DISTINGUISHING NATIVE TITLE AND LAND RIGHTS: NOT AN EASY PATH TO RIGHTS OR RECOGNITION[1]

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Introduction

The differences between native title and land rights can be confusing for everybody, even for our people with so-called 'inside knowledge' of being an Indigenous person and what the importance of land is to us culturally. The confusion that we have can be compounded ten-fold by those people in the community with little or no knowledge of either land claim regime available to Indigenous people for the return of land. To some in the non-Indigenous community, either regime simply means that 'Aborigines are claiming land'; where they believe they are going to be dispossessed of *their* land; to those in the Indigenous community land claims or land rights processes are both arduous and expensive for what are often outcomes of confusion and uncertainty.

For Indigenous people, however, both regimes should be equally important as one another. They are designed to provide rights in various forms to the very people that the lands were stolen from in the first place; the rights and recognition derived from either regime have the potential to empower the Indigenous people of our generation to progress forward towards equality and reconciliation.

Sadly, as a result of government intervention, legislative change, court decisions and internal disagreement within Indigenous communities, both regimes have provided a great source of confusion and conflict. In the communities, the confusion and conflict is often in relation to how the resources or recognition will be utilised for the good of the people.

In relation to the regimes themselves, conflicts arise in relation to which regime is best suited to the people concerned and how their respective claims fit into the legal environment; confusion arises also when potential applicants confront the difficulty in navigating through the application, mediation and litigation processes. It is also a source of conflict when people disagree over why they are claiming land; that is, what the true intention is behind their claiming rights and recognition through either regime - there are some people who see the claim process as a means of financial gain while others, who have not lost sight of the philosophy behind both processes, maintain their claims for the purpose of ensuring that Indigenous people's rights to land and title recognition are kept alive for those to follow in the future.

The following paper is intended to provide a summary of the claims process of each land rights regime; it also aims to highlight the complexity and

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difficulties of each process, highlight some of the problems in them and how, if at all possible, we should or could re-conceptualise the processes and assist the Indigenous land rights to move forward. The paper is also intended to remind us all why our people fought for so long and so hard to achieve rights in respect of land and title in the first place.

Background summary of native title and land rights

The concept of native title is nothing new for indigenous people throughout the world, in fact, native title has been interpreted and recognised many times prior to the 'discovery', or recognition of it, in the Australian legal landscape; native title recognition applicable to other indigenous people in world occurred many years prior to the birth of the Australian nation in 1901. The first common law jurisdiction to recognise native title was the United States with the case of *Johnson v McIntosh* in 1823. This decision was followed in 1847 with the New Zealand case *R v Symonds* and then Canada in 1888 with *St Catherine's Milling and Lumber Co v The Queen*. Several African countries followed this 'phenomenon' throughout the 1920s with cases such as *Amodu Tijani v Secretary Southern Nigeria* and *Sobhuza v Miller*.

Native title, and the overall concept of it, is about the original people's rights to title over land or waters; including any 'bundle of rights' and interests attached to the land and people. But such recognition in Australia has come at a financial and emotional cost. The claims are often hard fought for and communities go through lengthy litigation or negotiations; often with the government and corporate heavyweights - the process of claiming native title drains already limited budgets and resources, as well as the spirit of the claimants.

Since 1993, approximately $600 million has been spent on native title. Making up this amount is the Commonwealth with $63 million being spent in the Federal Court, $167 million on funding the National Native Title Tribunal ("NNTT") and approximately $370 million of funding to ATSIC to assist the Native Title Representative Boards and support them in their native title claims. It is important to remember that this amount would be higher if the amount spent in the last financial year, including the contributions made by the state and territory governments and the business community in negotiations, is calculated. Native title, the claims process and litigation has become a big industry in Australia with a very uneven playing field; native title litigation lawyers have been the big winners and not the people.

Native title in Australia has hit many hurdles in its short life and almost did not get off the ground; the first hurdle came in 1971 when it was held that the English common law did not even recognise it at all in the case of *Milirrpum v Nabalco Pty Ltd*. Subsequently, a new hope was provided by the High Court in 1979 when it said that 'a properly pleaded native title claim would raise an arguable question for hearing and determination' when it handed down *Coe v Commonwealth of Australia*. It was this year that saw the beginning of the native title struggle here in Australia; recognition that was never going to be won easily - Indigenous Australians had to wait a total of 170

years after the United States with the decision of *Mabo v State of Queensland [No 2]* before native title was to be recognised and applied in the laws of this country – a summary of the key cases in respect of native title in Australia is provided at Appendix 1.

Within Australia there is also a legislative mechanism created so that dispossessed Indigenous people have 'legal' rights and title to land; this is through the various "land rights" regimes operating in the states and territories. The land rights movement in this country commenced prior to native title when, in the mid 1970's, the Australian Federal and State governments commenced the introduction of legislation to finally return certain Crown land to Australia's original owners and occupiers.

It is important to note from the outset that there are legal differences between native title and land rights in Australia. The differences between the two are further explored later in the paper; essentially, native title is based on the traditional ownership and enjoyment of land and water – it is a form of recognising 'pre-existing' title whilst on the other hand land rights are a legislative response to those traditional rights to land due to Indigenous people whom have been dispossessed of their land resulting from European settlement.

