

# Building Indigenous Governance from Native Title: Moving away from ‘Fitting in’ to Creating a Decolonized space

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*The business of decolonization involves engaging with former colonial laws, policies, and practices in order to create a “space” for Indigenous peoples to express their unique identities, cultures, and ways of knowing. In postcolonial contexts, transitional justice measures have been used as a mechanism to enable the decolonization of legal spaces. However, decolonization does not always guarantee a postcolonial state. As a transitional justice mechanism, native title in Australia has evolved via the common law to recognize the relationships that Indigenous peoples have with their land and waters. However, native title has been accused of limiting the ability of native title holders to engage effectively in governance structures. Drawing on parallels in the Canadian context, we consider both the limitations of native title law as a tool for decolonization and the constraints imposed by Australia’s federal constitutional structure. The paper then outlines the legal regime established under native title and discusses how it operates outside the realm of “government.” We then consider the way in which native title holders engage with Indigenous and non-Indigenous governance within this “private sector” before discussing whether native title has been able to provide a decolonized space within Australia’s governance system.*

*La décolonisation exige de se lancer dans les lois, les politiques et les pratiques coloniales d’autrefois afin de créer un « espace » où les peuples autochtones puissent exprimer leurs identités, leurs cultures et leurs façons de savoir uniques. Dans les contextes postcoloniaux, des mesures juridiques de transition ont servi de mécanisme de décolonisation des espaces juridiques. Cependant, la décolonisation ne garantit pas toujours un État postcolonial. En tant que mécanisme juridique de transition, les titres autochtones en Australie ont évolué au moyen de la common law pour reconnaître les rapports des peuples autochtones avec leurs terres et leurs eaux. Toutefois, on a accusé les titres autochtones de limiter la capacité des détenteurs de titres autochtones de s’engager efficacement dans les structures de gouvernance. Les auteurs s’appuient sur des parallèles avec le contexte canadien pour examiner les limites du droit des titres autochtones comme outil de décolonisation et les contraintes imposées par la structure constitutionnelle fédérale de l’Australie. Ils exposent ensuite les grandes lignes du régime légal mis en place sous les titres autochtones en examinant comment ils fonctionnent en dehors du domaine du « gouvernement ». Puis les auteurs discutent de la participation des détenteurs de titres autochtones à la gouvernance autochtone et non autochtone à l’intérieur de ce « secteur privé » avant d’examiner la question à savoir si les titres autochtones ont pu assurer un espace décolonisé à l’intérieur du système de gouvernance de l’Australie.*

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## **Introduction**

As colonized peoples, Aboriginal and Torres Strait Islander peoples have been historically excluded from the constitutional makeup of the Australian state. The forced settlement of Australia disregarded Indigenous peoples' land and laws and established a series of colonies under British rule through the late 1700s and early 1800s. Through the formation of the Australian commonwealth in 1901, Indigenous peoples were again excluded from the self-governing communities that came together to form the federation. Indeed, the federal compact between the colonies that became Australia's written Constitution refers to Indigenous peoples only by way of exclusion.<sup>1</sup> The newly formed states sought to retain jurisdiction over the Indigenous peoples' lands and, to some extent, their labour, which are both essential to economic development.<sup>2</sup> Australia struggles with its identity as a colonizing force; the colonial relationship is ongoing and must be constantly renegotiated.<sup>3</sup> As Anne Curthoys has noted, Australia is at once both colonial and postcolonial, both colonizing and decolonizing.<sup>4</sup>

The Australian Constitution was designed as a political compact between colonial administrations to herald the emergence of an independent nation-state. It was not a declaration of the relationship between the state and its citizens, though it fills the role of the founding moment in nation-building terms. As a result, however, the Constitution has no explicit rights provisions, leaving the protection of citizens to the Parliament and the common law.<sup>5</sup>

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1 For example, section 51(26) originally gave the Commonwealth the power to make laws for "the people of any race except the aboriginal race." Similarly section 127 excluded Aboriginal people from the "reckoning" of the population. These references were removed from the Constitution in a 1967 Referendum. Section 25 however remains unchanged. This provision allows states to exclude certain races from voting. Similarly, section 51(26) now allows the Commonwealth to legislate for Indigenous peoples (as "people of any race") but there is no restriction as to require such legislation to be beneficial.

2 Aus, Commonwealth, *Official Report of the National Australasian Convention Debates, Melbourne, 1898*, vol 4 (Sydney: Legal Books, 1986) 228.

3 See Mick Dodson & Lisa Strelein, "Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State" (2001) 24 UNSWLJ 826.

4 Ann Curthoys, "An Uneasy Conversation: the Multicultural and the Indigenous" in John Docker & Gerhard Fischer, eds, *Race, Colour and Identity in Australia and New Zealand* (Sydney: UNSW Press, 2000) at 21-36. See also Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999) at 3.

5 The Australian Constitution is understood to contain three express guarantees or freedoms: the guarantee of just terms compensation for the acquisition of property (section 51(31)) (although not for Indigenous peoples, to which we will return later in this paper); the separation of religion and the state (section 116); and the freedom to move across state borders without discrimination (section 117). The only express right is the right to a trial by jury (section 80). The Constitution has also been interpreted as containing implied freedoms in relation to democratic representation, including the

The recognition of Indigenous peoples' rights and interests in relation to land through the Australian common law in *Mabo* 1992<sup>6</sup> and the subsequent processes established under the *Native Title Act 1993* (Cth) (NTA) have been a key strategy to restore a measure of land justice and to counter the laws and institutions formerly used to dispossess Australia's Indigenous peoples. Since colonization, Indigenous political gains in Australia have been based upon the language of equality and social justice rather than political self-determination and self-government or any Indigenous rights discourse.<sup>7</sup> The common law employs the legal device of "native title" to provide legal recognition and protection under Australian law to Indigenous rights and interests in territories held under Indigenous systems of law and custom. However, the promise that native title held 20 years ago, both as a mechanism for achieving a decolonization of Australian land law and as a potential basis for the recognition of Indigenous peoples as self-governing peoples has been thwarted by overly "legal" processes. Instead the result is a measure of frustration and dissatisfaction with the slow progress and minimal gains being achieved through native title. Twenty years later, the Australian polity is once again considering whether a change to our Federal Constitution could help heal the scars of colonization. The passing of the *Aboriginal and Torres Strait Islander Peoples Recognition Act* (Cth) in February 2013 marks the start of a two-year dialogue on Constitutional reform.

We cannot meaningfully debate formal recognition in the federal Constitution without considering the broader context of Australia's federal constitutionalism. This paper considers the role of native title as a transitional justice measure and its effectiveness in creating a decolonized space for Australia's Indigenous peoples. First, we consider the role of the law as a tool for decolonization and the limitations imposed by Australia's federal constitutional structure. The paper then outlines the legal regime established under native title legislation as outside the realm of "government" and the formation of native title corporations as a "private sector." We then consider the way in

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freedom of political communication (*Australian Capital Television v Commonwealth*, [1992] HCA 45, 177 CLR 106). See generally George Williams, "Race and the Australian Constitution: From Federation to Reconciliation" (2000) 38 Osgoode Hall LJ 643.

6 *Mabo v Queensland [No 2]*, [1992] HCA 23, 175 CLR 1 [*Mabo*]. Eddie Mabo, James Rice, and David Passi brought an action against the State of Queensland in the High Court claiming customary title to the Murray Islands in the Torres Strait based on Meriam law. The case recognized that the Meriam Le (people) were entitled to possess, occupy, use, and enjoy the Murray Islands under their own system of law and governance and that rights and interests flowing from those laws are recognized and protected under Australian law.

7 On the impact of the absence of rights discourse, see Larissa Behrendt, *Achieving Social Justice* (Sydney: Federation Press, 2003).

which native title holders engage with Indigenous and non-Indigenous governance within this “private sector” before discussing whether native title has been able to provide a decolonized space within Australia’s governance system.

