FROM EUPHORIA TO EXTINGUISHMENT TO CO-EXISTENCE?

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I INTRODUCTION

The High Court delivered judgment in *Mabo v Queensland [No 2]* 25 years ago, on 3 June 1992.[1] The Commonwealth government's major response — the heavily negotiated *Native Title Act 1993* (Cth) ('*NTA*') — commenced operation on 1 January 1994. Two additional elements in the Keating government's response were an Indigenous Land Fund (ILF) and a Social Justice Package (SJP). These are discussed below. After (broadly speaking) 25 years of this native title regime, what has been achieved and what remains to be done?

Whilst much progress can be mentioned, many experienced stakeholders have been voicing criticism and calling for substantial reform for at least 15 years, while the Australian Law Reform Commission (ALRC) has made important recommendations for reform in its Report Connection to Country (2015).[2] Little or no response has emerged from governments to these concerns, be they state or federal, and of whatever political persuasion. One notable exception to this refusal to date to take obvious steps to assist in 'closing the gap' is Victoria, which introduced a substantial alternative legislative scheme to the *NTA* in 2010 — the *Traditional Owner Settlement Act 2010* (Vic). These developments are also discussed below.

To my mind, when contemplating these mixed results, of particular significance is the view expressed by Justice Peter Gray upon his retirement from the Federal Court after 29 years of service, on 17 May 2013. By then, His Honour had accumulated vast experience in both the Northern Territory land rights scheme, established in 1976,[3] where he served as the Aboriginal Land Commissioner; and in the native title jurisdiction where, inter alia, he was Deputy President of the National Native Title Tribunal (NNTT). In his farewell speech, His Honour stated:

> The biggest disappointment in my career has been to see the opportunity given to us by the High Court in the Mabo case squandered. The concept of native title has been reduced to something of little practical significance by judges who have been unable to understand, and

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[1] (1992) 175 CLR 1 ('*Mabo (No 2)*'). For a detailed account of the litigation, see Bryan A Keon-Cohen, *A Mabo Memoir: Islan Kustom to Native Title* (Zemvic Press, 2013) available at <www.bryankeoncohen.com>.

[2] Australian Law Reform Commission, *Connection to Country: Review of the* Native Title Act 1993 *(Cth)*, Report No 126 (2015) ('*ALRC Report*').

[3] See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), introduced into the parliament by the Whitlam government in 1975; re-introduced and enacted, in amended form, by the Fraser government in 1976.

> legislators who have been consciously averse to, the vital relationship between people and land in Aboriginal tradition.[4]

I respectfully agree, but others disagree. Dr Mick Gooda, for example, former Aboriginal and Torres Strait Islander Social Justice Commissioner at the Australian Human Rights Commission was quoted, in reply, as saying:

> [M]any (Indigenous groups and others) have benefited from successful native title claims and joint use agreements (concerning land) with some WA mining deals worth hundreds of millions of dollars. There's an acceptance that native title is now part of the Australian landscape.[5]

II PROGRESS: 1994-2017

Despite the above difficulties, much has been achieved in 25 years. The *NTA*, following many rulings on precisely what the Act means — especially the definition of native title found at s 223(1) — is now more accepted by governments, miners, and other land users, as 'part of the landscape' than was the case during its first decade. Amongst many aspects, determinations of native title and agreement-making should be mentioned.

A *Determinations*

The NNTT maintains an extensive range of statistics regarding various procedures governed by the *NTA*, all found on the NNTT's website. As at 9 August 2017, 394 native title determinations had been made by the Federal Court. Of these, native title was found to exist in all or part of the determination area in 330 cases, with no native title found in 64 claims.[6] The increasing percentage of Australian land and islands involved is instructive. As at 30 June 2005 8%; 2010 12%; 2015 30% and at 3 September 2017 34.621%, totalling 2.667 million square kilometres subject to native title determinations.[7] The substantial increase since 2010 is mostly due to determinations in the Northern Territory, Queensland, and South Australia. Almost half of the recognised native title land is located in Western Australia, 51.6% of which is subject to various native title rights. Over 70% of that is exclusive possession land, by far the largest proportion of any jurisdiction.[8]

Of these determinations, 312 were reached by consent (usually after lengthy and often debilitating negotiations); 44 were litigated, and 38 were unopposed.[9] In addition, by January 2017, 164 Prescribed Bodies Corporate managed 2,412,614 sq km of native title land across Australia — about 32% of the country.[10] As at 9 August 2017, 242 further applications for a determination of native title had been presented to the NNTT

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[4] Jane Lee, 'Mabo's native title victory squandered, says Judge', *Saturday Age*, (Melbourne) 1 June 2013, 7.
[5] Ibid (bracketed words added).
[6] National Native Title Tribunal, Register of Indigenous Land Use Agreements (8 September 2017) <http://www.nntt.gov.au/pages/statistics.aspx>.
[7] Ibid. This area exceeds the combined areas of the UK, Ireland, the Netherlands, Germany, Belgium, France, Spain, Portugal, Italy and Austria. An additional 100,270 km^2 of seas are also determined native title areas.
[8] Ibid.
[9] Ibid. Four determinations, as of 8 September 2017, were described as 'not yet in effect'.
[10] Ibid.

with 206 accepted and registered.[11] After 25 years, these achievements are to be welcomed.

B *Indigenous Land Use Agreements*

As at 9 August 2017, 1,186 Indigenous Land Use Agreements (ILUAs) had been registered with the NNTT,[12] albeit often after a long struggle, pursuant to the future act provisions of the *NTA*.[13] These regulate future activities on native title land and involve financial and other benefits flowing to traditional owners. Many further agreements accompanying consent determinations of native title have also been concluded.[14] Thus a sense that long-overdue national recognition and some measure of land-justice for dispossession has been accorded to the Indigenous population generally, and to some communities fortunate enough to be able to access the system. These benefits should not be forgotten.

These statistics concerned with achieving, and benefiting from, native title are impressive — though like all such figures, they hide a multitude of issues and problems. Some are discussed below. In recent years, discussion has increasingly focused on land management problems, especially the role and functioning of Prescribed Bodies Corporate (PBCs), the entities that, as part of a determination, are required to hold (as trustee or agent) and manage land held under native title on behalf of traditional owners.[15]

III PROBLEMS: 1994-2017

Unsurprisingly perhaps, given the heavily negotiated character of the *NTA* during 1992-93, complaints have emerged over 25 years from all sides. These include:

1. a complex, excessively legalistic and mean-spirited regime designed more to constrain, than 'provide for the recognition and protection of native title';[16]
2. lack of resources for claimants' Representative Bodies (NTRBs), Service Providers (NTSPs) and especially PBCs to enable them to pursue onerous statutory functions imposed upon them, increasingly concerned with the management of native title land;[17]
3. extraordinary cost and delays in resolving native title claims, be it by agreement leading to a consent determination, or following hard-fought litigation;[18]

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[11] Ibid.
[12] Ibid.
[13] *NTA* ss 24AA–44G.
[14] Ibid s 31.
[15] Ibid ss 55-60AA. See also Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Report, Deloitte Access Economics, March 2014) <http://www.nqlc.com.au/files/5314/0530/8075/Deloitte_roles_function_ntos-Copy.pdf>.
[16] *NTA* s 3(a).
[17] The *NTA* s 203B imposes several statutory functions upon NTRBs and NTSPs. That is, in summary, facilitation and assistance, certification, dispute resolution, notification, agreement making, internal review, and others. PBCs' functions include to hold title on trust or act as agent, consult common law holders, enter into agreements. See *NTA* ss 57-58; *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth).
[18] The average period to achieve a determination is for litigated claims, seven years; for agreement by-consent claims, six years. See Board of the National Native Title Tribunal, '2010-11 Report' (Annual Report, National Native Title Tribunal, September 2011) 25. The record appears to be 17 years: see

4. on occasion, lengthy delays and entrenched opposition by state and territory governments and the bureaucracies that advise them — especially in the first decade since 1994; and,
5. protracted and damaging intra and inter-community disputes, particularly concerning identifying the right people for country.[19]

Amongst all this, two factors stand out for me.