The land rights journey began in South Australia in 1966. It was then that the State's government enacted the *Aboriginal Lands Trust Act*, which provided the Aboriginal people ownership rights to a remaining parcel of land in the south of the State. Subsequently, the Whitlam government in 1972 saw a new 'time' for Indigenous people in this country with the establishment of the Aboriginal Land Rights Commission ("ALRC"). Out of the ALRC came, amongst other things, a recommendation that Aboriginal reserves be transferred to Aboriginal ownership in conjunction with the establishment of an Aboriginal Land Commission; following this, the *Aboriginal Land Rights Act 1976* was enacted in the Northern Territory. These land rights undertakings by the respective legislatures were based on the perceived need of Indigenous people to have access to, or ownership of, their own country once more; this time in conjunction with, and within, 'white man' law.

Today in the Northern Territory almost 50 per cent of the land is collectively owned by the Aboriginal people flowing from the land rights legislation. The Northern Territory Act has also created a system of governing and overseeing what occurs if bodies want to explore or mine on Aboriginal land; it creates a form of autonomy and a sound basis for self determination in the future.

In relation to NSW, the relevant legislation is the *Aboriginal Land Rights Act 1983* (NSW). The government's aim in enacting this Act was to give Indigenous people of NSW rights over Crown land through representatives of the Aboriginal people and, in doing so, aimed to "help redress the injustice" caused to the Aboriginal community by the deprivation of their land following the settlement of Australia. The NSW Act allows our people in this State to claim Crown land and obtain a grant of freehold over it.

Public perceptions

The Australian colonial governments had great disregard for Indigenous people; they had even more disregard in respect to any so-called 'rights' Aborigines may have had to the land upon which they were settling. Settlers were granted land that was originally owned by Indigenous people, this granting of land was done without any requirement or expectation that they were to make any form of compensation. The colonisers did not even try to engage the Indigenous population in an attempt to form any kind of co-operative arrangement to share the lands; instead what the Indigenous people faced was dispossession from their land by a foreign entity with foreign weapons.

Land rights and native title have always had a mixed response from society; in the past the media's portrayal of the Indigenous peoples' struggle against poverty, alcohol and disease has not helped and has, in fact, provided the public with a stereotype of Indigenous Australia as 'dole bludgers', receiving 'hand outs' and alcohol abusers. These perceptions have also damaged the land rights and native title cause in this country as they give rise to some attitudes by relevant stakeholders that Indigenous people 'don't deserve land', or they question the claimants motives i.e. 'what do they want that land for?'. The most common in my mind is perception, and quite often the belief, that land claims are just another 'handout to the blacks'.

Unfortunately, these perceptions are inter-generational; continual damage that has yet to be repaired which, in turn, makes the process of claiming land or negotiating with larger entities much more difficult when we are 'convincing them' that our goals are not to hinder them in their operations, but to provide our people with a sustainable economic and cultural future.

There is also a real need for more education in the field of land rights and native title today more than ever; society should no longer feel threatened; nor should society believe that we have all assimilated into the quarter-acre, freehold blocks with mortgages. The importance of native title and land rights should be put back into the media spotlight; the public need to be shown how Indigenous people in the 21st century are still fighting in the courts (often with little or no money) to be recognised as traditional owners of land that is commonly accepted (historically) as land that really did belong to us in the first place. A public awareness campaign is needed to (re)educate society that the real agenda behind Indigenous people in fighting for land rights is for the recognition and traditions and culture attached to it. It is now time to regain our voices; we need a united front to advocate for these rights and to demonstrate that land means more than just 'a hand out' or an opportunity for short-term financial gain.

What each regime recognises

Both native title and land rights recognise the traditional rights of Aboriginal and Torres Strait Islander peoples' to land. Both rights, however, are

'legally' different. Native title itself is based on recognising traditional Indigenous ownership of land and waters - native title is not granted; nor is it a right that has been created by the legislatures, it is about recognising rights that 'have always been there'.

Land rights on the other hand are a legislative response by the various parliaments to those traditional rights to the land of the dispossessed Indigenous people.

In claiming land rights, Indigenous people are seeking a grant of title from the government of their state or territory. The granting of such land may, in fact, recognise traditional interests in the land such as heritage or culturally significant sites; or what was colloquially known as 'scared sites'; they may also be granted to those Indigenous people whom simply need the land that they were deprived of in the past and use such lands for their economic development and social betterment.

Successful land rights claims usually results in those claimants being afforded 'European' titles to land; titles such as freehold or perpetual lease - these titles are held by a community group or organisation who oversees the management of the land and its resources; individuals are not afforded the responsibility of maintaining individual title to their lands as other 'owners' of land are in society - although a positive side to it all is that the land will be passed on to future generations, thus ensuring that Indigenous people will have a continual connection with their land in some form or another.

In relation to native titleholders, they assert their 'pre-existing title' rights as well having cultural and spiritual recognition. Native title also varies according to the people and their rights and needs – claims may arise which seek a limited right of access to visit important places or the right to hunt and fish in, and on, certain lands and waters. The rights may also extend to a right to possess, occupy, use and enjoy the land in a way similar to freehold ownership.

Native titleholders may also have the right to be compensated if the government acquires their land or waters for future developments. These title holders could also, in some circumstances, have the right to negotiate over mining developments and mineral exploration on their lands – contrary to what some people believe, native title holders do not have the legal right to take away another person's valid right to land; i.e. privately owned homes, mining licences or pastoral leases.

It is important to remember that Indigenous people are not being 'given land' through native title determinations; native title groups are essentially asserting that their traditional links to an area have survived and, therefore, they have rights to the area according to their traditional laws and customs that existed thousands of years prior to colonisation; again they are not taking away another persons property nor are they provided with title deeds, they are simply having their pre-existing rights (that have been there for generations) recognised in the Australian legal system.