## **Decolonization and transitional justice**

As we settle in to the third International Decade for the Eradication of Colonialism and, in 2010, the 50<sup>th</sup> anniversary of the adoption of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>8</sup> attention to the decolonization of Indigenous peoples remains disconnected from meaningful change in domestic contexts.<sup>9</sup> While there is significant literature on the nature of settler colonialism and its resistance to change, Indigenous peoples have been less engaged with the theories, methodologies, and political movements of decolonization.<sup>10</sup> Instead, the focus has been on the development of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), which was finally accepted by the United Nations General Assembly in 2007 after more than a decade in development.<sup>11</sup> The UNDRIP articulates in detail the application of human rights principles in the context of Indigenous peoples. The Declaration encompasses, among others, rights over lands and resources, language and cultural rights, and education and citizenship rights. The most significant element of the Declaration

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8 *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15th Sess, (1960). The Declaration has the status of *jus cogens*, that is, an imperative principle of international law that is binding on the United Nations and its members as an authoritative interpretation of the United Nations Charter and normative principle of international law.

9 While there is nothing in the Declaration to prevent its application to the situation of Indigenous peoples, from the beginning the Declaration has been limited in practice by the “salt water thesis” that it should only be applied to circumstances in which the colonial power is separated from the colonized people by ocean. The “Belgium thesis” refuted this concept by arguing that the Declaration should apply to Indigenous peoples within sovereign states. See Michla Pomerance, *Self-Determination in Law and Practice* (The Hague: Martinus Nijhoff Publishers, 1982) for a classic account of the historical limitations of the Declaration. In this context, Huygens makes the distinction between decolonization through economic and military control and decolonization through institutions: Ingrid Huygens, “Developing a Decolonization Practice for Settler Colonizers: A Case Study from Aotearoa, New Zealand” (2011) 1:2 *Settler Colonial Studies* 53.

10 Anthony Moran, “As Australia Decolonizes: Indigenizing Settler Nationalism and the Challenges of Settler/Indigenous Relations” (2002) 26:6 *Ethnic and Racial Studies* 1013; Lorenzo Veracini, “Settler Colonialism and Decolonization” (2007) 6:2 *Borderlands e-journal*, online: <[http://www.borderlands.net.au/vol6no2\\_2007/veracini\\_settler.htm](http://www.borderlands.net.au/vol6no2_2007/veracini_settler.htm)>.

11 Australia’s Indigenous organizations were heavily involved in the drafting of the Declaration. However, Australia was one of four countries to vote against the adoption of the Declaration, along with Canada, the United States, and New Zealand. Australia later expressed its support for the UNDRIP in 2009.

is the right of all Indigenous peoples to self-determination, and by virtue of that right, the right to freely determine their political status.<sup>12</sup>

Decolonization and self-determination in the Indigenous context is complex, considering the influences and confluences of interactions between the colonizing and Indigenous cultures over centuries.<sup>13</sup> The role the UNDRIP in unmasking and demystifying the fear of separatism in debates about self-determination should allow us to reintegrate our thinking about colonized peoples' varied experiences. In order to decolonize a space within settler societies in which Indigenous peoples can freely express their political, cultural, and social identity, we require a mutual and collaborative dialogue. Decolonization for Indigenous peoples is not simply a matter of finding space to be Indigenous or to be different, for these too are colonized roles. Instead, we must find a space for Indigenous peoples simply to be — to be Arrernte, to be Noongar, to be Meriam or Badulgal, to be Karajarri, Yawuru, Yalanji, or any of the hundreds of groups who make up the first peoples of the continent.

Decolonization in settler societies has been linked to the institutions and structures of society. Just as the foundation of colonization in Australia was the displacement of Indigenous peoples from their land, so too the placement or displacement of Indigenous peoples in societal discourses remains a central concern. When survival depends on resisting assimilation,<sup>14</sup> focus understandably falls to structures of legal recognition and articulation of Indigenous rights but must also consider the need to engineer governance structures that recognize and reflect the unique identities and priorities of Indigenous peoples.<sup>15</sup> Just as colonization refers to the process of appropriation or the establishment of control through force and administration,<sup>16</sup> decolonization demands reforms in policy and institutional settings to restore

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12 The right of all peoples to self-determination is the first article in both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*. The right to self-determination is also stated within the original *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*.

13 Shepard argues that settler colonialism and decolonization are intimately linked: see Todd Shepard, *The Invention of Decolonization: The Algerian war and the remaking of France* (Ithaca, NY: Cornell University Press, 2006).

14 Wolfe, *supra* note 4 at 3.

15 There are layers of colonization and this debate is not limited to relationships between Indigenous peoples and “white settlers,” although this paper is limited to the role of Indigenous peoples within decolonized spaces. For the broader context of colonization see generally: Nan Seuffert, “Civilisation, Settlers and Wanderers: Law, Politics and Mobility in Nineteenth Century New Zealand and Australia” (2011) 15 *Law Text Culture* 10.

16 Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (London and New York: Zed Books, 1999).

political and cultural institutions and relations to traditional lands.<sup>17</sup> As such, we need a broader understanding of decolonization as referring not only to institutional structures and bureaucracy but also to cultural, linguistic, and psychological decolonization and the laws, policies, and processes that enable these other forms of decolonization to operate.

One of the strategies of decolonization is the use of “transitional justice,” which describes the process by which the colonizing order makes available legal institutions and mechanisms to provide recognition of Indigenous people. Joe Williams, a Maori judge of the Supreme Court of New Zealand, described native title as a transitional justice mechanism. In the Indigenous context, Williams defined transitional justice more specifically to refer to a process by which “the new order agree[s] either to uphold pre-existing rights ... or to make good on those that were unfairly taken away.”<sup>18</sup> Williams argues that postcolonial independent Australia has “reached a point in their development where they can address questions of transitional justice without fearing that to do so would undermine the legitimacy of the existing legal order.”<sup>19</sup> However, transitional justice is premised on the existing order staying intact. The benefit of transitional justice to the colonizer is that it receives moral legitimacy it might otherwise lack. Discrimination and debasement of Indigenous peoples is integral to Australia’s nation-building process. The idea that we need to unmake our institutions in order to regain our moral legitimacy challenges the Australian sense of national identity. Moral legitimacy from Indigenous peoples is difficult to achieve. As settler exodus is unlikely as a possible decolonization strategy,<sup>20</sup> the Australian context requires a renegotiation of the colonial relationships of power and dispossession and the emergence of new forms of government and engagement.

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17 According to Maori academic Linda Tuhiwai Smith, the practice of decolonization involves the transfer of the instruments of formal governance to the Indigenous people of a colony: *Ibid.* Roy also notes that “debates at the heart of contemporary postcolonial legal theory focus on the role of the law as an integral component of the colonial, imperial and now post colonial projects”: Alpana Roy, “Postcolonial theory and law: a critical introduction” (2008) *Adel LR* 315 at 324.

18 Joe Williams, “Confessions of a native judge: Reflections on the role of transitional justice in the transformation of indigeneity” in *Land, Rights, Laws: Issues of Native Title*, 3:14 (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2008) at 3, online: <<http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2008/ntc08papers/WilliamsJ.pdf>>.

19 *Ibid* at 4.

20 Franz Fanon, *Wretched of the Earth* (Harmondsworth, UK: Penguin Books, 1967) at 35.

## The limits of the available mechanisms

Indigenous peoples in Australia have sought to renegotiate their legal status, the return of their territories, and political autonomy through a variety of mechanisms. The recognition of native title in 1992 was not the first time the Court process had been employed to seek return of lands. In 1971 the Yolgnu people of Arnhem Land in the Northern Territory attempted to prevent bauxite mining approved by the government without the consent of the traditional landowners, but the case was unsuccessful.<sup>21</sup> Nevertheless, the decision led the Commonwealth Government at the time to instigate an inquiry, which recommended the introduction of legislation to recognize and protect Indigenous peoples' rights to their lands.<sup>22</sup> However, Australia's federal constitutional framework leaves the administration of lands, including Indigenous peoples' lands, within the jurisdiction of the states. At the time of the inquiry, the Federal Government was powerless to introduce legislation nationally (an issue we will explore further in the following section) and instead introduced the *Land Rights (Northern Territory) Act 1976* (Cth) in relation to the federally administered territory.<sup>23</sup> Many states followed suit, introducing statutory land rights regimes that provided for the return of certain lands, but excluded many other areas from being transferred. Western Australia was notable in its refusal to introduce any form of land rights, which thwarted further attempts to introduce a national land rights scheme.<sup>24</sup>

Throughout the 1970s a series of policies emerged under the penumbra of self-determination, including: regional and national democratically elected representative structures and national self-administration through the Aboriginal and Torres Strait Islander Commission; local self-government structures under state legislation; and community-controlled services and corporations. These structures were established as both a means of attracting funding and services but also as an expression of de facto governance. Established predominantly in a policy period of self-determination, the emergence of the

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21 *Milirrpum v Nabalco*, (1971), 17 FLR 141.

