**The Native Title Act**

> The people of Australia intend:
> (a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
> (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.[1]

So reads the preamble to the *Native Title Act 1993* (Cth). The *Native Title Act* sets out a national system for the recognition and protection of Aboriginal and Torres Strait Islander peoples' rights to land. The Act was passed by the Australian Parliament in response to the ground-breaking Mabo decision, which overturned 200 years of injustice. After three decades of Native Title, it is estimated that 'Aboriginal and Torres Strait Islander peoples' rights and interests in land are formally recognised over around 40 per cent of Australia's land mass.' However, the compromises involved in drafting the Act, court cases and subsequent legislative amendments have left many people wondering whether the *Native Title Act* fulfils the 'promise of *Mabo*'.

***The Mabo decision***

Aboriginal and Torres Strait Islander peoples have occupied the Australian continent for at least 60,000 years. Organised in distinct political communities, First Nations peoples were bound together by a system of customary law that governed their relationships to each other and to Country. When the British arrived and colonised the continent, they ignored the pre-existing systems of law that had directed these societies for tens of thousands of years. In what became known as *terra nullius* (land belonging to no one), the British simply ignored the rights and interests of First Nations peoples.

In *Mabo v Queensland (No 2)*, the High Court dismissed this position. The court rejected the idea that *terra nullius* 'was an appropriate legal foundation for Australia and renounced it as a legal fiction'.[2] It was out of step with both historical fact and basic principles of international law and justice. Instead, the Court held that Australian law could recognise First Nations peoples' native title. First Nations groups would need to satisfy two requirements to have their rights and interests in lands and waters recognised by Australian law.

1. They must continue to acknowledge and observe their traditional laws and customs and therefore maintain the necessary connection to their traditional country; and

2. They must demonstrate that their native title has not been 'extinguished' by law or government action

*Mabo (No 2)* was immediately recognised as momentous. Guugu Yimidhirr lawyer Noel Pearson remarked that the decision 'represents a turning point in the history of Australia since white "settlement"', and 'compels the nation to confront fundamental issues concerning the Indigenous people of Australia, issues which have been largely avoidable to date'.[3] Prime Minister Paul Keating agreed, noting that *Mabo (No 2)* 'gives Australia a tremendous opportunity to get its relationship with

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[1] *Native Title Act 1993* (Cth) preamble.
[2] George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 209.
[3] Noel Pearson, '204 Years of Invisible Title' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and its Impact on Australian Law* (University of Queensland Press, 1993) 75, 89

the Aboriginal and Torres Strait Islander people right'.[4] Keating believed that legislation was the best way 'to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management'.[5] Several months of difficult negotiation followed.

***The Native Title Act***

The *Native Title Act* was finally passed by the Commonwealth Parliament in 1993. The Act had four objectives. It aimed to: (1) provide for the recognition and protection of native title; (2) establish the ways future dealings affecting native title may proceed; (3) establish a mechanism for determining claims to native title; and (4) provide for the validation of past acts invalidated because of the existence of native title.

The Act also adopted a definition of native title drawn from Justice Brennan's judgment in *Mabo (No 2)*. Section 223(1) of the *Native Title Act* provides:

> The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

Aboriginal and Torres Strait Islander communities bear the burden of proving each of these three elements.

Native title is described as a 'bundle of rights'. This means that it encompasses a collection of rights and interests. Because the source of native title is the traditional laws and customs of the relevant First Nations community, native title can differ across groups. Among other elements, it may include the right to hunt, fish and gather traditional resources; the right to perform ceremony and protect cultural sites; and/or the right to live on the Country in question.

First Nations communities must apply to the Federal Court to have their native title recognised. Applications are referred to the National Native Title Tribunal (NNTT). The NNTT is an independent statutory body that mediates between the parties, assists in the negotiation of Indigenous Land Use Agreements, and can also conduct reviews and special inquiries. Once the application is registered on the Native Title Register, the parties are encouraged to mediate. If mediation is unsuccessful, the claim may go to trial for a decision as to whether native title exists or not. The focus on mediation has worked. As of May 2022, 556 native title determinations have been made, with 441 by consent and 60 unopposed. Of those 556 determinations, 456 have held that native title exists.

***Key moments of native title***

Reflecting the complex political, legal and moral questions that *Mabo (No 2)* and native title gives rise to, the *Native Title Act* has evolved over the years. Key developments include:

- **The *Wik* Decision**. In 1996, the High Court of Australia found that native title could co-exist with pastoral leases. However, the Court also confirmed that where a pastoral lease and a native title right were inconsistent, the non-native title rights prevail.

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[4] John Laws, Interview with Paul Keating, Prime Minister of Australia (Radio Interview, 17 June 1993) <http://pmtranscripts.dpmc.gov.au/release/transcript-8895>.
[5] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating).

