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"Always Was, Always Will Be": Connection to Country Amid Land Dispossession

The Failure of the Native Title Act to Protect Aboriginal and Torres Strait Islander Peoples' Culture and Identity in Australia

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ABSTRACT

Land is central to the culture and identity of Aboriginal and Torres Strait Islander peoples, a relationship encapsulated in the concept of "connection to Country". With the beginning of British colonisation in 1788 and the acquisition of the territory under the doctrine of *terra nullius*, First Nations peoples were subject to a violent process of dispossession, posing significant challenges to maintaining their connection to Country. The *Mabo* decision in 1992 overturned the legal fiction of *terra nullius*, leading to the passage of the Native Title Act 1993 (Cth), a landmark moment in the recognition of Indigenous land rights in Australia. However, this thesis argues that the potential of the Native Title Act in protecting the land-based culture and identity of Aboriginal and Torres Strait Islander peoples remains limited. First, its requirement for an uninterrupted connection to the land claimed ignores the disruption caused by colonisation. Second, the Act relies solely on Western legal frameworks and notions of property, which often conflict with Indigenous understandings of Country. Third, it operates within a system that assumes that land is available for exploitation, prioritising economic interests over the cultural interests of Aboriginal and Torres Strait Islander peoples. These structural flaws are illustrated through the Juukan Gorge case, a sacred rock shelter in Western Australia evidencing 46,000 years of continuous human occupation that was destroyed by the mining company Rio Tinto in 2020. Ultimately, the thesis contends that effective land justice must move beyond formal recognition towards a model enabling First Nations peoples to uphold and protect their relationships with land.

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TERMINOLOGY

The words we use carry a strong ideological weight. How we frame a concept can have a powerful impact on the meaning we want to associate that word with. It is for this reason that throughout this thesis, I have attempted to critically engage with the words I chose to refer to Indigenous peoples. As a non-Indigenous person writing about Indigenous rights, the only way to ethically engage in this research is by using the appropriate terms. To do so, the *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* has been key to inform my choices.

Throughout this thesis, I consistently use the term "peoples" in plural to refer to the heterogeneity of these communities. Using the word "people" in singular may reinforce the oversimplification to which Indigenous identities are often subject to in academia. The plural form is equally used when talking about Indigenous peoples living in different parts of the world than about Indigenous peoples within the same borders. As pointed out by Irene Watson, who belongs to the Tanganekald and Meintangk peoples from the Southeast of South Australia:

"When speaking of First Nations Peoples, I use the plural 'peoples'. The idea of 'us' being one big mob, or one homogeneous First Nations People of 'Australia' or the 'Aborigine', is a colonial myth".[1]

The word "Indigenous" is always capitalized, in light of the trajectory of the United Nations (UN) in response to the demands of Indigenous representatives, as a symbolic recognition of their status as peoples in international law and their essential right to self-determination, as enshrined in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Throughout this thesis, I use "Aboriginal and Torres Strait Islander Peoples" to refer to the Indigenous peoples of Australia. Note that "Aboriginal" and "Torres Strait Islander" refer to different groups of peoples: Aboriginal to the original peoples of mainland

[1] Irene Watson, 'Kaldowinyeri', *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2014).

Australia and Torres Strait Islanders to the original peoples of the 274 islands located in the Torres Strait (north of Australia).[2] In some instances, the word "Aboriginal" is used as an umbrella term to include both groups, like in the slogan "always was, always will be Aboriginal land", a statement of resilience usually employed in the land justice movement to symbolise that Aboriginal and Torres Strait Islander peoples have and will continue to fight for their lands and the rights. Alternatively, the term "First Nations peoples" is used, as a more encompassing term that acknowledges the diversity of Aboriginal and Torres Strait Islander peoples.

When citing Indigenous scholars, the specific name of the people they belong to is used, if known. The word "Aborigines" is used only when citing literal quotations, to maintain the accuracy of the original text. The term "Aborigine" was commonly used up to the 1960s but its use is now discouraged as it has connotations of colonial Australia.

In the context of Aboriginal or Torres Strait Islander individuals or groups who can prove a traditional connection, attachment or relationship to a specific area of land, the term "Traditional Owners" is employed.

[2] Working with Indigenous Australians, 'What's the Appropriate Term? Aboriginal and Torres Strait Islander Peoples' (2022) <https://www.workingwithindigenousaustralians.info/content/Indigenous_Australians_3_Approrpiate_Terms.html>.

INTRODUCTION

Australia is home of the oldest continuous culture on Earth. Aboriginal and Torres Strait Islander peoples have shared a spiritual relationship with their ancestral lands which has nurtured their culture and identity for thousands of years. This connection is encapsulated in the concept of "caring for Country",[3] which can be defined as "viewing and/or actively interacting with features of the biophysical environment that provides spiritual, cultural, historical or emotional meaning".[4] This idea of land involves mutual responsibilities, and human beings are themselves embedded in Country.

This was, however, interrupted with the arrival of British colonists in 1788 and the acquisition of the territory under the legal fiction of *terra nullius*, meaning "land belonging to no one". The First Nations peoples of Australia were subject to a long and violent process of land dispossession, in which they were separated from their communities, forced to assimilate into European culture and displaced from their homelands. Losing their lands was something beyond losing property, it also implied cultural erosion and losing a part of themselves. In the words of the anthropologist David McKnight, Country "constitutes identity, and loss of land is tantamount to loss of one's self".[5]

Land rights are an elementary part of Indigenous rights worldwide. In Australia, the biggest advance in the land justice movement came with the Mabo decision overturning the notion of *terra nullius* in 1992. In this historic decision, the High Court of Australia recognised that native title by Aboriginal and Torres Strait Islander peoples had survived colonialism and could be claimed under certain conditions. A year later, the Native Title Act was enacted as a mechanism to determine these claims. The Act is widely seen as a triumph in the land justice movement, and it is described as the legislation that

[3] "Country" is the term used by Aboriginal and Torres Strait Islander peoples to refer to the lands, waterways and seas to which they are connected. It reflects one's territory or land of origin.

[4] Jonathan Kingsley and others, 'Developing an Exploratory Framework Linking Australian Aboriginal Peoples' Connection to Country and Concepts of Wellbeing' (2013) 10 International Journal of Environmental Research and Public Health 678.

[5] David McKnight, *People, Countries, and the Rainbow Serpent: Systems of Classification among the Lardil of Mornington Island.*, vol 29 (Oxford University Press, 1999).

"recognises the rights and interests of Aboriginal and Torres Strait Islander peoples in land and waters according to their traditional laws and customs".[6]

Nonetheless, this recognition of their rights and interests remains very limited due to the nature of the Act itself. The objective of this thesis is to provide a critical analysis of the Native Title Act, with particular attention to how it fails to adequately reflect and protect First Nations peoples' culture and identity and poses challenges to maintain the responsibility of caring for Country. For this aim, this thesis undertakes a critical legal and historical analysis, relying on historical records, judicial decisions and international legal instruments to question the effectiveness of the Native Title Act. In this regard, it is to highlight the importance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Adopted in September 2007, it is the most comprehensive international instrument dealing with Indigenous peoples' rights.[7] Although later endorsed in 2009, Australia was one of the four nations that initially voted against the Declaration, claiming that "the provisions on lands, territories and resources were particularly unworkable and unacceptable"[8], already suggesting a certain position in the recognition of Indigenous land rights.

Essential to this thesis is also the work of Aboriginal scholars who apply critical legal theory and decolonial approaches to the Australian context. In particular, I would like to highlight the work of Goenpul woman Aileen Moreton-Robinson on the intersections of race, sovereignty and possession through the lens of property; Euahleyai/Gamillaroi woman Larissa Behrendt and Birri-Gubba/Yugambeh woman Nicole Watson on the limits of land justice in Australia; Tanganekald/Meintangk woman Irene Watson on the persistence and distinctiveness of Aboriginal legal systems.

Chapter 1 offers a historical overview of settler colonialism in Australia, with special attention to how the narrative of *terra nullius* perpetuated the dispossession of First Nations peoples, structures that are still embedded in the construction of Australia as a

[6] Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 'Native Title, Rights and Interests' (*PBC*, n.d.) <https://nativetitle.org.au/learn/native-title-and-pbcs/native-title-rights-and-interests>.

[7] Claire Charters and Rodolfo Stavenhagen, 'The UN Declaration on the Rights of Indigenous Peoples: How It Came to Be and What It Heralds', *Making the Declaration Work* (2009).

[8] ibid.

nation. The chapter shall provide an in-depth analysis of land dispossession, both in terms of how the philosophical theories of the time helped to justify the atrocities and in terms of how it was actually enforced by the colonial project. Land dispossession took place in the form of many different laws and practices, and the objective of this chapter is to provide a nuanced understanding of all the different structures that underpinned Aboriginal dispossession.

With the objective of understanding the implications of land dispossession, Chapter 2 examines the significance of land in Aboriginal and Torres Strait Islander culture and identity. Likewise, it explains how land was crucial for the settler colonial project and how the Western conception of land, shaped by the capitalist and productivist logic, fails to reflect the holistic approach of connection to Country, essential for First Nations peoples in Australia. As an experience shared by Indigenous peoples worldwide, the chapter also studies the importance of land rights under international law.

In Australia, the Native Title Act (1993) is considered the cornerstone of the land justice movement. Chapter 3 explores the origins of this movement, acknowledging the activism of Aboriginal and Torres Strait Islander leaders throughout the 19th and 20th centuries, the enactment of the first land rights legislation at the state level and the landmark Mabo decision in 1992, which marked a turning point for Indigenous rights and culminated in the Native Title Act.

The Native Title Act is analysed in detail in Chapter 4, paying attention to the specific elements that make the legislation unsuccessful in protecting Aboriginal and Torres Strait Islander culture and identity. By relying solely on Western legal terms, prioritising commercial interests and not reflecting land dispossession, I argue that the Act loses the potential it was though it could have after Mabo and serves, instead, to reproduce colonial dynamics. The Act fails to work as an instrument to protect the relationship Aboriginal peoples share with their lands, as an essential source of their culture and identity. This thesis aims at pointing out the current limitations in protecting this relationship, but providing recommendations for an amendment of the NTA is beyond its scope.

Chapter 5 illustrates this failure through the Juukan Gorge case. Western Australia, a state where the power of the mining industry has traditionally been a detractor for Aboriginal land rights, authorised the destruction of a sacred rock shelter in 2020 by Rio Tinto. The

place, showing evidence of 46,000 years of continuous human occupation was of particular cultural value for the Puutu Kunti Kurrama and Pinikura (PKKP) peoples, who had acquired native title in 2015. However, the Native Title Act was unsuccessful in protecting the PKKP peoples' cultural interests over Juukan Gorge against those of the mining company.

Australia always was and always will be Aboriginal land, and legal instruments like the Native Title Act should be a reflection of such an acknowledgement. A true attempt to redress land dispossession should move beyond conferring native title rights and ensure that Aboriginal and Torres Strait Islander peoples can adequately protect the cultural relationship they hold with their lands.

CHAPTER 1: A HISTORICAL REVIEW OF LAND DISPOSSESSION

The rights of Indigenous peoples to remain in their ancestral lands have been repeatedly stated in a variety of documents in international law. Despite this recognition, the different experiences of Indigenous peoples worldwide tell a different story – one marked by dispossession, marginalisation and the denial of their deep-rooted connection to land. In its preamble, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) acknowledges that "indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonisation and dispossession of their lands".[9] Land dispossession, the process by which individuals or communities are forcibly removed from their land, is critical to understand Indigenous peoples' struggles, still living under the heel of colonialism.

Australia's Indigenous peoples are not alien to this narrative. The history of Aboriginal and Torres Strait Islander Peoples can be tracked back more than 50,000 years before the European colonisation. The fact that between 750,000 and 1,000,000 people inhabited Australia at the time did not prevent British settlers to declare the land *terra nullius* considering Aboriginal Australians were "nomads with no concept of land ownership".[10] This implied the loss of their traditional lands to which they had a deep and spiritual connection. They were first excluded from and then forced to assimilate themselves into the creation of a new nation that bore nothing to their culture and identity in the territories they have called home for thousands of years. This chapter shall provide a historical overview of the foundation of Australia through settler colonialism, giving particular attention to the myth of *terra nullius* and how land dispossession was both justified and enforced.

[9] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* (13 September 2007) UN Doc A/RES/61/295.

[10] UN Human Rights Council, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia' (2017) A/HRC/36/46/Add.2.

1.1. The construction of Australia through the myth of *terra nullius:* the origins of land dispossession

The foundation of Australia as a nation cannot be understood without addressing the colonial relationship between the settlers and the original occupiers.[11] This section shall analyse how the legal fiction of *terra nullius* and the subsequent dispossession of Aboriginal peoples from their ancestral lands made Australia's constitutional foundation possible. Even if the myth of *terra nullius* was revoked with the Mabo decision in 1992, as it will be further explained in subsequent chapters, the narrative remains crucial to understand the legal, political and cultural structures that govern the country and that have historically marginalised Aboriginal peoples.

Addressing land dispossession in Australia brings us back to 1788, when the territory was deemed as a colony of settlement by the British empire, justified under the doctrine of *terra nullius* meaning "land belonging to no one". The term of *terra nullius* has its origins in classical Roman law and was established to confer title upon the discoverer of an object that belonged to nobody. Applying this doctrine to post-renaissance Europe meant that states were lawfully entitled to acquiring a territory that was uninhabited through occupation. However, the concept was expanded to equally include certain kinds of inhabited territories, depending on "the degree of political development and other characteristics of the inhabitants".[12] This development was measured in accordance with whether the land was laboured, as it will be explained in more detail in the following section. Although there were certain controversies over the exact types of territories that this expanded version of *terra nullius* encompassed, there was a general implication that European colonial powers were entitled to occupy territories inhabited by Indigenous peoples provided that those peoples did not conform to European standards of civilised nations. The case of Australia fitted this narrative, as it will be further explained in the following section. Through this "discourse of emptiness", as Richard Howitt labels it, the British empire acquired the continent as if it were empty of human societies, making the

[11] Terri Libesman, 'Dispossession and colonisation' in *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2018).

[12] Mark Frank Lindley, 'The Acquisition And Government Of Backward Territory In International Law' (1926).

territory available for settlement without an acknowledgment of acquisition by conquest.[13]

With British settlement, Aboriginal and Torres Strait Islander peoples, who had been living in the territory for at least 50,000 years prior to European settlement, were systematically dispossessed, murdered, raped, and incarcerated on missions, reserves and cattle stations, living under regimes of surveillance.[14] The "discourse of possession", as defined by Howitt, asserted the narrative that settlers took possession of the continent while dispossessing Indigenous peoples.[15] Through the fiction of *terra nullius* and taking advantage of the benefits derived from dispossession, British settlers established a "new nation", a nation that completely disregarded Aboriginal identity, values and culture, let alone Aboriginal peoples' rights to their lands. A nation in denial of Indigenous sovereignty and perceived instead as a white possession. In the words of Aileen Moreton-Robinson, "*terra nullius* gave rise to white sovereignty".[16] Belonging to this new nation was "racialized and tied to the accumulation of capital and the social worth, authority, and ownership that this conferred"[17]. This sense of belonging, from which Aboriginal peoples were altogether excluded, was reinforced both institutionally and socially. Institutionally, a State resembling the colony was soon established, enacting legislation and state policies which excluded the participation of Aboriginal peoples as citizens – who, in fact, did not attain citizenship until the late 1960s. The form of government as well as the education, legal, and industrial systems of Australia are ultimately rooted in British inheritance.[18] Socially, this narrative is further reinforced by the symbolic elements that build up the national identity, with the Union Jack incorporated into the

[13] Richard Howitt, 'Sustainable Indigenous Futures in Remote Indigenous Areas: Relationships, Processes and Failed State Approaches' (2012) 77 GeoJournal 817.

[14] Aileen Moreton-Robinson, 'I Still Call Australia Home: Indigenous Belonging and Place in a Postcolonizing Society' in Aileen Moreton-Robinson (ed), *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press 2015).

[15] Howitt (n 13).

[16] Aileen Moreton-Robinson, 'The House That Jack Built: Britishness and White Possession' in Aileen Moreton-Robinson (ed), *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press 2015).

[17] Moreton-Robinson, 'I Still Call Australia Home' (n 14).

[18] Moreton-Robinson, 'The House That Jack Built' (n 16).

national flag and 26 January chosen as the national day, commemorating the day of the arrival of Captain James Cook and the First Fleet at Botany Bay, a day that has been widely regarded by Aboriginal and other non-Indigenous citizens as "Invasion Day". The same values upon which the nation was established as a white possession were the same that justified dispossession of Aboriginal peoples from their lands. Through the interplay of settler law, politics and culture, the nation was configured as a "white possession".[19]

The ideological discourses of emptiness, possession and belonging are deeply embedded in the legal and political constitution of Australia as a nation and they serve to "legitimate state claims to impose social, economic and environmental governance systems in which Indigenous Australians' lands, water, territories and resources, are controlled, governed and ultimately possessed by the Australian Crown".[20]

1.2.A philosophical justification for land dispossession

Land dispossession is crucial to understand the contemporary relations between Indigenous and non-Indigenous Australians. When the first British colonists arrived in the continent, they considered few natives were living along the coast and deduced that there would be even fewer or none inland. This assumption was soon proved wrong: the governors of the first settlements discovered that Aboriginal peoples were, in fact, living inland and holding "special associations with land on a spiritual and inheritance basis".[21] However, the British colonial project and their claims for sovereignty remained unchallenged.

Land dispossession in the colonies was largely encouraged by a vision of the Indigenous inhabitants of those territories as "intrinsically barbarous and without any interests in land".[22] Colonial takeover was founded upon the presumed superiority of European cultures over all others. This was supported by John Locke's ideas of property ownership,

[19] ibid.

[20] Howitt (n 13).