22 Austl, Commonwealth, Aboriginal Land Rights Commission, *Second Report* (Canberra: Government Press, 1974) (also known as the "Woodward Inquiry").

23 Tim Rowse, "How we got a native title act" (1993) 65:4 *The Australian Quarterly* 110.

24 The most common form of land tenures include alienable freehold granted under the *Aboriginal Land Rights Act 1983* (NSW) in New South Wales; inalienable freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in the Northern Territory; trust land under the *Community Services (Aborigines) Act 1984* (Qld); and freehold under the *Aboriginal Land Act 1991* (Qld) in Queensland, with equivalents for the Torres Strait Islands. There are also specific pieces of legislation created for reserve or trust areas throughout Australia.

Indigenous corporate sector reflects a “liminal arm of government.”<sup>25</sup> These organizations have contributed to the formation of the Indigenous organizational sector, to which we will return later in the article.<sup>26</sup> Through the 1990s, many of these institutions were destroyed or reformed in favour of mainstream institutions and services, which were based on the assumption that removing responsibility and autonomy from Indigenous community organizations would better address Indigenous disadvantage.<sup>27</sup> More recently, the Australian Federal Government has supported the establishment of an advocacy body in the form of the Congress of Australia’s First Peoples which seeks to reconcile extant forms of governance into a collaborative structure. The fractured political dimensions of community development that now confront Indigenous peoples have resulted from the lack of formal mechanisms for the inclusion of Indigenous governance in regional governmental arrangements.

Colonization and decolonization are also inherently personal experiences; as Veracini claims, settlers carry colonialism “in their bones.”<sup>28</sup> Many decolonization movements around the world have utilized transitional justice measures that are directed to the personal. For example, in the Australian context reconciliation and truth-telling work alongside land rights and autonomy claims. The Reconciliation movement began in earnest in 1991 with the establishment of the Council for Aboriginal Reconciliation, later replaced by Reconciliation Australia.<sup>29</sup> The stories of those Aboriginal and Torres Strait Islander peoples removed from their families under racist policies of “protection” were presented as part of a commission of inquiry,<sup>30</sup> eventually resulting in an apology from the Australian Government. The symbolic importance of reconciliation and an apology have not detracted from the calls for more substantive redress, mirrored in debates about what constitutional recogni-

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25 Patrick Sullivan notes, however, that there are considerable issues of coherence within the sector: Patrick Sullivan, *The Aboriginal community sector and the effective delivery of services: Acknowledging the role of Indigenous sector organisations* (Desert Knowledge CRC Working Paper 73) (Alice Springs, Australia: Desert Knowledge CRC, 2010), online: <[http://www.nintione.com.au/sites/default/files/resource/DKCRC-Working-paper-73\\_Indigenous-sector-organisations.pdf](http://www.nintione.com.au/sites/default/files/resource/DKCRC-Working-paper-73_Indigenous-sector-organisations.pdf)>.

26 Tim Rowse, *Rethinking Social Justice: from ‘peoples to populations’* (Canberra: Aboriginal Studies Press, 2012).

27 Janet Hunt, “Between a rock and a hard place: self-determination, mainstreaming and Indigenous community governance” in Janet Hunt et al, eds, *Contested Governance: culture, power and institutions in Indigenous Australia* (Canberra: ANU Epress, 2008) 27.

28 Veracini, *supra* note 10 at para 10, drawing on the thinking of Fanon, *supra* note 20, who remarked (at 27-74) that the “the true enemy of the colonized is the European settler.”

29 *Council for Aboriginal Reconciliation Act 1991* (Cth).

30 Austl, Commonwealth, Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney: Australian Government Publishing Service, 1997).



tion should look like — is mere symbolic inclusion sufficient or are substantive measures still required to protect Aboriginal and Torres Strait Islander peoples' rights and identity?

### **Native title: decolonizing Australian land law?**

The limited political recognition of Indigenous interests in Australia places greater pressure on legal avenues as a means of resolving immensely political questions. Strelein has noted that the *Mabo* decision was a symbol for and the measure of the relationship between non-Indigenous and Indigenous peoples.<sup>31</sup> When the High Court recognized native title in 1992, they risked destabilizing the fundamental structure of Australian land law. That the Court was prepared to take on this controversial challenge and the emotive language in which they expressed their decision has remained a benchmark for recognition and reconciliation.<sup>32</sup>

The High Court in *Mabo* rejected the presumption that the British could settle a territory already occupied without recognizing the legal rights of the Indigenous inhabitants. To make sense of their decision they needed to reconcile Indigenous occupation of the territories with the legal myth of peaceful settlement, and do so without fracturing the skeletal structure of Australian law.<sup>33</sup> The Court would not reconsider whether Australia was settled, but it was prepared to revisit the “consequences of settlement.”<sup>34</sup> Reviewing the implications of the colonization of Australia, the High Court found that the error had been that “the Crown’s sovereignty over a territory which had been acquired under the enlarged notion of *terra nullius* was equated with Crown ownership of the lands.”<sup>35</sup> The concept of *terra nullius* was essentially applied

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31 Lisa Strelein, “Symbolism and function: From native title to Indigenous self-government” in Lisa Strelein, ed, *Dialogue about land justice : papers from the National Native Title conference* (Canberra: Aboriginal Studies Press, 2010) at 137.

32 *Ibid.*

33 *Supra* note 6 at 29. In *Mabo* Justice Brennan stated, “In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.” He further stated:

[I]f a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning: *supra* note 6 at para 29-30.

34 *Supra* note 6 at para 32.

35 *Supra* note 6 at para 39.

based on the perception that Australia's first peoples were so "low in the scale of social organization" that they should not be regarded as self-governing or as holding laws of their own.<sup>36</sup>

Indigenous peoples were accorded no special status as colonizers claimed sovereignty. Thus, the colonizers did not arrange treaties or agreements and occupied the land without consent or compensation. This perception entrenched an opportunity to appropriate Indigenous lands and create moral justifications for less "peaceful" settlement practices. Central to the *Mabo* decision is the assertion that the change in sovereignty from Indigenous peoples to colonizers did not invariably bring beneficial title to the lands. In other words, in *Mabo* the High Court found that the claim of the British Crown to Australia's states and territories did not have the wholesale effect of extinguishing native title but instead granted the Crown a "radical title." The Crown's title could only be perfected by express intention, and then only piecemeal, when other interests in land issued by the new sovereign are inconsistent with the continued right to enjoy native title.

The preservation of existing non-Indigenous rights and interests has become known as extinguishment.<sup>37</sup> In *State of Western Australia v Ward* the Full Federal Court explored the notion of extinguishment and held that native title can also be partially extinguished:

[I]f particular rights and interests of indigenous people in or in relation to land are inconsistent with rights conferred under a statutory grant, the inconsistent rights and interests are extinguished, and the bundle of rights which is conveniently described as "native title" is reduced accordingly.<sup>38</sup>

At once colonizing and decolonizing, the law of native title recognizes the wrongs of the past while also reaffirming colonization as an ongoing process. To this end, we can adopt Patrick Wolfe's description of settler colonial invasion as "a structure not an event."<sup>39</sup>

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36 *Cooper v Stuart*, [1889] UKPC 1.

37 Chief Justice of the High Court, Robert French, has described "extinguishment" as a misleading metaphor for what is more appropriately described as the withdrawal of recognition: Robert French, "The Role of the High Court in Recognition of Native Title" (2002) 30:2 UWA L Rev 129.

38 *State of Western Australia v Ward*, [2000] FCA 191 at para 91.