Other examples of claimants seeking recognition under Australian law can be seen in cases where they want recognised rights or 'legal permission' to

enter onto lands so that they are able to attend or participate in traditional ceremonies; or to visit sites of cultural significance.

Native title can exist in areas of Australia where it has not been extinguished in one form or another. Claimants may make an application to have their native title recognised, and with such an application, the Federal Court or NNTT determines whether or not native title still exists in relation to that particular land claimed. A determination of native title is usually by either a consent determination (which is where native title is agreed on without going to a hearing) or it is determined by long and expensive litigation resulting in the Federal Court making a determination - this is a cause of distress and confusion for those claimants whom have always belong to the land, whom have no knowledge, or understanding, of why they have to go to court and justify to a strange person (dressed strangely) why the land is important to them and their people.

The Court process and determination of native title does not, as noted above, take away or interfere with the rights and interests that other people have over the same area; again including those people whom own their homes on the claimed land or those persons or companies who hold pastoral or mining leases. It is to be noted also that, in some circumstances, the native title claimant group can often 'co-exist' or share the land claimed with these latter entities - evidentiary proof that native title does not diminish other people's rights in or over the claimed area. Where there is a conflict between native title rights and the rights of another person, the rights of the other person prevail; essentially native title claims are often made for "non-exclusive" or "shared rights" with other interested parties.

Native title may also exist in areas such as vacant Crown land; within forests and beaches; national parks and public reserves; some types of pastoral leases; land held by government agencies; land held for Aboriginal communities; or oceans, lakes, rivers, etc and other waters that are not privately owned.

Claiming land rights in NSW (or Australia)

In NSW, Local Land Councils ("LLC") may claim 'claimable Crown lands' for the vesting in the people's relevant Land Council. 'Claimable Crown lands' are defined as:

- Land vested in the Crown which can be sold, leased or reserved or dedicated for any purpose under the *Crowns Lands Consolidation Act 1913* or the *Western Lands Act 1901*;
- Land which is not lawfully used or occupied;
- Land which, in the opinion of the Crown lands Minister, is not needed or likely to be needed as a residential land or for an essential purpose; and

- Land which is not covered by a registered native title determination application by a claimant or by an approved native title determination that native title exists.

The land claims process differs from that of native title, while native title applications are processed through the Registrar of the NNTT or the Federal Court, land claims can only be lodged by Aboriginal Land Councils ("ALC") that have been established under the *Aboriginal Land Rights Act* – land claims cannot be made by individuals or groups.

The ALC's were established under the *Aboriginal Land Rights Act* to undertake land claims over vacant Crown land (or purchase land that is for sale) and have been provided with funds to make such claims or purchases.

Claims for land rights start with the relevant Land Council lodging its claim with the Aboriginal Land Rights Registrar (located in the Department of Aboriginal Affairs), the claim is then forwarded to the Minister responsible for the *NSW Crown Lands Act* for his/her consideration. Pursuant to the *Aboriginal Land Rights Act*, the Minister then must grant the claim if, at the date of lodgement, the land is:

- Crown land;
- Not lawfully used or occupied;
- Not needed for an essential public purpose; and
- Is not needed as residential land.

Land that is acquired under land rights regimes may be used for a number of reasons; it may be used for any community purpose including such things as commercial enterprises and community housing. A right of appeal against a Minister's decision to refuse a land claim lies with an appeal to the Land and Environment Court. The land claims process is provided at Appendix 2.

Native title claims in Australia

The *Native Title Act 1993* (Cth) describes native title as 'the rights and interests of Aboriginal and Torres Strait Islander people in land and waters, according to their traditional laws and customs that are recognised under Australian law'. These rights and interests recognition are a result of the *Mabo* decision. *Mabo* provided recognition for the first time, that the Indigenous people of Australia continue to hold native title – the case provided Aboriginal and Torres Strait Islander people with an opportunity to apply to the courts to have their native title rights recognised under Australian law; it also provided the foundation for the rights or title holder to be compensated if governments acquire land or waters for future developments.

Demonstrated recent use and continued access to Aboriginal lands is not required for proof of native title. This means that where Aboriginal people have been removed from their land or prevented from access to their land, native

title could still be determined; provided that they can 'prove' that they have maintained the spiritual connection. 'Connection' to land therefore does not require *actual* physical connection.

However, claiming and/or 'proving' native title in Australia is not an easy task. A basic understanding of the laws and principles surrounding native title is essential; to make a native title claimant application, including a non-claimant application or an application for compensation, a person or their representative must file an application in the Federal Court Registry- a task daunting for anybody. This is a process that really does require people with some legal knowledge or have an education in their background- it is very hard for those people whom have lacked the opportunity for any formal education to tackle the court practice and procedures.

In the Australian jurisdiction there are three main types of native title applications. They are:

1. Claimant applications

Claimant applications are made by Indigenous people for a determination that native title exists in a particular area of land or waters unique to them. A native title determination is the legal recognition of the rights and interests held by Indigenous Australians according to traditional laws and customs. They are often referred to as 'native title claims' or 'native title determination applications'.

2. Non-claimant applications

These applications are made by a person, or group, who does not claim to have native title to an area but is seeking a determination by the Court on whether native title does, or does, not exist in a particular area.

3. Compensation application

Compensation applications are made by Indigenous people seeking compensation for the loss or impairment of their native title in a particular area.