[21] AustLII, 'National Report Volume 2 – 10.3 The Dispossession of Aboriginal People' (n.d.) <https://www7.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol2/7.html>.

[22] David Ritter, 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 The Sydney Law Review.

deeply influential at the time Australia was colonised. His book *Two Treatises of Government* spread the idea that property is created through the mix of labour with the land. Following this theory, human beings exist in a state of nature before entering political society. It is in this state of nature that private property can be acquired through mixing one's labour with a resource – that is, working the land. Although this claim was originally framed as a critique towards the absolute power of monarchical rule, it ended up providing a philosophical justification for the appropriation of Indigenous peoples' territories.[23]

The forms of land use practised by many Indigenous groups – mainly hunting and gathering – were seen as an indication of "their indifference towards enlarging their possessions of land".[24] Because Indigenous peoples were not cultivating the land, they lacked land ownership. The true foundation of land was to be found on its use as farm settlement and agriculture.[25] Hunters, gatherers and herders had no land rights whatsoever since they did nothing beneficial to the land – such activities were associated with non-permanent usage rights rather than full ownership rights. The absence of permanent agricultural activity in a territory was equivalent to the state of nature, in the sense that its inhabitants were not owners of the lands as this mix of labour and land could not be found. Territories that were hence, "desert and uncultivated" could be occupied by a colonial power. Some authors argue that, although Locke did not explicitly intend to justify land dispossession, the link he drew between sedentary farming, property and sovereignty was ultimately used to dispossess Indigenous people.[26] Other authors are more sceptical of Locke's supposed lack of intentionality, pointing out that, in his view, not only were settlers inoffensive in so far as they were not taking anything away from

[23] Clifford Atleo and Jonathan Boron, 'Land Is Life: Indigenous Relationships to Territory and Navigating Settler Colonial Property Regimes in Canada' (2022) 11 Land 609.

[24] Calum Murray, 'John Locke's Theory of Property, and the Dispossession of Indigenous Peoples in the Settler-Colony' (2022) 10 American Indian Law Journal.

[25] Kaius Tuori, 'The Theory and Practice of Indigenous Dispossession in the Late Nineteenth Century: The Saami in the Far North of Europe and the Legal History of Colonialism' [2015] Comparative Legal History.

[26] Lisa Ford and David Andrew Roberts, 'Settlement and Dispossession' in Lisa Ford, Mark McMillan and Peter Cane (eds), *The Cambridge Legal History of Australia* (Cambridge University Press 2022).

Indigenous peoples, but they were also giving more back,[27] following the idea that colonialism had a civilising mission.

Whether intentional or not, most scholars agree that Locke's ideas provided a justification for the imperial project and subsequent dispossession of Indigenous peoples. While typically used to analyse European colonialism in America, the same logic can be applied to Australia. As Moreton-Robinson explains, Aboriginal peoples were categorised in contrast to white settlers "as nomads as opposed to owners of land, uncivilized as opposed to being civilized, relegated to nature as opposed to culture".[28] This shows a clear connection between dispossession and the idea of civilisation – understood in Western terms: the "civilising" nature of British settlement portrayed a view of Aboriginal peoples as uninterested in owning the land they inhabited, providing a solid basis to dispossession and acquisition. James Cook and Joseph Banks, two of the most symbolic figures in the exploration and subsequent colonisation of Australia, wrote that the country was "in the pure state of Nature, the Industry of Man has had nothing to do with any part of it".[29] Already present in Cook's diary, it is startling to think about how long this idea of Aboriginal peoples as "living in a state of nature without any rights or laws"[30] persisted for so long.

Kaius Tuori makes a distinction between the theory of savage outlawry and the theory of the gradual development of civilisation and property.[31] The former refers to the idea that uncivilised Indigenous peoples possessed no rights and formed no human community. From the colonialist lens, Aboriginal peoples, who had not established any hierarchical forms of social organisation, were essentially regarded as "savages" who could not exert ownership and enjoy ownership rights. The latter refers to the understanding that human beings progressed from communalism to private ownership. Under this narrative, Indigenous peoples had not developed the concept of ownership that was characteristic

[27] Atleo and Boron (n 23).

[28] Moreton-Robinson, 'The House That Jack Built' (n 16).

[29] AustLII (n 21).

[30] Tuori (n 25).

[31] ibid.

of the civilised nations and existed, instead, on the early stages of communalism. Aboriginal peoples, mainly hunger-gatherers, were considered to be at the lowest stage of evolutionary development by settlers, inspired by ideas of progress and evolution. The first theory influenced the development of the legal doctrine of dispossession while the second theory enforced the development of the practice. The intertwining of both theories prompted a complete and unilateral revocation of Aboriginal land rights in Australia that contrasts with the experiences of other Indigenous peoples. This does not mean that Indigenous peoples in other colonies were in a favourable position, but one peculiarity of colonialism in Australia is the complete absence of a treaty with its original inhabitants, as it will be addressed in the next section. In New Zealand, for instance, Māori peoples were initially granted collective land rights, seen by the British colonists as a complex tribal organisation who had a system of communal title.[32] In practice, the protection was diminished by the purchase of land at low prices or evictions justified on the grounds of "rebellion", but the different treatments of Indigenous peoples in accordance with the degree of compatibility to European standards shows that dispossession was linked to civilisation. Essentially, "determinations made about the level of civilisation that the Indigenous peoples had attained were employed to decide whether their land rights were recognized".[33]

Exploring the theories justifying dispossession seems relevant in so far as settler powers largely relied on the appearance of legitimacy for their self-understanding. Colonial governments represented themselves as the "proverbial good shepherds" whose goal was to protect Indigenous peoples and manage land in a "beneficial and rational manner".[34] Again, this can be traced back to Locke's understanding of dispossession, which he not only justified but also deemed beneficial for Indigenous peoples.

1.3.Dispossession as a multifaceted issue

In Australia, dispossession took place in the form of multiple tactics: from the violent acquisition of land at the beginning of colonisation to state policies aimed at removing

[32] ibid.

[33] ibid.

[34] ibid.

Aboriginal peoples from their original communities for the sake of their own "protection". Dispossession did not consist of a single event but of a long, complex and process spanned over centuries, from 1788 until the 20th century. Recognising the complexity and endurance of dispossession is essential not only for historical justice, but also for understanding the ongoing demands for land rights and self-determination in contemporary Australia.

Lisa Ford and David Andrew Roberts provide a comprehensive overview of how Aboriginal dispossession took place in Australia, which was made possible through a complex "mixture of legality and lawlessness".[35] Using their work as the starting point, and considering contributions from other scholars, this section breaks down dispossession into the following issues: settlement without a treaty, frontier wars, land grants, closer settlement, and protection policies. Although it is complex to draw exact temporalities in the issue of land dispossession, this analysis encompasses historical events that took place from the beginning of colonisation in 1788 until the 1970s, when most of the so-called "protection policies" were dismissed, as it will be explained.

A) Dispossession by settlement without a treaty

The first and most enduring act of dispossession was perhaps the failure to establish a treaty with Indigenous peoples, as briefly mentioned in the previous section. In North America, treaties between European colonists and Indigenous peoples were an essential element of the geopolitics of the region when European competition for colonies began. It is not surprising that these treaties were largely enacted in favour of the colonists' interests and provided inadequate compensation for land purchases to Indigenous peoples. Still, Indigenous peoples learned "to play European polities off against each other for better deals".[36] Nothing like this can be found in the case of Australia, however. The specific reasons why no treaty was signed in 1788, when the British arrived in New South Wales, are undocumented. Joseph Banks had stated that "there was nothing we

[35] Ford and Roberts (n 26).

[36] ibid.

could offer that they [Indigenous Australians] would take".[37] In the absence of a treaty, intercultural relations remained informal and reactive.

The previously discussed ideas of Locke concerning the use of land and property shaped an understanding that occupation of "unimproved land" – meaning land not worked according to the Western standards of agriculture and production – might be lawful.[38] Aboriginal peoples were mainly hunter-gatherers and, following the ideas of progress and evolution which drove the 18th century, were thought to be "at the lowest level of human development and cultural development"[39]. This prompted an abrupt and total denial of land rights, which was not the case for other Indigenous communities in other settler states. Resorting again to the case of New Zealand, Māori peoples shared "recognizable social and political units" that made them worthy of more rights in the eyes of the British colonists.[40] In *R v Murrel* (1836), it was ruled that Aboriginal Australians had no sovereignty, land rights or law, and established that all of the land in New South Wales was property of the Crown. Even if the treaties between settler colonies and Indigenous peoples were deeply dishonoured, they reflected certain acknowledgement of land title and sovereignty that would be especially relevant in the 20th century to underpin claims over resources and self-governance. The failure to sign a treaty of this nature in Australia left a devastating legacy and it is arguably "the most important act of dispossession by law effected by the British Crown".[41]

B) Frontier wars

In theory, British settlers were instructed to avoid "unnecessary interruption of Aboriginal occupations".[42] Nonetheless, this was interpreted in such a way that anything aimed at

[37] Joseph Banks, cited in Robert J Miller and others, 'The Doctrine of Discovery in Australia' in Robert J Miller and others (eds), *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press 2010).

[38] Emma Battell Lowman and Adam J Barker, *Settler: Identity and Colonialism in 21st Century Canada* (2015).

[39] Tuori (n 25).

[40] ibid.

[41] Ford and Roberts (n 26).

[42] AustLII (n 21).

advancing the colony could be regarded as necessary. In practice, this was translated into a *de facto* policy to expropriate the necessary land to establish a British settlement, in which Aboriginal welfare was barely taken into account. At first, Britain had taken over the land under the justification of "first discovery and settlement" based on the premise of a "desert and uncultivated land".[43] Aboriginal resistance to the dispossession of their lands challenged the narrative and British settlers adopted a "conquest mentality".[44] The appropriation of land became the "motivation for acts of physical violence",[45] resulting in a series of massacres, conflicts and acts of resistances known as the "Frontier Wars", between 1788 and the mid-1930s. Estimations calculate that around 2,000 and 5,000 colonists were killed in these wars. In the case of Aboriginal peoples, numbers are even more uncertain since most of their own records were lost.[46] Overall, it is estimated that around 90% of Aboriginal population living in the country before the invasion was killed during this period, as a result of colonial violence and foreign illnesses introduced by the settlers, particularly smallpox.[47]

C) Dispossession by land grants

After the initial waves of violent conflict, dispossession became more systematised and bureaucratised, turning into legislation and state policies to exercise control and remove Aboriginal peoples from their lands. Throughout the 19th century, dispossession was enabled through a combination of violence and grants of tenure. Granting land seemed inoffensive at first sight. It consisted of giving small acreages to former convicts, certain civil and military officials and free settlers, almost exclusively within a seventy-kilometre radius of Sydney. A commission of inquiry in the early 1820s recommended expanding the land grants. This way, "hundreds of thousands of acres were granted in fee simple for

[43] ibid.

[44] ibid.

[45] Jacob van der Walle, 'The Settler and the Land: Using Patrick Wolfe's Logic of Elimination to Understand Frontier Violence in Australia's Colonial Era' (2018) 4 NEW: Emerging scholars in Australian Indigenous Studies 45.

[46] Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (UNSW Press 2006).

[47] Victorian Aboriginal Child Care Agency 'Frontier Wars' (Deadly Story, n.d.) <https://www.deadlystory.com/page/culture/history/Frontier_wars/>.

remote grazing areas" and by the mid-1820s, almost all arable land was occupied by settlers.[48]

However, in a continent as dry as Australia, not even the concession of the free grants could meet the increasing demand for pasture. Graziers squatted onto land not granted by the state, unlawfully occupying new areas of land and competing with Aboriginal peoples for water and pastures to attract native animals. By the mid-1830s, it became increasingly evident that the only way to make squatters comply with the law was to allow them a "permissive occupancy through licensing".[49] These licenses were ultimately converted to leases, as squatters successfully convinced the British Parliament to recognise the legality of pastoralism. In the words of Ford and Roberts, "weak colonial government, weak imperial will, and overwhelming profits made settler and imperial legislation uncomfortable collaborators in the dispossession of Indigenous Australians".[50]

The pastoralist system (consisting of "running a few sheep or cattle in a vast arid wilderness without fences or adequate supervision")[51] did not effectively evict Aboriginal people from their ancestral lands. This does not mean that pastoral expansion was not accompanied by some degree of violence but pastoralists actually relied on Aboriginal labour, which prompted a short period of co-existence. These labour relations were, nonetheless, deeply unequal, as Aboriginal workers – including children – were underpaid and subject to brutal discipline and sexual exploitation. But the pastoralist system, at the very least, allowed them certain access to Country.

D) Dispossession by closer settlement

As Australian colonies (what we know as "States" today) obtained self-government, Aboriginal peoples were increasingly marginalised as their dispossession became a mark of settler progress and their supposed "savagery". Pastoralism was seen as an "unworthy and wasteful form of land use", not very different from hunting and gathering.[52] The

[48] Ford and Roberts (n 26).

[49] ibid.

[50] ibid.

[51] ibid.

[52] ibid.

colonial government wanted to promote a shift towards closer settlement. With this purpose, new legislatures were put in place targeted not at Aboriginal peoples but at squatters. In 1861, the parliament of New South Wales passed the Robertson Acts that allowed small farmers to choose and purchase blocks of Crown land for a modest price, making land more accessible to ordinary people vis-à-vis large squatters. The occupation of vast areas of land by squatters, without legal title, was encouraging a system where few powerful individuals controlled large portions of land, limiting access for smaller farmers. The Robertson Acts were aimed at bringing this problem to an end, regulating land acquisition and encouraging rural settlement and agricultural expansion. In the first years since the approval of these laws, cultivated land in New South increased by 50%. Similar acts were also passed in Victoria and South Australia.

For Aboriginal peoples, this opened a new and decisive phase of dispossession. The shift from pastoralism to closer settlement closed off access to Country disrupting Aboriginal life patterns and work opportunities and leading to extinguishment of Aboriginal tenure.

E) Aboriginal "protection" policies

From the 1860s to the 1970s, dispossession mainly took place in the form of the so-called Aboriginal protection legislation. Each colony (what later would become States[53]) passed its own "Protection Act", beginning with the Aboriginal Protection Act in the colony of Victoria in 1869. These laws gave governments extensive powers to regulate where Aboriginal peoples could live, work and travel. Aboriginal peoples were forcibly removed from their homelands to either missions, reserves or cattle stations; three kinds of spaces established by the government with the objective of "protecting" Aboriginal peoples in a deeply paternalistic sense. These places differed in terms of both form of management and the extent of control exercised over Aboriginal peoples. Missions were managed by the Church with the objective of converting Aboriginal peoples to Christianity. Reserves were unmanaged parcels of land to separate Aboriginal peoples in which they were responsible for their own housing. Stations were managed by government officials and had total control over Aboriginal peoples (schooling, housing, guardianship of the

[53] "State" refers to the six federated States that make up Australia. Before the Federation of Australia 1901, these States acted as separate British colonies.

children, etc.).[54] Many people were removed from their Country while others were placed in reserves and missions set up in their original Country. Regardless of where they were placed, Aboriginal peoples were subject to cultural erosion for the sake of assimilation to European standards. In missions, reserves and cattle stations, people were forbidden from speaking their languages, exercising their cultural practices or transmitting them to their children.

Many children were in fact forcibly removed from their families and communities to be placed in institutions or adopted by white families. It is estimated that, between the 1910s and the 1970s, 10,000 children were taken away. These groups of children became known as the "Stolen Generations", one of the darkest episodes in the Australian colonial past. Their removal left a legacy of loss and trauma for First Nations communities that still continues today. Among the detrimental effects derived from this policy, the Australian Human Rights Commission identified that these children were "less likely to have a strong sense of their Aboriginal cultural identity, more likely to have discovered their Aboriginality in life and less likely to know about their Aboriginal cultural traditions".[55]

The so-called protection policies further reinforced Aboriginal dispossession by restricting their "rights to move from reserves and missions, stealing their children and banishing their mixed-race family members to towns and cities." [56] These policies did not begin to be repealed until the 1960s. It was also at this time, in 1967, that Aboriginal peoples were granted the right of citizenship.[57]

Summary

In 1788, the first British colonists arrived in what we today know as Australia. Under the premise of *terra nullius* ("land belonging to no one"), which assumed that "desert and

[54] Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 'Missions, Stations and Reserves' (*AIATSIS*, 25 May 2022) <https://aiatsis.gov.au/explore/missions-stations-and-reserves>.

[55] Australian Human Rights Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

[56] Ford and Roberts (n 26).

[57] Working with Indigenous Australians, 'Integration, Self-Determination and Self-Management 1967 to Mid-1990s' (2020) <https://www.workingwithindigenousaustralians.info/content/History_6_Integration.html>.

uncultivated lands" could be lawfully occupied by another power, they annexed the territory to the British Crown as a colony of settlement. Nonetheless, the land was far from desert. Aboriginal and Torres Strait Islander peoples had been living in those territories for at least 50,000 years. Under the 18th century thinking, this, however, did not pose a substantial challenge for the colonists. Influenced by Locke's philosophy, property of the land was associated with a productive use of it. The First Peoples of Australia were mainly hunter and gatherer societies and, as such, British settlers did not consider them to meet the European standards of civilisation. This provided them with the perfect pretext to brutally dispossess them from their ancestral lands, through a complex mix of legality and lawlessness. For 200 years, Aboriginal and Torres Strait Islander peoples were subject to a sustained system of control, erasure and exploitation. From the refusal to negotiate treaties to the legal fiction of terra nullius, from violent frontier warfare to the calculated bureaucratic processes of land grants and protection acts; every mechanism of the colonial project served to alienate First Nations peoples from their lands and cultures and denied their customary proprietary rights

Despite the efforts for dispossessing Aboriginal and Torres Strait Islander peoples from their ancestral lands, they have never been absent from the cultural landscapes of Australia. In the words of Richard Howitt, they have been "a concrete, and often locally unsettling presence haunting many aspects of Australian social and cultural relations" [58], contesting the narrative of possession of the continent that imperial arrogance had qualified as *terra nullius* and maintaining their connection to Country, as the next chapter will address. As stated in the report *Australia State of the Environment 2021: Heritage*:

"First Nations people in Australia have survived and thrived despite invasion, land dispossession, introduced diseases and removal of children … And what has empowered First Nations people to endure? Connection. Connection to Country, connection to mob and connection to ancestors".[59]

[58] Richard Howitt, 'Scales of Coexistence: Tackling the Tension Between Legal and Cultural Landscapes in Post-Mabo Australia' [2006] Macquarie Law Journal.