A *The NTA as amended*

First are the complex and convoluted provisions of the *NTA* itself — leaving aside, for the moment, a large pile of state and territory complementary legislation, mainly concerned with validation of past Crown grants and extinguishment of native title, facilitated and required by the *NTA*. The *NTA*, itself a compromise, has been amended, mostly in minor and technical respects, several times.[20] Two are highlighted here. First were amendments, predominantly against Indigenous interests, by the Howard government, triggered by the *Wik People* v *Queensland*-inspired 'Ten-Point-Plan' of 1998.[21] Those amendments, in the infamous words of the then Deputy Prime Minister, Tim Fisher, promised, and indeed delivered, 'bucket-loads of extinguishment'.

Coupled with state and territory complementary legislation, these reforms 'validated' additional extinguishment of native title by reason of various tenures issued by governments since sovereignty; watered-down the 'right to negotiate' provisions by allowing states to introduce exemptions; and introduced two significant elements: tougher 'registration test' requirements, to be applied by the NNTT, being claimants' gateway to access rights to negotiate over land that was merely claimed; and, on the positive side, the ILUA scheme.[22] These amendments were claimed as necessary to achieve 'certainty' for economic interests, that is, developers; and most of them directly contradicted the *NTA*'s stated beneficial objectives of providing 'a just and proper ascertainment of native title rights and interests'.[23] None of these restrictive reforms have been corrected by subsequent governments, federal or state, of whatever colour or creed.

Second are the amendments enacted in June 2017 triggered by the Full Federal Court's *McGlade* v *NT Registrar* decision.[24] That decision struck down the prior understanding of the necessary requirements, under the NTA, as to how the traditional owning group should sign-off on an ILUA.[25] The key issue before the court was whether an 'area ILUA' can be registered by the NNTT if all individuals who jointly comprise the relevant registered native title claimant group have not signed the ILUA.[26] Prior to

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Bandjalang People No 1 & 2 v AG NSW [2013] FCA 1278 (2 December 2013) [1]. *Mabo v Queensland [No 1]* (1988) 166 CLR 186 ('*Mabo (No 1)*') and *Mabo (No 2)* (1992) 175 CLR 1 was a claim at common law which occupied 10 years.

[19] For a recent account concerning South Australia, see, Eve Vincent, *Against Native Title* (Aboriginal Studies Press, 2017).

[20] For example, in 1997, 1998, 2007, 2009, and 2017. See Nick Duff, 'Reforming the *Native Title Act:* Baby Steps or Dancing the Running Man?' (2013) 17(1) *Australian Indigenous Law Review* 56.

[21] *Wik People* v *Queensland* (1996) 187 CLR 1 ('*Wik*').

[22] The best source for practitioners is Butterworths *Native Title Service,* which collects together all the relevant legislation, plus commentary.

[23] See *NTA* (preamble).

[24] [2017] FCA 10 (2 February 2017) ('*McGlade*').

[25] See, e.g., Angus Frith, '*Case Note: McGlade v Native Title Registrar*' (2017) 8(28) *Indigenous Law Bulletin* 24.

[26] See *NTA* s 24CD(1) referring to 'all persons' who must be parties to the ILUA.

McGlade, prior authority — *QGC Pty Ltd* v *Bygrave [No 2]* — had established that, provided it is properly authorised, an ILUA can be registered if at least one of the persons named as a registered native title claimant was a party.[27] The court in *McGlade* held that certain types of ILUAs require all named registered native title claimants to execute the agreement.

These amendments,[28] introduced after a Senate inquiry involving one day of public hearings,[29] considerable focus on the Queensland Adani coal mine proposal whose ILUA had, with up to 150 others, been struck down,[30] and much unnecessary Parliamentary bad blood, restore the status quo ante.

B *High Court interpretation of NTA*

A third factor, related to the first, is a series of High Court rulings since 1992 that have sought to resolve various issues left unclear after *Mabo (No 2)* and the *NTA*. During the first decade, these included *Wik* (native title can co-exist with a Queensland pastoral lease);[31] *Fejo* v *Northern Territory* (the grant of a fee simple title, without more, permanently extinguishes native title, emphasising the 'inherently fragile native title right' is always susceptible to extinguishment;[32] *Yanner v Eaton* (native title right to hunt and kill estuarine crocodile where property was, by statute, vested in the Crown[33]; *Yarmirr* v *Northern Territory* (native title can exist in the sea),[34] *Western Australia v Ward* (native title is but a 'bundle of rights' each of which may be extinguished, applying the 'inconsistency of incidents' test;[35] and *Yorta Yorta Aboriginal Community* v *Victoria* (rendering more difficult the requirements of proof in *NTA* s 223(1).[36] At this point these High Court decisions reflected: ' a strong judicial tone of retrenchment and the prospects of socioeconomic development from native title took a battering'.[37]

In particular, *Yorta Yorta* compounded the s 223 definitional problems, imposing stringent additional elements to the definition (and thus evidential requirements) not found in the language of s 223(1) itself. In *Yorta Yorta* the plurality inferred the need to establish 'a normative body of custom and tradition' and a 'normative society' in order to satisfy the definition.[38] Further, this normative system under which the rights and interests are possessed must have 'had a continuous existence and vitality since sovereignty'.[39] Elaborating, the plurality added that acknowledgment and observance of laws and customs must have continued 'substantially uninterrupted' since

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[27] (2010) 189 FCR 412 ('*Bygrave*').
[28] See *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth).
[29] Senate Legal and Constitutional Affairs Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, Interim Report, 17 March 2017; Senate Legal and Constitutional Affairs Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, Final Report, 20 March 2017 ('*Final Report*').
[30] Ibid, *Final Report,* 5. Estimates ranged from 123 to about 150.
[31] (1996) 187 CLR 1.
[32] (1998) 195 CLR 96, 151 (Kirby J) ('*Fejo*').
[33] (1999) 201 CLR 351 ('*Yanner*').
[34] (2001) 208 CLR 1 ('*Yarmirr*').
[35] (2002) 213 CLR 1 ('*Ward*'). Here, the court rejected the view that communal native title could be equated with 'ownership' as known in western law.
[36] (2002) 214 CLR 422 ('*Yorta Yorta*').
[37] Sean Brennan, 'The Significance of the Akiba Torres Strait Regional Sea Claim' in Sean Brennan et al (eds) *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29 ('*Brennan 2015*').
[38] *Yorta Yorta* (2002) 214 CLR 422, [37]-[47] (Gleeson CJ, Gummow and Hayne JJ).
[39] Ibid [47]. The words 'continuity' and 'normative system' do not appear in the *NTA*.

sovereignty.[40] These rulings surely represent both a disappointing retreat from the 'judicial activism' of the Mason court that heard *Mabo (No 2)* and a crippling low point in native title jurisprudence over these 25 years.

IV Opportunities: 2013-2017

A *From extinguishment to coexistence*

After a decade of relative silence, in recent years, the High Court has shown a refreshing reluctance to find extinguishment only if this is a necessary implication of the relevant legislation, thus allowing native title to co-exist with a regulatory scheme. In *Karpany v Dietman* the court considered the *Fisheries Act 1971* (SA), and whether its provisions had extinguished native title by prohibiting the catching of fish without a licence.[41] The court held that the prohibitions amounted to regulation, not extinguishment, of native title rights.

Further, the court has restricted the extent of extinguishment concerning two mineral leases in Western Australia being part of the Mount Goldsworthy Iron Ore project in *Western Australia v Brown*.[42] There, the High Court held the relevant native title rights were not extinguished, progressively, with physical developments, but only suspended. Brendan Edgeworth comments:

> After Brown, the exercise of such (mining) rights can only suspend native title by practically or physically preventing its exercise. If there is no inconsistency identifiable at the moment of the grant of rights, the exercise of rights thereafter, however extensive, will not extinguish native title, but may have the effect of suspending their exercise.[43]

Most significantly, the court has also accepted that native title rights and interests may extend to rights of a commercial nature — i.e., commercial fishing in the Torres Straits — in *Akiba v Commonwealth* and thus raised the prospects of native title delivering additional indigenous autonomy and economic empowerment.[44] In this 'landmark case' Justice Finn, at trial, found that traditional owners, derived from 13 island communities, enjoyed a broad right to 'access and take resources of the sea for any purpose', including for commercial purposes.[45] Justice Finn, and the High Court, resisted atomising native title rights, as it had done in *Ward*'s so-called 'bundle of rights'.[46] Rather, it conceptualised native title as an underlying title, distinct from, and supporting the exercise of, incidents of title — e.g, to access, exclude, fish, sell, etc. — as found on the evidence. In their joint judgment, Hayne, Kiefel and Bell JJ distinguished regulating the exercise of such from the question of extinguishing them.[47] According to Sean Brennan, '*Akiba* marked a turning point in native title extinguishment law, towards a

