25 years of native title – Mabo and beyond

By Margret Carstens*

Abstract: This essay examines more than a quarter of a century of land rights developments, following the 1992 'Mabo (No 2)' decision by the High Court of Australia. Mabo (No 2) abolished the principle of terra nullius and marked the 'recognition' of Aboriginal and Torres Strait Islander peoples' connection to land and waters. In 1993, it led to the introduction of the Native Title Act (NTA). In this article, I will discuss the central challenges that still need to be addressed in Australian land rights law and related politics. Special focus is given to the Australian Law Reform Commission's (ALRC) review of the NTA (2015). This report addresses the main issues of connection (to land) requirements, the recognition and scope of native title rights and interests, and the NTA's authorisation and joinder provisions with regard to claimants, potential claimants and respondents. This essay will further investigate whether the 2017 changes to the NTA, concerning Indigenous Land Use Agreements, clarifiy native title law adequately, whether native title claimants have now lost rights and whether existing agreements are safe. Although the NTA is a limited, legalistic and inadequate scheme, I consider a reliance on agreement-making under the NTA. Existing agreements I assess as safe, however, I reject the discriminatory extinguishment of native title rights in land use agreements and demand their signature by all registered Native Title Claimants. Reforms to the extensive extinguishment regime and concerning legal technicalities built into the claims process would be urgently needed. Finally, I conclude that the ALRC recommendations concerning the NTA should be heeded, for the ALRC determinations would recognise, protect, and facilitate the claiming of native title appropriately. The ALRC authorisation recommendations would give more attention to how indigenous groups could effectively manage their determined native title rights. However, I demand an equitable process within the law governing connection requirements. In June 2017, the famous *Mabo v Queensland (No 2)* decision[1] ('Mabo (No 2)') on Aboriginal land rights delivered by the Australian High Court 25 years ago caused extensive celebrations and new hope among indigenous Australians and their supporters. However, Mabo (No 2) also produced protests, once again, from politicians, business leaders, journalists and academics.[2] This controversial landmark ruling continues to influence law and politics in Australia to a great extent. Therefore,

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1 *Mabo v. Queensland* (No. 2) (1992) HCA 23; (1992) 175 CLR 1. *Cf. Mabo v. Queensland* (1988) 166 CLR 186 ("*Mabo (No 1)"*).

it is time to look back at the past years since the Mabo decision was delived to outline the challenges that remain – and to consider what has been achieved.[3]

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A. Introduction

It has been more than 25 years since the Australian High Court upheld the claim led by the Meriam man Eddie 'Koiki' Mabo, along with David Passi and James Rice, that they held rights over the Murray Islands. In 1992, this High Court 'Mabo' ruling set a legal precedent for land rights across Australia. It acknowledged the existence of Aboriginal law and custom prior to British colonisation and the establishment of the Australian nation.

In the Mabo Case, the existing Australian legal system was challenged from two perspectives: On the assumption that Aboriginal and Torres Strait Islander peoples had no concept of land ownership before the arrival of British colonisers in 1788 (terra nullius) and that sovereignty delivered complete ownership of all land in the new colony to the Crown, abolishing any existing rights that may have existed previously.[4]

On 3 June 1992, the central question of whether territorial sovereignty of the Crown is synonymous to unlimited property in the land of the Australian colony was rejected. Moreover, the High Court of Australia (HCA) overruled the doctrine of *terra nullius.*[5]

Nevertheless, the High Court's Mabo decision accepted the British assertion of sovereignty in 1788, and held that from that time there was only one sovereign power and one system of law in Australia.[6]

2 *Bryan Keon-Cohen* (AM, QC, junior counsel to Ron Castan, AM, QC, throughout the Mabo litigation, 1982–1992), Reforms are urgently needed to the native title scheme, The Sydney Morning Harald, 1 June 2017, http://www.smh.com.au/comment/reforms-are-urgently-needed-to-the-native-title-scheme-20170531-gwh770.html (last accessed on 1 December 2018).

3 Cf. for example the extensive investigation in *Bauman, Tony / Glick, Lydia* (eds), The Limits of Change: Mabo and Native Title 20 Years on, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Research Publications, Canberra, Australia, May 2012, 444 pp.; concerning Mabo (2) and the first years following Mabo (No 2) see e.g. *Margret Carstens*, Indigene Land- und Selbstbestimmungsrechte in Australien und Kanada unter besonderer Berücksichtigung des internationalen Rechts, jur. Dissertation, Universität Bremen 1999, Egelsbach/ Frankfurt a.M./ München/ New York März 2000, pp. 1–404, 183–223 and *Margret Carstens*, From Native Title to Self-Determination? Indigenous Rights in Australia and Canada. A legal comparison, Law & Anthropology 11 (2001), pp. 249–282.

4 Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Mabo case https://aiatsis.gov.au/explore/articles/mabo-case (last accessed on 14 May 2019).

5 *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1, 29; cf. *Milirrpum v. Nabalco* (1971) 17 FLR 141, 183 (SCNT), famous as *Gove* decision. Here, for the first time, the existence of a 'native title' was considered, but rejected (cf. *Carstens* , note 3, p. 250).

6 *Justice Brennan / Terra Nullius,* (1992) 175 CLR 1, cf. http://www.mabonativetitle.com/xk_BrennanJusticeGera.shtml (last accessed on 15 May 2019), pp. 32–33.

By rejecting the opinion that Australia is *terra nullius*, the HCA accepted the influence of relevant international human rights standards.[7] In this context, the increasing influence of international law dealing with the protection of fundamental minority rights was distinctive.[8]

The Meriam people were entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands´. Mabo (No 2) marked the 'recognition' of Aboriginal people and Torres Strait Islanders' connection to land and waters.[9] The majority of the HCA found that the common law of Australia recognises a form of native title to land. Pre-existing rights and interests in land survived colonisation and still survive today. Prerequisite is that the people have maintained their connection with the land and that their title has not been extinguished by legislation or any action of the executive arm of the government inconsistent with that title.[10] Neither the establishment of the colonies nor Queensland's 1879 annexation of the Murray Islands extinguished the Meriam people's native title.[11]

In 1993, Mabo (No 2) led to the introduction of the federal Native Title Act (NTA), which commenced on 1 January 1994.[12] The much discussed NTA attempted to codify the implications of the decision and set out a legislative regime under which Australia's Indigenous people can seek recognition of their native title rights.[13]

To what extent has Australian law been challenged and/ or transformed by the Mabo judgement? This article will give an overview and will focus on the investigation of the central challenges to be adressed in Australian land rights law, in relevant court cases and

7 See *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1, 42 (*Brennan* J); Aboriginal and Torres Strait Social Justice Commissioner, Native Title Report January-June 1994, AGPS Canberra April 1995, p. 52.

8 *Michael Kirby*, The Growing Impact of International Law on Australian Domestic Law (Option 2) – Implications for the Procedure of Ratification and Parliamentary Scrutiny, Australian Law Journal – International Legal Notes, Australia/ NSW (3 November 1997), para. 6.

9 (1992) 175 CLR 1, p. 39 (Brennan J).

10 (1992) 175 CLR 1, pp. 39–40, 41–42, 42–45 (regognition of 'native title'); (1992) 175 CLR 1, pp. 63–64, (1992) 175 CLR 1, 69–70 (Brennan on extinguishment). Cf. http://www.mabonativetitle.com/xk_BrennanJustice Gera.shtml (last accessed on 16 May 2019).

11 Overturning the doctrine of terra nullius: The Mabo case, https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/native-title-research/overturning-doctrine-terra%20nullius-the-mabo-case.pdf (p.2) (last accessed on 14 May 2019).