[59] Anne McConnell and others, 'Australia State of the Environment 2021: Heritage' (Department of Agriculture, Water and the Environment, 2021) <https://soe.dcceew.gov.au/heritage/introduction>.

CHAPTER 2: EVERYTHING IS ABOUT THE LAND

> *"The land is what sustains Indigenous communities and identities. The land is what Settler people need in order to have a home and economic stability. The land is what colonialism seeks to turn into a commodity for power and profit. The land is what is contested, what is shared, what is danced, and what is discussed without words."* [60]

Land is the foundational aspect of the lives Indigenous peoples all over the world, to which they have a responsibility to respect. In the words of Siegfried Wiessner, "being 'indigenous' means to live within one's roots".[61] Even though we cannot find a static definition of what Indigenous means, there is always a certain requirement implying that, in order to be considered as Indigenous, a group "must have occupied and used a fairly definable territory before present day state borders in the area were drawn".[62] Indigenous communities are incredibly varied from place to place, but we can find common grounds in the "undeniable connection with the land and obligations to all creation".[63] Indigenous cultural practices are deeply rooted in this spiritual connection to land. Similarly to other Indigenous groups around the world, land plays a crucial role in Aboriginal and Torres Strait Islander culture and identity. In the First Nations' worldviews, the connection to land is a source of identity, spirituality and culture.

However, land also became central to an opposing purpose: enforcing the settler colonial project in Australia. While it remained the foundation of Aboriginal and Torres Strait Islander communities, it simultaneously served as the material basis for settler occupation, economic expansion, and the entrenchment of colonial authority. Land dispossession, hence, must be addressed beyond the mere loss of land –it entails a loss of autonomy, identity, culture and intergenerational continuity.

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[60] Lowman and Barker (n 38).

[61] Siegfried Wiessner, 'The United Nations Declaration on the Rights of Indigenous Peoples: Selected Issues' [2009] Faculty Book Chapters <https://scholarship.stu.edu/faculty_book_chapters/21>.

[62] Mattias Åhrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction', *Making the Declaration Work* (2009).

[63] Atleo and Boron (n 23).

Land is, simultaneously, "what sustains Indigenous communities and identities" and "what Settler people need in order to have a hove and economic stability".[64]. With the objective of understanding the all-encompassing effects of land dispossession, this chapter shall analyse land from these two radically different perspectives: as an inherent element in Aboriginal culture and identity and as a tool for the construction of a settler colonial state.

2.1. "Our story is in the land": the importance of Country in First Nations culture and identity

It's my father's land, my grandfather's land, my grandmother's land.

And I'm related to it, which also gives me my identity.[65]

Indigenous cultures are as diverse as Indigenous peoples themselves, each community presenting its own set of traditional ways of living, practices, values and beliefs. Without falling into a reductionist approach in which all Indigenous cultures fit into the same category, it can be said that they find common roots in the special relationship they share with their ancestral lands. In fact, it is this relationship with land that differentiates Indigenous peoples not only from other groups in settler societies but also from one another, given that "no two Indigenous peoples have the same relationship to a specific place".[66] The source of Indigenous spiritual, cultural and social identity can be found in their ancestral lands, territories and resources.[67]

One of the essential features of the Indigenous conceptions of land is that people and nature are inseparable, sharing a reciprocal relationship in which the land nurtures, protects and sustains humans and, in return, humans take the role of perpetual guardians of the land.[68] Indigenous peoples identify themselves as the guardians – rather than the

[64] Lowman and Barker (n 38).

[65] Father Dave Passi, Anglican priest, traditional landowner and land rights campaigner.

[66] Lowman and Barker (n 38).

[67] International Fund for Agricultural Development, 'Indigenous Peoples' Collective Rights to Lands, Territories and Natural Resources' (*IFAD*, 2018) <https://www.ifad.org/en/w/publications/indigenous-peoples-collective-rights-to-lands-territories-and-natural-resources>.

[68] Glenn Finau and others, 'Accounting for Indigenous Cultural Connections to Land: Insights from Two Indigenous Groups of Australia' (2023) 36 Accounting, Auditing & Accountability Journal 370.

owners – of their ancestral lands. In many Indigenous worldviews, the idea of "people living as an inseparable part of the land" plays a vital role.[69] This marks a key difference with Western philosophy, under which the relationship between people and nature is rather anthropocentric, subjecting the land to a constant rebuild to adapt it to human needs. This idea can be encapsulated through the concept of "nature's contribution to people" (NCP), that highlights how nature can be beneficial for human life. Alternatively, the opposite of this concept is "people's contribution to nature" (PCN), that is, how people's knowledge and worldviews can have a positive impact on nature. While the Western idea of nature can be best understood in terms of NPC, the reciprocal relationship typically strong in Indigenous cultures involves "a cyclical relation between PCN and NPC".[70] Put differently, their relationships to land are driven by both what the people can give and do to the land as well as how the land can sustain for the people.[71] For Aboriginal and Torres Strait peoples in Australia, this mutual relationship is known as "caring for Country" or "connection to Country".

For Aboriginal peoples, Country refers to the lands, waters, skies and all living entities with which they have a deep spiritual and cultural connection. For Torres Strait Islander peoples, Country also extends to the sea – including islands, reefs, cays, sandbanks and surrounding waters – which are central to their identity, culture and way of life.

Aboriginal sense of belonging originates from an ontological relationship to Country which is explained through the "Dreaming". The Dreaming is the basis of Aboriginal beliefs, representing the time the ancestral beings emerged from the land, sea and sky to form the Countries and create life. It is believed that, in the beginning, the land was flat and empty, and it was through the lives of these ancestors that the landscape was shaped, creating land and life in all its forms, including plants, mountains, rivers, animals and human beings. Ancestral beings "created and left the world of humans through being metamorphosed or some other form, disappearing into the territory of another group or

[69] Atleo and Boron (n 23).

[70] Silva Larson and others, 'Piecemeal Stewardship Activities Miss Numerous Social and Environmental Benefits Associated with Culturally Appropriate Ways of Caring for Country' (2023) 326 Journal of Environmental Management 116750.

[71] Lowman and Barker (n 38).

into the sky, ground or water. In doing so, they leave behind tangible evidence of their presence on Earth".[72] Aboriginal peoples derive their sense of belonging to Country from an inextricable connection between ancestral beings, humans and land. The Dreaming links nature and humanity as two inseparable entities and nurtures a connection to land based on mutual responsibility. Nancy Wills provides a compelling description of the concept:

"The *Dreaming*, this mystical, mythical core of Aboriginal culture is the land itself, the songs, the dances and the ceremonies; it is the ancestors who made the trees, the animals, the birds, who formed the mountains and the rivers, the bays and the inlets. The creation of life is the *Dreaming*".[73]

For Torres Strait Islander peoples, belonging is similarly rooted in deep connections to place and ancestry. While the concept of the Dreaming is not part of Torres Strait Islander cultures, they also believe that all natural features of the world were created by ancestral beings. Their cultures are closely linked to the Zugubal, "spirits who influence the seasons, winds and waters, and who can be seen in the sky and stars".[74] The most well-known of these spirits is Tagai, a great fisherman who is considered the creator of the world under this cosmology.[75] Tagai stories guide Torres Strait Islander peoples' relationship with their lands and seas.

This explains why, for Aboriginal and Torres Strait Islander peoples, the connection to land is not merely a physical bond but "a spiritual, cultural, and identity-defining relationship that has been nurtured for thousands of years".[76] Land is the fundamental element of stories, songs, and ceremonies that form an inherent part of their culture and

[72] Moreton-Robinson, 'I Still Call Australia Home' (n 14).

[73] Nancy Wills, *Give Me Back My Dreaming: Background to the Australian Aboriginal Claim to Land Rights* (Communist Arts Group 1982).

[74] Queensland Curriculum and Assessment Authority, 'Indigenous Perspectives in Education' (QCAA 2008).

[75] Encyclopaedia Britannica, 'Torres Strait Islander Peoples - History, Governance, Culture' <https://www.britannica.com/topic/Torres-Strait-Islander-people>.

[76] Bradley Brown, 'The Role of Elder, Indigenous Knowledge, and Connection to Land' (*The Keeping Place*, 27 December 2024) <https://thekeepingplace.com/the-role-of-elder-indigenous-knowledge-and-connection-to-land/>.

identity. Understanding that land is inextricably linked to First Nations peoples' existence is crucial to acknowledge that the different processes of land dispossession described in the previous section have effects far beyond the loss of property. Mainly due to dispossession, many Aboriginal communities have experienced an increasing disconnection from Country.[77] Access to Country means access to knowledge and culture. Many Aboriginal and Torres Strait Islander peoples do not have adequate access to Country, which has "significantly impacted their cultural identity and preservation of knowledge".[78] Dispossession from their lands is translated into the destruction of the basis of their spiritual, cultural and legal systems.[79]

2.2.Territoriality as settler colonialism's irreducible element

Land was not only central to Aboriginal existence, it also became essential for the settler colonial project. Settler colonialism is inextricably linked to land dispossession since it is aimed at transferring land from Indigenous peoples to Settler control.[80] According to Patrick Wolfe, "territoriality is settler colonialism's specific, irreducible element"[81]. Settler colonialism is inherently eliminatory in so far as it requires the "practical elimination of the natives in order to establish itself on their territory".[82] In this explanation, Wolfe highlights the objective of establishment on their territory as the primary force behind settler colonialism. He does not deny that, in the pursuit of this goal, settler colonialism leads to the elimination of the native peoples, but he attempts to mark a distinction between settler colonialism and genocide, in which, by definition, the objective is the total or partial destruction of a "national, ethnic, racial or religious group".[83] In Wolfe's understanding, the elimination of the native is a consequence of

[77] McConnell (n 59).

[78] ibid.

[79] Damien Short, 'Reconciliation and Land', *Reconciliation and colonial power: Indigenous Rights in Australia* (Ashgate 2008).

[80] Lowman and Barker (n 38).

[81] Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 Journal of Genocide Research 387.

[82] ibid.

[83] *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

gaining access to a territory, and not the ultimate objective. Analysing whether the practices that took place in Australia during settler colonialism amount to genocide is beyond the scope of this thesis, but what deserves special attention for the sake of this topic is that land dispossession is central to the functioning of settler colonialism. In Wolfe's words, "settler colonialism always needs more land".[84]

Land and its natural resources were among the main reasons behind colonialism in the 18th and 19th centuries. The industrial revolution created a need for the British empire to acquire more land and raw materials.[85] Land tenure was, then, central to the colonial state. Indigenous tenure and settler land holding were seen in a radically different way. While settler ownership of the land was "permanent, based on written procedure and protected by land registries", Indigenous was "dependent on occupation and usage, liable to be lost if either would cease".[86] As explained through Locke's theory, Indigenous tenure did not amount to property given that they were not benefiting from a productive use of its resources. Following, this logic, "land had to be allocated to settlers for economic reasons"[87], as they were the ones who could make the most of the productivity of the land.

Apart from the material conditions, land also provided a source of identity for British settlers. A key component of the settler identity is the intent to create and maintain a new homeland, creating a sense of belonging that is promoted by certain social and political structures, such as citizenship.[88] Both Indigenous and settler peoples have attachments to land, but they stem from "very different kinds of relationships with the places that they call home".[89] The sense of belonging enjoyed by non-Indigenous Australians is based on the dispossession of the original owners. It derives from ownership understood within the logic of capitalism, quite distant from the concept of belonging on equal footing shared

[84] Wolfe (n 81).

[85] Walle (n 45).

[86] Tuori (n 25).

[87] ibid.

[88] Lowman and Barker (n 38).

[89] ibid.

by Indigenous peoples.[90] Belonging is closely linked to a racialised social status that promotes a version of Australian history that privileges the exploits of white colonisers by representing them as the people who made the nation. The ontological relationship shared by Aboriginal peoples with their land is one that the nation-state has attempted to erode[91] by representing them as "nomadic and primitive, with no connection to the land"[92] they inhabit. White occupation of the land was the only way validated as leading to property but also to belonging.[93]

An important aspect of the kind of colonialism that took place in Australia and that differentiates the experiences of Aboriginal peoples from other Indigenous peoples is that "in Australia the colonials did not go home, and 'postcolonial' remains based on whiteness".[94] Settler colonialism focuses on "claiming land and on creating permanent settlements that replicate the social, political, economic, legal, and cultural structures of settlers' homeland over the new territories and the colonized".[95] This is exactly the case in Australia. The structures imposed by British settlement are still the structures under which the country works. Settler colonists treated the land through their own lens of property and ownership.[96] This concept of private property introduced by colonialism, based on an "exclusivist, productivist, individualist, and capitalist culture"[97] did not align with the Aboriginal notion of land tenure. The rule of law derived from European culture was imposed on two societies that could not differ more: the capitalistic, Christian, industrialising, white English settlers; and the nomadic, black, hunter gatherer Aboriginal

[90] Moreton-Robinson, 'I Still Call Australia Home' (n 14).

[91] Aileen Moreton-Robinson, '"Our Story Is in the Land": Why the Indigenous Sense of Belonging Unsettles White Australia' (ABC Religion & Ethics, 9 November, 2020) <https://www.abc.net.au/religion/our-story-is-in-the-land-indigenous-sense-of-belonging/11159992>.

[92] Walle (n 45).

[93] Moreton-Robinson, 'The House That Jack Built' (n 16).

[94] Moreton-Robinson, 'I Still Call Australia Home' (n 14).

[95] Isabel Altamirano-Jimenez, 'Settler Colonialism, Human Rights and Indigenous Women' [2011] Prairie Forum.

[96] Lowman and Barker (n 38).

[97] Brendan Edgeworth, 'Post-Property?: A Postmodern Conception of Private Property' [1988] UNSW Law Journal.

peoples of Australia.[98] The holistic conception of land shared by Aboriginal cultures was substituted by an idea of property as "exclusive, commodifiable, objective in the sense of being an object of appropriation and consumption and individual".[99] It is crucial to remark that such a conception of private property bore almost no resemblance to Aboriginal ideas of land tenure [100] because successive attempts of restorative justice in terms of land rights are ultimately based on this understanding of land, as it will be further explained in Chapter 4.

Australia was forged by settler colonialism and maintains legal, political, and economic systems rooted in the dispossession of Aboriginal lands. Aboriginal peoples have not only been dispossessed of land for settler occupation but have also faced challenges in land repatriation as a result of the "transformation of land into property".[101] As such, in order to effectively claim the rights to their ancestral lands, they have to navigate settler colonial institutions.[102] Land is central for the continuity of Aboriginal culture and it seems that the only plausible way to allow for this continuity is for Aboriginal peoples to take the settler-colonial property regimes and try to make them work within their own cultural contexts, in a way that respects their ontological relationship to land.

2.3.Land rights at the heart of Indigenous struggles

This dual understanding of land has shaped the experiences of Indigenous peoples worldwide, precisely because "being Indigenous means living a 'place-based oppositional' identity rooted in defending relationships to particular places against colonial imposition".[103] The UNDRIP recognises Indigenous peoples' collective rights to lands, territories and resources they have traditionally occupied and used. However, this tradition of collective rights contrasts with the Western dominant model that prioritises

[98] Ritter (n 22).

[99] Edgeworth (n 97).

[100] Ritter (n 22).

[101] Atleo and Boron (n 23).

[102] ibid.

[103] Lowman and Barker (n 38).

"individual ownership, privatization and development" that was imposed with settler colonialism, as it has been explained in the previous section.[104]

Land plays such a central role in Indigenous communities that it has been considered that the lack of a legal guarantee to their traditional lands – "with which they have deep, often spiritual ties" constitutes the clearest example of the ongoing violations of their human rights.[105] This explains why land rights are at the heart of Indigenous peoples' struggles.[106] These demands have been translated into the wide recognition under international law that Indigenous peoples hold both property and cultural rights to the lands, territories and natural resources they have traditionally occupied and used.[107]

Property rights are linked with the ownership, use and control of land and resources. International law has recognised that Indigenous peoples shall enjoy property rights over the lands they have traditionally occupied and used.[108] Domestic laws recognise "initial occupation as a means through which property rights to land can be acquired",[109] but in most cases, Indigenous tenure of their traditional territories has not been considered as giving rise to property rights. Instead, the State has positioned itself as the owner of Indigenous peoples' traditional territories and property rights have been reserved for the colonising, non-Indigenous population. More recently, this narrative has been called into question. The international community has acknowledged that "a domestic legal order whereby the law recognises that use of land by the non-Indigenous population gave rise to property rights, and Indigenous land use did not, violates the fundamental right to non-discrimination".[110]

[104] UN Department of Public Information, 'Backgrounder: Indigenous Peoples' Collective Rights to Lands, Territories and Resources' (United Nations 2018).

[105] Wiessner (n 61).

[106] International Fund for Agricultural Development (n 67).

[107] Åhrén (n 62).

[108] ibid.

[109] ibid.

[110] ibid.