After a claim is lodged, a registration test is applied to the claimant's application – this is conducted by the Native Title Registrar (or a delegate). When a claimant's application meets the conditions of the registration test, it is then entered onto the Register of Native Title Claims. The applicants go on to gain certain rights upon registration, such as having a say about proposed developments (future acts) in the claim area.

The registration test conditions are set out in s190A of the *Native Title Act 1993*. Some applications are considered against certain key conditions only. An outline of the native title application is provided at Appendix 4.

The Federal Court is also responsible for deciding who the parties to a native title application will be. To become a party in native title proceedings

parties must have an interest in the area that may be affected by the claim. These parties may include:

- The applicant/s;
- State, territory and local governments;
- Any other person who has made a native title application over the same area; and/or
- Any other person who may be affected by the native title claim.

Some parties may also have an interest in the particular claim area because they have a mining lease or prospector's licence; hold a pastoral lease; are an Indigenous person who also claims to hold native title in the area; represent a local shire; or hold a fishing licence in the area - it is essential that an interested party has a 'valid interest' that may be affected by the native title application.

To compound the confusion in the minds of native title claimants and their representatives even further, there are several other types of native title-related applications that can be filed with the Federal Court. These applications include:

- Revised native title determination applications (applications to vary or revoke a determination of native title);
- Strike out applications (applications by parties to native title applications for the matters to be thrown out because they fail to comply with the requirements of the *Native Title Act*);
- Applications to review a decision to refuse registration of a claimant application;
- Applications relating to appeals from decisions or determinations of the Tribunal on questions of law;
- Applications to remove the details of an indigenous land use agreement from the Register of Indigenous Land Use Agreements ("ILUA"); and
- Applications about the transfer of documents from one Aboriginal and Torres Strait Islander representative body to a new representative body.

Like the land rights regime, native title is held by a group of people and not by individuals. When the Court makes a determination that native title does in fact exist, the Court will at the same time also decide which claimants are the native title holders and what rights and interests make up that native title; the Court will also decide how those rights and interests will be held.

Under the *Native Title Act 1993*, native title holders are required to establish a body to represent them as a group as well as manage their native title rights and interests - these bodies are known as prescribed body corporate ("PBC"). Once established by the native title holders, and approved by the Court, the PBC is then entered onto the National Native Title Register as a registered native title body corporate.

Part of the reasoning behind having a PBC is so that the successful claimants have a 'management group' that operates on behalf of the native title holders; it also means that they have a say over what happens on their country. Once registered, a PBC is used as the legal body to conduct business between the native title holders and other parties with an interest in the area; parties such as pastoralists, governments or developers. A registered PBC makes it possible for native title holders to get on with the day-to-day business of the area, in accordance with the interests and consent of the whole group.

Because native title varies from region to region across Australia; so too does the traditional laws and customs - therefore the PBC must reflect the unique nature and wishes of the particular group. At the time the Court makes a determination that native title exists, the Court will request that the native title holders choose what kind of PBC they want. The native title holders can choose one of two alternatives:

1. The native title is held in trust by the PBC which acts as the trustee for the native title holders and operates for the benefit of the common law holders of native title; or
2. The native title is held by the common law holders of native title and the PBC acts as the agent of the common law holders, operating upon the instructions of the native title holders.

If native title holders do not choose either arrangement, then the Court will decide that native title must be held directly by the members of the group. This means that the PBC will be the agent of the native title holders. Essentially, the type of PBC that native title holders might choose will depend on what sort of legal relationship they want to have with each other and with other interest holders. The alternatives have different legal consequences and implications. Before choosing a type of PBC, native title groups really do need to seek legal and corporate advice and information; these are new and foreign concepts that play an important part in the title holders futures; these concepts are again a source of confusion for the title holders whilst at the same time an opportunity for lawyers and consultants to be the real beneficiaries from the process.

Alternative to expensive litigation

Indigenous Land Use Agreements ("ILUA") – these are a fundamentally important method in resolving possible lengthy and expensive court proceedings (often with uncertain outcomes). An ILUA is a voluntary agreement between particular native title groups and other interested stakeholders about the management and use of Indigenous land and waters.

An ILUA allows for our people to negotiate agreements to suit their particular circumstances; they are treated separately from the NNTT Court processes – however, they do form part of the final determination. Native title holders, when engaging in the ILUA process, can work towards mutually

agreeable outcomes in respect to future development, coexistence with the rights of others, access to different areas, extinguishment and compensation.

Once an agreement is finalised, the ILUA is then registered on the Register for Indigenous Land Use Agreements and binds all parties and all native title holders to the terms of the agreement made between them.

Future acts – Because claimant applications may take years in mediation or court proceedings before a final decision is reached, another system was devised to allow claimants and other stakeholders to negotiate about their interests while native title applications are being resolved; this process is known under the *Native Title Act* as the 'future act process'.

Native title claimants can potentially negotiate about proposed developments or land use if they are deemed to have the right to negotiate. Claimants gain this right if their native title application satisfies the registration test conditions as noted above. This ‘right to negotiate’ is not a right to stop a project or land use going ahead. It does, however, only apply to certain types of future acts such as mining.

The NNTT is the key administrator in the future acts process; it is their role to mediate between parties, to conduct inquiries and make future act determinations where parties in negotiation cannot reach agreement.

Compensation

Australian courts have found that native title rights and interests exist in many parts of Australia. However, in many other parts of Australia native title has been lost (extinguished) — for example, on freehold property — or impaired, for example, on some pastoral leases.