[40] Ibid [87].
[41] (2013) 303 ALR 216 ('*Karpany*').
[42] *Western Australia v Brown* [2014] HCA 8 ('*Brown*').
[43] Brendan Edgeworth, 'Extinguishment of native title: Recent High Court Decisions' (2016) 8(22) *Indigenous Law Bulletin* 28, 30.
[44] [2013] HCA 33 ('*Akiba*').
[45] Ibid 11.
[46] *Ward* (2002) 213 CLR 1.
[47] *Akiba* [2013] HCA 33, [68].

greater moderation and realism with the High Court seeming now to regard extinguishment as a "legal conclusion of last resort".'[48]

Further, Raelene Webb QC, President of the NNTT, notes 'a trend away from the harshness of extinguishment in earlier cases' citing *Brown* and *Karpeny*. She concludes:

> The confirmation that native title rights can have a commercial aspect in Akiba, and the emphasis on coexistence over extinguishment, evident in *Akiba*, *Karpany* and *Brown*, re-awakens the promise of *Mabo (No 2)*, with the possibility of unlocking greater economic potential for native title holders and empowering them.[49]

As to the recognition of commercially useful native title rights, following *Akiba*, the issue was explored and confirmed by the full Federal Court in *Pilki People v Western Australia* [2014] FCA 714 ('*Pilki*') and *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 ('*Birriliburu*');[50] raised the prospect of varying past native title determinations under the untested *NTA* s 13;[51] and led the Australian Law Reform Commission to recommend the insertion of a new s 223(2), designed to confirm the *Akiba* rulings.[52] As mentioned below, these recommended reforms have to date, been ignored by the Turnbull government.

B *Compensation*

Of equal significance in developing both the jurisprudence and the economic potential of native title, is the Federal Court Decision by Mansfield J in *Griffiths* v *Northern Territory [No 3]*.[53] This was the first occasion, after some 25 years, where a judge determined upon what principles, and in what sums, traditional owners should be compensated for extinguishment of their native title rights. Since 1992, only two cases had raised this issue: *Jango v Northern Territory* in 2006,[54] and *De Rose v South Australia* in 2013.[55] *Jango* failed at the threshold on pleading points and did not consider the compensation quantification question. In *De Rose* the court, for the first time, ordered compensation in a consent determination, but valuation principles and monetary details are unknown, due to the parties entering into a confidential compensation agreement.

Timber Creek is a small township located at the junction of Timber Creek and the Victoria River in the Northern Territory. In *Timber Creek*, the Ngaliwurru and Nungali Peoples achieved a determination of native title in 2007.[56] In 2011 they filed an

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[48] Brennan 2015, quoted in R Webb, 'The 2016 Sir Frank Kitto Lecture: Whither Native Title?' (2015-16) 19(2) *Australian Indigenous Law Review* 114, 123. ('*R Webb 2016*').
[49] Ibid 123. See also, to similar effect, *Queensland v Congoo* (2015) 320 ALR 1 where the native title rights, in a 3-3 decision, were held to be 'impaired', not 'extinguished'.
[50]. *Pilki* and *Birriliburu* were heard together at trial by North J; then later by the Full Court in *Western Australia v Willis on behalf of the Pilki People* [2015] FCAFC 186 ('*Pilki Appeal*').
[51] *NTA* s 13 permits pre-existing approved native title determinations to be varied if 'events have taken place since the determination was made that have caused the determination to no longer be correct', or if the interests of justice otherwise require such a variation. Whether new rulings satisfy s 13 is moot.
[52] *ALRC Report*, above n 2, Recommendation 8-1. See also Patrick McCabe, '*Pilki* and *Birriliburu*: Commercial Native Title Rights after *Akiba*' (2015-16) 19(2) *Australian Indigenous Law Review* 64.
[53] [2016] FCA 900 ('*Timber Creek*'). See generally Fiona Martin, 'Compensation for Extinguishment of Native Title: *Griffiths v NT* Represents a Major Step Forward for Native Title Holders' (2016) 8(27) *Indigenous Law Bulletin* 8; Leonie Flynn, Gavin Scott and Clare Lawrence, 'First Assessment of Native Title Compensation: *Griffiths v NT (No 3)'* (2016) 27 *Law Society of NSW Journal* 76.
[54] [2006] FCA 318 (Sackville J) ('*Jango*').
[55] *De Rose v South Australia* [2013] FCA 988 ('*De Rose*').
[56] *Griffiths v Northern Territory* (2007)165 FCR 300 ('*Griffiths (No 1)*'.

application for compensation pursuant to the *NTA* arising from the impact of about 60 land grants and the construction of public works within the township. Liability was determined in 2014 [57] and compensation assessed and ordered in 2016. [58] The compensation claim comprised three elements: economic loss, non-economic loss or solatium; and interest.

The *NTA* provides little guidance to quantification, other than s 51 which speaks, essentially, of 'just terms'. In addition, the court may have regard to principles for determining compensation in the relevant state or territory compulsory acquisition laws;[59] and total compensation for an act must not exceed sums payable if the act were compulsory acquisition of a freehold estate in the relevant land. [60] After extensive discussion of the principles to be applied, Mansfield J ordered the NT government to pay $3,300,261, comprised of $515,000 for economic loss (80% of freehold value); $1,300,000 for non-economic loss, being loss of traditional attachment to the land; and two interest amounts: $1,488,261 being simple interest on the economic loss component referable to 30 years from the time of extinguishment to date of judgment, and $29,397 being simple interest payable by reason of invalid freehold grants made in 1998.[61]

On appeal to the full Federal Court, Mansfield J's methodology was challenged on six grounds.[62] The Full Court dismissed these various grounds save for one, thus upholding the core principles relied upon by Mansfield J. The ground that succeeded concerned Mansfield J's award for economic loss. This was reduced due to the Full Court increasing the discount rate applied to the freehold value of the land, from 20% (Mansfield J) to 35%. That is, the Full Court decided that the land in question should be valued at 65% of the freehold market value at the time the acts complained of occurred. In reaching this result, the Full Court placed more emphasis on the native title holders' inability to control access to and determine use of the land, and the inalienable nature of native title.[63]

The parties were required to file an agreed form of orders to reflect the reasons for judgment by 4 August 2017. At the time of writing (August 2017) the Full Court decision has not yet been appealed, but that option remains open. As mentioned, 330 communities around Australia have, to date, achieved a determination of native title and thus may be entitled to compensation for extinguishment or impairment occurring after 31 October 1975.[64] The entire native title 'industry', not to mention several state and territory treasurers, the Yindjibarndi traditional owners and Fortescue Metals Group, await the next step, if any, with great interest.[65]

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[57] *Griffiths v Northern Territory* [2014] FCA 256 ('*Griffiths (No 2)*'.
[58] *Timber Creek* [2016] FCA 900.
[59] *NTA* ss 51(2)-(4).
[60] *NTA* s 51A.
[61] *Timber Creek* [2016] FCA 900, [232], [253], [301], [350], [351].
[62] *Northern Territory v Griffiths* [2017] FCAFC 106 ('*Timber Creek Appeal*'). The grounds were His Honour's approach to the assessment of economic and non-economic loss; whether invalid future acts can be compensated; post-judgment interest payable on compensation awarded for economic loss; valuation of some freehold lots; and orders concerning allocation of award monies by the claimants' PBC. Ibid [43]-[49].
[63] Ibid [49], [65], [82]-[84], [93], [110], [129]-[139].
[64] Being the date of enactment of the *Racial Discrimination Act 1975* (Cth).
[65] See *Warrie v Western Australia* [2017] FCA 803 (20 July 2017) where Rares J determined that the Yindjibarndi claimants enjoyed exclusive native title rights over FMG's Solomon Hub mining complex, raising the possibility of a further significant compensation claim. See Paul Cleary, Title

V ALTERNATIVES TO NTA CLAIMS

As mentioned, the definition of native title rights and interests, set out at *NTA* s 223, and the steep evidential hurdles involved, has proven a formidable road-block to many communities to achieving native title when claimants endeavour to first, satisfy government requirements when negotiating towards an agreed consent determination, or second, if negotiations fail, prove at trial in the Federal Court, the various elements in the definition. As a result, Indigenous communities most impacted by European settlement — e.g., those located on the eastern seaboard — have least, or no, ability to access the benefits of the NT regime. These requirements have also generated serious community disputes, and in-principle opposition from some traditional owner groups to the entire scheme, as yet another re-visiting of oppressive colonial requirements.[66] However, if the ALRC's current proposals for reform (discussed below) were implemented, all this may yet change. Meanwhile, various alternative schemes are being pursued. Four are discussed here.