Their collective rights to own and control their lands, territories and natural resources are more specifically enshrined in the UNDRIP (Arts. 26-28).[111] Articles 26 further specifies that Indigenous peoples have rights over the lands, territories and resources traditionally used and occupied as well as to those traditionally used but of which they have been dispossessed. This provision speaks in general terms and does not clarify the nature of these rights. According to Mattias Åhrén, it can be assumed that these provisions give rise to both cultural and property rights.[112] Article 27 establishes the need of providing "a fair, independent, impartial, open and transparent process" to recognise Indigenous land tenure systems.[113] Article 28 enshrines Indigenous peoples' right to restorative measures for the dispossession of their lands in the form of restitution or, when this is not possible, fair compensation.[114]

Cultural rights are linked to the spiritual and traditional relationships with land. This is clearly stated in Article 25 of the UNDRIP, which recognises the "distinctive spiritual relationship" that Indigenous peoples share with their traditional lands, territories and resources; a relationship they have rights to maintain and strengthen.[115] As a means to maintain this relationship, international law protects the traditional livelihoods and other culture-based activities as a means to protect Indigenous cultural identity. This was acknowledged by the Human Rights Committee (HRC) through the General Comment No. 23 (50) clarifying the contents of Article 27 of the International Covenant on Civil and Political Rights (ICCPR). The HRC recognised that "culture manifests itself in many forms, including a particular way of live associated with the use of land resources, specially in the case of indigenous peoples" and, as such, the right to enjoy a particular culture protected under Article 27 "may consist in a way of life closely associated with territory and use of its resources".[116] In other words, Indigenous cultural practices or ways

[111] United Nations Permanent Forum on Indigenous Issues, 'Report on the Seventeenth Session (16–27 April 2018)' (2018) UN Doc E/2018/43*-E/C.19/2018/11*.

[112] Åhrén (n 62).

[113] UNDRIP, art 27.

[114] UNDRIP, art 28.

[115] UNDRIP, art 25.

[116] Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art 27) UN Doc CCPR/C/21/Rev.1/Add.5.

of life associated with their ancestral lands deserve special protection under Article 27 of the ICCPR. Safeguarding their connection to land is equally crucial to the effective protection of Indigenous peoples' cultures as it can be upholding their languages, traditions or beliefs. The ILO Convention No. 169[117] –adopted in 1989 by the International Labour Organization and, to this day, the major binding legal instrument concerning Indigenous peoples' rights – also highlights the unique connection of Indigenous peoples with their ancestral lands. Article 13 calls state parties to apply the provisions of the Convention in a way that respects "the special importance for the cultures and spiritual values of the peoples concerned of their relationships with the lands or territories … which they occupy or otherwise use".[118] This essentially means that governments need to adopt a culturally sensitive approach when engaging with Indigenous peoples and their lands.

Despite the recognition on paper that Indigenous peoples hold both cultural and property rights over their lands, this has rarely translated into adequate state legislation or policies. Alternatively, in the few cases where steps to recognise their land rights have been taken, they have been unsuccessful in so far as they remain rooted in colonial structures. The full recognition of Indigenous peoples' rights over their lands would imply "fundamental structural and economical changes in most states in which Indigenous peoples today find themselves residing"[119] that governments are largely unwilling to undertake.

Summary

The Indigenous-settler relations were marked by a noticeably different understanding of land. Aboriginal and Torres Strait Islander peoples hold a spiritual relationship with their ancestral lands, which forms the basis of their culture and identity. Such a relationship is based on mutual responsibilities: land is not owned but guarded, an idea that is illustrated through the concept of caring for Country. Based on this, land dispossession was much

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[117] Note that Australia is not a State party to the ILO Convention No. 169. This section, however, aims to give an overview of how land rights are protected under international law, regardless of the obligations to which the state of Australia in particular is bound by.

[118] Indigenous and Tribal Peoples Convention, 1989 (ILO Convention No. 169) (adopted 27 June 1989), Article 13.

[119] Åhrén (n 62).

more than losing property – it was an erosion of culture and a loss of identity. But land was also essential for the settler project, although under a very distinct ideology. Territoriality is settler colonialism's irreducible component: without land, a colony of settlement cannot be established. Although each context has its particularities, this story is not exclusive to Australia: Indigenous peoples all over the world were dispossessed from the lands they had inhabited for thousands of years and that nurtures their distinct culture and identity as Indigenous peoples. Land rights have always been a central argument in Indigenous struggles. Struggles for lands are, in fact, struggles for life. This is reflected in the emphasis on land provisions in Indigenous rights, like the UN Declaration on the Rights of Indigenous Peoples. These rights acknowledge not only the proprietary nature of these rights, but also the cultural one, which acquires special relevance for the purposes of the thesis. Based on the importance of land rights in Indigenous peoples' struggles, the next chapter will analyse the extent to which land justice has been implemented in Australia – or how the country has failed to do so.

CHAPTER 3: BRINGING LAND JUSTICE TO AUSTRALIA

Connection to land is vital in Aboriginal and Torres Strait Islander cultures. There has been a long battle to gain legal and moral recognition of the lands and waters occupied prior to the colonisation of Australia in 1788 and the annexation of the Torres Strait Islands by the colony of Queensland in the 1870s. Claims of land justice are not simply a "desire to reclaim soil"[120] but, more importantly, they reflect the aspiration to exercise their traditional obligations to the lands that they have a cultural and spiritual attachment with and the understanding that land is key for their self-determination. In this thesis, land justice is understood not merely as legal recognition of property rights, but as the restoration of the cultural, spiritual, and identity-based relationships Aboriginal peoples have with Country.

This chapter examines landmark moments in the land justice movement in Australia and acknowledges the inspiring activism efforts by Aboriginal and Torres Strait Islander peoples who, despite having everything against them, never stopped fighting for their rights over their Countries. In particular, this chapter shall analyse the momentum created by the Mabo decision in 1992, when the High Court of Australia overturned the doctrine of *terra nullius* and affirmed that native title[121] had always existed and survived colonialism, and the subsequent enactment of the Native Title Act in 1993.

3.1.The path to Mabo: the struggle for land justice in Australia

Aboriginal political activity has widely been regarded as a relatively recent phenomenon, emerging in the late 1960s and 1970s, but it can be traced back as early as to the 1840s in Flinders Island, northeast of the island of Tasmania. Walter George Arthur, an Aboriginal man who was separated from his community and grew up among colonists, is considered to be one of the pioneers in Aboriginal activism. Alongside with his wife Mary Ann and other Aboriginal residents, he led a petition to Queen Victoria in 1846 demanding, among other things, the recognition of their land rights and allocation of land and resources to

[120] Larissa Behrendt and Nicole Watson, 'Shifting Ground: Why Land Rights and Native Title Have Not Delivered Social Justice' <https://opus.lib.uts.edu.au/handle/10453/6021>.

[121] Under Australian law, native title is the recognition that Aboriginal and Torres Strait Islander people have rights and interests to land and waters according to their traditional law and customs.

allow them to sustain themselves. The request, considered as the first known Aboriginal petition to the British Crown, did not bring immediate changes but paved the way for later 19th-century activism.

At the turn of the 20th century, Aboriginal peoples mobilised forming political organisations, despite living in conditions of very restricted freedoms under the system of reserves and missions. The demands of the different groups were not homogenous, influenced by their local circumstances, but land claims were a common feature.[122] They understood that land was key to achieve self-sustaining and to make decisions about their own.[123] The first of these organisations was the Australian Aboriginal Progressive Association, founded in 1924 by Fred Maynard in Sydney.[124] In 1927, they petitioned Jack Lang, the Premier of New South Wales, for reasonable repatriation of their land, asking that "all capable Aboriginals shall be given in fee simple sufficient good land to maintain a family".[125] Three decades later, in 1966, the AAPA's struggle for land justice regained momentum in the Gurindji strike, considered for many as the beginning of the contemporary land rights movement.[126] The strike was initiated when the Gurindji people working at the Wave Hill Station were excluded from the Cattle Station Industry (Northern Territory) Award 1951, which established minimum conditions and terms of employment for employees on cattle stations in the Northern Territory.[127] The strike started as an industrial dispute with the Gurindji workers demanding a wage of $25 per week, but the primary goal was reclamation of their Country and repatriation of their

[122] Nicole Watson, 'Howard's End: The Real Agenda Behind the Proposed Review of Indigenous Land Titles' [2005] Australian Indigenous Law Reporter.

[123] Behrendt and Watson (n 120).

[124] Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (Routledge 1999).

[125] Fred Maynard, 'Fred Maynard, President, Australian Aboriginal Progressive Association, to J.T. Lang, Premier of New South Wales' (letter, 1927).

[126] Watson, 'Howard's End' (n 122).

[127] AustLII, 'Timeline: Legal Developments Affecting Indigenous People - 1951' (*AustLII*, n.d.) <https://www.austlii.edu.au/au/other/IndigLRes/timeline/1951.html>.

traditional lands. As the leader of the strike, Vincent Lingiari, declared "You can keep your gold. We just want our land back".[128]

Another landmark event within the land justice movement in this decade was the Yirrkala Bark Petitions. Following the discovery of large deposits of bauxite in the ancestral lands of the Yolngu people, located in the Gove Peninsula (Northern Territory), the Australian Federal Government announced that it would lease part of the land to a mining company to exploit the minerals. In 1963, the Yolngu people, who had not been consulted in this matter, sent a petition to the Australian Parliament explaining that the affected land was vital to their livelihood as "it [had] been hunting and food gathering land for the Yirrkala tribes from time immemorial".[129] The Parliament established a committee to investigate the issue and concluded that the Yolngu people must be compensated for the loss of their traditional lands in the form of land rights, royalties from the mining operation, and financial compensation. However, the recommendations were ignored and in 1968 the Federal government granted rights to the mining company Nabalco to exploit the resources, again without consulting the Yolngu, who this time brought the case (known as the *Gove Land Rights Case*) to the Northern Territory Supreme Court on the grounds of communal native title over their lands. They claimed that, under customary law, they held communal proprietary land rights which had survived the acquisition of sovereignty.[130] The judge, Justice Blackburn, rejected this claim and ruled in favour of the mining company, justifying that the Yolngu people's relationship to land was not compatible with the European concept of property. He nonetheless found that the Yolngu possessed a "subtle and elaborate system of laws"[131], leaving open the possibility of future recognition of native title.

[128] Minoru Hokari, 'From Wattie Creek to Wattie Creek: An Oral Historical Approach to the Gurindji Walk-Off' (2000) 24 Aboriginal History.

[129] Harry Hobbs, 'The Woodward Royal Commission' (*ANTAR,* 23 November 2022) <https://antar.org.au/resources/the-woodward-royal-commission/>.

[130] Ronald Paul Hill, 'Blackfellas and Whitefellas: Aboriginal Land Rights, the Mabo Decision, and the Meaning of Land' (1995) 17 Human Rights Quarterly 303.

[131] *Milirrpum v Nabalco Pty Ltd* [1971] 17 FLR 141.

On Australia Day 1972 the Prime Minister at the time, William McMahon, launched a new policy concerning Aboriginal land use, refusing to acknowledge any form of land rights or native title and encouraging Aboriginal peoples to apply for leases instead. Not only did these leases fail to satisfy independent ownership of traditional land but they also required Aboriginal peoples to demonstrate a social and economic use for the land and excluded any mineral and forest rights. In response, four Aboriginal activists drove from Sydney to Canberra to establish an Aboriginal Embassy by setting up a beach umbrella in front of the Parliament House asking for "land now, not lease".[132] The Aboriginal Tent Embassy, as it became known, quickly gained considerable support, gathering both Indigenous and non-Indigenous people across Australia in favour of the land rights movement. It is now a permanent protest occupation site symbolising the fight for Indigenous land rights worldwide. The leader of the opposition, Gough Whitlam, visited the Embassy and announced that his government would legislate to give Aboriginal peoples the rights to their lands "not just because their case is beyond argument, but because all of us as Australians are diminished while the Aborigines are denied their rightful place in this nation".[133] In the elections held in December of that same year, Whitlam became the Prime Minister and appointed Edward Woodward to lead a Royal Commission into Aboriginal Land Rights.[134]

Instead of a national land rights law, they opted for establishing a precedent for land rights legislation in the Northern Territory. The Woodward Royal Commission produced two reports acknowledging the need of bringing "simple justice to a people who have been deprived of their land without their consent and without compensation" as well as the responsibility of ensuring "the preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity".[135] In 1975, Whitlam's government introduced a Bill into Parliament based on these reports. However, a

[132] Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge 2013).

[133] Gough Whitlam, 'Election Speech' (Blacktown, NSW, 13 Nov 1972).

[134] Hobbs (n 129).

[135] Edward Woodward, 'Australian Aboriginal Land Rights Commission: Reports' (Aboriginal Land Rights Commission 1974).

constitutional crisis sparked a governmental change before the Bill could be passed. The new coalition government, led by Malcolm Fraser continued the push for land rights and in 1976 the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) was passed as the "most progressive land rights legislation" in the history of the country.[136] The Act signified the restitution of large areas of land and coastal areas in the Northern Territory, bringing for many Aboriginal peoples an era of "self-management of the Country and the seeking of economic and cultural futures for younger generations of Aboriginal land-owners".[137] Under this legislation, nearly 50% of the Northern Territory has been restored to their Traditional Owners.[138] One of the major strengths of the ALRA is that it prohibits the grant of a mining interest on Aboriginal land without the previous agreement between the intending miner and the Aboriginal Land Council for the area.[139] To reach an agreement, it is required that the Council has dutifully consulted with the Traditional Owners, guaranteeing that they understand the agreement and that their consent, if given, is informed. This provision anticipated the principle of free, prior and informed consent (FPIC) that would be later enshrined in the UNDRIP in 2007 as a pillar of Indigenous rights over their lands. As it will be explained at the end of this chapter, this is one of the key differences in comparison to the legislation at the national level – the Native Title Act.

Following the enactment of the ALRA in the Northern Territory, land rights legislation was adopted in the states of New South Wales, Queensland, Tasmania and South Australia, with Western Australia remaining the only state in which no statutory schemes of this nature have been passed. The scope of the different legislations at the regional level changes considerably, reflecting varying emphasis on the importance given to providing Aboriginal peoples with land justice as well as different levels of the political will when faced with industrial lobbying – particularly the mining industry – and political

[136] Behrendt and Watson (n 120).

[137] Amanda Kearney, 'Aboriginal Land Rights, Subjection and the Law' in Lisa Ford, Mark McMillan and Peter Cane (eds), *The Cambridge Legal History of Australia* (Cambridge University Press 2022).

[138] Jason Behrendt and Sean Brennan, 'Land Justice' in Lisa Ford, Mark McMillan and Peter Cane (eds), *The Cambridge Legal History of Australia* (Cambridge University Press 2022)

[139] The ALRA (NT) establishes different Aboriginal Land Councils to represent and negotiate on behalf of the Aboriginal peoples living in that area.

opposition.[140] All in all, all these land regimes were geographically limited in scope, given that they only operate at the regional level. It was not until the passage of the Native Title Act in 1993, as it will be discussed in the following section, that a national system of land rights for Aboriginal and Torres Strait Islander peoples was established in Australian law.[141]

3.2.The Mabo decision and the Native Title Act

My father told me: 'Son, this land will belong to you when I die.'[142]

The enactment of land rights legislation at the regional level was far from marking the end of the land rights movement. After the mid-1970s, pressure for recognising traditional laws and customs in relation to land through the courts culminated in the landmark High Court decision in *Mabo v Queensland (No. 2)*. Prior to this case, Australian courts, still guided by the doctrine of *terra nullius*, had failed to support the traditional relationship between Aboriginal peoples and the land.[143]

In 1982, a group of Meriam peoples from the Eastern Torres Strait led by Eddie Mabo, lodged a case with the High Court of Australia for the legal ownership of the Mer Island, demonstrating that they had occupied the territory for hundreds of years and proving the continuity of customary law. The island had been annexed to the colony of Queensland in 1879, but the plaintiffs claimed continuous enjoyment of their land rights, which had not been extinguished and continued to be recognised by the Australian legal system.[144] That is, they reclaimed the existence of native title over their lands. The State of Queensland attempted to defeat the case through passing the Queensland Coast Islands Declaratory Act of 1985, which retroactively extinguished without compensation any Torres Strait Islander claims over their traditional lands. In 1988, the High Court of

[140] Behrendt and Brennan (n 138).

[141] Hobbs (n 129).

[142] Eddie Koiki Mabo, Aboriginal and Torres Strait Islander land rights activist born on the island of Mer in the Torres Strait.

[143] Hill (n 130).

[144] Frank Brennan S.J., 'Mabo and Its Implications for Aborigines and Torres Strait Islanders', *Mabo: A Judicial Revolution* (MA Stephenson & Suri Ratnapala eds., University of Queensland Press, 1993).

Australia ruled in *Mabo v Queensland (No. 1)*, known as *Mabo (No. 1)*, that this Act violated the Commonwealth's Racial Discrimination Act 1975, "because it extinguished the claimed property rights in a racially discriminatory manner.".[145] This ruling paved the way to *Mabo (No. 2)*, setting the stage for "challenging the doctrine of *terra nullius* before the High Court".[146]

On 3 June 1992, after ten years of legal battle,[147] the High Court ruled in *Mabo (No.2)* that the Meriam held traditional ownership on the Island of Mer, upholding their claim to native title.[148] This landmark decision overturned the legal fiction of *terra nullius* asserting that even though "the Crown acquired a radical title to land within its territory, native title to land continued unaffected until it was extinguished by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title".[149] In other words, the Court found that native title had not been automatically extinguished by the acquisition of sovereignty by the Crown but had rather survived colonisation[150], rewriting the legal, social and political history of Australia.[151] In the words of Larissa Behrendt and Nicole Watson, this decision was "not just the recognition of our presence … It was also the recognition of our sovereignty – our laws, our capacity to govern and our right to make decisions about our own future".[152] Behrendt also expressed the significance of Mabo in a lecture delivered in 2006 at the James Cook University:

"I grew up in a country where the legal system did not recognise the rights of my people to our land and was silent about our sovereignty. … In the decision in Mabo, Australian

[145] Behrendt and Brennan (n 138).