Native title rights are impaired where native title holders are not able to fully exercise their traditional rights in those areas. This happens because the High Court has said that, where the rights of the native title holders are inconsistent with the legal rights of another person — for example, a leaseholder — the rights of the other person prevail.

Most loss or impairment of native title is a result of government action in granting an interest over land where native title exists. When a court finds that native title rights have been lost or impaired, compensation may be payable. This is similar to the general situation in Australia when property rights are lost — for example, when private property is acquired for the construction of a freeway. Compensation is paid to the owners of the property for that loss.

This process is not as simple as it sounds, again it is a source of confusion and uncertainty as the claimants are required to make a formal compensation application to the Federal Court. The claimants can make an application before or after a determination of native title - but the court must make a determination that native title existed before deciding if any compensation is payable. This is because the Court may find that native title existed in some parts of the area and not in others and then, when that is complete, put a price on heritage that has been lost or simply not recognised.

Frustratingly, it is again the Courts that decide on who is entitled to, as well as the kind and amount of compensation to be paid to the claimants when negotiations break down between the unequal parties in dispute.

Difficulty in claiming

It can be quite difficult for claimants to maintain a positive approach to the lands cause when they are continually stonewalled in a white legal system. Aboriginal people are now faced with the legal requirement to prove that they have a continual observance and acknowledgment of their customs and traditions in respect of the land claimed – this a difficult task when you have no access to the land; you have kept no records and have simply been displaced. We have in this country a process of claiming lands through an Act that was supposed to work in favour of Aboriginal people, instead we now have a system that encompasses a sad irony when it says to Aboriginal people in this country:

> *"We have come to your country, we have dispossessed you of your land, we have acted in a racist and oppressive manner for over a 150 years and now in claiming land from us we want the following from you before we will recognise your claim:*
> *i) A demonstration of unbroken connection with the land;*
> *ii) Within our legal system;*
> *iii) On a limited budget;*
> *iv) In the face of public ignorance; and*
> *v) Against corporations larger and more powerful - who are fighting you because they want the benefits of your land."*

The native title system in Australia simply does not work; people cannot prove unbroken association with land when they were dispossessed of their land and the government and corporations know this.

In initiating claims under either regime, claimant groups may need to ask some hard questions in relation to what their intentions are in motivating their claims. For example, what does native title and land rights really mean to them? Are they seeking to redress the wrongs of the past through economic empowerment as embodied in the land rights regime? Are claimants seeking to have the land returned, not for the rights and protections attached to it, but simply for the compensation? Questions such as whether or not claimants are seeking the rights and titles for the right reasons – continual cultural enjoyment or an expedited path to economic independence?

There are elements of empowerment in claiming land in Australia; however, priorities should lie in achieving economic independence and protection of the Aboriginal culture – priorities in claims arising out of both regimes.

In fighting to obtain recognition, it is important to remember the true philosophy behind each of the regimes; sadly the native title regime has been eroded over time and battle for recognition has caused heartache for many people – one only has to ask the Yorta Yorta people to see the hurt the Coalition agenda and the Courts have caused in their fight.

The elected Indigenous representative body, ATSIC, played a fundamental role in contributing to the native title process in this country. ATSIC provided a voice for claimants through its strong advocacy on the issue. It also provided resources to the native title battle with programs administered through the Native Title and Land Rights Branch; support that filtered through to the representative bodies and assisted them in making their people's respective claims. Indigenous Australia still needs that voice whether or not it is in the ATSIC form or not – we must not let Indigenous affairs fade into the background of the agenda.

Native title itself has been likened to a 'bundle of rights' rather than a comprehensive right in property. This means that native title can be all of, some of, or any one of the many things that Indigenous people have traditionally done on their land. The implication is, as shown by the courts, that each of these rights that people claim has to be proven. They have to be proven one by one in order to have the Court declare that they do in fact exist – this 'proving' in these claims is often long, expensive and complicated; The case of Yorta Yorta again demonstrated this when it ran for ten years. Whereas, an alternative to such financial and emotion hardship can be achieved through reaching agreements in the mediation process – an alternative that costs less and is more ideal.

Mediation and negotiation in land claims allows for parties to maintain day-to-day relationships with each other. By mediating, all relevant parties remain in control of the outcome which recognises each party's interests - an agreement cannot be finalised without everyone's consent. However, the time it takes to resolve an application through mediation depends on the *willingness* of the people involved to reach agreements, as well as the complexity of the claim. It is during these processes that cohesion and leadership needs to be shown; a demonstration that although we, as claimants, may be socially disadvantaged, we still have the right to claim and be recognised as the rightful owners of the land; we deserve the right to be sitting at the negotiation table.

Claimants need to be educated at a grass roots level. They need to be made fully aware of their rights, the processes, the costs and possible outcomes delivered to them in a language and method which they will understand. Claimants must be educated that there are viable alternatives to litigation and that such alternatives should be considered. Claimants also need to be a aware that land claim funding has been, and continually is, exhausted on legal bills; and that there are corporations and governments with bigger budgets and more resources to conduct litigation long into the future.