39 Wolfe, *supra* note 4 at 2.

## Federalism, state power and native title

As a decolonizing strategy, native title needs to compete within a web of interacting legal regimes at both the federal and state level. Federalism is a mechanism for sharing power between different levels of government, generally over contiguous territory. In Australia, there are three levels of government: the Commonwealth, state, and local governments. Plenary powers lie with the state legislatures (as the former colonies) and the Commonwealth Constitution articulates exclusive and shared powers of the Commonwealth or Federal legislatures. Various state government acts outline local government responsibilities.<sup>40</sup> Where the Commonwealth has non-exclusive power, it is able to assert dominance in law-making through the operation of section 109 of the Constitution, by which Commonwealth laws prevail over any conflicts with state legislation. The reach of Commonwealth powers has extended since federation through the creative uses of specific “constitutional pegs,” such as the corporations and external affairs powers, which expands the Commonwealth Government’s ability to regulate.<sup>41</sup>

As noted in the opening sections of the article, unlike other former British colonies, the Commonwealth Government does not have exclusive legislative responsibility in relation to Indigenous peoples and Indigenous lands. Indeed, a specific “Indigenous” law-making power was specifically excluded from such jurisdiction until 1967.<sup>42</sup> The Federal Government established the native title system through the NTA, relying on the constitutional power to make laws “for the people of any race for whom it is deemed necessary to make special laws”: section 51(26). However, as a land issue, responsibility for engaging with native title falls to the states and local authorities. As the jurisdictions with the most to lose from the recognition of native title, the states are positioned as the primary respondent to Indigenous peoples claims, with the Courts and a specialist tribunal as mediator and arbitrator. As native title is an initiative of the High Court, for which the Commonwealth Legislature has assumed authority, state land and water management regimes have been slow to accommodate and change in response to the existence of native title.

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40 At the time of writing, there was a proposal to recognize local government in the Australian Government, which will be considered by referendum in September 2013: *Australian Constitution Alteration (Local Government) Bill 2013*.

41 In *Western Australia v Commonwealth* [1995] HCA 47 at para 99, the High Court dismissed the Western Australian Government’s argument that the “races power is merely a constitutional peg on which the Commonwealth inappropriately [sought] to hang the [NTA].”

42 Williams, *supra* note 5.

The recognition of native title and the Federal Government's legislative response have been criticized occasionally by state governments as an impingement on their efficient administration of "Crown" lands.<sup>43</sup> The Western Australian Government challenged the constitutional validity of the NTA in *Western Australia v Commonwealth*.<sup>44</sup> A central issue in the case was the extent to which the NTA impairs state functions and controls state legislative powers. The Western Australian Government argued that in restricting the operation of state laws, through providing for circumstances under which state actions are valid or invalid, the NTA effectively restricts the operation of state power. However, the High Court made the distinction between directly invalidating state laws and the fact that the laws were invalid only to the extent of any inconsistency based on section 109 of the Constitution.<sup>45</sup> The High Court noted:

Three aspects of the operation of the Native Title Act are of central importance to its constitutional character: the recognition and protection of native title, the giving of full force and effect to past acts which might not otherwise have been effective to extinguish or impair native title and the giving of full force and effect to future acts which might not otherwise be effective to extinguish or impair native title.<sup>46</sup>

The High Court reiterated that the NTA provides for the protection of Indigenous rights and interests based on their traditional laws and customs but also protects existing tenures that would otherwise be rendered invalid by the recognition of native title. The NTA also outlines procedures for how future activities can interact with recognized native title rights and interests. In reaching its conclusions, the High Court affirmed that the NTA was validly made under the Commonwealth Government's constitutional power under section 51(26).<sup>47</sup> The High Court decision affirms the original *Mabo* decision and the validity of the legislation with respect to state government regulation. The High Court saw the NTA not as a means of controlling the exercise of state legislative power, but as a means of excluding laws made in exercise of that power from affecting native title holders. At the Commonwealth level, despite initial resistance, it was anticipated by those within the Federal

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<sup>43</sup> For an account of the original negotiation process, see: Rowse, *supra* note 23.

<sup>44</sup> *Western Australia v Commonwealth* [1995] HCA 47 at para 33.

<sup>45</sup> Section 109 of the Constitution provides that Commonwealth law will prevail over state law, to the extent that state law is inconsistent with Commonwealth law.

<sup>46</sup> *Supra* note 44 at paras 78-93.

<sup>47</sup> *Supra* note 44 at para 97 where Chief Justice Mason, and Justices Brennan, Deane, Toohey, Gaudron, and McHugh noted that the removal of the general defeasibility of native title by the NTA for the purposes of s 51(26) of the Constitution is sufficient to demonstrate that the Parliament could properly have deemed that Act to be "necessary."

Government that state government jurisdictions would come to “treat” native title with justice.<sup>48</sup>

As a transitional justice measure, native title provides a mechanism for confronting the question of dispossession and restoring a measure of land justice through transferring a limited form of control over resources back to traditional owners. The higher vested interest of the states in rejecting native title and maintaining their control over lands was partly overcome by narrowing the mechanics of decolonization to legal concepts and processes. That is, rather than relying purely on political negotiation, Indigenous people could resort to substantive rights.

Notwithstanding the appeal to justice, the give and take of transitional justice left native title with its share of discriminatory limbs. As part of the political compromise implicit in the *Mabo* case, the High Court of Australia refused to extend to native title holders the protection of the common law or of the Australian Constitution (and state constitutions) that protect citizens from the arbitrary deprivation of property by the Crown.<sup>49</sup> In the Australian Constitution this takes the form of a guarantee of “just terms” compensation.<sup>50</sup> For Indigenous peoples, however, the Court held that it was legal (even if though morally wrong) to discriminate on the basis of race; therefore, failure to protect or compensate Indigenous peoples for the loss of their land was

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48 At the time of the enactment of the NTA, a leaked cabinet briefing from Sandy Hollway, Deputy Secretary of the Department of Prime Minister and Cabinet, revealed that:

We avoid the administrative and cost problems of setting up a Commonwealth Structure across the country; we avoid those Commonwealth institutions becoming a ready-made target for blame associated with a slowdown in development activity or disruption of land management; the more intransigent States become clearly isolated; more positively, State systems are encouraged to make genuine efforts to take account of native title and treat it with justice (rather than the Commonwealth simply coming in over the top, which is not the most healthy long term solution for the country) (cited by Alan Ramsey, *Sydney Morning Herald* (2 October 1993) 31).

49 *Adeyinka Oyeekan v Musendiku Adele*, [1957] UKPC 13, [1957] 1 WLR 876 at 880, Lord Denning explained that:

In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.

See Kent McNeil, “Racial Discrimination and Unilateral Extinction of Native Title” (1996) 1 *Australian Indigenous Law Reporter* 181.

50 *Constitution*, section 51(31).

considered valid.<sup>51</sup> The introduction of the *Racial Discrimination Act* (RDA) in 1975 provides the only form of protection under law.<sup>52</sup> The RDA prohibits discrimination on the basis of race, in accordance with the United Nations *Convention on the Elimination of Racial Discrimination*. By extension the RDA protects against discrimination in the enjoyment of rights to property (including in community with others). It thus protects native title against arbitrary extinguishment by executive arms of government in Australia and also by state legislatures (by virtue of section 109 of the Constitution), effectively extending existing protections to apply equally to native title. The RDA has been successfully asserted against state legislation and executive acts on a number of occasions, including efforts by the Queensland Government to derail the proceedings in the *Mabo* case itself.<sup>53</sup>

While the NTA is a harsh and unjust legal doctrine, there are significant acts affecting the enjoyment of native title that are awaiting compensation claims. Furthermore, a significant part of the NTA considers how native title groups will be consulted and compensated in the future. This unrealized compensation bill implicitly influences native title negotiations and the political and legal positioning of the state and federal governments. Many states maintain high thresholds to accept proof of claims to native title and seek additional assurances of access to land for future development.

Unlike other former British colonies, Australia lacks a formal mechanism for the negotiation of comprehensive agreements or treaties between the government and Indigenous peoples, and does not provide protection for such agreements in a way similar to that provided by section 35 of the *Constitution Act 1982* (Can). There has been considerable debate in Australia about the introduction of constitutional mechanisms that would recognize the historical and political status of Aboriginal and Torres Strait Islander peoples, create a legal framework for agreement-making, and protect rights that are vulnerable to abrogation.<sup>54</sup> The absence of a constitutional framework for the recognition of Aboriginal rights, and title in particular, has been a key contributor to the lack of protection of even recognized native title rights and interests.