[146] Hill (n 130).

[147] Unfortunately, Eddie Mabo, who had initiated the case in 1982, passed away only a few months before the High Court decision. Although he could not witness this legal victory himself, he provided his people, the Meriam people, with the recognition of their rights over their lands.

[148] Brennan S.J. (n 144).

[149] ibid.

[150] Behrendt and Watson (n 120).

[151] Hill (n 130).

[152] Behrendt and Watson (n 120).

law finally recognised that Indigenous people were actually here and that we had a system of laws and governance".[153]

In essence, the judgment introduced the principle of native title into the Australian legal system. In recognising the traditional rights of the Meriam people to their ancestral lands, the Court also held that native title existed for all Indigenous people in Australia as part of the "law applying to Aborigines on the mainland as well as to the Torres Strait Islanders".[154] Native title exists under two conditions: as long as a group has maintained a traditional connection with the land, and it has not been extinguished by other titles allowing ownership of that land.[155] In this regard, it is important to clarify that native title is the recognition that First Nations peoples had a system of law and ownership of their lands prior to European settlement but it does not provide them with ownership of the land in the same way as statutory land rights regimes like the ALRA in Northern Territory do.

Although the Mabo decision was celebrated as an "important psychological victory for Aboriginal people",[156] it also increased the racial tensions between Indigenous and non-Indigenous Australians, in a complex interplay of the different interests of federal and state governments, Aboriginal communities, farmers and pastoralists, and the mining industry.[157] The media played a key role as a propaganda tool, portraying native title as a threat to Australian property interests and Australian values.[158] The morning after the decision, newspaper headlines read statements like "The decision has the potential to destroy our society" or "80% of Western Australia could be claimed",[159] sparking a

[153] Larissa Behrendt, 'The Long Path to Land Justice' (James Cook University, 2006).

[154] Frank Lumb, 'The Mabo Case - Public Law Aspects', *Mabo: A Judicial Revolution* (MA Stephenson & Suri Ratnapala, University of Queensland Press 1993).

[155] It should be noted that while Mabo (No.2) recognised the native title within Australian common law, it did not clarify what acts would be effective to extinguish it.

[156] Behrendt and Watson (n 120).

[157] Hill (n 130).

[158] Behrendt (n 153).

[159] Peter H Russell, 'Consequences I: Legislating Native Title', *Recognizing Aboriginal Title* (University of Toronto Press 2005).

misleading view that "everyone's backyard"[160] (referring to privately owned land) was at risk when the decision was in fact only applicable to Crown land. Besides having no real legal foundation, this threat to private "backyards" was commonly cited in the press to create a sense of a national crisis triggered by Mabo.[161] According to a respondent of a research conducted by Ronald Paul Hill in Western Australia after the Mabo decision:

"They were saying again that it's your backyards which are more or less affected by *Mabo*. Well, if they sit down and read what was printed in the first place, it only affects land which is owned by the government, crown land… So what they're doing is [creating] a fair bit of racial tension so the white people get up in arms and say 'Hang on, you can't do that to us!'…You know, it's more or less a con game".[162]

Besides economic and political interests, the decision by the High Court recognised that the first Australians were not European but "societies with long histories of their own and with legitimate claims to continue their collective existence".[163] With this rewriting of Australian history, the decision's more immediate response was a "fierce outburst of settler nationalism"[164] by those who saw Mabo as dismantling the legitimacy of the country.

With the objective of resolving such uncertainties and balancing the different interests, Paul Keating, the Prime Minister at the time, began a lengthy process of negotiations aimed at seeking a "balanced outcome advancing Indigenous rights and providing certainty for industry".[165] For nearly a year, issues concerning the rights and interests of Indigenous peoples dominated the political agenda, something that is "unmatched any of the other English-settler countries",[166] like New Zealand or Canada. In September 1993,

[160] ibid.

[161] Short (n 79).

[162] Hill (n 130).

[163] Russell (n 159).

[164] ibid.

[165] ibid.

[166] ibid.

a Commonwealth Native Title Bill was proposed, primarily aimed at "setting up a system to decide claims for native title and to assist in resolving conflicting interests in the land".[167] In December, the Native Title Act 1993 (Cth) (NTA) was passed, putting in place a system that attempts to "balance Indigenous and non-Indigenous people's rights to land".[168] The text itself asserts that, among the main objects of the Act are "(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings" and "(c) to establish a mechanism for determining claims to native title".[169] The key features of the NTA can be summarised in the following provisions:

(1) It formally recognised native title and protected it against inconsistent state legislation, meaning that states and territories cannot enact legislation overriding native title rights.
(2) It confirmed rights to compensation when native title act is affected by "a limited category of past extinguishment acts"[170] (before 1993) or for future developments (after 1993).
(3) It created a right to negotiate in relation to mining activities and acquisitions by the government for public purposes, to allow affected people the opportunity to secure community benefits and protections for their land. This right to negotiate does not imply a right to veto the project in question.
(4) It created a system for making and resolving native title claims: the National Native Title Tribunal (NNTT).

The system established by the NTA works in the following way. In order to hold a native title, claims must be presented before the Federal Court and provide evidence showing their traditional connection with the lands and waters claimed as well as demonstrating why their native title has not been extinguished.[171] The claims are assessed by the NNTT

[167] Hill (n 130).

[168] Central Land Council (Australia), 'Native Title Act: Made Simple.' (*Native Title Act: made simple.*) <https://territorystories.nt.gov.au/10070/651993>.

[169] *Native Title Act* 1993 (Cth) s 3.

[170] Behrendt and Brennan (n 138).

[171] Russell (n 159).

through a registration test to consider if native title exists in accordance with certain merit and procedural conditions. If these conditions are met, the claim is registered, and the applicants acquire various procedural rights under the status of "registered native title claimant", like the right to be consulted about future developments of the land. The NNTT notifies the claim, including the parties interested in the claimed land. The registration is usually followed by a process of mediation, aimed at assisting the different parties to reach agreement on a series of matters, including "private owners and lease holders, public authorities as well as other Indigenous groups with interests in the area".[172] If the parties can agree, the Federal Court will make a ruling called "determination of native title", which is an agreement identifying who holds the native title, the rights derived from it, the nature and extent of any other interests in the area, the relationship between the different interests, and whether native title rights include the right to exclude others.[173] Otherwise, if the mediation does not reach an agreement, the claim will be heard by the Federal Court, which will examine the evidence presented by both sides to determine if the Indigenous system has continued and if any government land titles have extinguished the native title.[174]

The NTA clarified some of the aspects that had remained pending after Mabo, such as the conditions under which native title is extinguished. Freehold titles and most land leases extinguish native title completely while pastoral leases extinguish it partially. As mentioned above, native title does not grant ownership of the land, nor does it confer the power to take away other people's rights to the land (like a pastoralist or a company) or to stop developments. This marks a key difference between native title and land rights. Although both systems recognise Aboriginal and Torres Strait Islander peoples' rights to land, statutory land rights regimes like the ALRA (NT) achieve ownership in the form of alienable freehold title, the most complete kind of land interest in common law systems.[175] This implies that exclusive possession might be exercised, giving the beneficiaries some

[172] ibid.

[173] Native Title Act (n 169), s 225.

[174] Central Land Council (Australia) (n 168).

[175] Mark Rumler, 'A Review of Free, Prior and Informed Consent in Australia' (OXFAM Australia 2011).

degree of decision-making power over their lands.[176] It has been already explained that the ALRA (NT) requires consent when a third party seeks an interest in Aboriginal land, however this is not the case in the NTA. Without securing land ownership or veto rights, one might wonder what rights are derived from native title. Native title essentially entails "shared rights to the land with other people who also have an interest in the land",[177] including the right to access land and to hunt, the right to protect sites, the right to hold ceremonies and the right to have a say on the management or development of the land. About this last right, the NTA enables governments, companies and native title holders to negotiate agreements about future developments over the land, either mining, farming, tourism or any other project affecting native title. These agreements are known as the Indigenous Land Use Agreements (ILUAs). Native title holders cannot block the project, but they are able to negotiate employment opportunities, compensation schemes and the protection of sacred sites. This only applies when a native title has been successfully claimed under the procedure previously described. Otherwise, neither states nor companies are bound by an obligation to consult with the claimants. The complexities upon land developments deserve a more careful examination, that will be addressed in Chapters 4 and 5.

Summary

In Australia, First Nations' mobilisation for land justice began almost as early as British settlement. Already in the 1840s, Walter George Arthur, led a petition to the Queen in recognition of their land rights. The turn of the 20th century witnessed the formation of the first Aboriginal organisations, like the Australian Aboriginal Progressive Association founded in 1924. Aboriginal activism flourished particularly in the 1960s and the 1970s. Moments like the Gurindji strike, the Gove Land Rights case or the Aboriginal Tent Embassy paved the enactment of the first land rights legislation in the Northern Territory in 1976: the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA). Similar legislation was passed in other states. Legislation at the national level, though, would not arrive until the 1990s. In 1992, the High Court of Australia in *Mabo v Queensland (No.2)*

[176] Grace Simeon, 'ANTAR Land Back Factsheet' (*ANTAR,* 2024).

[177] Central Land Council (Australia) (n 168).

overturned the doctrine of *terra nullius* that had guided the foundation of Australia and recognised that native title had not been extinguished with colonialism. For some sectors of the population, this was seen as a dismantlement of the sovereignty of the country that rendered uncertain non-Indigenous interests over the lands, particularly by the pastoralist and mining industries. With the view of solving such uncertainties, the Native Title Act (Cth) (NTA) was passed in 1993, establishing a mechanism to establish when native title existed and when it had been extinguished by past acts.

CHAPTER 4: A CRITICAL ANALYSIS OF THE NATIVE TITLE ACT

The enactment of the Native Title Act constituted a turning point in the Aboriginal land struggle. For the first time in Australia, a system to claim and recognise native title over land and waters was established at the national level. A native title claim achieves the recognition of a group's rights over their lands, associated with certain access and usage rights which are, beyond any doubt, crucial for the empowerment of Aboriginal peoples.

Nonetheless, given the nature of the NTA as an attempt to balance Aboriginal and non-Aboriginal interests over land, it is pertinent to question the extent to which the NTA has been truly successful in delivering land justice to Aboriginal and Torres Strait Islander peoples, with special emphasis on the cultural side of land justice. This chapter will dive into this matter by providing a critical analysis of the NTA. Taking the spiritual and ontological connection that First Nations peoples share with their lands into account, the nature of the critique is not only legal, but cultural and epistemological, aiming to highlight those aspects in which the NTA fails to effectively protect Aboriginal and Torres Strait Islander cultures and identities in relation to their lands. More specifically, the critique is organised around three concrete elements that illustrate the failure of the NTA in this regard: (a) it is not reflective of land dispossession, (b) it is a legal system outside Aboriginal patterns and (c) it is not centred on Aboriginal interests.

4.1. The lack of reflection of dispossession

Dispossession and native title have the same address.[178]

The most widely criticised aspect of the Native Title Act might be the excessive burden of proof placed on claimants to show "a continuing, unbroken traditional connection with or occupation of the land in question since the assumption of Crown sovereignty".[179] This means that they not only need to prove current physical occupation but also a definite cultural continuity with the original occupants.[180] Despite 200 years of displacement, frontier wars, stolen generations and assimilation policies, Aboriginal and Torres Strait

[178] Taylah Gray, Wiradjuri woman, at her TEDx Talk 'Native title, Dispossession & Colonialism' (2023).

[179] David Ritter, 'Whither the Historians? The Case for Historians in the Native Title Process' [1999] Indigenous Law Bulletin.

[180] Short (n 79).

Islander peoples are subject to a disproportionately strict test to show they have maintained the connection to territories that were theirs from the very beginning. This only contributes to reinforce a settler-colonial perspective where Aboriginal land rights must be proven while non-Aboriginal possession of land is assumed to be perfectly legitimate. Such a system is problematic for two main reasons. On the one hand, it serves to validate past acts of dispossession of Aboriginal and Torres Strait Islander peoples that took place until the entry into force of the NTA on 1 January 1994.[181] On the other hand, for those who were able to remain in their ancestral lands, it establishes a very strict mechanism to prove their ongoing connection.

Concerning the first aspect, it results quite interesting to take a closer look to the preamble of the Native Title Act, which explicitly acknowledges the history of dispossession:

"The people whose descendants are known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement. They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation and successive governments have failed to reach a lasting and equitable agreement … concerning the use of their lands".[182]

Despite this recognition of dispossession on paper, it is fair to state that the NTA offered nothing to those Aboriginal and Torres Strait Islander peoples whose dispossession is complete and were entirely displaced from their original Country.[183] The "sad irony" of the NTA is that in those places where dispossession has been most thorough, brutal and systematic, the less likely it is that native title rights will be recognised to the descendants of those affected.[184] The extremely large number of Aboriginal peoples who were "forcibly dislocated from their homes, relocated to missions and cattle stations, and often relocated a second time"[185] have little to benefit from a system that requires an uninterrupted relationship with the land in order to effectively establish native title. The

[181] Russell (n 159).

[182] Native Title Act (n 169).

[183] Short (n 79).

[184] Australian Human Rights Commission, 'Native Title Report 2003' (2003).

[185] Hill (n 130).

vast majority of Aboriginal and Torres Strait Islander peoples now live in urban or semi-urban areas, either in major cities or in inner or outer regional areas. Especially for those living in big cities, the value of the NTA remains on the symbolic level. As Sol Bellear, former deputy chair of the Aboriginal and Torres Strait Islander Commission (ATSIC), expressed: "too few of our brothers and sisters living in Sydney and Melbourne, Brisbane, Perth, Adelaide and Hobart will be able to prove their native title to land under the restrictive conditions of the *Mabo* decision".[186] Even though it is remarkably challenging to provide an exact calculation, data from the Australian Institute of Health and Welfare estimated that in 2018-2019 around 24% of Aboriginal and Torres Strait Islander peoples were living on their homelands,[187] meaning that an overwhelming majority of Indigenous Australians do not live in their original Country because they have suffered an absolute dispossession from their lands.[188] The number of Aboriginal peoples who meet the degree of physical attachment to the land required to make a claim under the NTA remains overly limited, failing to critically acknowledge one of the darkest episodes in the history of Australia.

Put simply, the NTA established a process through which "those who were not [physically] dispossessed could claim and exercise their native title rights".[189] I consider it important to add the clarification of "physically" in this regard. Taking into account the multiple ways in which dispossession has taken place over the years, it can be misleading to talk about Indigenous Australians who were not dispossessed. Even those who could remain in their original Country suffered the consequences of assimilation policies, violence and very limited freedoms under the system of reserves and missions. And yet in these cases, claimants need to demonstrate that they have effectively maintained a connection with their ancestral lands that has survived all the colonial attempts to erase it. The NTA compels Aboriginal peoples "to go before the state's native title processes

[186] Robert Tickner, *Taking a Stand: Land Rights to Reconciliation* (Crows Nest, NSW: Allen & Unwin 2001).

[187] Australian Institute of Health and Welfare, 'Profile of First Nations People' (2022) <https://www.aihw.gov.au/reports/australias-welfare/profile-of-indigenous-australians>.

[188] Tickner (n 186).

[189] Russell (n 159).

where native title applicants are required to prove the extent to which their nativeness has survived genocide".[190] This also assumes Aboriginal culture as static and overlooks how the continual use of culture, language and customs was disrupted by colonialism and shaped to adapt into the white dominant society. As Annette Xiberras, Wurundjeri woman and chair of the Victorian Traditional Owners Land Justice Group, notes:

"I don't believe in the Native Title Act… Culture changes over time, and we've changed to adapt into a white society so that we can protect our children, our land and our country. We've had to do what we've had to do to survive. Our culture is still alive and it's still adapting, but native title doesn't recognise or see that".[191]

Differently from other property rights, Native Title claimants bear the burden of proof, often requiring anthropological and historical evidence that can be difficult, lengthy and expensive to obtain.[192] It is paradoxical that a system aimed at bringing land justice to the Traditional Owners of Australian lands requires them to prove their land rights, while non-Indigenous land tenure is assumed to be legitimate. The intersection between race and property plays a crucial role in perpetuating Aboriginal dispossession, where "only white possession and occupation of the land [is] validated … as a basis for property rights".[193] An interpretation of domestic law that "recognises that non-Indigenous land use gives rise to property rights when Indigenous peoples' land use does not"[194] can only be described as inherently discriminatory. This was, in fact, the position held by settlers in the early stages of colonialism, as explained in Chapter 2, where settler land tenure was seen as permanent and Indigenous land tenure only existed according to occupation and usage.

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[190] Irene Watson, 'Buried Alive' (2002) 13 Law and Critique 253.

[191] Joint Standing Committee on Northern Australia, 'Official Committee Hansard' (Commonwealth of Australia 2021).

[192] Australian Law Reform Commission, 'Connection to Country: Review of the Native Title Act 1993 (Cth)' (Australian Government 2015) ALRC Report 126.

[193] Aileen Moreton-Robinson, 'The High Court and the Yorta Yorta Decision' in Aileen Moreton-Robinson (ed), *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press 2015).

[194] Åhrén (n 62).