12 NTA, Vol. 2, no. 110 of 1993. See Australian Government, Federal Register of Legislation, https://www.legislation.gov.au/Details/C2017C00178 (last accessed on 12 May 2019).

13 Native title is defined in s 223 of the NTA as 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.

related politics over recent years. Is the Australian Law Reform Commission (ALRC)'s review of the Native Title Act, Connection to Country (2015)[14] an adequate answer?

The ALRC has taken into account the development of the law, procedure and practice over two decades since the NTA was introduced, as well as the policy and the economic arena in which the native title was implemented. In August 2013, the Attorney-General of Australia requested that the ALRC conduct an inquiry into Commonwealth native title laws and legal frameworks in the following areas:

- connection requirements relating to the recognition and scope of native title rights and interests; and
- any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.[15]

B. Overview – Land rights after Mabo (No 2)

What are the major developments in Australian law after Mabo? What has been achieved and where are the main issues these days?

The Mabo (No 2) decision – that Indigenous Australians, subject to proof, enjoyed traditional rights and interests in their ancestral land pursuant to their customs and traditions, and that British colonisation had not extinguished these rights – opened up a wide range of possible responses by governments, state and federal.

After one and a half years of intensive negotiations, one central response to Mabo (No 2) was the Native Title Act[16] (NTA), introduced by the Keating government. The Native Title Bill 1993 initially had three elements: native title legislation, an Indigenous land acquisition and management fund, and a 'social justice' package[17]. Next to the Indigenous Land Corporation (ILC)[18] and the associated Land Fund, indeed, the social justice package was delivered. Unfortunately, the latter was not implemented.

The NTA, in force since 1994, then clarified to some degree the stakeholders legal positions and established a federal court process to deal with land claims. State legislation, which was deemed invalid by the High Court recognition of Native title in Mabo, now be-

14 Australian Government, Australian Law Reform Commission, Connection to Country: Review of the Native Title Act 1993 (Cth) (ALRC Report 126), 4 June 2015, https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_126_final_report.pdf (last accessed on 15 Mai 2019), pp. 1–392.

15 *ALRC* Report 126, note 5, p. 35.

16 NTA, Vol. 2, no. 110 of 1993. See note 12., Australian Government, Federal Register of Legislation, https://www.legislation.gov.au/Details/C2017C00178 (last accessed on 12 May 2019).

17 Further measures that the Government should consider to address the dispossession of Aboriginal and Torres Strait Islander people as part of its response to the 1992 High Court decision on native title. See *Native Title Social Justice Advisory Committee*, 'Rights, Reform and Recognition', Aboriginal and Torres Strait Islander Commission, Wooden ACT 1995, p. 1.

18 A corporation established to assist Aboriginal and Torres Strait Islander people to acquire and manage land, so as to provide economic, environmental, social or cultural benefits for those people, see Aboriginal and Torres Strait Islander Act 2005 (Cth) s 191B.

came valid. Moreover, a procedure and standards for future native title agreements were introduced.

States followed with their own legislation. The 1994 ACT Native Title Act, the 1994 New South Wales Native Title Act (Act 45 of 1994) and the 1994 South Australian Native Title Act clarified various native title issues, as well as the 1994 Tasmanian Native Title Act (Act 81 of 1994), that clarified and confirmed issues relating to native title. The 1999 (WA) Native Title (State Provisions) Act created the Native Title Commission. Already before the NTA had been in force, the 1993 Queensland Native Title Act (Act 85 of 1993) elucidated various native title issues. The Northern Territory (Confirmation of Titles to Land Request) Act 1993 just confirmed the native title. Due to the Gove decision in 1971[19], in 1976, a legislative answer by the Federal Parliament dealing with aboriginal land rights already had been introduced for the Northern Territory,[20] the Aboriginal Land Rights (NT) Act 1976 Cth. The ALRA is the central Australian legislation that combined traditional aboriginal rights and culture with European institutions and administrative measures.Together with the NSW land rights legislation the ALRA can be seen as the model for the NTA, although compared to the ALRA the NTA is weakened. For example, according to the ALRA, the indigenous consent in mining was necessary until, in 1997, the 'sunset clause' was introduced to the ALRA; there is no veto right in mining in the NTA. The degree of offered native title rights still rests with the additional legislation of the states. This increases the barriers for instance for mining on indigenous land.[21]

In 1998, the NTA was substantially amended by the Howard government and its Ten Point Plan following the Wik decision (*Wik Peoples v. Queensland & Ors)*[22]. While, according to the 1996 Wik verdict, a native title can coexist in some circumstances with pastoral leases – although leasehold overrides native title where rights conflict (*Wik Peoples v. Queensland & Ors)*[23] – 'exclusive possession' may also exist only in certain places such as unallocated or vacant crown land, usually in the north of the continent and in its remote

19 *Milirrpum v. Nabalco* (1971) 17 FLR 141 (SCNT).

20 Aboriginal Land Rights (NT) Act, No. 191 of 1976, Acts of the Parliament of the Cth of Australia 1976, 1619–1664 (ALRA). Necessity of indigenous consent to mining until 'sunset clause' in 1997.

21 *Carstens*, note 3, p. 206. There is no list of native title rights in the NTA and the content of native title is controversial: Only traditional rights or commercial rights included, adapted to indigenous needs? Pro some changes of rights and customs as they are currently observed and recognised: *Mabo v. Queensland* (No. 2) (1992) 175 CLR 61, 70 (Brennan J). In detail concerning the interaction of NTA and state legislation see *Carstens*, note 3, pp. 179–183; 209–211 (copy with author); for legislation in detail see austlii.edu.au.

22 (1996) 187 CLR 1; 141 ALR 129 (HCA), cited as 'Wik'; cf. *Carstens*, note 3, p. 254; in detail: *Carstens*, note 3, p. 214–215.

23 (1996) 187 CLR 1; 141 ALR 129 (HCA). *Wik Peoples v. Queensland* (1996) 187 CLR 131–133; 141 ALR 188–190 (Toohey J.); 141 ALR 129, 279 (Kirby J.): existing native title rights are not necessarily extinguished.

centre.[24] The Wik decision was (and is) of vast significance as about 42 per cent of the Australian land mass is under pastoral lease. Wik resulted in various reactions, amongst others with concerns about the future of the native title process and the viability of many pastoral holdings.[25] Deputy Prime Minister Tim Fischer claimed those changes would validly extinguish native title for thousands of land interests granted by the Crown since 1788. It also restricted the 'future act' regime stopping claimants from negotiating terms with miners on claimed land prior to resolution of the claim. Because sectional interests were prevailing over mainstream interests, Wik has prompted such a vehement political response (Ten-Point-Plan) by the Howard Government. On the twentyfirst anniversary of the Wik Ten-Point-Plan in 2018, it appeard that Aboriginal communities' connection to land still continued to be under pressure by economic interests, e.g. of mining companies.[26]

From 1994 to 2010 indigenous groups made 1556 applications for native title covering 13 per cent of Australia's land mass with 458 of those claims still before the court as of 2010. The success of the legislation has been agreement-making with 470 Indigenous Land Use Agreements (ILUA) signed off by 2010, using native title for purposes like energy facilities, health care centres and gas pipelines. The people of Mer negotiated an ILUA in 2010 to permit the building of a new primary school, roads and services.[27]

Much debated changes of the Native Title Act followed, e.g. in 2009 and 2010 concerning conciliation, Native Title Representative Bodies and proof. The institutional change with the central role of the Federal Court was particularly criticised.[28]

Nevertheless: until the 1st April 2015 a total of 308 native title determinations had accumulated.[29]

The ILC still continues to operate, purchasing properties around the nation, transferring title to indigenous corporations and assisting with their management. Until June 30, 2016,

24 Of this realistic assessment: *Paul Daley*, Mabo 25 years on: let's look at the vast, absurdist fiction this ruling toppled, 2 June 2017, https://www.theguardian.com/australia-news/postcolonial-blog/2017/jun/03/mabo-25-years-on-lets-look-at-the-vast-absurdist-fiction-this-ruling-toppled (last accessed on 14 December 2018).