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51 McNeil, *supra* note 49.

52 *Mabo v Queensland [No 1]*, (1988), 166 CLR 186.

53 *Ibid.*

54 Australian Institute of Aboriginal Torres Strait Islander Studies, *Submission to the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (Canberra: Submission Australian Institute of Aboriginal Torres Strait Islander Studies, 2011) at 15, online: <<http://www.aiatsis.gov.au/ntru/docs/2011constitutionalrecognition.pdf>>.

## A tier of government or a private interest?

While Australia's law recognizes the distinctive laws and customs of Aboriginal and Torres Strait Islander peoples, this recognition does not capture Indigenous forms of governance. Unlike Canada, Australia lacks a strong public law framework that explicitly addresses the relationship between its Indigenous peoples and the state. In both Australian and Canadian contexts, political discourse has considered measures to include Indigenous governance structures. In the 1980s the Australian Law Reform Commission (ALRC) formally considered the possibility of including Indigenous forms of governance in the recognition of what was then described as Aboriginal customary law.<sup>55</sup> Governance was viewed as a crucial element in restoring Indigenous institutions that were essential to maintaining unique identities, thought traditions, and ways of being.<sup>56</sup> Subsequent Royal Commissions have echoed these same sentiments regarding the interlinkages between self-determination and social dysfunction and poor socio-economic outcomes within Australia's Indigenous communities.<sup>57</sup>

However, despite having to establish a continuing system of law and custom acknowledged and observed by the Indigenous group in order to prove native title,<sup>58</sup> neither the Courts nor the Legislature have substantially acknowledged the public nature of native title recognition thus far. Rather, Australia treats native title as private property interest, represented through corporate rather than governmental institutions, as the prescribed forms of governance under the NTA are responses to property concerns rather than exercises of jurisdiction.

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55 Austl, Commonwealth, Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (ALRC Report No 31) (Sydney: Australian Government Publishing Service, 1986). Regarding the Canadian context, Burrows notes that there is a strong connection between Indigenous government and Indigenous law and that the recognition of Indigenous laws and customs is interlinked with concepts of self-determination: John Burrows, *Indigenous Legal Traditions in Canada* Report for the Law Commission of Canada (Ottawa: Law Commission of Canada, 2006).

56 Austl, Commonwealth, Commission of Inquiry into Poverty, *Law and Poverty in Australia Second Main Report* (Canberra: Australian Government Publishing Service, 1975) which notes "[T]he causes are connected with the political subjugation and alienation of Aboriginals and the destruction, over many years, of Aboriginal culture, identity and dignity" at 288.

57 Austl, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* by Commissioner the Honourable D J O'Dea, vol 1 (Canberra: Australian Government Publishing Service, 1991).

58 *Mabo*, *supra* note 6 at para 68 (Brennan J).

By contrast, the Canadian Supreme Court decision of *Delgamuukw v British Columbia* in 1997<sup>59</sup> and the subsequent decision of *Campbell v British Columbia (Campbell)* have hinted at the need to recognize the right of self-government.<sup>60</sup> In particular, the decision of *Campbell* discussed the constitutional validity of governance arrangements under the Nisga's Final Agreement and found that section 35 of the Canadian Constitution does protect Aboriginal self-government.<sup>61</sup> Referring to the judgment of *Delgamuukw*, the Court noted:

The right to determine the appropriate use of the land to which an aboriginal nation holds title is inextricably bound up with that title. First, it is "aboriginal law" which is part of the source of aboriginal title. Second, the right to decide how to use that land is also a part of the right.<sup>62</sup>

This emerging view has been supported at the policy level. The Canadian Royal Commission on Aboriginal Peoples (RCAP) described Aboriginal peoples as a "third order of government." In 1995, the Canadian Government released the first Federal Policy Guide implementing the inherent right to self-government. Although the guide does not displace existing treaties and recent self-government agreements, it provided a comprehensive framework for negotiation, implementation, and financial arrangements to ascertain the self-government rights of Aboriginal peoples.<sup>63</sup>

The recognition of native title in Australia implies recognition of an extant society for the purposes of establishing claims to rights and interests.<sup>64</sup> The recognition and rationalization of forms of Indigenous governance underpin the success of measures to enable the expression of Indigenous authority and autonomy. Australia has not fully resolved the subsequent question of responsibility to recognize the institutional structures and processes involved in the effective articulation of Indigenous forms of governance. Notwithstanding these findings and the comparative jurisprudence, the Australian High Court

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59 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.

60 *Campbell v British Columbia (Attorney-General)*, 2000 BCSC 1123, 189 DLR (4th) 333. The concept of "self-government" was rejected by the Supreme Court because it was framed in general terms but returned to trial for determination.

61 These governance arrangements are detailed in: *Nisga'a Final Agreement Act*, SBC 1999, c 2 and *Nisga'a Final Agreement Act*, SC 2000, c 7.

62 *Supra* note 60. This decision has not been affirmed or challenged in higher courts.

63 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Indian and Northern Affairs Canada, 1996).

64 The elements required to prove native title are articulated under section 223 of the NTA. For further discussion on this point see: Will Sanders, *Towards an Indigenous order of Australian government: Rethinking self-determination as Indigenous affairs policy* (Canberra: CAEPR Discussion Paper No 230/2002, 2002), online: <[http://caepr.anu.edu.au/sites/default/files/Publications/DP/2002\\_DP230.pdf](http://caepr.anu.edu.au/sites/default/files/Publications/DP/2002_DP230.pdf)>.



has articulated a view of native title that denies any “parallel law making authority” inherent in the Indigenous peoples.<sup>65</sup>

Under the NTA, once native title has been determined Indigenous groups must establish a native title corporation to hold or manage the recognized rights. In the native title context the legal interests of native title groups in Australia are articulated through their corporate entities — Registered Native Title Bodies Corporate (RNTBCs).<sup>66</sup> As a consequence, legal recognition of interests in land has not translated into the robust institutions and policies required to support the full realisation of these legal gains, in the sense that recognition of native title does not necessarily create a sphere of authority and autonomy in which Indigenous self-government can be enjoyed. Unsurprisingly, the recognition achieved through native title falls short of the expectations and aspirations of the Indigenous peoples. Confusion over the role and scope of recognized native title rights and interests has led to the institutional marginalisation of native title corporations in the governing of Indigenous territories.

Nevertheless, within formal structures of recognition important cultural institutions for decision-making can be given space such that Indigenous laws and social structures can operate with authority. The process of claiming and receiving recognition can reinvigorate Indigenous governance institutions.<sup>67</sup> For example, traditional laws and customs are often an important aspect of the composition of native title corporations. These laws and customs define the composition of the native title group and may flow through to the group’s relationship with the corporation and the decision-making processes. At the same time, however, native title corporations are products of the colonial system, governed by the NTA and the incorporating legislation, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). As such, native title corporations sit *between* forms of governance, requiring appropriate structural support and flexibility to function as a mechanism of decolonization rather than a new form of colonization.

Native title is unclear about the intersection of Indigenous and non-Indigenous legal institutions. The authority of these corporate structures, while legally recognized, have yet to be negotiated with and between Australia’s

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<sup>65</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria*, [2002] HCA 58, 214 CLR 422.

<sup>66</sup> They are commonly known as Prescribed Bodies Corporate (PBCs). The NTA contains both terms to describe the requirement to establish the body. We will refer to them here as native title corporations.

<sup>67</sup> Alexander Reilly, “A Constitutional Framework for Indigenous Governance” (2006) 28 Sydney L Rev 403.

federal and state governments. Moreover, the federal structure of Australian sovereignty and governmental authority has worked against such a renegotiation and has provided an excuse for inaction regarding practical policy implementation. In any event, native title corporations have not realized the potential to provide this space. This legal indeterminacy is not approached through concepts of self-determination and institutional agency but rather through inherently vulnerable and ever-diminishing private rights and interests. Coupled with the lack of state and federal government policies and initiatives to respond to and accommodate recognition of native title, competition between Indigenous and non-Indigenous governance contributes significantly to the marginalization of native title corporations.