Presently, it is still the Federal Court that decides whether or not a native title claimant application should be mediated by the NNTT or goes onto the adversarial process; the Court is fully aware of the imbalance between the claimant group and the respondent(s) but simply has no alternative:

> …The deck is stacked against the native holders whose fragile rights must give way to the superior rights of the landholder wherever the two classes of rights conflict. And it is a system that is costly and time consuming. At present the chief

> beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system…[2]

The deck is stacked in favour of non-Aboriginal entities and therefore it may be time to re-examine the land rights regimes or look to other countries for alternative models. We also need to re-educate mainstream Australia so that the public's level of understanding on land issues is raised; as well as to repair the profile of native and land rights after decisions such as *Wik*. By undertaking such a re-education, the path to a mutually respectful relationship between all affected parties may be realised; education is required to ensure that the continual frustration, denial and disrespect does not pass onto the next generation – it is this cycle of resentment and misunderstanding that needs to be broken. It is also time to educate Aboriginal Australia; to provide a real explanation of how to undertake land claims, the difficulties and cost in investigating and lodging them and whether or not other alternatives should be explored in the process of being 'recognised' as the true custodians of Australian land.

[2] *State of Western Australia v Ben Ward* (2002) 76 ALJR 1099.

APPENDIX 1.

SIGNIFICANT NATIVE TITLE CASES IN AUSTRALIA

Since the High Court held that the Australian common law recognised native title in the *Mabo* decision, the Federal Government intended that those recognised rights be entrenched into legislation through the passing of the *Native Title Act 1993*. This legislation set up the framework for native title claimants who sought recognition that their traditional rights had not been extinguished, and to also validate the land titles of the occupiers that may have been called into question by the decision. The aim of the legislation was to *recognise and protect native title* in Australia.

1. MABO

The most significant and recognised case in Australia is the decision in *Mabo v State of Queensland [No 2]*. The first *Mabo* case was decided by the High Court in 1988[3]. Both cases concerned three islands in the Torres Strait. In the first *Mabo*, after the court proceedings were commenced, the Queensland Parliament passed legislation which purported to invalidate any native title interest in those islands retrospectively from when they became part of Queensland in the 1870s. *Mabo* challenged this legislation on the grounds that it was invalid as it breached the *Racial Discrimination Act 1975;* the High Court held by a 4:3 majority that it agreed with *Mabo*.

The result flowing from *Mabo* No. 2 is that Aboriginal and Torres Strait Islander people with a continuing connection with their traditional lands, and according to their traditions and customs, may be recognised as having native title rights. Proving a continuing connection usually involves showing that traditional laws and customs have been passed down through generations to the present day. However, where this connection is broken, or where other actions have taken away those rights (such as the issuing of freehold title over the land to another party), and then native title is extinguished.

In *Mabo*[4] the Court held, with a 6:1 majority, that the Indigenous people of the Murray Islands held native title which was recognised by Australian common law; and that native title reflects the entitlements of the Indigenous inhabitants in accordance with their laws and customs to their traditional land.

The High Court recognised that the Meriam people of Torres Strait had native title over their traditional lands. This decision dispelled the notion that the Australian continent belonged to no-one at the time of Europeans' arrival - the doctrine known as "*terra nullius*". The High Court also rejected the view that full legal and beneficial ownership of all the lands in the then new British colony were vested in the Crown, unaffected by any claims of the Aboriginal inhabitants.

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[3] *Mabo v State of Queensland* (1988) 166 CLR 186.

[4] *Mabo v State of Queensland* (1992) 175 CLR 1.

2. *THE NATIVE TITLE ACT* CASE

The *Native Title Act* was challenged in 1994 by the Western Australian government. In March 1995 the High Court determined that the *Native Title Act* was valid[5]. This case was important for the holding of its validity as well as for its analysis of the Act; furthermore, the case is also important for deciding that the native title principles which were determined in the *Mabo* case also applied to mainland Australia.

3. WAANYI

In 1996 the High Court heard *North Ganalanja Aboriginal Corporation v Queensland*[6]. The case was initiated to determine the interpretation of a particular section of the *Native Title Act*. The case also raised the question of whether pastoral leases were extinguished by native title. The High Court did not decide the lease question in this case holding that to do so would be acting in the role of providing an advisory opinion which the High Court does not have the authority to do.

4. WIK

Another High Court case heard in 1996, and as well-recognised as *Mabo*, is the *Wik* case[7]. The High Court held, with a 4:3 margin, that native title was *not necessarily* extinguished by the grant of a pastoral lease.

The *Wik* case was brought by the Wik Aboriginal people of Cape York Peninsula and focused primarily on pastoral leases in Queensland. The fundamental question raised in the litigation was whether the granting of a pastoral lease necessarily extinguished native title; this question was very important considering the fact that more than 40 per cent of Australia is covered by pastoral leases.

Under the common law, both freehold and leasehold title were seen as providing the holder with "exclusive possession"; which according to *Mabo* extinguished native title. In the *Wik* decision, however, the majority of the High Court held that although common law titles were common in England, they played very little part in Australian property law. The Court held that when looking at the question of extinguishment of native title, it is necessary to look at both the legislation under which it was granted and the lease or title document that applied to the land in question. In the case of the Wik people, the lease in question was found not to have necessarily extinguished their native title.

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[5] *State of Western Australia v The Commonwealth [Native Title Act Case]* (1995) 183 CLR 373.

[6] *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595.

[7] *Wik Peoples v Queensland* (1996) 187 CLR 1.

Essentially, the majority of the Court endorsed the co-existence of native title and the pastoral leases concerned, but with importance afforded to the pastoral lease holders.

The Liberal government subsequently amended the *Native Title Act* in 1998 to deal with the implications from the *Wik* decision and to tighten up various aspects of the Act. The amendments, to be known as the "10-Point Plan", were strongly criticised by Indigenous Australians and the Labor Party.

5. FEJO

The case of *Fejo v Northern Territory*[8] involved the question of whether a freehold grant permanently extinguished native title. The High Court held that native title is extinguished permanently by a grant in fee simple and it is not revived at any time later, even if the land is later again held by the Crown. The justification for this was that the rights conferred by a fee simple grant are rights inconsistent with the continuation of any native title rights and interests.