25 *Brian Stevenson*, The Wik Case, https://www.wikvsqueensland.com/case.html (last accessed on 14 May 2019).

26 *Natalie Cromb*, How did the 10-Point Plan outline our future? 5 July 2018, https://www.sbs.com.au/nitv/article/2017/05/08/how-did-wik-10-point-plan-outline-our-future (last accessed on 16 May 2019).

27 *Derek Barry*, Mabo and 25 years of native title, 16 February 2017, https://woollydays.wordpress.com/2017/02/16/25-years-of-mabo-and-native-title/ (last accessed on 15 December 2018).

28 *Kevin Smith*, The Native Title Amendment Act 2009: Minor amendments or just playing it small and safe? CEO, Queensland South Native Title Services Ltd, Paper delivered at National Indigenous Legal Conference, University of Adelaide 24 Sept. 2009, p. 9; in detail see *Margret Carstens*, Aboriginale Territorialrechte in Australien – Die Native Title-Gesetzgebung 2009/10, Verfassung und Recht in Übersee 43 (2010), pp. 506–514.

29 In detail see *ALRC* Report 126, note 5, p. 90.

the ILC had purchased 252 properties, totalling about 5.86 million hectares, and granted 191 to indigenous corporations.[30]

Although some parts of the Australian continent are now covered by a combination of land rights (federal and state parliamentary social justice responses, e.g. in Gove) and exclusive and non-exclusive native title, establishing a native title is often extremely difficult and divisive. Sometimes claimants have competing interests owing to the required proof of 'continuous' connection to traditional lands from which Aboriginal peoples were eradicated or otherwise dispossessed of during occupation and colonisation.[31]

Often, Indigenous Land Use Agreements (ILUAs) – agreements that set out arrangements between native title holders and others regarding land access and use – are an alternative. Until 2017, a total of 1172 ILUAs have been concluded under the NTA's 'right to negotiate' regime.[32] Moreover, regional claims become increasingly important, where several claimant groups join together, as one 'cultural block' to make one claim to one large, consolidated area.

One example is the Akiba (regional) claim[33], finalised in the High Court in 2013, where 13 Islander communities joined together and successfully claimed a large area of seas in the Torres Strait. 'Akiba' also decided, for the first time since 1992, that native title rights can include rights to commercially exploit the land, seas and resources.

Another current example is a regional claim concerning the Noongar people in the south-west of Western Australia. Here, six groups joined together and negotiated a resolution with many respondents by way of six ILUAs and a legislated settlement with the Western Australian government. Significant financial and other benefits were involved.[34] Although the Noongar agreement permanently extinguishes the native title claim over 200,000 sq km of southern Western Australia.

The so-called Uluru statement from the Heart was presented by First Nations peoples from around Australia on May 26, 2015. It calls for a Makarrata Commission to supervise a process of agreement-making between governments and First Nations as well as truth-telling about Aboriginal history. It also requests constitutional reforms to empower Aboriginal people and take a rightful place in their own country, furthermore the establishment of a First Nations Voice enshrined in the Constitution.[35]

30 *Keon-Cohen*, note 2.

31 *Daley*, note 24.

32 *Keon-Cohen*, note 2.

33 Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013) HCA 33; 250 CLR 209 (7 August 2013).

34 *Keon-Cohen*, note 2.

35 See Final Report of the Referendum Council, 30 June 2017, https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf, (last accessed on 14 May 2019), p. 36 (contitutional issue, proposals concerning the Voice to the Parliament); One year since the Uluru Statement called for Voice, Treaty & Truth, https://www.humanrights.gov.au/about/news/one-year-uluru-statement-called-voice-treaty-truth; in detail: *Gabrielle Appleby /*

In 2017, a significant Federal Court (FC) ruling (*McGlade v Native Title Registrar*[36]) ('McGlade')[37] against the $1.3 billion Noongar agreement[38] was held. McGlade was brought by several Noongar people from the south west of Western Australia. The decision related to longstanding claims by the Noongar people of Western Australia. The claims had apparently been settled with the WA government, through entry into a complex series of agreements known collectively as the South West Native Title Settlement. The resulting ILUAs were challenged on the basis that not *all* of the representatives had entered into the ILUAs. Until February 2017, it had been accepted that agreement by a majority of the representatives would suffice to bind the whole group to the ILUA. Now the FC was asked to confirm that the Native Title Act required all registered native title claimants (RNTC) to sign the ILUA. The Court found the Native Title Registrar does not have the jurisdiction to register an ILUA unless it is signed by all RNTC who are 'named applicants'.[39] As the decision had a massive flow-on effect to similar deals, including Adani's $16bn coal project in Queensland, McGlade led to a bill introduced by the government in February 2017 to clarify aspects of native title law.[40] Already in June 2017, both houses of Parliament passed the hasty amendments to the NTA to annul the effects of the February 2017 Federal Court full bench decision.[41] Now, consequently, area Indigenous Land Use Agreements (ILUA) can be registered without requiring every member of the RNTC to be a party to the agree-

Megan Davis, The Uluru Statement and the Promises of Truth, Australian Historical Studies 49:4 (2018), pp. 501–509, https://www.tandfonline.com/doi/full/10.1080/1031461X.2018.1523838 (last accessed on 14 May 2019).

36 (2017) FCAFC 10, 340 ALR 419.

37 This Full Federal Court ruling, handed down on 2 February 2017, overturned the previous 'Bygrave decision' (*QGC Pty Ltd v Bygrave and Others* (No 2) (2010) 189 FCR 412; (2010) FCA 1019), which had found that it was not necessary for all members of a registered native title claimant to sign.

38 Cf. *Harry Hobbs*, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', AUSPUBLAW (24 October 2018), https://auspublaw.org/2018/10/the-noongar-settlement-two-lessons-for-treaty-making-in-australia/ (last accessed on 17 May 2019).

39 FC in *McGlade*, note 20; in detail see *Hannah McGlade,* The McGlade Case: A Noongar History of Land, Social Justice and Activism, Australian Feminist Law Journal 43 (2) (2017), pp. 185–210; for the political context see *Babs McHugh*, Federal Court full bench decision on WA Indigenous Land Use Agreement has nationwide ramifications, 7 February 2017, http://www.abc.net.au/news/rural/2017-02-08/turmoil-over-indigenous-land-use-ruling/8250952 (last accessed on 18 December 2018).

40 Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5821 (last accessed on 29 November 2018); vgl. *Stephen Fitzpatrick*, 25 years after Mabo, indigenous remain 'asset rich and dirt poor', The Australian, 8 March 2017, http://www.theaustralian.com.au/national-affairs/indigenous/25-years-after-mabo-indigenous-remain-asset-rich-and-dirt-poor/news-story/366c79a833429027f593141442738d47 (last accessed on 18 December 2018).