### **The emergence of native title as a “sector” on the political landscape**

Despite the obstacles to recognition, native title now covers 20 per cent of Australia’s total land mass.<sup>68</sup> These native title lands are managed by over 100 native title corporations which differ in terms of types and form of land-holdings, aspirations, levels of capacity, and support. There are a further 443 claimant applications still outstanding, potentially contributing to the growth of a native title corporate “sector.”<sup>69</sup> These corporations’ holdings of land interests are sometimes augmented by small and large scale settlement or compensation funds and additional corporate structures to manage them. All levels of government have a significant interest not only in the mechanics of native title recognition but the future capacity of native title corporations as the key negotiators regarding native title lands. With so many outstanding claims, the extent of native lands already determined and the growing sector of Indigenous native title holders have received inadequate attention and support.<sup>70</sup> On the policy level, this question has been largely unresolved despite emerging repeatedly in various forums.<sup>71</sup>

In 2001, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund recommended that na-

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68 Austl, Commonwealth, National Native Title Tribunal, *Determinations of Native Title* (27 March 2013), online: <[http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Quarterly%20Maps/Determinations\\_map.pdf](http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Quarterly%20Maps/Determinations_map.pdf)>.

69 *Ibid.*

70 Toni Bauman & Tran Tran, *First National Prescribed Bodies Corporate Meeting: issues and outcomes, Canberra, 11-13 April 2007* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007).

71 *Ibid.*

tive title corporations “receive adequate funding to perform their statutory functions and that they receive appropriate training to meet their statutory duties.”<sup>72</sup> Similarly, in 2002, research on the funding issue recommended direct funding, either via representative bodies or through a regional support model.<sup>73</sup> Neither of these early calls for funding were actioned. A joint departmental steering committee developed the 2005 *Report on the Structures and Processes of Prescribed Bodies Corporate*, which recognized that, aside from access to funding, native title corporations also need be able to recover costs<sup>74</sup> (for example, through mandatory consultations for land development activities) and have greater flexibility in their governance arrangements.<sup>75</sup> However, despite these calls, over the past two decades state and federal governments have disavowed responsibility for resourcing native title corporations post-determination, resulting in a constitutional impasse. The states claim that the NTA framework is a Commonwealth creation and as such should be maintained by the Commonwealth. The Commonwealth argues that native title once recognized is primarily a land-management matter and as such is the responsibility of the states. In this deadlock, native title corporations were expected to develop autonomy as community organizations with the capacity to compete for and acquit their land-management functions within the revolving grant culture of community organizations.<sup>76</sup> The failure of the private sector is evident, with approximately 70 per cent of RNTBCs currently receiving

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72 Austl, Commonwealth, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Effectiveness of the National Native Title Tribunal in fulfilment of the Committee's duties pursuant to subparagraph 206(d) (i) of the Native Title Act 1993* (Canberra: Australian Government Publishing Service, 2003).

73 Austl, Commonwealth, Office of the Registrar of Aboriginal Corporations, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act: Final Report of the Review of the Aboriginal Councils and Associations Act 1976 (Cth)*, by Corrs Chambers Westgarth Lawyers with Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senator Brennan Rashid (Canberra: Australian Government Publishing Service, 2002 (the Rashid report)).

74 *The Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011(Cth)* enable RNTBCs to charge a fee for costs incurred in providing certain services and set out a procedure for the Registrar of Indigenous Corporations to review decisions to charge such fees. See also *Native Title (Technical Amendment) Act 2007 (Cth)*.

75 FaHCSIA “Guidelines for the support of PBCs” provides for “emergency” funding for basic administrative assistance through NTRBs: Austl, Commonwealth, Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), *Guidelines for the support of PBCs* (Canberra: Australian Government Publishing Service, 2009), online: <<http://www.aiatsis.gov.au/ntru/docs/researchthemes/pbc/Guidelines2009.pdf>>.

76 Native title corporations also exist within a complex “Indigenous sector” of Aboriginal corporations that have formed to fulfil community service functions in many remote Aboriginal communities. According to Tim Rowse, the “Indigenous sector is of fundamental importance in contemporary Indigenous affairs.” Yet he also notes the lack of policy and funding support for Indigenous corporations. These corporations are relevant in terms of holding land titles, providing representation, ensuring service delivery, and as a means to generate economic income: *supra* note 26 at 101.

no income.<sup>77</sup> To this end, the Federal Government has initiated a further review to examine the emerging issues of sustainable and functional native title corporations.<sup>78</sup>

The lack of development of native title corporations is consistent with the general malaise of the Indigenous corporate sector.<sup>79</sup> Limited support for native title corporations is compounded by limited awareness of how social relations have been formalized by the NTA and the related incorporation legislation. In some instances native title corporations exist merely as a formality for native title transactions mediated through non-Indigenous advisors. This effective lack of agency severely diminishes the cultural authority of Indigenous governance. For Indigenous peoples, there is a dilemma of dependence and independence in arguments for and against government funding as a support for native title activities that could provide support to Indigenous governance institutions. This is an ongoing challenge for native groups in Australia in the absence of comprehensive settlements that provide a sustainable funding base independent of non-Indigenous government.

While there has been a marked movement toward more comprehensive settlements of native title claims in some jurisdictions, most notably Victoria, the vast majority of determinations do not contain provisions for ongoing sustainable governance. Furthermore, while there remains a significant unrealized compensation bill for past extinguishment, the 1975 cut-off for compensable acts limits the overall redress of past wrongs. As a result, many Indigenous groups will rely on economic activities or government grants to provide resources for their future development.

## **Negotiating development on native title lands in the private sphere**

By managing the institutional architecture surrounding the NTA, the Federal Government has a large impact on the operation of native title corporations. Through the NTA, the Federal Government has established “processes” for the protection of native title, known as the “future acts regime.” The future

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77 Deloitte Access Economics, *Review of Native Title Organizations: Discussion Paper* (June 2013), at 15-16, online: <[https://www.deloitteaccessconomics.com.au/uploads/File/DAE\\_NTOR%20Discussion%20Paper.pdf](https://www.deloitteaccessconomics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf)>.

78 “Native Title Organisations Review,” online: Department of Families, Housing, Community Services and Indigenous Affairs <<http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/native-title-organisations-review-0>>.

79 Sullivan, *supra* note 25.

acts regime regulates activities that may influence native title rights and interests such as infrastructure development and land management. The NTA makes it illegal for a government or private party to engage in an activity that may impair native title rights without complying with the requirements of the future act regime. Depending on the severity of the impact, the NTA may require that the native title holders be notified or consulted. One of the statutory functions of native title corporations is dealing with access requests and processing “future acts” — activities that would affect or diminish native title rights and interests, such as mining exploration or the building of infrastructure. However, as a vestige of colonialism, the NTA does not give the native title holders the right to refuse permission for an act to proceed.

The inclusion of a “non-extinguishment principle” provides for most acts to pass without any permanent legal extinguishment. Through the future acts regime and the non-extinguishment principle, the Crown’s duty to consult is effectively delegated to private companies, further entrenching native title in the private sphere. While statutory royalties and taxes flow to the federal and state governments, native title groups must rely on negotiating a share of the development against a backdrop of compulsion.<sup>80</sup> Native title groups do not have the right to cease negotiations or to choose with whom they do business. Should negotiations falter,<sup>81</sup> parties will default to arbitration, which historically has usually guaranteed that the proposed development will go ahead.<sup>82</sup> Indeed, the current tenure maps still refer to native title lands as “unallocated crown land” (ideally awaiting a more productive use) rather than recognizing the underlying Indigenous native title rights and interests that form a burden on the Crown’s qualified title.

Since the legal recognition of native title, state governments’ fear of the potential for native title to deliver land and self-government to Indigenous peoples has been replaced by a greater driving force to settle Indigenous resource claims through the private sphere. According to David Ritter:

The early years of the native title system can be seen as a struggle over the depth and breadth of what would be recognized. What subsequently took place in the mid to late nineties — the transition to “agreement making” as the hegemonically accepted

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80 Tony Corbett & Ciaran O’Faircheallaigh, “Unmasking Native Title: The National Native Title Tribunal’s Application of the NTA’s Arbitration Provisions” (2006) 33:1 UWA L Rev 153.

81 The NTA contains a requirement of “good faith” in negotiations (although this has been less than effective in prompting the Federal Government to introduce amendments to clarify the requirements of good faith negotiations): *Native Title Amendment Bill 2012* (Cth).