The requirements of proof are complex and subject to authoritative interpretation by the Courts, which limits the capacity of the NTA to fulfil Aboriginal aspirations.[195] Aboriginal and Torres Strait Islander peoples face a burden of proof which is unrealistic and inflexible. This became particularly evident with the *Yorta Yorta v Victoria* case in 2002. The Yorta Yorta people claimed native title over certain lands and waters surrounding the Murray River, a claim that was dismissed by Justice Onley of the Federal Court in 1988, as well as by the Full Bench of Federal Court in 2001 and by the High Court in 2002 in subsequent attempts by the claimants to appeal the decision.[196] The Yorta Yorta people could show "ongoing physical presence, assertation of rights to the land, maintenance of identification as a community entitled to the land and maintenance of cultural identity"[197] but remained, apparently, not sufficient to meet the requirement of continuous occupation. With the *Yorta Yorta* decision, the Courts raised the evidentiary threshold initially set by *Mabo (No.2)*: groups had to show continuity since the Crown asserted sovereignty in three different dimensions –society, laws and customs, and rights. One can only expect that "two centuries of colonisation – including frontier warfare and the paternalistic, oppressive policies of the 'Protection' and 'Assimilation' eras – have significantly interrupted any of the three dimensions".[198] Setting up such a high threshold is turning a blind eye on the legacy of colonialism in Australia and the historical injustices that First Nations peoples have been subject to, making native title simply unattainable for most of them. An additional layer of complexity comes with the fact that what is accepted as proof is largely tied to non-Indigenous prejudices of what constitutes "real Aborigines".[199] Assessments of proof are culturally insensitive in so far as they are mainly based on Western modes of documenting history, prioritising "colonial administrations' written historical record over Indigenous oral history".[200] Oral histories, despite being a "well

[195] Leya Reid, 'Native Title, Land Rights and Aboriginal Self-Determination' (2018) 4 Emerging scholars in Australian Indigenous Studies.

[196] Moreton-Robinson, 'The High Court and the Yorta Yorta Decision' (n 193).

[197] Lisa Strelein, 'Proof of a Native Title Society: Yorta Yorta v Victoria', *Compromised Jurisprudence: Native title cases since Mabo* (2nd edn, Aboriginal Studies Press 2009).

[198] Behrendt and Brennan (n 138).

[199] Moreton-Robinson, 'The High Court and the Yorta Yorta Decision' (n 193).

[200] Short (n 79).

respected and accepted part of the discipline of history"[201] have been almost totally excluded from consideration in native title claims. A positive change in this sense was brought about by the amendment of the Act under Kevin Rudd's government in 2009 with the "new evidence rules", allowing witnesses to give evidence orally and in a narrative form.

With the requirement of a continuous and interrupted connection with the land claimed, the NTA goes against basic principles of Indigenous rights law which were later on enshrined in the UNDRIP, in accordance to which the legal recognition of Indigenous rights over their lands "does not require Indigenous peoples to show continuity in the possession of their land and resources or to occupy the land on a regular basis to benefit from it".[202]

4.2. Navigating a legal system outside First Nations laws and customs

> *As distinct from the laws of the colonisers, Indigenous peoples' laws are not buried in judgements and statutes. They are contained in story, song and art. Law inheres in all living things.* [203]

A perhaps less commented but equally important issue about the Native Title Act is the limited power it has conferred to Aboriginal people to determine what native title is. Following the Mabo decision, the promise of native title invoked great hope in many Aboriginal peoples around Australia and the general expectation was that native title would be defined by their laws and customs, cultural practices and their own understanding of their interests in their traditional lands.[204] In the ruling of *Mabo No. 2*, Justice Brennan J stated that "native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous

[201] Ritter (n 179).

[202] Dorothée Cambou, 'Indigenous Peoples Right to Self-Determination and the Principle of State Sovereignty over Natural Resources: A Human Rights Approach and Its Constructive Ambiguity' [2022] Edward Elgar Research Handbook on the International Law of Indigenous Rights.

[203] Nicole Watson, 'Indigenous Legal Traditions and Australian Legal Education' in Lisa Ford, Mark McMillan and Peter Cane (eds), *The Cambridge Legal History of Australia* (Cambridge University Press 2022).

[204] Behrendt and Watson (n 120).

inhabitants of a territory".[205] However, the NTA and subsequent case law have narrowed the definition of native title, taking a rather conservative approach. The meaning of native title has been shaped by judges who, for the most part, are not of Aboriginal descent. The judicial system remains a sphere in which First Nations peoples are underrepresented,[206] and Australian courts and parliaments might seek to override a native title through "narrow interpretations of facts and with a Eurocentric gaze on Aboriginal history, experience, culture and life".[207]

The NTA makes a modest attempt to compensate for this underrepresentation by establishing that as far as it is practicable "the President [of the Tribunal] must … ensure that the Tribunal includes at least one member with special knowledge in relation to Aboriginal and Torres Strait Islander societies"[208] and that "persons appointed as assessors[209] are to be selected from Aboriginal peoples or Torres Strait Islanders".[210] The reality, however, is that the lists of skills necessary to qualify as such leaves many Aboriginal people out of consideration for exercising as assessors. It is questionable the extent to which a Tribunal mainly composed by non-Aboriginal people can reach a solution that is satisfactory for Aboriginal peoples and that effectively acknowledges their relationship to land. In general, "Aboriginal people are skeptical of the ability of white Australians to understand the meaning of land to them and its tie to their culture".[211] The complexity embedded in the legal process of making native title claims means that the NTA ends up benefiting very few.[212] As Peter H. Russell explains, "the dense complexity of the act's 127 pages and 253 sections made it a very inaccessible instrument for those

[205] *Mabo v Queensland (No 2) ('Mabo case')* [1992] High Court of Australia 175 CLR 1.

[206] Russel Goldflam, 'The White Elephant in the Room : Juries, Jury Arrays and Race' [2011] Indigenous Law Centre, University of New South Wales.

[207] Behrendt and Watson (n 120).

[208] Native Title Act (n 169) s 124 (2).

[209] Assessors assist the Court in performing its functions under the NTA.

[210] Native Title Act (n 169) s 37A (4).

[211] Hill (n 130).

[212] Reid (n 195).

who are supposedly its primary beneficiaries – Australia's Indigenous peoples".[213] While it might be paternalistic to assume that Aboriginal peoples are more unfamiliar with complex legal documents like the NTA just for being Indigenous, one cannot overlook the fact that they face more structural barriers in the access to higher education than other Australian citizens.[214] The process of making a claim requires basic legal knowledge about native title, making it particularly inaccessible "for those without formal education on court practices, procedures and principles".[215]

Plus, Aboriginal peoples have a history of legal traditions spanning for thousands of years prior to British settlement that is not at all reflected in the current Australian legal system.[216] One of the deeply entrenched consequences of colonialism present in the Australian system is the erasure of First Nations peoples' laws and the imposition of a rule of law which was merely the product of European culture.[217] As a result, Aboriginal peoples tend to be disadvantaged by the operation of a legal system that is "based on 'truths' that were totally alien to them".[218] What is more, such a system of settler law has historically been used to deny Aboriginal sovereignty, systems of land tenure and law.[219] Irene Watson describes native title as a "construct of the Australian state and the courts"[220] whose potential for recognising Aboriginal rights to lands is illusory, in so far as it has preserved the dynamics of colonialism that continue to dispossess Indigenous peoples. Even in the cases of successful claims of native title, such title is not "accompanied by

[213] Russell (n 159).

[214] Larissa Behrendt and others, 'Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People' (Department of Industry, Innovation, Science, Research and Tertiary Education, 2012).

[215] Reid (n 195).

[216] Watson, 'Indigenous Legal Traditions and Australian Legal Education' (n 203).

[217] Ritter (n 22).

[218] ibid.

[219] Shino Konishi, 'Reckoning with the Past' in Lisa Ford, Mark McMillan and Peter Cane (eds), *The Cambridge Legal History of Australia* (Cambridge University Press 2022).

[220] Irene Watson, 'Kaldowinyeri', *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2014).

the right to govern themselves according to their laws and customs",[221] a clear indicator of the presence of the colonial dynamics. The system that attempts to deliver land justice cannot be the same system that perpetuated the dispossession of Aboriginal peoples, a thought Nicole Watson conceptualises by defending that "because the colonial project is built upon inequality between the colonised and the coloniser, it can never offer solutions for ongoing oppression".[222]

Furthermore, the concept of land embedded in the NTA derives from the idea of private property and "individual property rights cannot be easily reconciled with Aboriginal law".[223] The significance of land in Aboriginal culture, as explained in the second chapter, includes a spiritual relationship that goes beyond legal possession,[224] a relationship that is difficult to characterise through non-Indigenous concepts of law.[225] Indigenous peoples worldwide regard their land from a collective and holistic point of view, rather than as an individual or commercial property[226] and this "transformation of land into property has created myriad challenges to ongoing struggles of land repatriation".[227] In Australia, these challenges were particularly visible in the already mentioned *Yorta Yorta* case. Besides strong evidence showing alive and vibrant Aboriginal culture in the area, Justice Onley found that the "tide of history" had "washed away" the traditional laws and customs of the Yorta Yorta people, needed to claim native title.[228] In the final ruling of the High Court, one of the judges, Justice Callinan, defended there was a lack of objectivity in the Yorta Yorta people's claims who, "understandably resentful of past dispossession, made

[221] Short (n 79).

[222] Watson, 'Indigenous Legal Traditions and Australian Legal Education' (n 203).

[223] Watson, 'Howard's End' (n 122).

[224] Hill (n 130).

[225] Dorothée Cambou, 'Indigenous Peoples Right to Self-Determination and the Principle of State Sovereignty over Natural Resources: A Human Rights Approach and Its Constructive Ambiguity' [2022] Edward Elgar Research Handbook on the International Law of Indigenous Rights.

[226] Daphne Magna, 'The Fight for Land Rights of Indigenous People Continues' [2023] *Tough Convos* <https://www.toughconvos.com/post/the-fight-for-land-rights-of-indigenous-people-continues>.

[227] Atleo and Boron (n 23).

[228] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] High Court of Australia HCA 58.

emotional outbursts and failed to give evidence which could be of assistance to the Court".[229] Moreton-Robinsons analyses the ruling pointing out that the oral testimonies of the Yorta Yorta people showing their connection to land and customary practices are undermined, and that Indigenous possession is measured solely in accordance with signifiers of white possession: "the idea that you have to have a physical presence on the land to enjoy one's entitlements is based on conceptions of white property ownership, which requires evidence of human occupation in the form of fences, title deeds, or residences".[230] The *Yorta Yorta* case brought to light the Western lens through which Aboriginal experiences are examined in order to assert native title.

Clifford Atleo and Jonathan Boron explain that Indigenous peoples worldwide face similar challenges in the fight for the recognition of their lands and how, under these conditions, they need to make sense of the legislation in place to make it more compatible with their cultural contexts, within systems that do not completely align with their own laws and customs.[231] At times, this implies "asserting claims to lands through settler-colonial legal avenues in order to have a level of control over how the land is managed"[232], like Aboriginal and Torres Strait Islander peoples claiming their rights under the NTA. For instance, success in claiming a native title under the NTA tends to result in the creation of a corporate body to manage the land, like Land Trusts or Land Councils. These native title corporations are subject to "a complex web of Western legal duties and responsibilities"[233] which overshadow Aboriginal decision-making processes. A comprehensive effort to deliver land justice in Australia should move beyond tied Western standards to truly reflect the importance of land for Aboriginal culture and identity.

In order to enjoy certain rights over their lands, Aboriginal and Torres Strait peoples often find themselves forced to navigate a legal system that has been built completely overlooking their own laws and their own conception of the land – a system outside their laws and customs. This only helps to reinforce a complex system in which Indigenous

[229] ibid.

[230] Moreton-Robinson, 'The High Court and the Yorta Yorta decision' (n 193).
[231] Atleo and Boron (n 23).

[232] ibid.

[233] Behrendt and Brennan (n 138).

subjects need to "perform whiteness while being Indigenous".[234] As Nicole Watson claims, "rather than placing our faith in a system of law that was built upon our annihilation, Indigenous peoples should reject *terra nullius* and restore the authority of our own laws."[235] In the path of protecting their relationship with land, Aboriginal peoples may find themselves at a crossroads. On the one hand, their conception of land does not necessarily align with Western legal concept of ownership on which the laws like the NTA are rooted, nor do their customs and laws find representation in the broader legal system. On the other hand, the use of these legal mechanisms seems the only plausible option to effectively claim their land rights and, consequently, protect their culture and identity.

4.3. The prioritisation of commercial interests

> *We are raised to understand that we belong to the land, not that it belongs to us, and with that belonging comes a responsibility to protect the land which is why Indigenous people pursue land rights following our dispossession – because land rights are in fact our birth right.*[236]

Struggles over land are not buried in the past. In the early stages of colonialism, Aboriginal peoples had to make an enormous effort to preserve their connection to land vis-à-vis the colonial project, for which land became essential. Now, this conflict of interests is best illustrated in the Aboriginal efforts to protect their lands in opposition to development projects to exploit those territories. Land catches the interests of many industries, particularly of the mining industry. In Australia, a mineral-rich country, this sector is one of the biggest contributors to the national economy, accounting for 12.2% of the GDP.[237] On paper, one of the main motivations behind the enactment of the NTA was establishing a system that could balance these different interests over land, Aboriginal and non-Aboriginal. However, in practice, native title has been reconceptualised to favour the latter, "subjected to the political motivations of governments that have valued

[234] Moreton-Robinson, 'I Still Call Australia Home' (n 14).

[235] Watson, 'Indigenous Legal Traditions and Australian Legal Education' (n 203).

[236] Natalie Cromb, Gamilaraay woman, for the National Indigenous Television.

[237] 'Composition of the Australian Economy Snapshot' (*Reserve Bank of Australia*, 10 October 2022).

certainty for non-Aboriginal property interests over the interests of Aboriginal people".[238] What is more, even if the we took the NTA as a true attempt to balance these conflicting interests, there is certain unfairness in balancing two sets of interests that clearly do not stand on equal grounds due to historically based inequalities, instead of trying to advance the ones of the group that finds itself in a more disadvantaged position. Without special protection, the inevitable result of this balance of interests is the "[prevalence] of commercial interests and the perpetuation of the established colonial order".[239] The NTA is not revolutionary in the sense that it does not dismantle the power relations embedded in the Australian society and it is not a decolonising legal instrument since, should a conflict arise between native title and non-Indigenous interests, it is the rights of the native title holders that would be ceded.[240]

This bias is suggested by the lack of veto rights over future development of their land, which renders land rights largely meaningless, as supported by Woodward in the Royal Commission reports back in 1974, prior to the enactment of the ALRA: "I believe that to deny the Aborigines the right to prevent mining on their land is to deny the reality of their land rights".[241] Many Aboriginal groups were discouraged by the fact that, without veto power, what the NTA advanced was a mere right to negotiate rather than a right to decide what use is made of the lands they have occupied since time immemorial.[242] This is a remarkable difference if we compare it with the ALRA in the Northern Territory, of which the right to veto commercial development is an essential element, as explained in Chapter 3. The absence of such a right in the NTA "guarantees the continuance of an imbalanced power relationship between indigenous peoples and mining interests, a situation which is clearly of benefit to the later not the former".[243] The room for advancement in land justice with the Mabo decision seemed genuinely promising, but the application of the native

[238] Behrendt and Watson (n 120).

[239] Short (n 79).

[240] ibid.

[241] Woodward (n 135).

[242] Short (n 79).

[243] ibid.

title eventually gave way to the interests of a powerful commercial lobby", a situation that was facilitated by the press and the construction of a "national crisis" of uncertainty following the decision of the High Court in 1992.[244] In this context, the Australian mining industry led a public campaign arguing that native title would disrupt their activities, something that should be considered nothing less than a "crisis of national interest"[245] given the crucial role they played in the Australian economy. Despite being far from the reality,[246] this narrative deeply shaped how native title was put into practice.

Even in cases of successful claims to native title, Aboriginal peoples are unable to negotiate future developments on their lands on an even footing. Under the so-called right to negotiate, if an agreement is not reached within a time frame of six months, the mining company is allowed to proceed with payment of compensation.[247] This means that mining companies are usually free to begin their operations without Indigenous consent, even failing to give notice of the beginning of operations to the relevant titleholders.[248] Amendments of the original text have demonstrated that the NTA is an instrument of the government to advance mining interests against the traditional custodians of the land.[249] Any potential of the Act to bring land justice to Aboriginal peoples was curtailed by Native Title Amendment Act 1998 (Cth), passed during John Howard's presidency, which limited the rights of native title holders in all matters affecting land ownership and use.[250] The amendment secured the certainty of the interests of non-Indigenous titleholders at the

[244] ibid.

[245] Damien Short, 'Reconciliation and Land II: The Wik Case', *Reconciliation and colonial power: Indigenous Rights in Australia* (Ashgate 2008).

[246]Financial statistics show little evidence for depressed exploration activity in post-Mabo Australia, with mineral exploration expenditures experiencing an increase in 1993 after the recession of the early 1990s. See Ian Manning, 'Native Title, Mining and Mineral Exploration: The Impact of Native Title and the Right to Negotiate on Mining and Mineral Exploration in Australia' [1997] National Institute for Economic and Industry Research.

[247] Jon Altman, 'Indigenous Communities, Miners and the State' in Jon Altman and David Martin (eds), *Power, Culture, Economy: Indigenous Australians and Mining* (1st edn, ANU Press 2009).

[248] Short (n 79).

[249] Natalie Cromb, 'Native Title Is Not "Land Rights"' (*NITV*, 22 June 2017) <https://www.sbs.com.au/nitv/article/native-title-is-not-land-rights/d4i7nfp6v>.

[250] Geir Ulfstein, 'Indigenous Peoples' Right to Land' (2004) 8 Max Planck Yearbook of United Nations Law.

expense of those of native titleholders. It breached the principle of non-discrimination based on race, a pillar of international human rights law, and Australia was placed under early warning by the Committee on the Elimination of Racial Discrimination (CERD) following the enactment of the Act. The Government, however, refused to implement the recommendations of the Committee.[251]

Among other changes, the 1998 Amendment Act limited the range of future acts to which the right to negotiate applies. Under these amendments, the right to negotiate is reduced to a right to be consulted where native title is coexistent with other titles, like a pastoral lease.[252] Consultations are usually consigned to a "tick-the-box" exercise for companies where the prospects for First Nations to have real say over their Country are widely limited. In this regard, it is important to have in mind the principle of free, prior and informed consent (FPIC) endorsed by the UNDRIP. The idea behind this principle is that it "requires the *free*, non-coercive negotiations *prior* to any development intervention that provide full and accurate information about the proposed project and its implications with the aim to create an *informed* Indigenous population".[253] Article 19 of the Declaration regards the principle as the duty of States to "consult with the Indigenous peoples concerned … in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".[254] This includes, as stated in Article 32, "any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".[255] Even if the UNDRIP does not offer much clarification on the dubious issue of whether the principle of FPIC entails necessarily a right to veto, it seems reasonable to claim that the principle is not satisfied by the mere

[251] Short (n 245).