41 The Conversation, The last line of defence: Indigeneous rights and Andani's deal, https://theconversation.com/the-last-line-of-defence-indigenous-rights-and-adanis-land-deal-79561, 19 June 2017 (last accessed on 18 December 2018).

ment. This creates a higher barrier for claimant groups, in securing the agreement of every named party. In addition, the effect of the McGlade decision is that existing ILUAs may be challenged if not all representatives had signed the agreement. This not only creates uncertainty for existing traditional owner groups, but as well for those who thought they had complied with the NTA in relation to their activities on native title land.[42]

Meanwhile, on 21 February 2019, the Commonwealth government introduced the Native Title Legislation Amendment Bill 2019 (Cth) to amend the Native Title Act 1993 and the Corporations (Aboriginal and Torres Strait Islander) Act 2006. This bill introduced significant amendments that might affect, amongst other things, the extinguishment of native title, the role of the applicant in a native title claim, and the creation of indigenous land use agreements.[43] The Native Title Legislation Amendment Bill 2019 (Cth) intends to improve native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes, including to: give greater flexibility to native title claim groups to set their internal processes; streamline and improve native title claims resolution and agreement-making; allow historical extinguishment over areas of national and state park to be disregarded where the parties agree; increase the transparency and accountability of registered native title bodies corporate; and create new pathways to address native title-related disputes arising following a native title determination.[44]

According to the Bill of 2019, Section 31, agreements potentially affected by the Full Federal Court's decision in McGlade (2017) will have their validity confirmed. The Bill also includes a 'fail safe' provision to ensure that if the Bill effects the acquisition of property of a person other than on just terms (within the meaning of paragraph 51(xxxi) of the Constitution), that person would be entitled to compensation. However, on 11 April 2019, the bill lapsed at dissolution in the House of Representatives and will no longer be proceeding.

42 *Kate Galloway*, The trouble with the McGlade amendments to the Native Title Act, 13 April 2017, https://kategalloway.net/2017/04/13/the-trouble-with-the-mcglade-amendments-to-the-native-title-act/, last accessed on 14 May 2019.

43 See in detail: Australian Govenment, Native Title Reforms, Fact Sheet No. 1, Overview of Reforms, https://www.ag.gov.au/Consultations/Documents/native-title/native-title-reforms-factsheet-1.pdf (last accessed on 21 May 2019); Native Title Legislation Amendment Bill 2019, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6304, (last accessed on 21 May 2019). The Bill before Parliament contained several additional provisions to the exposure draft bill. These are summarised e.g in: *Lindsay Taylor/ Elaine Yeo*, Native Title Legislation Amendment Bill 2019, https://www.lindsaytaylorlawyers.com.au/in_focus/native-title-legislation-amendment-bill-2019/ (last accessed on 21 May 2019).

44 Concerning the relevant provisions see in detail: AIATSIS, Native Title Legislation Amendment Bill 2019 (Cth), https://aiatsis.gov.au/ntpd-resource/29485. With a link to the complete text of the bill. This article mainly concentrates on the land rights situation around the 25th anniversary of Mabo (2) and the NTA Amendment Bill 2017.

Finally, a significant decision was handed down on the 13th March 2019: *Griffiths v Northern Territory of Australia*[45] ('Timber Creek'). In this ruling, the Australian High Court ordered the Government of the Northern Territory to pay $2.53 million AUD (1.78 million USD) in compensation to the Ngaliwurru and Nungali peoples for the loss of native title in the town of Timber Creek, south of Darwin.[46] Although in 2006, the Ngaliwurru and Nungali peoples won native title to parts of their land in Timber Creek, in 2006 it was also found that these rights had been lost in other areas where government infrastructure had been built. In 2011, the Ngaliwurru and Nungali peoples sued the Northern Territory Government for the loss of these rights.

In the 2019 Timber Creek High Court ruling, compensation for cultural and spiritual loss formed a significant part of the judgment: The HCA noted that the relationship of Aboriginal peoples to their land encompasses all of the country, and not just sacred sites. The relationship of the Ngaliwurru and Nungali peoples with their land could be seen as a spiritual and metaphysical one that was not capable of assessment on an individual small allotment basis. Thus, any damage to a single part of their land, such as a bridge through the so-called dingo dreaming, could be seen to affect the entirety.[47]

In Timber Creek, the High Court addressed for the first time the approach to be taken concerning the calculation of compensation for native title claims. The case involved the economic valuation of native title rights and interests principally under the NTA 1993 (Cth). It includes important issues of principle, implying the application of well-established rules as to the valuation of compulsorily acquired land as well as the loss and impairment of traditional rights and interests of Aboriginals in Australia.[48]

Last but not least should be mentioned that since 29th May 2019, Ken Wyatt is Australia's first Indigenous Australian to hold the position as Minister of Indigenous Affairs.

45 *Griffiths v Northern Territory of Australia* (2019) HCA 7 (http://eresources.hcourt.gov.au/downloadPdf/2019/HCA/7, 147 pages, last accessed on 12 May 2019).

46 *Griffiths v Northern Territory of Australia* (2019) HCA 7, 1 (order); cf. International Work Group on Indigenous Affairs (IWGIA), Landmark ruling provides compensation to indigenous peoples in Australia, 30 April 2019, https://www.iwgia.org/en/australia/3336-compensation-australian-indigenous-peoples (last accessed on 12 May 2019).

47 *Griffiths v Northern Territory of Australia* (2019) HCA 7, 84; cf. IWGIA, Landmark ruling provides compensation to indigenous peoples in Australia, 30 April 2019.

48 As stated by the court, they 'punched holes in what could be likened to a single large painting', p.86. See *Griffiths v Northern Territory of Australia* (2019) HCA 7, pp. 6, 30, 35, 86; cf. *Barry Lewin*, https://www.slmcorporate.com.au/uncategorized/timber-creek-compensation-matter/ (last accessed on 14 May 2019).

C. Evaluation

According to the Indigenous Professor Shaun Ewen, the Mabo (No 2) decision underlines, that 'setting right past wrongs is an important part of the healing process'.[49] Positively, Ewen[50] emphasises that the Mabo decision is very significant 'in a legal sense'. He also convincingly argues that a Truth Commission tasked with discovering and revealing past wrongdoing by the government and proportionate compensation are other important steps towards reconciliation.

The historic Uluru statement from the Heart finally demands for a truth commission. In calling for a Makarrata Commission, Aboriginal and Torres Strait Islander peoples require an overdue body that could maintain political momentum for treaty and resolve legal complications that arise within the Australian federation. Nevertheless, convincingly objected by Hobbs[51], in prioritising a constitutionally enshrined 'Voice to the Federal Parliament'[52], Aboriginal and Torres Strait Islander peoples disclose their concerns that the design of a Makarrata Commission may not (fully) reflect their aspirations.

The proposed amendments in the new Native Title Legislation Amendment Bill 2019 (Cth) – although lapsed at dissolution and no longer in proceeding – would be the most substantive since the 'Wik' amendments in 1998. Currently, the amendments need to be discussed once again and then have to be analysed in detail. There are serious concerns: The Senate Standing Committee for the Scrutiny of Bills criticised the bill's retrospective validation of indigenous land use agreements and other agreements; the Parliamentary Joint Committee on Human Rights raised concerns with the effect of the Native Title Legislation Amendment Bill 2019 on human rights, such as the right to culture and the right to privacy.[53]

In relation to compensation, the Timber Creek High Court verdict of March 2019 is highly significant, for it not only – finally – adressed the issue of compensation for lost native title rights, but also because the Court was willing to give a financial value to the 'cultural loss' and 'spiritual harm' sustained by the claimants. The ruling has its origin in Mabo (No 2), and later in the Wik decision, because these decisions clarified that Australia's common law acknowledges and protects the traditional land rights of Aboriginal and Torres Strait Islander peoples. As a consequence of these important decisions, the legislative structure for the recognition, protection and compensation of native title was provided by the

49 *Shaun Ewen*, cited by *Catriona May*, Marking Mabo: How has Native Title changed since the landmark ruling?, University of Melbourne, https://pursuit.unimelb.edu.au/articles/marking-mabo-how-has-native-title-changed-since-the-landmark-ruling (last accessed on 19 December 2018).