6. YANNER

The case of *Yanner v Eaton*[9] involved the spearing of several crocodiles which Yanner and others ate and froze the meat. They were charged with taking fauna without a statutory permit; the statute under which they were charged also declared that all fauna was "the property of the Crown". Yanner's defence was that he was acting pursuant to his native title right and did not need a permit. The Queensland Court of Appeal rejected his defence and held that the statute extinguished any native title. It was subsequently appealed to the High Court.

By a majority of 5:2, the High Court accepted his defence and reversed the decision of the Queensland Court of Appeal. The key deciding point in the High Court was that the term "property", in the context of the statutory declaration that all fauna was State property, did not mean full beneficial or absolute ownership. Rather it was no more than the aggregate of the various rights of control by the executive that the legislation created such as rights to limit the fauna taken and to receive royalties. Accordingly the native title was not extinguished; and under the *Native Title Act*, a native titleholder did not need a permit for hunting.

7. *YARMIRR – CROKER ISLAND* CASE

By 2001 more than 120 native title claims had been made in relation to areas of sea and seabed around Australia's coastline. The High Court test case of *Commonwealth of Australia v Yarmirr*[10] examined the question of whether there could be native title to the sea and sea-bed below the low-water mark.

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[8] *Fejo v Northern Territory* (1998) 195 CLR 96.
[9] *Yanner v Eaton* (1999) 201 CLR 351.
[10] *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1.

The claimants sought *exclusive* possession of the seas that conflicted with other interested parties such as commercial fishing entities as well as the rights of international passage and navigation. The Australian government argued that as native title was a concept recognised by the common law, it could not exist in sea areas because the common law did not apply there.

The High Court held, by a 5:2 majority, that the *Native Title Act* clearly indicated that native title rights and interests may extend into the sea, sea-bed and sub-soil beyond the low-water mark. The Court concluded that the resultant native title rights to fish were not exclusive but 'co-existed' with the rights of others. The native titleholders therefore could not control commercial operations such as fishing in the sea.

8. WESTERN AUSTRALIA v WARD

The *Ward*[11]case was a claim for native title to land and waters in north-western Australia involving land that had contained pastoral leases, the Ord River irrigation area, the Argyle diamond mine and areas of water.

The High Court found that the pastoral and mining leases had extinguished any native title to control access to, or use of, that land; that the public right to fish in tidal waters continues. The High Court also emphasised that native title is "a bundle of rights" of varying content, which was not necessarily analogous to a fee simple, and which could be extinguished part by part**.**

9. WILSON v ANDERSON

Wilson v Anderson[12] was handed down on the same day as *Ward*. The case involved the validity of a pastoral lease granted in perpetuity in the western division of New South Wales and a claim of native title over the land. By majority, the High Court decided that those perpetual pastoral leases were like freehold – and so they extinguished native title. This determination was a major set back for the native title claimants of NSW as the pastoral leases cover about 40 per cent of the State.

10. ERUBAM LE DARNLEY ISLANDERS

The *Le Darnley*[13] case involved the Queensland government and the possibility of having to acknowledge the traditional owners of lands on which the State's schools are built upon. The Court so far has found that native title was not extinguished on land over area covered by public works built after the *Wik* decision on 23 December 1996. Native title was extinguished on land area covered by public works built before the *Wik* decision.

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[11] *Western Australia v Ward* (2002) 76 ALJR 1099.
[12] *Wilson v Anderson* (2002) 76 ALJR 1306.
[13] *Le Darnley Island* (2003) FCAFC 227.

11. DE ROSE HILL

This case is currently gone from the single judgment of Justice O'loughlin[14] to be before the Full Court of the Federal Court – it is awaiting determination after the Full Court reserved its decision.

12. YORTA YORTA

The case of *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors*[15]initially involved the Yorta Yorta people claiming exclusive possession of 2,000km² of land around the Murray River in New South Wales and Victoria. At first instance, the Court found that the "tide of history" had washed away any native title. The reason provided for this was that by 1881, the Aboriginal claimants' ancestors were no longer in possession of their tribal lands and had ceased to observe their traditional laws and customs. Sadly, and by a majority, the Full Federal Court agreed.

The appeal to the High Court raised an issue of fundamental importance for all native title claims in Australia. The question to be examined and determined was whether a native title applicant was required by the *Native Title Act* to prove, amongst other things, proof of continuous acknowledgment and observance of traditional laws and customs since 1788. The lower courts found that the claimants could not prove that key element and so their claim failed. The High Court dismissed the appeal 5:2, having regard to the findings of the trial judge. Justices Gaudron and Kirby dissented. The majority said that as native title is not a creature of the common law, there were no "common law requirements" of native title. But the key point in the majority's judgments was that under the *Native Title Act*'s definition of native title, the rights and interests had to be possessed under *traditional* laws and customs acknowledged and observed – and unless their acknowledgment and observance had "continued substantially uninterrupted since sovereignty" (which in most cases is 1788), any laws and customs which were *now* acknowledged and observed could not properly be described as traditional.

[14] *De Rose v South Australia.*

[15] *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 77 ALJR 356.

APPENDIX 2.

NSW LAND RIGHTS: LAND CLAIMS

Land Council sends the claim to Registrar at the Department of Aboriginal Affairs who registers it and sends it to the Department of Land and Water Conservation (DLWC)

Aboriginal Land Claims Unit in DLWC sends it to the district office relevant to the land being claimed.