82 *Supra* note 80 at 153.

way of resolving native title matters — was not a product of slow awakening, but the consequence of protracted and multidimensional legal and political tussle.<sup>83</sup>

Parallel to the protracted development of native title corporations are increasing calls to enable capital accumulation on Indigenous lands to develop an economic base. This policy shift has reframed native title as a critical means of “expanding commercial and economic opportunities.”<sup>84</sup> While a few native title groups have been successful in securing income through leveraging mining and water development on traditional lands, others who want to preserve or manage their traditional lands have limited resources to pursue their native title aspirations. This system draws attention away from the majority of small and struggling native title corporations to the minority who have successfully leveraged royalties and other benefits from mining or large scale development.<sup>85</sup> Focus has shifted to “optimising the benefits of native title payments” and “maximising outcomes from native title benefits” without recognizing whether this model of private sector development is consistent with the development aspirations of the Indigenous peoples.<sup>86</sup>

At the same time, a narrow characterisation of Indigenous interests constrains many native title corporations, largely excluding them from economic and political rights, with a number of determinations of native title limiting native title rights to personal, communal, ceremonial, and non-commercial areas. The High Court has conceded that the meaning of native title is still open:

Even if difficulties about the meaning of the word “property” were resolved, it would be wrong to start consideration of a claim under the Act for determination of native title from an a priori assumption that the only rights and interests with which the Act is concerned are rights and interests of a kind which the common law would

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83 David Ritter, “Hypothesising social native title” in Lisa Strelein, ed, *Dialogue about land justice: papers from the National Native Title Conference* (Canberra: Aboriginal Studies Press, 2010) 115 at 116.

84 Austl, Commonwealth, Attorney General’s Department, “*Terms of reference*” *Joint Working Group on Indigenous Land Settlements* (Canberra: Australian Government Publishing Service, online: <[http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-JWILS+Terms+of+Reference+06.11.08.pdf/\\$file/JWILS+Terms+of+Reference+06.11.08.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-JWILS+Terms+of+Reference+06.11.08.pdf/$file/JWILS+Terms+of+Reference+06.11.08.pdf)>).

85 Former Commonwealth Attorney General Robert McClelland announced at the Native Title Conference that the native title system should be committed to “real outcomes”: Hon Robert McClelland MP, Commonwealth (Austl), *Keynote Address* (Paper presented at the Native Title Conference: Spirit of country, land, water, life, Melbourne Cricket Ground, 3-5 June 2009). See also *supra* note 83.

86 Marcia Langton, “Native title, poverty and economic development” (The Mabo Lecture delivered at the People, Place, Power, Native title conference, Canberra, 3 June 2010).

traditionally classify as rights of property or interests in property. That is not to say, however, that native title rights and interests may not have such characteristics. The question is where to begin the inquiry.<sup>87</sup>

The High Court rejected the broader reading of the sui generis native title adopted in *Delgamuukw*, in which the unique nature of native title was considered a source of strength. In reaching its decision, the High Court noted that a broader construction of native title from *Delgamuukw* was wrongly assumed to rely on the “different circumstances” occasioned by rights thought to arise from, rather than being recognized by, the *Constitution Act 1982* (Can). Instead, Australian law uses the uniqueness of native title to justify an “inherent vulnerability” in the title that undermines its recognition and robustness.<sup>88</sup>

The narrow interpretation of native title rights and interests forces discussion to fit within the constraints of the law or engage within political processes to force the legal and institutional arrangements surrounding it to change. If we view the incoherence of native title against its rationale and purpose as transitional justice in a decolonizing methodology, we see a retreat from justice. The power relationships established in the formative years of nation building persist as Indigenous people continue to be effectively dispossessed incrementally as non-Indigenous agents identify new uses for traditional lands. Furthermore, a lack of administrative responsibility for native title corporations and the subsequent policy vacuum created by the perceived uncertainties of native title law has hampered the operation of native title corporations within native title communities. The dividing lines created to administer native title corporations vary by state, by degree of capacity for negotiation, by the level of commercial and development interest on native title lands, and by policy pressure and fashion. These factors have influenced the way in which state government representatives have sought to characterize their policy and funding relationships with native title.

## **Competing governance arrangements**

In Australia’s constitutional framework, state governments also have legislative responsibility for local government. Despite the fact that native title, in theory, recognizes rights that predate colonization, in reality native title recognition occurs against a backdrop of other, sometimes competing, forms of

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<sup>87</sup> *Commonwealth v Yarmirr*, [2001] HCA 56 at para 14 (Gleeson CJ and Gaudron, Gummow, Hayne JJ), 208 CLR 1.

<sup>88</sup> *Fejo and Mills v Northern Territory and Oilnet (NT) Pty Ltd*, [1998] HCA 58, 195 CLR 96.

representation. The most inextricable are those created through Aboriginal Community Council or local Shire models of community representation supported by state government agencies and funding. While some states have introduced forms of local Indigenous government, the establishment of these governing bodies is not consistent across the country and in some circumstances competes with the interests of traditional owners of territories in which Indigenous communities reside.

As discussed earlier, statutory forms of Indigenous local government pre-date the recognition of native title and are recognized based on different criteria. As such, overlapping land tenures are effectively “held” for the benefit of differing forms of Indigenous group composition, creating not only internal conflict over “ownership” and control over tenures but also competition over the resources to manage these tenures.

Currently, the Federal Government has limited influence on the extent to which the distribution of programs responds to the needs of Indigenous people throughout different regions, as most service provisions are under state government control.<sup>89</sup> Moreover, successive intervening government policies also further complicate the delivery and payment of services.

There are practical and costly implications of this model of Indigenous administration, especially where a form of “welfare colonisation” supports uncoordinated and short-term governance structures. Yawuru leader Peter Yu explains:

The whole structure of government in the Kimberley is chaotic and confusing to Aboriginal people who have to deal with approximately forty separate government agencies. Not only does this put enormous pressure on their daily lives, but the services these agencies provide are not meeting basic needs. This is a wastely expenditure of public resources which does little to change peoples’ lives for the better but, instead, perpetuates a huge bureaucratic monster which provides employment for hundreds of non-Aboriginal people.<sup>90</sup>

Native title holders not only have statutory responsibilities for the management of their recognized native title lands but also have aspirations to pursue broader social objectives within the context of asserting Indigenous forms

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89 Austl, Commonwealth, Australian Government Commonwealth Grants Commission, *Indigenous Funding Inquiry: Final Report* Commonwealth Grants Commission (Canberra: Australian Government Publishing Service, 2001), online: <<http://www.cgc.gov.au/index.php/inquiries/other-inquiries/53-2001-indigenous-funding-inquiry>>.

90 Peter Yu, “Aboriginal Peoples, Federalism and Self-Determination” (1994) 13:1 *Soc Alternatives* 19.



of governance. Governance in this sense refers to traditional laws and customs as well as the ability of native title holders to make decisions about their recognized land holdings.<sup>91</sup>

Native title is not only a legal right or interest but also the expression of Indigenous relations to territories and the underlying systems of ethics and reciprocal responsibilities that underpin these relationships. Often, once native title has been determined, Indigenous groups seek to capitalize on land-management opportunities through conservation funding and initiatives that align with their priorities and interests in caring for country.<sup>92</sup> These synergies between land management and native title priorities have refocused attention on funding for activities linked to conservation priorities. However, these programs are limited in scope and do not necessarily provide a contemporary form of expressing Indigenous decision-making powers over their territories. For instance, while cultural stories related to the importance and significance of water are recognized in water planning instruments, policy decisions do not take into account the underlying laws and legal traditions defining Indigenous relationships to water.

Engaging with the unique ways in which Indigenous priorities are expressed is central for developing governance structures that enable greater Indigenous participation in managing their traditional lands. Stephen Cornell and Joseph Kalt have found that natural, human, and financial resources are not the keys to development; rather, development is a political matter, requiring sound institutional foundations, strategic thinking, and informed action.<sup>93</sup> In the Australian context, Janet Hunt and Diane Smith describe Indigenous governance as a developmental issue, requiring holistic policies recognizing the social environment, local cultural capital, and a whole-com-

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91 Reilly, *supra* note 67 at 435. Reilly also refers (at 407) to governance as:

[D] ecisions Indigenous communities make individually or collectively about how they might govern themselves regardless of formal rights. Indigenous governance describes the way Indigenous peoples observe and practice their own laws independently of any obligations they have under mainstream law. It is also about how Indigenous people negotiate the intersection of their own laws and rights and obligations they have under the central legal system.