50 *Ewen*, note 49.

51 Cf. *Harry Hobbs*, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', AUSPUBLAW (24 October 2018), note 38.

52 *Megan Davis,* 'Voice, Treaty, Truth', The Monthly (July 2018), https://www.themonthly.com.au/issue/2018/july/1530367200/megan-davis/voice-treaty-truth (last accessed 19 June 2019).

53 Native Title Legislation Amendment Bill 2019, https://www.lindsaytaylorlawyers.com.au/in_focus/native-title-legislation-amendment-bill-2019 (conclusion), note 42.

Native Title Act 1993 (Cth). Timber Creek is the most important decision since Mabo (No 2) and Wik: It can be called a landmark decision for native title compensation in Australia, for as for example the IWGIA stated, 'it has set a precedent that will influence and spur future claims for compensation by groups of Aboriginal and Torres Strait Islander peoples across Australia'.[54] Despite the fact, that under the NTA, a right of compensation is provided for the 'impairment and extinguishment' of native title rights in a (limited) range of circumstances,[55] until now, there had been no clear guidance on what this meant in practice. Timber Creek has changed this and will surely have a huge impact, for Commonwealth and State Governments could be liable for billions of dollars in native title compensation, since the Timber Creek case covers 23 sq km which is only 0.001 per cent of the 2.3 mil. sq km declared native title land.[56] Although the decision provides some guidance about how compensation claims can be resolved, two key issues can be identified that have to be resolved over the coming years. Firstly, the significant reliance on intuition (the role of intuition), secondly, the relationship between the NTA's compensation scheme and the constitutional requirement for 'just terms' for any acquisitions of property by the Commonwealth ('acquisition on just terms' guarantee in s 51 (xxxi) of the Australian Constitution).[57]

However, despite these rather positive land rights developments, Aboriginal and Torres Strait Islander people still face appalling outcomes in terms of health, education and incarceration rates and it is undeniable that more needs to be done. Injustices and untruths in the statistics have to be fully addressed. Ewen correctly calls Mabo (No 2) an important and foundational step towards improvement in this regard. Lee Godden (Melbourne Law School) even considers the Mabo decision a significant moment in Australia's legal history.[58] It is a central case in Australian constitutional law and legal history. Moreover, the

54 IWGIA, Landmark ruling provides compensation to indigenous peoples in Australia, https://www.iwgia.org/en/australia/3336-compensation-australian-indigenous-peoples (30 April 2019) (last accessed on 15 May 2019).

55 Compensation is dealt with in NTA 1993 (Cth) pt 2 div 5 (Determination of compensation for acts affecting native title). See NTA: s 50(2) Bodies that may determine compensation (… Federal Court ...), s 61(1) Native title and compensation applications (... table ... of applications that may be made …), cf. ALRC Report 126, p. 212; 51 (Criteria for determining compensation), 53 (*Just terms* compensation). The right to compensation arises in respect of past acts (acts that affect native title which generally occurred *before* 1 January 1994) and future acts (acts that affect native title that generally occur *after* 1 January 1994, for example grant of a mining lease.

56 Cf. *Barry Lewin*, https://www.slmcorporate.com.au/uncategorized/timber-creek-compensation-matter/ (last accessed on 16 May 2019).

57 Of this opinion and in detail see e.g. *Aaron Moss/ William Isdale*, Where to Next? Native Title Compensation following Timber Creek, AUSPUBLAW (03 April 2019), https://auspublaw.org/2019/04/where-to-next?-native-title-compensation-following-timber-creek (last accessed on 16 May 2019).

58 *Lee Godden*, in the following cited by *Catriona May*, 'Marking Mabo: How has Native Title changed since the landmark ruling?', University of Melbourne, https://pursuit.unimelb.edu.au/articles/marking-mabo-how-has-native-title-changed-since-the-landmark-ruling (last accessed on 19 December 2018).

Mabo decision surely created a policy environment for agreement making.[59] However, a central problem of Mabo (No 2) is that the HCA was limited in its ability to provide redress for Aboriginal claimants by the need to assimilate the concept of Native title within the existing legal regime and understanding of sovereignty, as stated in Justice Brennan's judgment in Mabo (No 2)[60]. Furthermore, despite the determination that native title rights and interests continued to exist in Australia, Mabo (No 2) itself provided little guidance to parties concerning what these rights consisted of or how they were to be determined. In addition, when the Native Title Act was introduced in 1994, parties were uncertain about what the legislation required, most notably proof of native title. Subsequent case law has tried to clarify this from 1996 until 2017.[61] It finally provided practitioners with the necessary guidance. Specific cases like Yorta Yorta (2002)[62] have been influential in settling the law in relation to native title after the introduction of the federal Native Title Act.[63]

What have been the central challenges concerning Aboriginal land rights in recent years?

The Akiba decision of 2013 for the first time not only marks the recognition of commercial native title rights by the Australian High Court, but it creates an opportunity to promote discussions about integrating sea rights, Indigenous governance and commercial development across Australia.[64] This High Court judgement was overdue, because commercial fishing rights are essential to the Indigenous people of Australia, because they are traditional rights and integral to the economic development of Indigenous communities.[65] However, with Butterly, the judgment does not require either the Commonwealth or Queensland to reallocate commercial fishing licences, nor does it mandate that native title claimants should be granted a certain number of licences. The only immediate impact is that rights in relation to commercial fishing will now be subject to the limited future act processes in the Native Title Act 1993 (Cth). Butterly suggests correctly that such issues should be negotiat-

59 *June Oscar*, National native Title Conference 2017 – Mabo lecture, http://aiatsis.gov.au/gallery/video/june-oscar-ao-mabo-lecture-2017 (last accessed on 20 December 2018).

60 *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1, 32–33 (J. Brennan). Until today, these limits of the native title legal framework can be seen as one reason why Aboriginal peoples are seeking alternative means of redress (eg. treaty, self-determination).

61 *National Native Title Tribunal (NNTT)*, 25 Years of Native Title Recognition, Key Native Title Cases, http:// http://www.nntt.gov.au/Documents/Key%20native%20title%20cases.pdf (last accessed 15 May 2019) and http://www.nativetitle25.gov.au/key-native-title-cases/ (last accessed on 22 November 2018).

62 *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 on connection and traditional law and custom (the Yorta Yorta test).

63 In detail see the relevant cases in NNTT, note 60 (cases from 1996 until 2017).

64 *TimeBase Caselaw*. Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013) HCA 33, 8 August 2013; *Lauren Butterly*, Unfinished business in the Straits. Indigenous Law Bulletin 8(8) (September October 2013), pp. 3–6.

65 Also of this opinion: Aboriginal and Torres Strait Islander Social Justice Commissioner *Mick Gooda*, Australian Human Rights Commission, Sydney 2013.

ed rather than viewed in the narrow legal framework of native title. Furthermore, he convincingly emphasises recognition of the already active Indigenous commercial fishery in the Torres Strait. The practical questions raised by this judgement definitely present a valuable opportunity to open up discussions and also to showcase the successful commercial fishing by traditional owners that is already taking place in the Torres Strait.[66]

Another decision, the Noongar judgement, delivered by the Federal Court, presents one of the central challenges of the year 2017, last but not least because it provoked a necessary and intense debate about the NTA Amendment Bill 2017. According to the Australian Law Reform Commission (ALRC) and many others a general reform of the Native Title Act is needed even more today.