A *Indigenous Land Corporation*

The *NTA*, as the preamble indicates, was never intended to be the sole national response to *Mabo (No 2)* and indigenous demands for land justice, or to economic and social disadvantage resulting from dispossession since 1788. The *NTA* was accompanied by two further elements: the establishment of a Land Fund and a Social Justice package, all aimed at providing a comprehensive response, particularly for those groups unable to prove traditional connection.

The Land Fund (now labelled the Land Account) and the Indigenous Land Corporation (ILC) were established in 1994 and 1995 respectively, and now operate under the *Aboriginal and Torres Strait Islanders Act 2005* (Cth) ('*ATSI Act*').[67] The ILC's purposes are to acquire land in order to grant an interest in that land to Indigenous corporations, especially those unable to access the native title regime, and to manage Indigenous-held land for their 'economic, environmental, social, or cultural benefit'.[68] Such 'benefits' include:

> …developing an economic base for future generations, providing training and jobs, looking after culturally and/or environmentally significant country, or securing and expanding the delivery of Indigenous services. [69]

Balancing those objectives can be challenging but over 25 years, the ILC has contributed significantly to the Indigenous Estate. As at 30 June 2016 the ILC had acquired 252 properties around Australia and granted 191 to Indigenous corporations.[70]

Fight: The people of the Pilbara take on Australia's great philanthropist (September 2017) The Monthly <https://www.themonthly.com.au/issue/2017/september/1504188000/paul-cleary/title-fight> 25.

[66] See, eg, Eve Vincent, *Against Native Title: Conflict and Creativity in Outback Australia* (Aboriginal Studies Press, 2017).

[67] See *ATSI Act* s 191A(1), previously called the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

[68] Ibid s 191B; Board of the Indigenous Land Corporation, 'Annual report 2015-2016' (Annual Report, Indigenous Land Corporation, September 2016) 2 ('*ILC Report 2016*'). The ILC's land acquisition functions under s 191C (a) and detailed in s 191D(1)(a) and (b) were considered in *Adnyamathanha People v SA* [2014] FCA 101, [64].

[69] *ILC Report 2016*, above n 68, 7.

[70] *ILC Report 2016*, above n 68, 8; and see map of Australia showing locations of purchases: *ILC Report 2016*, above n 68, 138.

These properties were valued at $161 million and held 87,955 head of livestock valued at $49.1 million.[71] Amongst many other activities, one of the ILC's subsidiary companies, Australian Indigenous Agribusinesses Pty Ltd operated 14 agriculture businesses on 2.1 million hectares of land owned by the ILC or leased from Indigenous land holders.[72] As at 30 June 2017, the ILC had acquired approximately six million hectares of land across Australia.[73]

In stark contrast to other key bodies in the native title sector — especially Native Title Service Providers and Prescribed Bodies Corporate — the ILC receives substantial funds to pursue its activities. Its primary source is the abovementioned Aboriginal and Torres Strait Islanders Land Account.[74] Between 1994-2004, the Account received appropriations of $121 million per annum from consolidated revenue. By 2004, it held $1.42 billion.[75] From 2004-2016, the Account received a further $484.3 million, such that the balance held at 30 June 2016 was $2.023 billion. From July 2010 the ILC has received, from the Account, a minimum guaranteed annual payment of $45 million (2010-2011 values).[76]

The ILC has, however, been criticised for not fulfilling its purpose, including that it 'focuses on economic-gain rather than reparation for dispossession'.[77] Australian Human Rights Commissioner Tom Calma commented in 2009:

> … it is questionable whether, in its administration, the ILC meets the original intent of the fund and provides an accessible and alternative form of land justice when native title is not available … Many [Indigenous] people have voiced confusion and frustration to me about the ILC's role, activities and the outcomes it is achieving.[78]

A 2014 report by Ernst & Young recommended limiting the role of the ILC from engaging in 'commercial activity' and, as one option, the amalgamation of the ILC and another statutory body, Indigenous Business Australia (IBA). Ernst & Young considered that the ILC has been 'distracted by its expansion into commercial activities'.[79] This controversy — critical for the most acculturated and damaged Indigenous communities — included resistance to amalgamation of the ILC and IBA suggested by Minister Scullion in 2014, an amalgamation said to be 'worth close to $3 billion'.[80]

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[71] *ILC Report 2016*, above n 68, 165, excluding the Ayers Rock resort, held by ILC but separately accounted for.
[72] *ILC Report 2016*, above n 68, 30. Previously called National Indigenous Pastoral Enterprises.
[73] Interview with ILC (Personal correspondence, 6 September 2017).
[74] The Land Account is a Special Account provided for in the *Public Governance, Performance and Accountability Act 2013* (Cth) s 80.
[75] Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 64 (2014) ('*ALRC DP 2014*').
[76] *ILC Report 2016*, above n 68, 64. The $45 million is indexed annually as per the Consumer Price Index.
[77] *ALRC DP 2014*, above n 75, 64, citing Australian Human Rights Commission, *Native Title Report 2007*, Report No 1 (2008) 47 ('*AHRC 2007*').
[78] Tom Calma, 'Native Title in Australia: Good Intentions, a Failing Framework?' (2009) 93 *Australian Law Reform Commission Reform Journal* 1, 8.
[79] Ernst & Young, *Review of the ILC and IBA,* Report No 1 (17 July 2014), quoted in Patricia Karvelas, 'Scullion rejects report on indigenous body overhaul', *Weekend Australian,* 3-4 May 2014, 8.
[80] The ILC 'manages' $1.9 billion in assets and income and the business group's programs are worth another $1 billion. See Patricia Karvelas, '$2 Billion Indigenous Land Fund Next on Agenda', *The Australian*, 27 October 2014, 5.

This proposal did not eventuate but following the appointment of a new Chairperson Eddie Fry (also Chair of IBA) and the arrival of a 'substantially refreshed Board' in October 2015, 'a shared services model to combine (some) functions' with IBA was investigated in order 'to achieve savings and efficiencies'.[81] The new Chairman proposed that 'the ILC should be a central institution in helping to define, enhance, and potentially extend the Indigenous Estate' while in October 2015, the new ILC Board 'actively prioritised land management over acquisition',[82] reflecting the change of focus nationwide from 'recognition and protection of indigenous rights in land to being able to use those rights for economic development'.[83] The ILC, in partnership with the IBA, is well placed to pursue these objectives.

Another significant connection — no doubt unintended — between the land acquisition activities of the ILC and the *NTA* arose in 2014 due to a Federal Court decision in South Australia. In *Adnyamathanha People* v *South Australia* [2014] FCA 101 ('*Adnyamathanha*'), Mansfield J held that land purchased by the ILC and transferred to a native title claiming group attracted the protections of *NTA* s 47A: i.e., any extinguishment or impairment of native title over the relevant land by prior crown grants — e.g. a fee simple title — could be 'disregarded' for the benefit of the native title claimants. This decision revealed a potential new strategy to secure a determination of native title for groups otherwise locked out under current processes.[84]

B *Social Justice Package*

During negotiations of the *NTA* in 1993 with the Keating government, Indigenous negotiators envisaged a two-phase process; first a land acquisition fund; second, long-term social justice measures.[85] During 1994, the development of the package has given to ATSIC. In 1995, ATSIC provided a Report to government, Recognition, Rights and Reform, containing numerous recommendations addressing issues aside from land rights: e.g., reserve seats in Parliament, cultural heritage protection, language preservation: issues related to the history of dispossession and assimilation. The Howard government rejected the entire report, save for recognition of the Indigenous flag, and following a change of government, the package sank without trace.[86] This aspect is not just ancient history. In 2008, Dr Tom Calma, Social Justice Commissioner, said: 'This abyss is one of the underlying reasons why the native title system is under strain'.[87]

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[81] *ILC Report 2016*, above n 68, v.
[82] *ILC Report 2016*, above n 68,v, 5.
[83] *ILC Report 2016*, above n 68,38.
[84] *ILC Report 2016*, above n 68; and the somewhat sensationalist Mark Schliebs, 'New native title claims to exploit loophole', *The Australian*, 30 April 2014, 6. Interestingly, the SA government did not appeal this decision.
[85] Darryl Cronin, 'The Lead up to the Passage of the Native Title Act', in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 47, 67.
[86] Les Malezer and Toni Bauman, 'Interview with Les Malezer: Reflections on the 20th Anniversary of Mabo', in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 154, 161L. Les Malezer and Toni Bauman, 'Interview with Pat Turner', in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 310, 317.
[87] *ALRC DP 2014*, above n 75, 64.