The district office investigates the claim including as necessary reference to public authorities

Public authorities notify the district office about their needs for the claimed land

The district office sends a report back to the Aboriginal Land Claims Unit in DLWC

Aboriginal Land Claims Unit makes a recommendation to the Minister for Land and Water Conservation

Minister for Land and Water Conservation makes a decision to either grant or refuse the claim and then notifies the Aboriginal Land Council

REFUSED: an appeal may be made to the Land Environment Court

GRANTED: titles to land granted are delivered to the Aboriginal Land Council

APPENDIX 3.

COMMON TERMS IN LAND RIGHTS & NATIVE TITLE CLAIMS

Arbitration: an inquiry conducted by the Tribunal into a future act determination application which takes into account the effect of the future act on the enjoyment by the native title party of their registered native title rights and interests (among other things) and the economic or other significance of the future act and the public interest. The arbitration (inquiry) leads to the Tribunal making a determination whether the future act can be done and, if so, whether conditions should be imposed.

Directions: formal orders from the Tribunal in relation to the inquiry, which include orders stating when parties should provide material to the Tribunal.

Expedited procedure: see fast-tracking.

Expedited procedure objection consent determination: a decision by the Tribunal that the expedited procedure (fast-tracking) does or does not apply, which is made when parties have reached agreement.

Fast-tracking (or expedited) procedure: this refers to the fast-tracking process for future acts that might have minimal impact on native title, such as some exploration and prospecting licences. If this procedure is used, and no objection is lodged, the future act can be done without the normal negotiations with the registered native title parties required by the Native Title Act.

Future act: the granting of the right to conduct a proposed activity or development on land and/or waters that affects native title rights and interests. Generally, rights to be informed and consulted about the future act are given to native title claimants. In the case of some future acts including the grant of mining or exploration rights and some compulsory acquisitions of native title, the future act can not validly be done unless the right to negotiate process in the *Native Title Act* is followed.

Future act determination application: an application made by any negotiation party to the Tribunal for it to determine whether a future act may proceed, and if so what conditions should apply.

Future act determination: a decision by the Tribunal that a future act may proceed and whether any conditions apply.

Future act consent determination: a decision by the Tribunal that a future act may proceed and whether any conditions apply, which is made when parties have reached agreement and consented to those conditions applying.

Inquiry hearing: the hearing by the Tribunal of evidence and submissions by parties who are in a right to negotiate inquiry (i.e. a future act determination application inquiry or an expedited procedure objection application inquiry). In some cases a determination will be made, based on written evidence submitted to the Tribunal, without holding an inquiry hearing.

Listing hearing: a preliminary meeting/hearing held by the Tribunal so that it can check compliance with directions, ensure that all necessary documents are before it and set a time and location for an inquiry hearing.

Mediation (future act): a process which allows negotiation parties, with the assistance of a mediator, to discuss their interests in the area, identify the issues, consider alternatives and explore ways to reach agreement. Mediation processes are useful where negotiation is not progressing.

Member: a person who has been appointed by the Governor-General as a member of the Tribunal under the Native Title Act. Members are classified as

presidential or non-presidential. Some members are full-time and others are part-time appointees.

Native title application: an application for the legal recognition of the native title rights and interests held by Indigenous Australians over a particular area of land or waters, according to traditional laws and customs.

Native title determination: a decision by an Australian court or other recognised body that native title does or does not exist in a particular area of land or waters.

Negotiation party: an individual, group or organisation that may participate as a party to proceedings in a right to negotiate inquiry, namely the government party (usually a State or Territory government who propose to do the future act); the grantee party (the person who has requested the future act to be done) and the native title party (the registered native title claimants).

Notification (future act): the publishing of a notice in major newspapers by the State or Territory government stating that it intends to do certain future acts, such as granting a mining lease, in an area. This is called a 'section 29 notice', because section 29 of the Native Title Act sets out how notice must be given.

Notification date: the 'notification date' is identified in the published notice. Starting from the notification date parties have specific periods of time in which to lodge applications. Periods of time vary, depending on the type of application.

Objection application: registered native title claimants can object to a tenement grant being fast-tracked. They have four months from the notification date to lodge an objection. If the objection is successful, the development cannot go ahead without the normal negotiations required by the Native Title Act.

Preliminary conference: a meeting of the parties, often conducted by telephone, and usually convened by a Tribunal staff member at the request of a Tribunal member.

Registration test: a set of conditions under the *Native Title Act 1993* that is applied to native title claimant applications. If an application meets all the conditions, it is included in the Register of Native Title Claims, and the native title claimants then gain the right to negotiate together with certain other rights, while their application is under way.

Registered native title claimants: native title claimants who have met the conditions of the registration test.

Right to negotiate: the right of native title claimants (whose application has satisfied the registration test) to be involved in discussions about — but not veto — proposed developments (such as mining) on areas of land or waters where native title exists. Where the right to negotiate applies, negotiations with native title claimants must occur before the grant for the proposed development can go ahead. The right to negotiate process is managed by the State or Territory government, but the Tribunal may be requested to mediate.

Status conference: a meeting of the parties, similar to the preliminary conference, which is held four weeks before compliance with the first direction is due. The purpose of the status conference is to ascertain whether negotiations have been, or are likely to be, successful.

Without prejudice: a condition applying to discussions during negotiations, which prevents them being used as evidence in any subsequent court action.

APPENDIX 4.

NATIVE TITLE: CLAIMS PROCESS