The ALRC Report[67] convincingly underlines, that the NTA is invested with many aspirations for the future of Australia's Indigenous peoples and has brought opportunities and challenges for wider Australian society. However, the law regarding the recognition and scope of a native title would raise fundamental questions about the nature of native title within the Australian legal system. 'Authorisation procedures'[68] would be of concern to claiming group members and for third parties.[69] Moreover, as the ALRC already emphasised in 2015, the party and joinder provisions would reflect a critical point in the interaction between Aboriginal people and Torres Strait Islanders, the courts and third parties in the native title claims process.[70]

Consequently, the ALRC offered 30 valuable recommendations for a required reform concerning connection requirements, nature and content of native title, authorisation provisions, joinder and party provisions, and claims resolution.[71]

Having led the ALRC's review of the NTA, 'Connection to Country', tabled in Federal Parliament on Mabo Day in 2015 (but without notice), it is coherent that Godden highlights some urgent challenges in detail: Because the Mabo decision has been narrowed by subsequent cases, she calls extinguishment the 'flip side of recognition', and stresses, that the legal foundation is still tied to the colonial past.

66 *Butterly*, note 63, p.3; Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013) HCA 33, https://www.escr-net.org/caselaw/2014/akiba-behalf-torres-strait-regional-seas-claim-group-v-commonwealth-australia-2013-hca (last accessed on 11 December 2018).

67 ALRC Report 126, note 5, p. 40.

68 An application for a determination of native title can only be made by an applicant who has been authorised by all the people who hold the native title claimed (Native Title Act 1993 (Cth) s 61).

69 See Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, note 40.

70 In detail see ALRC Report 126, note 5, pp. 37–40.

71 See ALRC Report 126, note 5, p.18 – 25 (summary of recommendations).

I. Connection requirements

In the decade after the Mabo decision a series of High Court decisions tested the implementation of the Native Title legislation. In Goddens[72] view this series of decisions very much narrowed the potential of Mabo (No 2) and the Native Title legislation, with perhaps the best example being the central 'claims test' – the proof of connection that an Aboriginal claimant needs to bring (cf. s 223(1) NTA). She emphasises that the evidence thresholds became much more difficult to establish, for an indigenous group must show (according to the test) they existed as a society prior to the assertion of British sovereignty and demonstrate that they have continued to practice law and custom through to the present day, and that it has been substantially uninterrupted. In my opinion, this definitely is a huge evidentiary task and for some groups a more than difficult threshold to overcome. While Godden says it is possible for groups that were forcibly moved off their land to succeed in a claim (where they can demonstrate they have continued to maintain spiritual connection), she correctly believes the test works unfairly for those Indigenous peoples most adversely affected by white settlement. This way, those people most affected, have the least ability to claim. Other authors underline this, e.g. Daley[73], who strongly emphasises that it is easier for those whose connection to traditional land was less disrupted by invasion to assert their rights. This would lead to conflicts over land between them and others who were more impacted and, therefore, find it harder to establish continuous connection. I agree, for while *terra nullius* was proved to be a ridiculous fiction, degrees of colonial disruption – or invasion – will now largely determine the success of native title claims.

The ALRC Report[74] specifies, that 'rigorous testing of connection requirements is (…) important to secure transparency for governments and third parties, to ensure the integrity of the claims system and to facilitate identification of the appropriate members of a claim group.' Therefore, the ALRC's recommends an amendment to s 223(1) NTA to 'acknowledge that linking between the pre-sovereign laws and customs and their modern counterpart is necessary. Carefully targeted recommendations are directed to reducing the impact of the connection requirements where they have introduced more stringency than may be evident from the current definition of native title in s 223(1) NTA.'[75] The capacity for traditional laws to adapt, evolve and develop and that requirements for continued acknowledgment of laws and customs not be unduly onerous, is correctly seen as 'an important means of addressing the challenge of change in Aboriginal and Torres Strait Islander communities, while still reflecting the significance of the recognition of traditional connection to land and

72 *Godden*, note 57.

73 *Daley*, note 24.

74 ALRC Report 126, note 8, pp. 25, 60. Concerning 223 (1) NTA see details in ALRC Report 126, ebid., pp. 73–79.

75 ALRC Report 126, note 8, pp. 17, 25, 76.

waters.[76] This sounds adequate and realistic: the demand for a traditional connection to land and waters must concider the ligitimate changes that occur over time in indigenous communities. The right to development includes this.

Furthermore, ALRC Report 126[77] states with good reasons, that "regardless of the underlying jurisprudential position, the practical outcome has been that there are new matters requiring evidence, certainly beyond those indicated either by the judgments in Mabo (No 2) or the strict words of s 223(1). Several submissions to this Inquiry noted the difficulties for all parties that these additional requirements have imposed."

II. Extinguishment

The Mabo decision was vitally important as it recognised the presence of Indigenous people within Australia at the point of British colonisation. Nevertheless, May[78] emphasises correctly, that within the Native Title model, 'recognition' comes with a set of sovereign legal powers. This sovereign power implicates the power to extinguish Indigenous land rights. Godden[79] convincinly stresses, that 'Mabo affirmed these powers of extinguishment in respect of many parts of Australia, so the ruling precluded claims where the impacts of colonisation had been perhaps the most devastating, for example in urban, east coast Australia. There remains an inequity built into the very foundations of the Mabo model.' In 1996, the famous so called Wik decision[80] was the most controversial case brought under the Native Title Act, for the Australian High Court found that native title could co-exist with pastoral leases. That the High Court has progressively taken a more restrictive approach to native title following the backlash against the Wik decision has been analysed in detail.[81] As the Wik decision caused a controversy the former Howard Government unfortunately responded with legislation to greatly extend the extinguishment regime. Godden states with reason, that because of the Government's Ten Point Plan and the Native Title Amendment Act 1998 120 agreements and permits that had fallen into doubt because of the Wik decision were reinstated. However, as argued by Keon-Cohen, following the Wik decision, the Howard government's amendments to the Native Title Act, allowing massive extinguishment, further entrenched the defects of the NTA as a limited, excessively legalistic and inadequate scheme.

76 ALRC Report 126, note 8, pp. 25; cf. In detail page 78 (2.87 – 2.89) and (continuative) p. 66, note 56.

77 ALRC Report 126, note 8, p. 74.

78 *May*, note 49.

79 *Godden*, note 57.

80 *Wik Peoples v Queensland* (1996) 187 CLR 1; 141 ALR 129 (HCA). Cf. *Carstens*, note 3, pp. 213–216; *Carstens,* note 3, pp. 262, 266 (in comparison with Canada).

81 Eg. by *Brennan* and *Strelein, see Sean Brennan*, Native Title in the High Court of Australia a Decade after Mabo, Public Law Review 14 (209) (2003) and *Lisa Strelein*, Compromised Jurisprudence: Native Title Cases Since Mabo, Aboriginal Studies Press, 2nd ed, Canberra 2009.

Following the first decade of major High Court cases, there definitely was a turn to stronger reliance on agreement-making under the Native Title Act. One has to agree with May, that this pattern has continued to the present day and that there is a growing number of Native Title determinations across Australia, with many claims luckily resolved by consent between the parties.[82] Godden [83] points out correctly, that almost one third of Australia is now subject to some form of Indigenous land tenure or rights (including Native Title) or statutory land rights. Many of these areas have some form of co-existence or co-management agreement for land and waters between Indigenous and non-Indigenous groups. In this regard, Australia compares favourably with other common law countries with an indigenous populations. Many of these outcomes would not have been possible without the Mabo decision.[84]

The Native Title Legislation Amendment Bill 2019 finally proposes an extension of the circumstances in which historical extinguishment can be disregarded to areas of national, state or territory parks, and certain pastoral leases (s 47C NTA). Here, further discussion is needed.