C *Victorian TOSA Scheme*

1 *Slow Progress*

In Victoria, the resolution of native title claims between 1994 and 2003 has been described as 'glacial'.[88] By 2002, when the High Court delivered its *Yorta Yorta* decision, approximately 20 unresolved active native title applications concerning Victoria were before the Federal Court. Apart from *Yorta Yorta*, none of these claims had been resolved, unless they were discontinued or withdrawn. *Yorta Yorta*'s additional evidential burdens concerning establishing connection back to sovereignty effectively removed any prospect of Victorian claimants securing recognition of native title either through negotiation or a contested hearing in the Federal Court. The intent expressed in the *NTA*'s preamble, to ensure that Aboriginal people '[r]eceive the full recognition and status to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire',[89] was clearly negated in Victoria. Traditional owners thus sought alternative processes to resolve native title issues.

In 2003, the then Labor Government introduced a policy to resolve native title claims by mediation and agreement in preference to litigation.[90] In 2004, under this approach, the State signed off on a joint management agreement with the Yorta Yorta people over 50,000 hectares of Crown land in the state's north, including the Barmah State Forest and areas along the Murray and Goulburn Rivers.[91]

In December 2005 the Wotjobaluk claim in the Wimmera region was settled after a ten-year negotiation under the *NTA*.[92] This settlement included a consent determination of native title recognising non-exclusive native title rights and interests, funding for the PBC for five years, title to three culturally significant areas, and co-operative management involvement in several national parks and state forests in the region. Similarly, in March 2007, after an eleven year struggle, the Gunditjmara people in the State's south-west achieved a consent determination from the Federal Court over the larger part of their claim area.[93] The associated settlement agreement included co-operative management of an important national park, freehold title to culturally significant areas of land, a commitment from Government for continued consultation and support for several Gunditjmara projects, and five year funding for their PBC.

Thus, from 1994-2007, only two positive determinations recognizing non-exclusive native title rights and interests were made in Victoria, plus three negative determinations that native title did not exist in the claimed areas.[94] These results involved a very large, but incalculable, human cost for claimants, and financial cost to the State, the Commonwealth and numerous other parties, totalling many millions of

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[88] Interview with Austin Sweeney, Principal Legal Officer, Native Title Services, Victoria (Personal correspondence, date unknown) ('*Sweeney Interview*').
[89] See *NTA* preamble.
[90] Mary Scalzo, 'Native Title and its Implications' (Speech delivered at the Victorian Government Solicitors Office, Melbourne, 26 September 2007) 8 <http://www.vgso.vic.gov.au/content/native-title-and-its-implications>.
[91] Native Title Services Victoria, *History of Native Title in Victoria* (23 November 2014) <http://www.ntsv.com.au/native-title-in-victoria/>.
[92] *Clarke on Behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795 ('*Wotjobaluk*'). *Wotjobaluk* applications No 2 and No 3 were also the subject of consent determinations on the same date, ruling that native title did not exist over areas of Crown land claimed.
[93] *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 ('*Gunditjmara*').
[94] *Yorta Yorta* (2002) 214 CLR 422; *Wotjobaluk* [2005] FCA 1795.

dollars. Some argued that such costs far outweighed any native title benefits delivered. In 2010, the then Attorney General, Rob Hulls, predicted that, under *NTA* procedures and based on this experience, a further 50 years would be required to resolve existing and future claims.[95]

2 *Time for a change: TOSA*

In 2008 the Brumby Labor Government established a Steering Committee to develop a Victorian Native Title Settlement Framework. Its report of December 2008 proposed a negotiation-based scheme to settle native title claims in Victoria in an expedited, more comprehensive, and effective manner.[96] These recommendations were endorsed by the Victorian Cabinet in 2009,[97] leading to the enactment, in September 2010, of the *Traditional Owners Settlement Act 2010* (Vic) ('*TOSA*'), supported by additional policies, guidelines and programs.

TOSA established a framework within which out-of-court native title settlements can be negotiated. Although *TOSA* has become the preferred settlement mechanism for traditional owners with bipartisan support, it remains a voluntary process for claimants, i.e., they may elect to file, as an additional or alternative process, a native title determination application pursuant to the *NTA* in the Federal Court.

Following the enactment of *TOSA* and consultation with major stakeholders, [98] Threshold Guidelines were developed setting out specific criteria to be satisfied before the State will enter into native title settlement negotiations with a claimant group.[99] To commence a claim, a group must submit a Threshold Statement to government that satisfies these criteria: e.g., that the group is the 'right people for country', that it includes all native title holders for the agreement area, and that it has the organisational capacity to negotiate a comprehensive settlement agreement. Connection to the claimed area need not have been maintained 'substantially uninterrupted' by each generation since sovereignty (as required by *NTA* s 223(1)). The traditional owner group must, however, articulate its contemporary relationship to country and links to the past in a 'Statement of Association to Country'. The emphasis is not on 'tradition' and 'continuity' but on the active contemporary relationship to country maintained by the claimant group. A suitable corporation, i.e., a 'settlement corporation' must be created to represent the group in negotiations, and enter into, and implement, the settlement agreement for the benefit of all members.

3 *Settlement components*

Under *TOSA*, in addition to the essential Recognition and Settlement Agreement ('RSA'), a settlement package may include up to six further specified agreements,

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[95] Premier of Victoria, 'Comment on the introduction of the Traditional Settlement Bill 2010' (Media Release, 28 July 2010) 1.

[96] Steering Committee for the Development of a Victorian Native Title Settlement Framework, 'Report of the Steering Committee December 2008' (Report, Victorian Department of Justice, 2008) www.landjustice.com.au/document/report_sc_vic_native_title_settlement_framework_13May09.pdf.

[97] Victorian Attorney-General Rob Hulls, 'Keynote Address'
(Speech delivered at the AIATSIS Native Title Conference 2009, Melbourne Cricket Ground, 4 June 2009).

[98] ie, between 2011-13, government agencies, the Victorian native title Representative Body, Native Title Services Victoria (NTSV), the Traditional Owner Land Justice Group, and Aboriginal Heritage Council.

[99] *Threshold Guidelines for Victorian traditional owner groups seeking a settlement under the Traditional Owner Settlement Act 2010* (Victorian Department of Justice & Regulation, 2013). This was reprinted in 2015 following election of the Andrews Labor government.

depending upon circumstances.[100] Key settlement components are contained in a RSA: the State formally recognises the group as the traditional owners of the agreement area, with rights over Crown land similar to those commonly included in a non-exclusive native title determination.[101] *TOSA* creates a new form of freehold title in Victoria — Aboriginal title[102] — which may be granted over Crown land such as national parks and reserves, and which does not extinguish native title. The settlement package may grant 'normal' freehold title, for cultural and/or economic purposes, to the settlement corporation over relevant parts of the claim area.[103] An alternative to the *NTA*'s future act regime, set out in a Land Use Activity Agreement ('LUAA'), is also included. In contrast to the *NTA*'s scheme,[104] a LUAA specifies five categories of land use activity on Crown land (Routine, Advisory, Negotiation Class A & B, and Agreement Activities)[105] and procedures for future use of public land that takes account of traditional owners' rights and interests.[106]

TOSA s 40A enables a LUAA to provide community benefits for negotiation and agreement activities as compensation for the impact on traditional rights. Pursuant to a Funding Agreement, separate lump-sum funding is deposited in a new Victorian Traditional Owner Trust. Capital and income may be drawn down to fund the core activities of a group's settlement corporation. Additional funding may be negotiated to support economic development opportunities for the group.

The native title aspects of a settlement are dealt with in an ILUA, executed and registered under the *NTA*. Native title holders agree to validate past acts; to consent to future acts (identified or not) as dealt with under the state's alternative future act process contained in the settlement's LUAA; to withdraw all existing native title or compensation claims; and not lodge any future claims. Traditional owners are not required to surrender native title rights and interests, except when required under the LUAA processes, e.g., with an agreed sale of Crown land.