[252] Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4 Native Title Research Unit.

[253] Alexander Dunlap, '"A Bureaucratic Trap:" Free, Prior and Informed Consent (FPIC) and Wind Energy Development in Juchitán, Mexico' (2018) 29 Capitalism Nature Socialism 88.

[254] UNDRIP, art 19.

[255] UNDRIP, art 32.

right to negotiate, especially if it does not occur under equality of conditions.[256] In his visit to Australia in 2010, the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, reflected on the disadvantaged position of Aboriginal and Torres Strait Islander peoples in negotiation processes because "the terms of such agreements are kept secret, the traditional owners have limited time to negotiate, legal representation is often inadequate and Government involvement does not always align with indigenous interests".[257] The NTA fails to adequately reflect the principle of FPIC, which is now a cornerstone of Indigenous rights. The issue of FPIC, and its limitations, will be further explored in Chapter 5.

Apart from the mining sector, one of the industries that has also heavily influenced the operationalisation of the NTA is the pastoral industry, especially after the outcome of *Wik Peoples v Queensland.* In June 1993, the Wik and Thayorre peoples of the Cape York peninsula claimed native title over certain areas of Queensland, which were subject to two pastoral leases.[258] It was clear under the NTA that freehold title extinguished native title, but it was uncertain if this was the case with the grant of a pastoral lease. In 1996, the Court decided that, since they do not confer exclusive possession to the leaseholder, pastoral leases did not extinguish native title and, hence, both could co-exist.[259] Nevertheless, the Court also ruled that in case of a conflict between pastoralist rights and native title rights, the former would prevail.[260] Far from being revolutionary, this ruling only confirmed that Australian law can extinguish native title and highlighted the certainty of pastoralists interests – essentially the right to occupy land and use it for grazing purposes.[261] What the *Wik case* showed was that some pastoral practices may not

[256] James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (Social Science Research Network, 3 January 2018).

[257] James Anaya, 'Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Addendum - Situation of Indigenous Peoples in Australia' (Human Rights Council 2010) A/HRC/15/37/Add.4.

[258] Short (n 245).

[259] Harry Hobbs, 'The Wik Decision Factsheet' (*ANTAR*, 31 October 2022) <https://antar.org.au/resources/the-wik-decision/>.

[260] Behrendt (n 153).

[261] Human Rights and Equal Opportunity Commission, 'Native Title Report - July 1996 to June 1997' (HREOC 1997).

be inconsistent with native title rights.[262] Every claim needs to be examined on a case-by-case basis: if coexistence is possible, native title is not extinguished.[263] Yet again, this further illustrates how Aboriginal interests are secondary when there are other commercial, non-Indigenous interests in the land.

If we think about the significance of land for Aboriginal communities, the failure of the NTA to adequately protect the land from development projects can have an impact on their culture and identity. It is important to remember that Aboriginal peoples see themselves as the guardians, rather than the owners, of the land. This guardianship is associated with a responsibility to take care of and protect the land. This task becomes almost impossible to achieve in the current state of land rights in Australia, where these rights are "being eroded over time in favour of destructive commercial activities" which, in the words of Natalie Cromb, Gamilaraay woman, "destroy the land we are culturally bound to protect".[264] Provided that native title does not ensure the protection of the land against other activities, such as mining or pastoralism, it is more than reasonable to question the real utility of asserting native title. As Cromb explains:

"Indigenous people do not want 'title' to land. Indigenous people want their rights returned. The right to protect Country which means that we can banish mining companies and their destructive practices from their lands. Indigenous people do not want to be arrested for protesting the destruction of Country by mining companies. Indigenous people do not want to be told they're trespassing when visiting sacred sites to perform ceremony".[265]

Not only does the NTA fail to prioritise Aboriginal interests, but its operationalisation has ameliorated the interests of other stakeholders, particularly the mining industry, against the traditional custodians of the land, whose duty to protect Country is rendered incredibly challenged. The NTA – and virtually all land rights and native title legislation – has

[262] Short (n 245).

[263] Hobbs (n 259).

[264] Cromb (n 249).

[265] ibid.

guaranteed the prevalence of prior commercial interests sending a clear message: Aboriginal interests are subordinate to commercial interests in Australian society today.[266] Even when native title is successfully claimed, it operates within a system that assumes that land is available for exploitation, prioritising economic interests over Aboriginal sovereignty and cultural heritage, as it will be exemplified in Chapter 5. The law only tolerates Aboriginal relationships to land when they are not in conflict with development agendas. Otherwise, the lands are "appropriated for integration and assimilation into the capitalist project".[267] It seems as if Locke's theory linking land ownership to productivity that was used to justify land dispossession during the first stages of colonialism were still applicable in contemporary Australia, only respecting Aboriginal relationship to their lands when no other capitalist interests are at stake. Under this framework, the potential of the NTA to effectively protect Aboriginal culture and identity is, if not null, extremely limited.

Even though native title is now widely accepted as the formal recognition of Indigenous rights to land, it is important to clarify that "native title is not land rights, and behind this construction of rights to land lurk the *muldarbi* [268] and its power to extinguish"[269], that is, colonial, legal structures that reproduce the patterns of oppression and dispossession. When solely built upon colonial models, the law is "a blunt instrument for resolving issues between Indigenous peoples and colonising governments and is apt to weigh against the interests of Aboriginal and Torres Strait Islander peoples".[270]

Summary

As anticipated in the introduction, Country "constitutes identity, and the loss of land is tantamount to the loss of one's self".[271] As such, legal mechanisms that attempt to deliver

[266] Altman (n 247).

[267] Watson, 'Kaldowinyeri' (n 1).

[268] Australian Aboriginal word that means "demon-spirit". Here, Watson applies it to describe all instances of colonialism worldwide and its effects upon Indigenous people's lives, laws and territories.

[269] Watson, 'Kaldowinyeri' (n 1).

[270] Lisa Strelein, 'Building Cultural Strength: Rethinking Native Title Compensation and Settlement' (AIATSIS 2014) <https://aiatsis.gov.au/publication/117036>.

[271] McKnight (n 5).

land justice should serve to protect the land-based culture and identity that Aboriginal and Torres Strait Islander peoples hold with their homelands. Although the NTA marked a turning point for Indigenous rights in Australia, I argue in this thesis that the Act has been unsuccessful in this regard.

This reasoning comes from three main arguments. First, the NTA does not acknowledge land dispossession, requiring claimants to show a continuous and interrupted connection to the land claimed. This means that the law offers little recourse to Aboriginal peoples who experienced a total dispossession from their lands. Even for those who continue to live in their traditional Country, the potential of the NTA to bring land justice remains elusive since the requirements to show proof are incredibly burdensome. Second, the NTA is framed under Western legal concepts that not only shape an understanding of land based on concepts of property and commodity but also make the system very inaccessible for many First Nations peoples aiming to hold native title over their lands. Third, although the Act was intended to balance Indigenous and non-Indigenous rights over their lands, the lack of Aboriginal veto rights over future developments on their lands often results in a bias towards commercial interests, especially considering the important role mining companies play in the Australian economy. This prioritisation of commercial interests hinders the Aboriginal duty of caring for Country, as the next chapter illustrates through the Juukan Gorge case. In the words of Irene Watson, "native title does nothing to help us care for Country".[272]

[272] Watson, 'Buried Alive' (n 190).

CHAPTER 5: THE JUUKAN GORGE CASE

The Juukan Gorge case is one of many stories that illustrate how the NTA operates under the logic of making land available for exploitation, prioritising economic interests over Aboriginal sovereignty and cultural heritage. Juukan Gorge was a sacred rock shelter on Puutu Kunti Kurrama Pinikura Country, located in the Pilbara region of Western Australia. The site was one of the most important archaeological places in Australia, evidencing continuous human occupation for 46,000 years, including "a high frequency of flaked stone artefacts, rare abundance of faunal remains, unique stone tools, preserved human hair, and sediment containing a pollen record charting thousands of years of environmental change".[273] Juukan Gorge was of great cultural and spiritual significance to the Puutu Kunti Kurrama and Pinikura/Binigura (PKKP) peoples who had, generation after generation, exercised their duties as the keepers of the place. Burchell Hayes, Puutu Kunti Kurrama man, described the site as:

"A place where the spirits of our relatives who have passed away, even recently, have come to rest. It is a place that the very, very old people still occupy… It is the ancient blood of our people and contains their DNA. It houses history and the spirits of ancestors and it anchors the people to this Country".[274]

On 24 May 2020, despite fierce opposition by its Traditional Owners, Juukan Gorge was completely destroyed by the British-Australian mining company Rio Tinto, the world's second largest metals and mining corporation.[275] Founded in 1873 and originally operating under two different branches, the UK-based Rio Tinto-Zinc Corporation (RTZ) and Australia-based Conzinc Riotinto of Australia Limited (CRA), both were merged in 1995 under a dual listed company with the name of Rio Tinto.[276] What is more striking about this case is that the PKKP peoples held native title rights over the site under the

[273] ANTAR, 'Rio Tinto's Destruction of Juukan Gorge' (*ANTAR,* 22 May 2025) <https://antar.org.au/issues/cultural-heritage/the-destruction-of-juukan-gorge/>.

[274] ibid.

[275] Russell Hotten, 'A History of Rio Tinto' (*The Telegraph*, 11 July 2007) <https://www.telegraph.co.uk/finance/2811968/A-history-of-Rio-Tinto.html>.

[276] Bruce Harvey and Simon Nish, 'Rio Tinto and Indigenous Community Agreement Making in Australia' (2005) 23 Journal of Energy & Natural Resources Law.

NTA, rights that were easily overridden. The destruction of Juukan Gorge meant the loss of access to "intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems of human life going back 46,000 years".[277] It is a clear example of how Aboriginal cultural relationship to their land is effortlessly undermined under the Australian legal system – because the mining company was, indeed, acting under the law – even in those cases where their Traditional Owners have affirmed their native title rights under the NTA.

5.1.Western Australia: a detractor of native title and land rights

To understand the complexities entrenched in this case, it is important to overview the state of native title and land rights in Western Australia, where the Juukan Gorge case took place. Although the Native Title Act is a federal legislation and, as such, it is applicable to the whole of Australia, the history of land rights arrangements in each state affects the way in which native title operates in each of the jurisdictions.[278] In the case of Western Australia, this history is one "based on the denial of Aboriginal ownership, the systematic taking of land and encumbering Aborigines from the freedom to use and occupy the land in accordance with their traditions".[279] The State has historically opposed Aboriginal land rights, being the only one in Australia that had not enacted any kind of Aboriginal land rights legislation at the state level. Likewise, it took the strongest position of rejection to Mabo. There was a sense that Western Australia had much more at stake than any other state, with the media spreading the view that 80% of the territory could be claimed.[280] Although this message oversimplified the reality – only those areas in which native title rights had not been extinguished could be claimed – it is true that it was the state where native title was more likely to be determined: 34% of the territory remained vacant Crown land in 1993.[281] The government of Western Australia initially refused to

[277] ANTAR (n 273).

[278] Australian Law Reform Commission 'Land Rights and Native Title in the States and Territories' (*ALRC*) <https://www.alrc.gov.au/publication/connection-to-country-review-of-the-native-title-act-1993-cth-alrc-report-126/3-context-for-reform/land-rights-and-native-title-in-the-states-and-territories/>.

[279] Claudio Pierluigi, 'Aboriginal Land Rights History: Western Australia' (1991) 1 Aboriginal Law Bulletin.

[280] Russell (n 159).

[281] Altman (n 247).

accept native title law at the national level and, before the NTA was enacted, they passed their own legislation: the Land (Titles and Traditional Usage) Act 1993 (WA Act). The Act aimed to extinguish native title in Western Australia and replace it with "traditional usage rights", which essentially entail the rights to hunt, hold ceremonies, or other traditional activities in the land, providing a significantly weaker degree of recognition of Aboriginal lands and no compensation.[282]

When the NTA became part of Australian law, the Western Australia government challenged its constitutional validity before the High Court of Australia, under the premise that all native title had been extinguished in their territory at the time of European settlement, and further reinforced their argument by stating that the WA Act had extinguished native title before the NTA was passed. This legal blur was resolved in 1995 through *Western Australia v Commonwealth (Native Title Act Case)*, when the High Court found that the NTA was constitutionally valid, that the WA Act was inconsistent with the Racial Discrimination Act 1975 and that native title had not been extinguished at time of European settlement.[283] The WA Act was, hence, deemed unacceptable and the NTA was applicable in Western Australia as in any other state of the country. Eventually, all states, including Western Australia, passed "complementary legislation to give effect to the federal schemes and to validate interests in their State".[284] In Western Australia, this materialised into the Titles (Validation) and Native Title (Effects of Past Acts) Act 1995, which validates past acts by the State (like land grants and leases) and categorises how they affect native title, that is, whether they extinguish native title or not.[285] It also led to the Native Title (State Provisions) Act 1999, as a tool to create specific rules applicable to Western Australia for procedures of notification, consultation and objection for future acts – like mining or development – in line with the provisions of the NTA.[286]

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[282] National Native Title Tribunal, '25 Years of Native Title Recognition' (2017).

[283] ibid.

[284] Behrendt and Brennan (n 138).

[285] Anne De Soyza, 'Proposed Native Title Legislation in Western Australia' [1999] Indigenous Law Bulletin.

[286] ibid.

5.2.The influence of the mining industry

As a resource-rich state, mining interests have always been at stake in Western Australia. The mining industry has fundamentally opposed land rights, seeing consent-seeking procedures or negotiations as "just another regulatory hurdle in the way of unimpeded access to Aboriginal land for mineral exploration and exploitation".[287] The Australian Mining Industry Council strongly opposed land rights in the 1970s and in the 1980s, coinciding with landmark moments in the Aboriginal land justice movement and the enactment of the first land rights legislations in some states. After the approval of the ALRA in the Northern Territory – the most comprehensive land rights regime – the Whitlam's government intended to use this legislation as a benchmark for other states. With the purpose of establishing a legislative framework for Aboriginal land rights in Western Australia, the state government established the Aboriginal Land Inquiry in 1983. Among its findings, they recommended that Aboriginal peoples should have veto power over mining. This attempt was, however, halted by the Western Australian Chamber of Mines. With the support of conservative political parties, they launched a very effective campaign against land rights in Western Australia, relying on racist stereotypes to spread fear in the wider population,[288] anticipating what would later on be replicated after Mabo. Eventually, the recommendations of the Aboriginal Land Inquiry were rejected by the government of Western Australia in 1984, showing the strong influence of the mining industry.

The ten years that followed the enactment of the ALRA in 1976 were characterised by the mining industry largely failing to come to terms with Aboriginal land rights "refusing to recognise any form of customary or Indigenous rights, concentrating instead on litigation and arguments advocating legislative review".[289] While the decades of the 1970s and 1980s were crucial for the Aboriginal land rights movement, they were equally so for the mining industry, a period when "the self-conscious nation-building activities of Australia's resource explorers and miners were coming to fruition". Mining companies

[287] Altman (n 247).

[288] Pierluigi (n 279).

[289] Harvey and Nish (n 276).

sensed that they were the backbone of the Australian economy and part of a "project of immense national significance". [290]

Not surprisingly, the mining industry also opposed the passage of the NTA in 1993, in spite of its clearly stated objective of balancing both Indigenous and non-Indigenous interests over land. They maintained their opposition to land rights during the rest of the decade of the 1990s, even when the first Court cases dealing with native title issues revealed that the mining industry could benefit more from the NTA than Aboriginal peoples themselves. Their strong position deeply influenced the subsequent amendment of the Act in 1998, removing the right to negotiate in some instances.[291]

Nevertheless, under the influence of globalisation and increasing pressure on businesses to abide by human rights standards, the position of some mining companies started shifting in the mid-1990s. This change could be seen by the Minerals Council of Australia (which substituted the former Australian Mining Industry Council) seeking strategic partnerships with Aboriginal organisations.[292] One company in particular, Rio Tinto, assumed a strong leadership role, demonstrating that, especially in the remote areas in which they operate where there is often a lack of other commercial opportunities, they needed to be "the catalyst for sustainable regional development".[293] The Chief Executive of the company at the time, Leon Davis, publicly committed to working within the Native Title legislative framework and engaging with Aboriginal peoples:

"Let me say this bluntly. CRA [Conzinc Riotinto of Australia][294] is satisfied with the central tenet of the Native Title Act. In CRA we believe that there are major opportunities for growth in outback Australia which will only be realised with the full cooperation of all interested parties. This Government initiative has laid the basis for better exploration

[290] ibid.

[291] Altman (n 247).

[292] ibid.

[293] ibid.

[294] Former name of the company before its full merger with RTZ.

access and thus increased the probability that the next decade will see a series of CRA operations developed in active partnership with Aboriginal people[s].”[295]

Rio Tinto has positioned itself as a “good corporate citizen [operating] in a socially responsible way”.[296] The company has focused on enhancing community engagement, illustrated through its direct agreement-making with Aboriginal peoples. Rio Tinto has led some of the most progressive agreements with Aboriginal communities, like the Argyle Participation Agreement (APA).[297] Signed in 2005, the APA a legally binding agreement between Rio Tinto’s Argyle Diamond Mines (located in the East Kimberley region of Western Australia) and the Gija and Miriuwung peoples, the Traditional Owners of the pertinent lands. It established mutual rights and responsibilities of all parties, ensuring that the Aboriginal communities of the area would benefit from the project in terms of employment and training opportunities, financial benefits and heritage protection.