III. (Party to an) agreement, consultation and consent

The Federal Court Noongar judgement (McGlade) posed a major challenge, for it created uncertainty in relation to a lot of older Indigenous Land Use Agreements/ILUA's (and the Noongar agreement itself) and forced amendments. Although the Federal Court has applied what it believed the Native Title Act says, there was a question over the validity of those agreements that may have been registered but not signed by all named applicants. Even an appeal to the High Court was found likely.[85] It is understandable that an ILUA has to be signed by all registered Native Title Claimants who are 'named applicants'. For according to Zillmann[86], not just pastoralists, miners and local governments want those (prior) agreements enforced, but quite legitimately some native title groups want that as well who are

82 *May*, note 49.

83 *Godden*, note 57.

84 E.g. in Belize (Supreme Court, 2007) and in 2001 in Nicaragua ('*Awas Tingni decision*': recognition of indigenous territorial rights in Latin America), cf. *Margret Carstens*, Indigene Territorialrechte in Lateinamerika nach dem Awas Tingni-Urteil von 2001 – Folgeurteile und -berichte im Interamerikanischen Menschenrechtssystem, Verfassung und Recht in Übersee 3 (2009), pp. 399–424, p. 420 (note 92: The Supreme Court of Belize A.D. 2007, Consolidated Claims, Claim No. 171 of 2007 (*Cal/Teul vs. Attorney General of Belize and Minister of Natural Resources and Environment*) & Claim No. 172 of 2007 (*Coy/ Caal vs. Att. Gen. of Belize and Minister of Natural Resources and Environment*); note 5: *Mayagna (Sumo) Community of Awas Tingni v Nicaragua* IACtHR Series C 79 (2001); 10 IHRR 758 (2003)).

85 *McHugh*, note 39.

86 Cf. *Ben Zillmann*, cited in *McHugh* (7. February 2017), note 39.

receiving negotiated benefits from registered ILUAs. As Galloway[87] correctly summarises, there are parties that seek a procedural amendment to ensure the protection of existing interests, but also those parties that have a substantive interest at stake in the amendments.

Hence, it was very likely that a 'legislative fix' – that then took place in June 2017 – occured to retrospectively give some certainty. As expected, the NTA changes of 2017 – that area Indigenous Land Use Agreements can be registered without requiring every member of the RNTC to be a party to the agreement – definitely weaken the NTA to suit mining companies.[88] On the other hand, these changes now ensure that pre-existing ILUAs are still enforceable. That is why even the Australian Labor Party supported parts of the government's bill.[89]

Nevertheless there are aspects of the NTA amendments that certainly water down the traditional decision making processes.[90] Consequently, the 2017 NTA amendments are still controversial. Indigenous people criticise, with good reason, that the Native Title Act requires nationwide consultation (of traditional owners) and review, if NTA changes occur, because this federal legislation exists to serve traditional owners.[91] The NTA does not exist to facilitate the investment of global corporations. It exists to safeguard the interests of Aboriginal and Torres Strait Islander peoples, and its provisions, including the way in which they are enacted, must honour that purpose.[92]

The Australian Greens party explicitly stated a lack of consultation with Aboriginal and Torres Strait Islander communities regarding the NTA bill 2017. According to the 'United Nations Declaration on the Rights of Indigenous Peoples'[93] and with it's right to free prior informed consent in mind it is consequent that traditional owners demand the government to (at least) allow more time for consideration by Indigenous groups affected by proposed changes to native title law.

87 *Kate Galloway*, The trouble with the McGlade amendments to the Native Title Act, 13 April 2017, https://kategalloway.net/2017/04/13/the-trouble-with-the-mcglade-amendments-to-the-native-title-act/ (last accessed on 15 May 2019).

88 *Nakari Thorpe*, Native title being watered down for big mining, say Traditional Owners, NITV News, 3 March 2017, http://www.sbs.com.au/nitv/nitv-news/article/2017/03/02/native-title-being-watered-down-big-mining-say-traditional-owners?cid=inbody:mabo-lawyer-changes-to-native-title-act-could-enable-projects-like-the-adani-mine (last accessed on 13 November 2018).

89 Cf. *The Guardian*, Labor to support native title changes to protect mining deals, https://www.theguardian.com/australia-news/2017/mar/21/labor-to-support-native-title-changes-to-protect-mining-deals (last accessed on 14 November 2018).

90 Cf. Australian Greens respond to Native Title Amendment Bill 2017, 20 March 2017, https://greens.org.au/news/wa/australian-greens-respond-native-title-amendment-bill-2017 (last accessed on 15 November 2018).

91 *Ella Archibald-Binge*, Calls for Native Title Amendment Bill to be scrapped to allow consultation, NITV, 12 June 2017, http://www.sbs.com.au/nitv/nitv-news/article/2017/06/12/calls-native-title-amendment-bill-be-scrapped-allow-consultation (last accessed on 15 November 2018).

92 *Kate Galloway*, note 83, l.c.

93 Adopted by the UN General Assembly the 13th September 2007.

At this stage, it is interesting to note that the proposed (but currently refused) amendments of the Native Title Legislation Amendment Bill 2019 concerning the role of the applicant (as contained in Schedule 1 of the Native Title Legislation Amendment Bill 2018) would implement recommendations made by the Australian Law Reform Commission in its Connection to Country: Review of the Native Title Act 1993 (Cth) report.[94]

D. Resumee and outlook

Admittedly, a lot has been achieved since Mabo (No 2) held in 1992. As of March 2017, 388 determinations on native title have been made by the Federal Court. 308 of those succeeded, in whole or in part. These successful claims cover not less than about 32 per cent of the Australian land mass.

However, for those involved from the beginning,[95] native title remains a complex terrain, although it is now an established part of the legal and political landscape in Australia. With good reasons, already in 2012, on the 20th anniversary of Mabo, Dodson[96] and others drew into question assumptions about the impact of the High Court's ruling and unresolved questions of justice for Indigenous Australians.

Consenting with Keon-Cohen[97], following strident opposition especially during the first 10 years by respondents, today, native title is a more accepted part of the political and business scenery. Much of the early fears have abated. Thus, over the past decades, many more claims have been negotiated, rather than been forced to trial, delivering savings in cost and effort (but not always time), and many more 'consent' determinations of native title. This more co-operative engagement provides a firmer basis for co-existence on the same land between traditional owners and crown grantees into the future.

It is correct that an important achievement is the negotiation and execution of Indigenous Land Use Agreements between traditional owners and respondents as part of the claims process. These ILUA's deliver a range of outcomes for all sides: for the respondents (e.g. a mining company), secure access to land and utilisation of its resources.[98] ILUA's definitely play an important role in making native title work for all Australians. Although, as argued by Pat Dodson, one has to consider that very often agreements are linked to the

94 *Australian Govenment*, Native Title Reforms, Fact Sheet No. 1, Overview of Reforms, note 42, p. 1. For details on the Native Title Legislation Amendment Bill 2018, Schedule 1, see https://www.ag.gov.au/Consultations/Documents/native-title/exposure-draft-native-title-legislation-amendment-bill-2018.pdf (p.4: authorisation, applicant decision making, replacement of applicant).

95 Cf. autors like *Mick Dosdson* and *Hal Wotten*, in *Bauman/Glick*, note 3, xvii and p. 431.

96 *Michael J. Evans*, citing *Pat Dodson*, Land use deals kill native title, 28 June 2017, https://www.linkedin.com/pulse/land-use-deals-kill-native-title-pat-dodson-michael-j-evans (last accessed on 15 December 2018).

97 *Keon-Cohen*, note 2.