4 *TOSA Outcomes 2010-2017*

In 2013 and 2016 *TOSA* was amended to clarify and improve its operation.[107] Since *TOSA* commenced operation in 2010, three settlements have been negotiated and finalised, two involving *TOSA* elements with an accompanying ILUA.

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[100] These deal with land transfers and/or grants, future use of land, natural resources, future funding, an ILUA, and joint management of parks and reserves. See Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Research Unit, Native Title Information Handbook Victoria 2016 (AIATSIS, 2016) 6-8; Board of the Native Title Services Victoria, 'Annual report for the financial year 2015-2016' (Annual Report, Native Title Services Victoria, September 2016) 10-11 ('*NTSV 2016 Report*') <http://www.ntsv.com.au/ntsvwp-content/uploads/2013/04/NTSV-Annual-Report-2015-2016.pdf>.

[101] *TOSA* s 9.

[102] See *TOSA* Pt 3 Div 4.

[103] The grant may include conditions that the title may not be encumbered, transferred or sold, although it may be transferred to another settlement corporation with the consent of the responsible Minister.

[104] See *NTA* Pt 2 Div 3.

[105] See *TOSA* Pt 4.

[106] These embrace the gamut from routine activities undertaken without notification (eg., erection and maintenance of fences, signage and similar low impact works: *TOSA* s 33(1)), through to major impact activities such as the grant of an estate in fee simple that can only proceed with the traditional owner group's agreement: *TOSA* s 40(4).

[107] See *Traditional Owner Settlement Amendment Act 2013* (Vic); *Traditional Owner Settlement Amendment Act 2016* (Vic). According to the Attorney-General, the 2016 amendments 'includ[ed] many provisions sought by traditional owners and have been developed in close consultation with the

On 22 October 2010, the Federal Court issued a consent determination to conclude the Gunaikurnai people's claim,[108] accompanied by the signing of the first settlement package[109] incorporating benefits under *TOSA*.[110] This was followed in July 2011 with a consent determination in favour of the Gunditjmara and Eastern Marr people recognising non-exclusive native title rights to part of their claimed area, done solely under the *NTA*.[111] During 2013, Dja Dja Wurrung native title settlement negotiations were concluded successfully — the first to include all the elements of a settlement package available under *TOSA*.[112] The RSA commenced operation on 14 November 2013 with ceremonies held at Bendigo. The settlement was hailed as 'a giant leap in reconciliation' and as 'breaking free from the constraints of native title law'.[113]

In 2014, the State formally accepted the first Threshold Statement submitted by a traditional owner group (the Taungurung people) that did not also involve the lodging of a native title application. This was an historic development since the Government's commitment to negotiate a settlement on this basis opens the door to resolving all other native title matters in Victoria under *TOSA* without the requirement that traditional owner groups must first lodge a native title determination application in the Federal Court.

Frustration has emerged amongst claimants over recent years at the state's 'dilatoriness in dealing with' several Threshold Statements lodged for assessment by government agencies.[114] These complaints triggered a review of the 'Threshold stage process' in August 2017. A report is to be provided to government by the end of October 2017.[115] Meanwhile, as at September 2017, several further Victorian claims are being pursued, some solely under *TOSA*,[116] some also filed in the Federal Court and registered by the National Native Title Tribunal.[117] These claims are at various stages and are proceeding.

Federation of Victorian Traditional Owner Corporations and Native Title Services Victoria': Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 2016, 3236 (Martin Pakula, Attorney-General).

[108] *Mullett on behalf of the Gunai/Kurnai People v Victoria* [2010] FCA 1144 (North J).

[109] Four agreements constituted the package: an RSA, Land Agreement, Funding Agreement and Traditional Owner Land Management Agreement.

[110] Non-exclusive native title rights and interests were recognised over some 22,000 km^2 of Crown land in East Gippsland. Under the RSA, additional benefits included the grant of Aboriginal title to ten national parks and reserves (now jointly managed with the State) plus the Commonwealth and State governments each contributing $6 million dollars. These monies were deposited in the Victorian Traditional Owner Trust to support the core activities of the Gunaikurnai Land & Waters Aboriginal Corporation over the ensuing twenty years.

[111] *Lovett on behalf of the Gunditjmara People v Victoria [No 5]* [2011] FCA 932 ('*Gunditjmara Part A*').

[112] See Victorian Department of Justice and Regulation, *Dja Dja Wurrung Land Use Activity Agreement* (25 October 2013) Victorian Department of Justice and Regulation Native title website <www.justice.vic.gov.au/home/your+rights/native+title/dja+dja+wurrung+land+use+activity+agreement>.

[113] Mick Dodson, 'Victoria's giant leap in reconciliation', *The Age* (Melbourne) 14 November 2013.

[114] *NTSV 2016 Report*, above n 100, 6.

[115] This commenced on 3 August 2017 by indigenous barrister Tim Goodwin. See Victorian Attorney-General Martin Pakula, 'Review of the threshold stage process' (Media Release, 3 August 2017.

[116] Taungurung settlement is expected by Christmas 2017; Wurundgeri-Woiwurrung is seeking to meet Thresholds as at September 2017; Wotjobolok and Gunditjmara are seeking further *TOSA* long-term benefits following *NTA* consent determinations.

[117] *Sweeney Interview* above n 88. Eastern Marr Threshold Statement lodged 2013; Gunai-Kurnai People; First Peoples of Millewa-Mallee; and Gariwerd Native Title Group are at various *TOSA* stages and are 'active' claims in the Federal Court.

The scheme, with its supporting policies and programs,[118] undoubtedly provides a more effective, efficient and comprehensive approach to resolving native title matters in Victoria. It eliminates some of the lengthy and resource intensive procedures associated with the *NTA*, (e.g., historical tenure analysis); emphasises present day relationships of traditional owners to country rather than continuity of the laws and customs of a normative society from the distant past; places a well-defined range of potential outcomes on the negotiation table in each settlement, and clearly identifies in advance the negotiation pathway. In addition, capacity-building processes that support settlement negotiations equip traditional owner groups with better governance and decision-making to implement what are intended to be long-term durable agreements. The scheme, like the ILUA experience over 25 years under the *NTA*, also opens-up wider scenarios of treaty discussions, now underway in Victoria. As the Victorian Attorney-General, Martin Pakula, stated in Parliament in August 2016:

> [*TOSA*] strongly aligns with this government's commitment to support self-determination for Aboriginal Victorians, which is also being progressed through the work to develop a treaty … any treaty process will need to take account of settlement agreements made under [*TOSA*]… They are, in themselves, vehicles for self-determination for Victoria's traditional owners.[119]

D *Regional consolidated claims*

An alternative and potentially more fruitful approach utilized during the last decade is for neighbouring communities to join together as one 'society' utilising a common "normative system" of custom and tradition and mount a single, consolidated claim to a combined area. As Justice Finn, trial judge in *Akiba*, has asked:

> Should not native title claims proceed at the level of the largest reasonable aggregation of the groups in a society and of the largest area within which they have their rights?
> Why should we not aspire to the regional, or macro, resolution of native title claims? … I ask whether an approach to native title that has the aggregated claims of a whole society at its core may in the end have greater advantages in securing empowering outcomes for claimants?[120]

These are good questions and experience to date with this option suggests that this strategy can deliver several benefits. A single large claim is (relatively) resource efficient; increases the claimants' bargaining power when negotiating a consent determination or an ILUA; is more likely to lead to consistent outcomes throughout the relevant region; allows for flexibility of outcomes transcending a limited declaration of native title rights; and can deliver more substantial resources tailored to the particular social and economic problems of the communities involved.

E *Noongar claim*

Three recent regional or macro claims pursuing this approach are noted. First is the Noongar Peoples' claim in the southwest of Western Australia. In Noongar, six claimant groups combined to make a single claim to their country, utilizing the South West Aboriginal Land and Sea Council (SWALSC). Following a trial, Wilcox J held,

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[118] For example, the 'right people for country' mediation and facilitation program, and a range of measures to more closely align the *NTA*, *TOSA*, and Victorian Aboriginal Cultural Heritage legislation.
[119] Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 2016, 3236 (Martin Pakula, Attorney-General).
[120] Paul Finn, 'A Judge's Reflections on Native Title', in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 23, 26.

in 2006, that, subject to extinguishment issues, native title existed over an extensive area, including the Perth metropolitan area — the first such finding in Australia.[121] However, in 2008, this result was overturned, on appeal,[122] isolating various errors of law, while leaving open the question of the existence of native title over Noongar land outside of Perth. Rather than pursue further litigation, the SWALSC and the state agreed, in December 2009, to pursue a resolution by negotiation. In 2012, the SWALSC presented a list of demands to the state, including recognition as traditional owners, a land base, a quantum of funds, governance rights to traditional owner corporations, and a cultural centre.[123] Despite considerable concerns amongst some Noongar claimants regarding the state's demand that native title be extinguished, an agreement in principle was reached in 2013. That agreement, in substance, was contained in the Noongar Recognition Bill, tabled in the state parliament in October 2014.[124] The settlement package, intended to settle all native title claims in the region, affects about 30,000 Noongar people, is valued at about $1.3 billion and covers up to 320,000 hectares of crown land. This package, however, still required the agreement of all six claimant groups, and the execution of six ILUAs accordingly.