92 Caring for country can be understood as “Indigenous peoples’ approaches to land and water management, although with some central distinctions”: Jessica Weir, Claire Stacey, and Kara Youngetob, “The Benefits Associated with Caring for Country,” Literature review, prepared for the Department of Sustainability, Environment, Water, Population and Communities (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2011) at 1.

93 Stephen Cornell and Joseph P Kalt, “Sovereignty and Nation-Building: The Development Challenge in Indian Country Today” (1998) 22:3 *Am Indian Cult Res J* 187.

munity framework.<sup>94</sup> The double bind of increasingly restricted interpretations of the economic potential of native title and the heavy reliance of native title bodies on state and federal government funding affects the ability of native title holders to assert their unique forms of governance. The robustness of Indigenous forms of governance is contingent upon independence derived from adequate resources. The inverse is also true: the greater the dependency of Indigenous forms of governance on ad hoc funding, the weaker native title corporations will become.

Canadian literature has widely discussed the extension of reasoning on Indigenous rights and interests to governance.<sup>95</sup> Temporal elements between traditional Indigenous laws and customs and those that have inevitably arisen with colonial institutions have limited the protection of Indigenous governance. The Australian context recognizes precolonial powers through native title and Indigenous authority is reflected in the construction of native title corporations as a modern institutionalized model for the transmission of Indigenous forms of governance and land management.<sup>96</sup>

The connections between constitutional recognition and governance have been discussed more recently in the Australian context in the consideration of Indigenous constitutional recognition. In the Australian context, Reilly has argued that Australia's constitutional arrangements already require engagement with Indigenous forms of governance, in a form of federalism that supports the "governance capabilities with Indigenous communities."<sup>97</sup> However, this engagement is not actioned in any meaningful way. Proposals have been mooted for an agreement-making provision in the Commonwealth Constitution that gives clear jurisdictional authority to the Federal Government to enter into comprehensive agreements.

Native title holders' formal land management, community development, and governance responsibilities are often misinterpreted in these interactions. Poor translations related to caring for lands and water and maintaining social and cultural relationships through song and ceremony determine how resulting institutions enabling Indigenous governance are defined. These transla-

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94 Janet Hunt & Diane Smith, *Building Indigenous community governance in Australia: Preliminary research findings*, CAEPR Working Paper 31 (Canberra: Centre for Aboriginal Economic Policy Research, 2006) at 68.

95 Borrows extends arguments for the recognition of Aboriginal title and the rights and interests flowing from this recognition to preexisting and contemporary forms of governance: John Borrows, "Tracking trajectories: Aboriginal governance as an Aboriginal right" (2005) 38:2 UBC L Rev 285.

96 *Ibid.*

97 Reilly, *supra* note 67.

tions become replicated in the ways in which Indigenous and non-Indigenous people negotiate the building of infrastructure, land access, and other community development on native title lands. Unfortunately, the unique relationships that Indigenous people have to their land and waters, as expressed through native title, are considered to be “last in line,” excluding the priorities and aspirations of native title holders in the design, regulation, governance, and funding for native title corporations. The retrospective recognition of native title has required other legal regimes, planning processes, and organizations to adapt to native title corporations as a new governance institution. However, this process has been protracted, creating legal frustrations hampering the work of native title corporations. Given the context-based and community-driven nature of self-determination, the legal and social marginalization of native title combined with its core governance role creates the potential for diminishing the concept of native title as it was originally asserted and recognized in the *Mabo* decision.

Initially designed to ensure that native title rights and interests are protected from extinguishment by state legislative acts, native title interests are not given due consideration in state funding and legislative decisions in areas such as town planning and water management. As such, Indigenous forms of governance are only articulated within these contexts in the form of “consultation” as opposed to meaningful engagement with pre-existing, emerging, and continuing governance structures. This temporal bind is institutionalised on a fundamental level through a form of “uncooperative” federalism that treats responsibility for engagement with Indigenous forms of governance (and the laws and customs underpinning them) as purely symbolic or only having legal clout when translated through mainstream legal structures and institutions. This essential compromise of Indigenous governance is illustrated throughout Australia.<sup>98</sup>

## **Conclusion**

*Mabo* continues to challenge perceptions of land justice and provides a mechanism for realising equity through the recognition of Indigenous relationships to land and waters. The interactions between these unique identities and other legal regimes remain unclear, as they involve not only issues of law but also of perception. Despite this uncertainty, however, a clear difference exists between enabling participation and consultation and actually transferring the regulation of administration of Indigenous held land and services to the rec-

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<sup>98</sup> *Ibid.*

ognized traditional owners. While the issue of capacity is imperative, broader questions of the ways in which Indigenous forms of governance are supported and engaged will also need to be addressed. While formal constitutional recognition has been put forward as one form of necessary and important engagement between Indigenous people and the state, practical considerations tied with the complicated impact of federalism on the native title system (and how native title rights and interests are treated) should also become a necessary priority for creating a decolonized space. Central to this project will be the critical engagement with Indigenous forms of governance, in their pre-existing modes but also as they have evolved in response to introduced institutions and ideas.

These steps require time and investment in developing solutions appropriate to each group, resolving how native title and the variety of historical institutions and processes can be structured to reflect the needs of Indigenous peoples' governance into the future. Native title is capable of looking back to remedy past injustices and create a present space for Indigenous governance to be recognized. However, further work is needed to provide a sustainable future for Indigenous self-government, as the negotiation of Indigenous self-government agreements with native title groups will not be sufficient. A multitude of government and corporate bodies may be needed in these discussions.

Decolonization has been defined as the process of handing over governance to the Indigenous peoples within a colony.<sup>99</sup> There is a reluctance to discuss Indigenous governance in Australia in the context of decolonization, as it threatens our sense of national identity and legitimacy. However as Veracini has argued, "treating settler colonialism as separate from decolonisation enables a disavowal of many colonisers and their practices, allowing for 'colonialism' to be perceived as something generally perpetrated by someone else."<sup>100</sup> The existing formal structures for the exercise and recognition of native title are complicit in excluding Indigenous forms of governance. The extent to which the Federal Government has control over the implementation of native title is based on parallel state government regimes for land and water management. These regimes have formed to the exclusion of Indigenous interests and will need to renegotiate how native title presently interacts with existing formal structures.

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<sup>99</sup> Tuhiwai Smith, *supra* note 16.

<sup>100</sup> Veracini, *supra* note 10 at para 4.

While industry and government have recognized that native title corporations are not necessarily meeting their needs for access and responsiveness, there is little focus on the appropriate role of native title holding institutions not only as service providers but also as community governance institutions based on recognized Indigenous laws and customs. In Australia, native title is thus viewed, not as a “tier of government” but rather as merely another private interest group.

We do not argue here that recognition by the colonial state is determinative of the continued existence of Indigenous governance. On the contrary, the ability of Aboriginal and Torres Strait Islander peoples to prove native title is testament to the survival of Indigenous socio-legal structures. The decolonization strategy is to create a space for Indigenous governance to continue to “breathe.” Facilitating this space means not only recognizing a sphere of autonomy and authority, but also not fuelling unnecessary competition among institutions or overburdening them with administration.

To emphasize the need to create a sphere of authority and autonomy for Indigenous governance does not deny the need to continue decolonizing the institutions of colonial government. If we accept, as Wolfe suggests, that colonization in settler societies is a process rather than an event, then so too is decolonization. The challenge of decolonization strategies for Aboriginal and Torres Strait Islander peoples in their negotiations with Australian governments is that it is an ongoing project. Moreover, Indigenous peoples must negotiate with a state at war with itself, battling the imperative to colonize with the moral understanding of the need to decolonize. To this conflict constitutional reform can provide a partial answer, by making some of the rules more immutable and evening the playing field a little more. The ebbs and flows of political negotiations still remain at the heart of discussions about the place of Indigenous peoples in the governance of their territories.

*Building Indigenous Governance from Native Title*