98 *Keon-Cohen*, note 2.

extinguishment of native title.[99] That is why, according to Dodson, lawmakers need to rethink the idea that an agreement for alternative uses of native title land requires extinguishment of native title rights.

Nevertheless, there are recent noteworthy developments including the emergence of regional claims that also provide an obvious and potentially fruitful land-base for pursuing domestic 'treaties' or 'agreements'. This might deliver a measure of self-government to the relevant native title owners. In this sense, an impressive number of 'domestic treaties' already exist. In addition, such 'treaty' discussions are under way with the Victorian and South Australian Governments.[100]

Until now, in accordance with Keon-Cohen[101], although the Native Title Act has delivered valuable results, it still remains a limited, excessively legalistic and consequently an inadequate scheme with it's extensive extinguishment regime and legal technicalities built into the claims process. The act is a negotiated compromise and did not exploit the full potential of the Mabo decision. This was and still is a failure by the Federal Parliament. Much more needs to be done to build on the Mabo decision.

Many problems remain with the native title scheme. Reforms are urgently needed. As argued by the above cited authors, the most glaring failure is the burden of proof imposed upon Indigenous claimants. Among many suggestions for reform, including the overdue reverse of the current onus of proof, are the urgent recommendations contained in the extensive report of the Australian Law Reform Commission, Connection to Country (April 2015). These reforms can be seen as consistent with the spirit of Mabo and the NTA and recognise, protect, and facilitate the claiming of native title. As ALRC Report 126[102] concludes, the Native Title Act is invested with many aspirations for the future of Australia's Indigenous peoples, for it has brought opportunities and challenges for wider Australian society. Native title is seen as 'the capacity to contribute to the improvement of the circumstances of Aboriginal and Torres Strait Islander peoples.' However, the ALRC demands correctly, that if native title is to provide an effective platform for future development, a prerequisite is ensuring an equitable process within the law governing connection requirements. I agree with the ALRC, that there is an urgent need for a longer term perspective. In the future, surely more attention has to be paid to how native title groups can effectively manage their determined native title rights and interests. The ALRC authorisation recommendations are consequently framed in that context.[103]

99 *Michael J. Evans*, citing *Pat Dodson*, note 95.

100 *Keon-Cohen*, note 2.

101 *Keon-Cohen*, note 2.

102 ALRC Report 126, note 5, p. 25.

103 See ALRC Report 126, note 5, p. 26.

Pursuant to Roberts[104], the prime area for reform is the extensive extinguishment regime and legal technicalities built into the claims process. It is a failure that Indigenous communities who have lost their traditional connection to their country due to colonisation, and who thus are most worthy of some land-related redress (e.g. indigenous peoples located along the eastern seaboard) are still cut out of the scheme's benefits.

Furthermore, in 2008, the then Minister for Indigenous Affairs, Jenny Macklin, delivered an address concerning Mabo where she highlighted three very important areas for reform: next to the complex and slow claims processes and the inadequate representation for claimants she also highlighted with good reasons the flow of payments to claimants and native title holders. It is unlikely that the 2017 NTA changes will help the indigenous cause.[105]

Particularly in times where aspects of native title law have been changed because of the Noongar decision, the importance of the ALRC's Report 126 (2015) to improve the NTA in an extensive and adequate way should finally be recognized: Although this report was tabled in the Federal Parliament in June 2015, to date, the government has failed to offer any response, let alone adopt the mentioned, much-needed reforms. This rejection is not understandable. As Australia celebrated 25 years of Mabo in 2017, the demand of Keon-Cohen and others was (and still is) convincing, that this disinterest has to be replaced by action in favour of the Aboriginal peoples of Australia.

According to Williams[106], one legacy of the Mabo case has been to shift the debate back to the political realm. Today, he considers little motivation in the courts to further develop Aboriginal rights, consequently it is no surprise that Aboriginal people are instead seeking justice and political empowerment through constitutional change and negotiated agreements. As Williams puts it, 'the decision has brought about important processes of agreement making, and enabled a new generation of Indigenous leaders to come to the fore.'

It was an important step for the Australian legal system that the Mabo decision recognised the rights of Aboriginal peoples and Torres Strait Islanders to their traditional lands and waters and thereby abolished the notion that, under international law, Australia was 'terra nullius' (the 'land of no-one') at the time of British colonisation.[107] However, as Godden[108] points out, it is still an incomplete step, as parts of the Australian legal foundation as

104 *George Roberts*, 25 years after Mabo decision: Indigenous Native Title still a struggle, ABC, 3 June 2017 (http://www.abc.net.au/news/2017-06-03/25-years-after-mabo-decision:-indigenous-native/8586122 (last accessed on 15 December 2018.

105 Cf. *Derek Barry*, Mabo and 25 years of native title, 16 February 2017, https://woollydays.wordpress.com/2017/02/16/25-years-of-mabo-and-native-title/ (last accessed on 14 May 2019).

106 *George Williams*, The ongoing legacy of the Mabo decision, UNSW Newsroom, Sydney 5 June 2017,https://newsroom.unsw.edu.au/news/business-law/ongoing-legacy-mabo-decision (last accessed on 18 December 2018).

107 *Mabo v. Queensland* (No 2); vgl. *May*, note 49.

108 *Godden*, note 57.

a nation remain tied to the Australian colonial past. Other nations have turned to a truth commission or a process for dealing with past injustice. These approaches have to be explored in Australia. It is time for a truth and reconciliation commission and a treaty with Australia's first peoples as demanded in the Uluru statement from the Heart of 2015. The limits of the native title legal framework – the need in Mabo (No 2) to assimilate the concept of native title within the existing legal regime and understanding of sovereignty – are one reason why in Australia, Aboriginal peoples are seeking alternative means of redress like a treaty or the movement towards indigenous self-determination.

It is certain that institutional reform to empower Indigenous peoples in Australia has to be realised. Australian politics and institutions – constitutional regulations included – need to be adjusted to reality.

Although today, wide areas of Australia are indigenous-owned under various forms of title, many people, particularly in rural and remote communities, still live in third world conditions.[109] After all 20 per cent of indigenous Australians, about 150,000 people, who are living in remote areas, today must be the key focus in regulations to overcome disadvantages. [110]Josefine Cashman, who until recently sat on the Prime Minister's Indigenous Advisory Council, legitimately warns 'the lack of an economy and the lack of infrastructure (…) to support local and regional economies and sustainable remote communities' is putting at stake 'the very future of indigenous Australia'. Godden correctly demands 'to regard the platform of principles of recognition, equality and justice in Mabo as values to be affirmed in seeking to redress widespread disadvantage of Aboriginal peoples and Torres Strait Islanders in Australian society.'[111] Many of the structural problems (such as poor health outcomes that are evident in indigenous communities) continue in spite of the increasing pace of native title resolutions and agreements. The benefits of native title have been uneven across Australia and it does not always deliver culturally appropriate economic benefits for the communities. The implementation of the native title system has been mixed. Improvements in this area are very urgently needed.

Especially in Australia, the 12th anniversary (2019) of one of the most important instruments for the rights of indigenous peoples, the United Nations Declaration on the Rights of Indigenous Peoples, more than ever calls for keeping the promise of the rights of indigenous peoples.[112] Improved land, resource and self-determination rights are strongly required for indigenous Australians. The time is ripe to begin anew.

109 *Josephine Cashman*, cited by *Fitzpatrick*, note 40.

110 The other part of the Aboriginal and Torres Strait Islander population is living in towns and cities and is better able to access mainstream services. *Cashman*, cited by *Fitzpatrick*, note 40.

111 *Godden*, note 57.

112 See in general: *IWGIA*, Newsletter, Kopenhagen, September 2017.