After authorisation meetings, the six groups approved the deal in early 2015 and the six required ILUAs were executed in June 2015. The settlement was finally enacted, as two Bills, in June 2016.[125] However, one of the ILUAs was caught up in the *McGlade* decision, and was thus rendered invalid, as discussed above. Following resolution of this problem through amendments to the *NTA*, the six ILUAs are currently (August 2017) being considered by the NNTT for approval and registration. That process should be resolved soon, when native title aspects, at least, of the settlement will be completed.

F *Torres Strait Seas claim*

The Torres Strait seas claim — *Akiba* — already mentioned, is another large regional claim filed in November 2001. This claim, by claimants from thirteen island communities and also from the mainland, embraced approximately 37,800 km^2 of sea between Cape York Peninsula and Papua New Guinea. The claim succeeded at trial before Finn J in 2010,[126] delivering non-exclusive native title rights 'to access and take resources of the seas for any purpose', including for commercial purposes.[127] This important commercial ruling is discussed above. As in any large regional claim involving many communities, the trial judge was confronted with the 'society requirement', a 'large, time-consuming and controversial' issue 'at the forefront of the case'.[128] Justice Finn subsequently recorded:

[121] *Bennell v WA* [2006] FCA 1243 ('*Bennell*').
[122] *Bodney v Bennell* [2008] FCAFC 63 ('*Bodney*').
[123] See, amongst many commentaries, Michael Mccagh, 'Native Title in the Southwest: The Noongar Recognition Bill' (2016) 8(11) *Indigenous Law Bulletin* 26.
[124] Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2014 (WA). A land administration Bill was also introduced in November 2015.
[125] *Noongar (Koorah, Nitja, Boordahwan)(Past, Present, Future)Recognition Act 2016* (WA); *Land Administration (South West Native Title Settlement) Act 2016* (WA).
[126] *Akiba v Queensland (No 3)* (2010) 204 FCR 1.
[127] Ibid [11].
[128] Ibid [488].

> I was confronted with five possible societies — the largest a single society, stretching from coastal PNG to Cape York; the most diffuse, 13 societies constituted by the individual inhabited islands. … I concluded that, despite their differences, the Islanders were part of a single society the metes and bounds of which I did not have to define. [Clearly, however] no matter which of the five proposed societies I might have found, it would not in any way have affected my conclusions as to the claimants' native title rights and to the geographical reach and the aggregate dimensions of those rights. Patch-work like, they covered almost the entirety of the claim area.[129]

The determination at trial was appealed to the Full Federal Court[130], and again to the High Court,[131] where, finally, these rulings were affirmed. Claimants and their advisors concerned with not only the utility of native title as an economic 'fungible', but also how to constitute one macro 'society' that might satisfy the court's developing jurisprudence, are no doubt studying these rulings carefully, and perhaps gaining renewed enthusiasm.

G *Cape York regional claim*

This is a single, combined claim by over 40 traditional owners groups to 14.6 million hectares of land known as 'The Cape York United No 1 Claim'.[132] It covers a substantial majority of Cape York, being areas that fall within the Cape York Land Council's jurisdiction. Areas already the subject of prior native title determinations, or of native title claims extant at the time of filing, and areas where native title has clearly been extinguished (e.g., freehold land) are all excluded. The claim was filed in the Federal Court on 12 December 2014,[133] was accepted for Registration on 6 February 2015, has attracted many respondents and is reported to be 'on track to be settled within two years'.[134] Anthropological reports focused on particular parts of the claim area, and the 'single society' question, are (as at September 2017) under preparation. As currently formulated, this is the single largest claim yet filed since 1994. According to the Cape York Land Council, the claim's successful completion will mean that 'most of the cape will be covered by native title' leading to the question: what does the CYLC do next?[135]

VI Proposals for reform

A *Generally*

Discontent and criticism concerning the *NTA* and associated programs continues from many stakeholders.[136] Save for the *Wik* amendments in 1998, mentioned above,

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[129] Finn, above n 120, 25. Queensland had contended for 13 societies, the Commonwealth four (made up of clusters of islands) the applicants one to which the native title claim group belonged. Finn J held the evidence supported the existence of a single society before sovereignty. This society, 'island by island … observed and acknowledged a body of traditional laws and customs'. It 'admitted of some local differences' but these differences were not 'in the scheme of things, of real moment for present purposes.' Ibid [488].

[130] *Commonwealth v Akiba* [2012] FCAFC 25.

[131] *Akiba* (2013) 250 CLR 209.

[132] Jamie Walker, 'Land Rights Councils "in need of a role"', *The Australian* (Brisbane), 5 September 2017, 6.

[133] *Ross v Queensland & Commonwealth* (Unreported, Federal Court, 2014).

[134] Jamie Walker, 'Land Rights Councils "in need of a role"', *The Australian* (Brisbane), 5 September 2017, 6.

[135] Ibid.

[136] Such criticism, and Ministerial declarations of intent, are often voiced at the annual national native title conference, held each year around 3 June — 'Mabo Day'. For the first such conference, held in

government response around the country has been piecemeal at best, non-existent at worst. For over at least a decade, suggestions for reform have focused not only on the complexities and deficiencies of the *NTA*, but increasingly on 'broader land settlements' to include both native title and non-native title outcomes.[137]

As to the 'narrower' question of the *NTA*, the difficulty of establishing the existence of native title rights for many communities suffering various degrees of dispossession (a history deemed irrelevant by the *NTA*), the impossibility of meeting the burdensome onus of proof set out in *NTA* s 223, has long been of central concern, and remains unresolved. Amongst much agitation and many suggestions, in 2008, Justice French (then of the Federal Court) proposed that once certain basic facts were established, the facts necessary to establish native title should be presumed to exist, subject to proof to the contrary, a task to be pursued by respondents.[138] This 'reversal of the onus of proof' proposal is an attractive option to many. In 2011, this proposal, and others, were pursued by the Greens by way of Bills in the Senate, all with no tangible results.[139] In 2012, Nicola Roxon, Attorney-General in the Gillard Labor Government, proposed a set of reforms of minor, peripheral character — all to no effect.[140]

B *Australian Law Reform Commission*

These, and many further reform suggestions, have now been presented to, collected together by way of submissions, and usefully discussed, by the Australian Law Reform Commission (ALRC) in its recent Report, Connection to Country. The Report, dated April 2015, was tabled in the Federal Parliament the following June. Pursuant to limited terms of reference issued by the Labor Government in 2013, the Report's many valuable recommendations which, if implemented, would substantially improve claimants' prospects of success, focus on seven topics.[141]

To my mind, the most significant are recommendations concerning the definition of native title set out in s 223, as interpreted by the High Court. The ALRC recommends amending the definition to provide that traditional laws and customs may adapt, evolve or otherwise develop; to clarify that claimants need not establish that acknowledgement of traditional laws and observance of traditional customs have continued substantially uninterrupted, by each generation, since sovereignty; nor that a society, united in and

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Melbourne in April 2000, voicing various complaints, see papers at Bryan Keon-Cohen (ed), *Native Title in the New Millennium* (AIATSIS, 2001). See also Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010).

[137] See Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice: Flexible and Sustainable Agreement Making* (August 2009). See also *ALRC Report*, above n 2, 107-114.

[138] Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (Speech delivered at the Federal Court Native Title Users Group, Adelaide, 9 July 2009). The basic facts included that the claim group reasonably believed that their ancestors, at sovereignty, acknowledged traditional laws and customs that connected them to the claim area; and that laws and customs currently acknowledged and observed were traditional. See also *ALRC Report*, above n 2, 216-20.