In minerals-rich areas, the position of Aboriginal peoples’ position towards mining activities is not homogenous, showing highly variable aspirations for engagement with the companies. not homogenous, showing highly variable aspirations for engagement with the companies. Bruce Harvey, former Chief Advisor Aboriginal and Community Relations of Rio Tinto, and Simon Nish, former Director of External Relations of Rio Tinto, argue that in remote areas of Australia, “mining frequently provides the only realistic basis for sustainable economic development”.[298] Additionally, in the context of poor delivery of essential services and infrastructure – like education, health, housing or water – it is sometimes the case that mining companies make the social investments that should be the responsibility of the state, partly because getting license to operate was historically conditioned to the development of new mining towns.[299] In remote areas,

[295] Statement by Leon Davis in 1995, appointed as Chief Executive of CRA in 1994 and of Rio Tinto between 1997 and 2000, following the merging of the companies.

[296] Altman (n 247).

[297] Harvey and Nish (n 276).

[298] ibid.

[299] Altman (n 247).

sometimes mining becomes the only industry offering economic prospects. Under these circumstances, it is not surprising to see a wide diversity of opinions towards the mining industry from the Aboriginal communities, ranging from "pragmatic acquiescence to mainstream views of development" to a culturally-based opposition grounded on the environmental damage to their livelihoods and the possible violation of sacred sites,[300] showing the failure of the sector to respect the cultural aspects of their relationship to land. As Jon Altman points out: "it is rarely appreciated that for many Indigenous groups the landscape is both a source of livelihood and the essence of the Dreaming, the sentient landscape being created according to Indigenous ontology by Ancestral Beings".[301]

5.3.The destruction of Juukan Gorge and the failure of the NTA

One might find striking that the Juukan Gorge, a site with immeasurable cultural value for the PKKP peoples, could be destroyed by the same company that prides itself in championing Aboriginal rights and interests in their operations. What is more striking is that the CEO of Rio Tinto was not lying when he affirmed in the mid-1990s that Rio Tinto would operate under the legislative framework of the NTA. Because one of the most devastating aspects of the Juukan Gorge destruction is that, in effect, Rio Tinto acted within the law.[302]

In 2013, the company received ministerial consent to destroy the caves under the Aboriginal Heritage Act 1972. One year later, an archaeological exploration working with the Traditional Owners of the place discovered thousands of significant objects – like tools and other artefacts, animal remains and even human hair – finding evidence that Aboriginal peoples had first used Juukan Gorge around 47,000 years ago, during the last ice age.[303] The place was much older than originally thought, making it one of the oldest places in Australia, and the results of the excavation encouraged efforts to prevent the destruction of the site. However, the license provided by the government could not be

[300] ibid.

[301] ibid.

[302] ANTAR (n 273).

[303] Jordan Ralph, Michael Slack and Wallace Boone Law, 'The First Published Results from Juukan Gorge Show 47,000 Years of Aboriginal Heritage Was Destroyed in Mining Blast' (*The Conversation*, 19 July 2024) <http://theconversation.com/the-first-published-results-from-juukan-gorge-show-47-000-years-of-aboriginal-heritage-was-destroyed-in-mining-blast-234806>.

revoked, not even after the uncovering of new information about the place. Apart from its immense value as a scientific and cultural heritage site, the place was very special to the PKKP peoples, who achieved native title rights to the Juukan Gorge area under the Native Title Act.

Negotiations had been going on for years. In 2003, the PKKP peoples had started negotiations with Rio Tinto and an Indigenous Land Use Agreement was registered with the NNTT in 2013 – the same year, Rio Tinto obtained consent from the Western Australian Minister for Aboriginal Affairs to lawfully impact the caves under Section 18 of the Aboriginal Cultural Heritage Act 1972 (WA). It is worth noting that at the time, this position was held by Peter Collier, a non-Indigenous member of the Liberal Party. The decision makers were not required to obtain consent from the Traditional Owners, meaning the PKKP peoples were simply informed about this and not properly consulted. During this time, the PKKP peoples were in a legal battle to obtain native title under the NTA, which was determined in 2015 by the Federal Court. This confirmed their ongoing connection to the lands and conferred them exclusive possession rights over some areas in which no other conflicting rights existed, and non-exclusive rights in other areas, including where Juukan Gorge was located. As explained in Chapter 4, holding a native title does not provide the holders with veto power, which would have been crucial in this case. Their native title rights were easily overridden by the government of Western Australia. Notwithstanding their opposition to the activities, on the morning of 24 May 2020, Juukan Gorge was destroyed and with it 46,000 years of Aboriginal occupation.

This exposed one of the major limitations of the NTA in protecting the cultural relationship of Aboriginal peoples to their lands. As David Trigger, the director of the Centre for Native Title Anthropology states: "native title law does not inherently protect Aboriginal cultural heritage in an enforceable way which would prevent the destruction that occurred at Juukan Gorge".[304] It can be said that the PKKP peoples achieved legal restitution in the sense that they were able to assert native title rights over their lands, but this does not mean that land justice in a broader sense was delivered. Without having the right to stop the destruction of a place as culturally significant as Juukan Gorge, native

[304] Evana Ho, 'Destruction of Juukan Gorge Highlights Flaws in Native Title' 53 (*ANU Reporter*, 1 November 2022) https://reporter.anu.edu.au/all-stories/destruction-of-juukan-gorge-highlights-flaws-in-native-title.

title remains a symbolic acknowledgment with little to offer in practice. Once again, this story illustrates how First Nations' rights and interests are put second when other commercial interests are at stake, particularly those of the mining industry. From a different perspective, it also highlights the difficulties faced by Aboriginal peoples in navigating a system where the positions of power responsible for making decisions over their own affairs are held by non-Indigenous people. The fate of Aboriginal culture is in the hands of a system in which their peoples and their interests are seriously underrepresented.

The failure of the NTA, as demonstrated by the Juukan Gorge case, lies not only upon the fact that there are many Aboriginal and Torres Strait Islander peoples for whom the system offers nothing to protect their lands but also upon the obstacles faced by those who have successfully achieved native title when dealing with third parties who have interests in their Country.[305]

5.4.After Juukan Gorge: is there "a way forward"?

Following the Juukan Gorge disaster, on June 11 2020, the Senate of Australia requested an inquiry into the destruction of the site, led by the Joint Standing Committee on Northern Australia who published the final report in October 2021, under the title *A way forward.*[306] It highlighted that the destruction of Juukan Gorge was "not just a loss for the PKKP peoples, but a loss for the nation, and the world, as a whole".[307] The report not only pointed out Rio Tinto's failure but also acknowledged the general lack of care for Aboriginal and Torres Strait Islander heritage in all states and territories and the Commonwealth of Australia, affirming that "lawmakers and corporations alike must consider the relevance of UNDRIP to the social, cultural and economic realities of Aboriginal and Torres Strait Islander peoples and review their relationships in light of these realities".[308] Following the framework of the UNDRIP, the Joint Standing

[305] Behrendt and Brennan (n 138).

[306] Australian Government, 'Australian Government Response to the Destruction of Juukan Gorge' (Commonwealth of Australia 2022).

[307] Joint Standing Committee on Northern Australia, 'A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge' (Parliament of Australia 2021).

[308] ibid.

Committee stated the importance of embracing the principle of FPIC as the basis for a legislative change that can ensure that "the world's oldest living culture continues to thrive".[309] The report set out eight key recommendations, among which we can find:

"The Committee recommends that the Australian Government review the *Native Title Act 1993* with the aim of addressing inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the future act regime. This review should address … developing standards for the negotiating of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the UN Convention of the Rights of Indigenous Peoples (UNDRIP)."

So far, the potential of the NTA in protecting Aboriginal Heritage, crucial for their culture, lies solely in the right to negotiate in relation to a future act. The Joint Committee raised concerns about the unequal position of Aboriginal and Torres Strait Islander peoples in these negotiations. Unless native title holders decide to abide by the developer or miner's suggested terms, the only alternative tends to be an arbitrated outcome, usually in favour of the company in question. This is an injustice faced by many Indigenous peoples worldwide in similar situations. Negotiations are widely used as a way to legitimise the activities of extractive industries, ignoring Indigenous knowledge and practices to give way to the interests of the powerful actors.[310] Featured by power imbalances and even sometimes coercion and violence, the real decision-making power conferred to Indigenous peoples is extremely limited.

The NTA does not provide sufficient protection to First Nations culture across Australia. The right to negotiate does not come with a right to veto developments that pose an unreasonable threat to their lands, leaving many traditional owners in an "absurd situation" where they have rights to protect lands with no methods of enforcement.[311] The Joint Committee report calls for the endorsement of the principle of FPIC in the NTA as

[309] ibid.

[310] Eva Maria Fjellheim, '"You Can Kill Us with Dialogue:" Critical Perspectives on Wind Energy Development in a Nordic-Saami Green Colonial Context' (2023) 24 Human Rights Review 25.

[311] Pamela Faye McGrath and Emma Lee, 'The Fate of Indigenous Place-Based Heritage in the Era of Native Title', *The right to protect sites: Indigenous heritage management in the era of native title* (Australian Institute of Aboriginal and Torres Strait Islander Studies 2016).

a way of moving forward this restrictive framework. Still, it is important to state the limitations of FPIC and recognise that it might not offer a complete solution. Provided that there is no certainty on the issue of whether FPIC implies a right to veto, as stated in Chapter 4, there is no guarantee that abiding to the principle would be translated into the full capacity of Aboriginal and Torres Strait Islander peoples to have a say over the development of their lands. The potential of the FPIC would be determined by the wider context in which it operates. In this sense, it will not make much difference "unless it is accompanied by supportive and effective political leadership and bureaucratic support at all levels of community and government".[312] Otherwise, FPIC can even serve as a form of "inclusionary control" which enforces colonial law and protects corporate investments.[313] Although no FPIC procedures have taken place in Australia, it could be insightful to draw lessons from related contexts in which such consultations have been enforced. Prior to the approval of a wind project, Alexander Dunlap points out how the FPIC consultation held in Juchitán de Zaragoza (Mexico) in 2014 was "wielded by governments as a counter-insurrectionary device to pacify opposition and legitimize controversial development projects".[314] By following the guidelines of the State or private company in question instead of Indigenous customs, FPIC can easily become a strategic mechanism to legitimise land acquisition and create social divisions while affirming existing power imbalances.[315]

Upholding Indigenous rights over their lands might require the "imagination and active pursuit of a future beyond the limits of existing frameworks".[316] In this respect, it might be pertinent to re-think the current development model and move towards one that respects Indigenous relationships to land. The destruction of Juukan Gorge illustrates a wider trend of how the dominant political order seriously undermines First Nations' interests. Extractive industries have played a key role in the longstanding

[312] ibid.

[313] Dunlap (n 253).

[314] ibid.

[315] ibid.

[316] McGrath and Lee (n 312).

"developmentalist expansion that has been at the forefront of dispossessing Aboriginal people across the Australian continent".[317] The economic development of the Australian nation occurred at the expense of Aboriginal peoples, undermining the foundations of their culture, including their social and political structures, their economic base and, especially relevant in this case, their relationship with the land.[318] An injustice that not only does the NTA not redress but also seems to permit.

Summary

To illustrate how First Nations' culture is easily diminished in the framework of the Native Title Act, I resort to the Juukan Gorge case. In 2020, the mining company Rio Tinto destroyed two rock shelters that were sacred to the PKKP peoples and showed evidence of continuous human occupation for 46,000 years. The PKKP peoples had achieved native title of the site under the NTA in 2015, but the lack of veto rights meant that the company could achieve ministerial consent to lawfully destroy the site. After the Juukan Gorge disaster, a report by the Joint Committee was published, setting out recommendations for a possible legislative change to enable a better protection of First Nations' cultures. The Committee signals the endorsement of FPIC as enshrined by the UNDRIP as a meaningful step to move forward. Nonetheless, it is important to be cautious about the potential of FPIC to translate into real decision-making power for Indigenous peoples, rather than becoming a mere reproduction of the same colonial dynamics. At the core of this problem is the developmentalist expansion that has continuously dispossessed Aboriginal and Torres Strait Islander peoples in Australia. Moving forward might imply imagining a future beyond the limits of existing frameworks.

[317] Morgan Brigg and Mary Graham, 'The Relevance of Aboriginal Political Concepts (2): The Need for Aboriginal Ethics' (*ABC*, 15 June 2020).

[318] Australian Human Rights Commission (n 184).

CONCLUSION

Aboriginal and Torres Strait Islander peoples have been occupying the lands and waters of what we today know as Australia for 50,000 years. In 1788, the first British colonists arrived at these territories and annexed them to the empire under the doctrine of *terra nullius. Terra nullius* gave way to white sovereignty, creating a "new nation" mirroring the colony by imposing a political, legal and economic system that could not be any more alien to its original inhabitants. A new nation that completely disregarded Aboriginal values, identity and culture. A new nation that, in order to be established, needed to dispossess First Nations peoples from their lands.

Land dispossession was strongly linked to a Western understanding of civilisation. Influenced by Locke's ideas of property ownership, Aboriginal and Torres Strait Islander peoples were seen as nomads, uncivilised and uninterested in land, providing a philosophical justification for the acquisition of their lands. The colonial government assumed a "civilising" mission, thinking not only that they were not taking anything away from First Nations peoples, but that they were also giving more back. Dispossession became a long and complex process, enforced in a variety of ways. The absence of a treaty between the colonists and Indigenous peoples, the conquest mentality adopted during the Frontier Wars, the agricultural expansion through land grants and closer settlement and Aboriginal protection legislation; this thesis has demonstrated that every mechanism of the colonial project was designed to dispossess Aboriginal and Torres Strait Islander peoples from their ancestral lands.

Land acquired a dual understanding. For First Nations peoples, the connection to their lands constitutes the basis of their culture and identity, a relationship that is represented through the concept of "Country". The dispossession of land also destroyed the basis of their spiritual, cultural and legal systems. For settlers, land was central for enforcing the settler colonial project, serving as the material basis for settler occupation, economic expansion, and the entrenchment of colonial authority. Territoriality is settler colonialism's irreducible element, as explained by Patrick Wolfe. The imposition of colonial understandings of land has shaped the lives of Indigenous peoples worldwide and the return of land is, hence, vital for their existence. The emphasis given to land-

related provisions in the UNDRIP demonstrates the significance of land for Indigenous peoples' rights.

Struggles for lands have, then, featured much of the Indigenous struggles around the world. For Aboriginal and Torres Strait Islander peoples, mobilisation for land justice began almost as early as British settlement. This thesis has analysed different landmark moments in the land justice movement. The long battle for the recognition of First Nations' rights over their ancestral lands reached a turning point in 1992 with the Mabo decision, when the High Court of Australia overturned the doctrine of *terra nullius* and affirmed that native title had not been extinguished with colonialism. Based on racist stereotypes, this historic decision sparked an environment of uncertainty across Australia and increased the racial tensions between Indigenous and non-Indigenous Australians. With the objective of balancing the different interests over the land, the Native Title Act 1993 (Cth) was enacted a year after Mabo. While remaining a crucial moment in the history of Indigenous rights in Australia, in this thesis I have demonstrated how the NTA fails to reflect and protect Aboriginal and Torres Strait Islander peoples' relationship with their lands, which is crucial for their culture and identity.

First, the NTA fails to acknowledge the reality of the vast majority of Aboriginal peoples that, due to land dispossession, are unable to prove an uninterrupted connection to their ancestral lands. What is more, for those who are living in their original Country, the requirements for proof are so burdensome that it is extremely challenging for them to show that they have maintained a continuous connection to the land inhabited. Second, the law is drafted under Western legal concepts and the conception of land brought about by settler colonialism that are difficult – or almost impossible – to accommodate with Indigenous understandings of land. Third, although the law is meant to balance Indigenous and non-Indigenous interests over the lands, the reality is that this equilibrium is biased towards economic interests, prioritising the activities of extractive industries over the duty of caring for Country. All in all, a system that overshadows the land dispossession to which First Nations peoples were subject for 200 years, that does not reflect Indigenous understandings of the land and that prioritises exploitation is a system that is doomed to fail. The NTA offers very little, if anything at all, to protect the cultural relationship that Aboriginal and Torres Strait Islander peoples share with the lands that have been theirs since time immemorial.

To illustrate this narrative with a recent example, I resort to the Juukan Gorge case to exemplify the failure of the NTA in protecting the relationship of Aboriginal and Torres Strait Islander peoples with their Country. Juukan Gorge was a sacred rock shelter evidencing 46,000 years of continuous human occupation, located in Western Australia, a state where the influence of the mining industry has traditionally been a detractor for land rights. The place was particularly significant for the PKKP peoples, who had achieved native title over the area in 2015 under the NTA. In 2020, the mining company Rio Tinto destroyed Juukan Gorge, despite opposition from its Traditional Owners. What is particularly striking about this case is not merely the subordination of a site with profound cultural significance to the interests of a mining company, but that such act was entirely legal under the framework of the NTA. Stories like this ask for a very necessary exercise of questioning why a system that should bring land justice to Aboriginal and Torres Strait Islander peoples keeps failing to protect their cultural rights. The developmentalist expansion in Australia has come at the expense of land dispossession, and it is time to adopt a new paradigm of development that puts the protection of First Nations' relationships to land at the forefront.

Land justice is not only about formal recognition. It is about restoring a relationship with land that is spiritual, cultural and identity-defining. When the NTA is proven unsuccessful in allowing Aboriginal and Torres Strait Islander peoples to meaningfully exercise their connection to Country, what remains? One could argue that the Act functions less as a tool for justice and more as a mechanism that reproduces colonial dynamics, offering limited, if any, substantive redress to those it was intended to benefit, those who have inhabited the lands of Australia since time immemorial. Because Australia always was, and always will be, Aboriginal land.

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