- **The 10 Point Plan**. In 1998, the Howard government pushed through the *Native Title Amendment Act*. The Act introduced more flexible Indigenous Land Use Agreements. However, its main focus was to – in the words of Deputy Prime Minister Tim Fischer – pour 'bucket-loads of extinguishment' on the native title rights of Indigenous peoples.[6] The Act did this, placing restrictions on native title claims.

- **The *Yorta Yorta* Decision**. In 2003, the High Court of Australia imposed higher legal thresholds that make it far harder for First Nations groups to prove that they have maintained a 'traditional' connection to the land and thus that they possess native title.

- **The Northern Territory Emergency Response**. In 2007, the Howard government staged a massive intervention into Aboriginal communities in the Northern Territory. Among other elements, the intervention compulsorily acquired sixty-five Aboriginal townships held under the *Native Title Act*.

- **Reviews**. In 2015, the Australian Law Reform Commission released a report recommending 30 changes to the *Native Title Act* to 'refocus on the core elements of native title law to facilitate an effective determination process'.

- **The Noongar Settlement**. In 2015, the Noongar Settlement was approved by the Noongar Nation as six Indigenous Land Use Agreements. The largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history, the Settlement has been described by some as 'Australia's First Treaty'.

- **The *Timber Creek* Decision**. In 2019, the High Court confirmed the approach to calculating compensation for economic and cultural loss arising from the violation of native title rights. It was the first time that the Court had considered how compensation under the *Native Title Act* should be assessed.

***Opportunities and challenges***

The *Native Title Act* has provided significant benefits for many First Nations communities. For those who have had their native title rights and interests recognised by Australian law, it has enabled them to re-empower their traditions and culture. Legal recognition can also have a deeper psychological impact. For example, in confirming the registration of the Yamatji Nation's native title, Justice Debra Mortimer noted that:

> The recognition given by determination of native title, for those who have long been denied any recognition by Australian law of their deep and abiding connection to their country is a step in the struggle of Aboriginal and Torres Strait Islander peoples to regain what was taken away from them.[7]

A successful determination of native title reflects the determination and spirit of First Nations communities. For instance, in celebrating the determination of Queensland's largest ever native title determination, Kuuku Ya'u elder Father Brian Claudie exclaimed:

> I will get the clapsticks and I will sing. In the back of my mind, I'm thinking about the old people and the culture they have passed on. This claim is special for this

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[6] John Highfield, Interview with Tim Fisher, Deputy Prime Minister of Australia (Radio Interview, 4 September 1997).

[7] *Taylor on behalf of the Yamatji Nation Claim v State of Western Australia* [2020] FCA 42 (7 February 2020) [80].

> generation. It's very important for the future children, generation to generation to generation.

Despite these benefits, several significant limitations hinder the capacity of native title to comprehensively resolve the 'unfinished business' of the relationship between the Australian State and First Nations peoples.[8]

1. Native title employs an unjust burden of proof. In the *Yorta Yorta* case, the High Court confirmed that claimants must prove continuous and uninterrupted survival of pre-colonisation traditional laws and customs for their native title to be recognised.[9] Given the realities of colonisation, native title is therefore unavailable for many First Nations.

2. First Nations communities often only obtain recognition of non-exclusive native title. This form of title is limited in its economic utility

3. Native title does not recognise First Nations peoples' right to self-government

4. The native title process is also slow and overloaded. Some claims take many years to finalise. For example, it took 25 years for the Wakka Wakka people's native title claim to be finally resolved.

***Beyond the Native Title Act?***

These limitations have encouraged the development of alternative agreement-making processes. In Victoria, the *Traditional Owner Settlement Act 2010* (Vic) enables traditional owners to pursue a negotiated 'recognition and settlement agreement' outside the native title regime. The Act allows Aboriginal communities who may not be capable of proving native title to attain a degree of land justice, but it too has limitations.

But native title can be the starting point for broader agreements. The Noongar Settlement demonstrates this potential. Taking the legal form of six Indigenous Land Use Agreements, the Noongar Settlement between the Noongar people and the Western Australian government is the largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history. The $1.3 billion settlement includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage. As part of the Settlement, the Noongar people agreed to surrender any native title rights and interests that exist in the area and consented to the validation of all potentially historically invalid acts. The size and scope of the agreement has led some constitutional lawyers to describe it as Australia's First Treaty.

Several states and territories have gone even further. Victoria, the Northern Territory, Queensland, and South Australia have formally committed to entering treaty processes with the First Nations communities whose traditional lands fall within their borders. Other states and territories may soon follow.

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[8] Patrick Dodson, 'Beyond the Mourning Gate: Dealing with Unfinished Business' in Robert Tokinson (ed), *The Wentworth Lectures: Honouring Fifty Years of Australian Indigenous Studies* (Aboriginal Studies Press, 2015) 192.

[9] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.