[139] See a series of Bills largely adopting French J's proposals at Native Title Amendment (Reform) Bill 2011; Native Title Amendment (Reform) Bill (No 1) 2012; Native Title Amendment (Reform) Bill 2014. See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Native Title Amendment (Reform) Bill 2011 (2011).

[140] Nicola Roxon, 'Echoes of Mabo' (Speech delivered at the AIATSIS National Native Title Conference, Townsville, 6 June 2012).

[141] ie, traditional laws and customs, being the native title definition in *NTA* s 223; connection; proof and evidence; the nature and content of native title (giving effect to the principles set out in *Akiba*); authorisation; parties and joinder; and promoting claims resolution.

by its acknowledgment and observance of traditional laws and customs has continued in existence since sovereignty.[142] Further, the ALRC recommends that a native title claim group may possess rights and interests where they have been transmitted between Indigenous groups in accordance with their traditional laws and customs.[143] The ALRC comments that these recommendations are intended to:

> … acknowledge that, while retention of a focus on traditional law and customs is important, the law should be flexibly applied to allow evolution, adaptation, and development of those laws and customs and succession to native title rights and interests.[144]

I, for one, wholeheartedly agree. As to proof and evidence, Justice French's 'reverse onus' suggestion was not supported, the ALRC preferring the abovementioned substantial amendments to *NTA* s 223, and introducing into the Act '… guidance regarding when inferences may be drawn (in the proof of native title) "including inferences from contemporary evidence that the claimed rights and interests are possessed by the claimant group".'[145]

This inadequate survey of a carefully researched and substantial report ignores much additional significant discussion and reform recommendations. To date, the current Turnbull government has failed to respond in any way, save for having regard to the authorisation recommendations in the development of the *McGlade* amendments concerning ILUA sign-off requirements, mentioned above.

C *Constitutional reform*

A related debate over recent years centres on agitation for amendment to the federal *Constitution*. On one view, this began in the late 1970s with Makarrata discussion[146] which has now revived.[147] In 2012, a report by an expert Panel recommended repealing ss 25, 51(xvi) and inserting new sections, labelled 51A, 116A and 127A.[148] Currently, these proposals have been abandoned in favour of four reforms emerging from nation-wide program of First Nations Regional Dialogues conducted during 2016-17 culminating in a 'Statement from the Heart' devised at a National Constitutional Convention held at Uluru in May 2017.[149] This proposes, in short, four reforms: first, a constitutionally entrenched 'first nations voice' or representative body (to be subsequently established by statute), to advise the federal Parliament on laws affecting Indigenous people. Second 'an extra-Constitutional Declaration of Recognition' of First Peoples to be passed by the Parliament to 'articulate a symbolic statement of recognition to unify Australians'; third, the establishment of a Makarrata Commission

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[142] *ALRC Report*, above n 2, recommendations 5-1 to 5-4, 29, 133-171.
[143] *ALRC Report*, above n 2, recommendations 5-5.
[144] *ALRC Report*, above n 2, 26.
[145] *ALRC Report*, above n 2, recommendations 7-1, 220-226.
[146] See eg, Stewart Harris, *It's Coming Yet* (Aboriginal Treaty Commission, 1979); Report of the Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later* (1983).
[147] See, eg, Michael Mansell, *Treaty and Statehood* (Federation Press, 2016); Shireen Morris (ed), *A Rightful Place* (Black Inc Press, 2017), Megan Davis and Marcia Langton, *It's Our Country* (Melbourne University Publishing, 2016); Damien Freeman and Shireen Morris, *The Forgotten People* (Melbourne University Publishing, 2016); *Contra* Keith Windschuttle, *The Break-up of Australia* (Quadrant Books, 2016).
[148] Expert Panel on Indigenous Constitutional Recognition, *Final Report of the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012).
[149] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (30 June 2017) Uluru Statement from the Heart (i) ('*Referendum Report*').

to pursue two tasks: to 'facilitate a process of local and regional truth telling', i.e., about Indigenous history, especially since 1788; and 'to supervise a process of agreement-making between governments and First Nations', i.e., Treaty-talk.[150] These proposals were considered and accepted by a Referendum Council, which provided its Report to the Prime Minister and Leader of the Opposition on 30 June 2017.[151] The nation awaits their response. A referendum (concerning the first recommendation only) has not yet been decided upon, let alone a date announced.

For current purposes, I merely note: As to the above, not a word about traditional country. Such constitutional discussion segues easily, in my mind, to constitutional recognition of native title. Amongst many overseas precedents in this arena, in 1982, the *Canadian Constitution* was amended to read:

> Section 35(1) The existing aboriginal and treaty rights of Aboriginal people of Canada are hereby recognized and affirmed … (3)… treaty rights includes rights that now exist by way of land claim agreements or may be so acquired.

To the best of my knowledge, Canada continues to be both economically prosperous and constitutionally and culturally responsible. In my view, such entrenchment of native title rights is long overdue. But when you consider that the *Land Rights Act 1976* (NT) delivered, and still delivers, a power of veto over mining to traditional owners (subject to Ministerial override);[152] how such a veto power was carefully excluded during negotiations of the *NTA* in 1993; and how impossible, politically, such a prospect appears today, 25 years on, such 'radical' constitutional reform would, I fear, gather little political support from any side of the chamber and, consequentially, in the electorate. The proposals now before our political leaders, however, I consider to be very modest involving no threats to the supremacy of Parliament, and to be worthwhile and achievable if they are ever put to a referendum.

VII CONCLUSION

After 25 years of operation, the native title sector is increasingly transitioning from 'recognition and protection of Indigenous rights in land to (using) those rights for economic development[153] and seeking new ways to utilise the land estate to support self-determination. Thus, for example, with claims in Cape York approaching completion, Cape York Land Council Chairman Richie Ah Mat is 'thinking outside the square', including that his Council 'could become a platform for a new form of regional government', assisting traditional owners to achieve 'a life of economic opportunity built on land and home ownership, empowerment and … recognition in the *Constitution*'.[154] Meanwhile, despite undoubted success and a significant increase in Indigenous estate Australia-wide, failure by governments to reform the *NTA* both flies in the fact of its stated objectives, and is a sad commentary on 'closing the gap' rhetoric uttered by politicians.

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[150] Ibid, 149, (i), (iii), 2.
[151] Ibid.
[152] See *Aboriginal Land Rights (NT) Act 1976* (Cth) part IV, ss 40, 42(6).
[153] Board of the Indigenous Land Corporation, '2015-16 Annual Report' (Annual Report, Indigenous Land Corporation, September 2016) 38.
[154] [154] Jamie Walker, 'Land Rights Councils "in need of a role"', *The Australian* (Brisbane), 5 September 2017, 6.

As at September 2017, sharp conflict continues to arise, particularly between the extractive industry and native title holders in Western Australia.[155] Discussions aimed at reforming the *NTA* are proceeding — albeit at snail's pace — between the Attorney General's Department, Canberra, and the national peak body for Native Title Representative Bodies and Service Providers, and Territory Land Councils, the National Native Title Council.[156] Meanwhile, Indigenous organisations such as those in Cape York are not waiting: they are looking outwards and upwards; e.g., to land-based commercial opportunities, the negotiation of domestic 'treaties', and to constitutional reform that might include rights of self-government founded on areas the subject of native title . Such 'rights' represent but a small development of the principles enunciated in *Mabo (No 2)*: the recognition of the continued vitality, and legal validity, of a system of law founded on custom and tradition not sourced in, but recognised by, Australian common law. Such traditional laws delivered, via *Mabo (No 2)*, enforceable rights to land: they may also yet deliver enforceable powers of self-government including increased ability to control and develop the now expansive Indigenous estate.

But that is another story that — one fears — could well occupy the next 25 years.

[155] See, eg, Paul Cleary, Title Fight: The people of the Pilbara take on Australia's great philanthropist (September 2017) The Monthly <https://www.themonthly.com.au/issue/2017/september/1504188000/paul-cleary/title-fight>: '18 separate legal and administrative proceedings during 2009 – 2013' (and continuing), between Andrew 'Twiggy' Forest's Fortescue Metals Group and Yindjibarndi traditional owners concerning development of the Solomon Hub mining complex in the Pilbara.

[156] Interview with the National Native Title Council (Personal correspondence, 4 September 2017). Matters under review include the *ALRC Report*; an inquiry by COAG as to which, see Senior Officers Working Group, *Investigation into Indigenous Land Administration and Use: Report to COAG* (December 2015); and the aborted Native Title Amendment Bill 2012.