Beyond the Native Title horizon: A multifaceted vision for Indigenous empowerment in contemporary Australia

By *Siddharth Saigal*[*]

Abstract: This article advocates for empowering Australia's Indigenous custodians through innovative legal devices with respect to their traditional lands. This is because Indigenous Australians possess certain rights and duties that are unique to their being. Regrettably, these rights have crystallised into an aging Native Title system inherently characterised by Crown supremacy and Indigenous subservience. In exploring the Native Title machinery through the lens of Australia's colonial legacy, this article illuminates the many injustices in containing a dynamic and complex culture within the unforgiving parameters of this outdated system. Thus, a great inequity exists at the very foundation of Native Title when those most adversely affected by colonial dispossession are inadequately protected. Nevertheless, contemporary legal precedents are increasingly recognised as significant developments in expanding a legal universe rooted in the proscriptive common law tradition. Achieving 'case-by-case' reform is ultimately overshadowed by the financial, emotional and physical burdens placed upon Indigenous litigants. Beyond the Native Title horizon lies an unchartered territory, a place where Indigenous autonomy can coexist within legal systems of land governance. In this innovative spirit, Australian lawmakers are challenged to adopt a co-governance scheme modelled on New Zealand's *Te Awa Tupua Act* to empower Indigenous Australians and dismantle entrenched principles of anthropocentric environmentalism.

***

A. Introduction

> *'We didn't have a clue where we came from… It was drummed into our heads that we were white. I was definitely not told that I was Aboriginal.'*[1]

* Bachelor of Science (Advanced) (Honours I) and Bachelor of Laws Graduate from the University of Sydney, Australia. E-mail: sidsaigal6@gmail.com.
I acknowledge that as a non-Indigenous writer, my opinions, beliefs and position on Native Title may or may not reflect those held by Indigenous Australians. In accordance with COPE Guidelines and my ethical obligation as a researcher, I am reporting that I have no competing interests.

1 *Human Rights and Equal Opportunity Commission*, Commonwealth of Australia, Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families (1997), p. 143.

Empowering humanity's oldest surviving civilisation,[2] in a saga largely characterised by exile, profound loss and cultural genocide remains an ambivalent and contested space in contemporary Australia. With Indigenous youth incarceration rates exceeding the average by twenty-fourfold at present, it is abundantly clear that inflexible and dated mechanisms of empowerment have failed in disrupting an all-familiar cycle of dispossession.[3] What little remains of the cultural, spiritual and legal spheres of the Indigenous human experience is under a renewed threat from a growing inertia towards reforming an aging set of 'one-size-fits-all' legal frameworks. In the context of securing Indigenous land rights, the Native Title system under the *Native Title Act* (the 'NT Act')[4] marks a critical, and perhaps the only juncture in the road to reforming hostile and seemingly unchallengeable principles of the common law. Three decades later, the NT Act has matured into something that is excessively legalistic,[5] painfully slow and inherently characterised by Crown supremacy and Indigenous subservience. Therefore, key decision-makers are challenged to stretch the limits of their legal imagination to reduce the persisting power imbalances.

This article argues that Native Title must be seen as one of the many legal consequences flowing from the common law's recognition of the unique connection between Indigenous Australians and the land and waters of Australia.[6] It follows that any alternative vehicle of empowerment must embrace a model that effectively protects Indigenous land, water and environmental interests on one hand, whilst respecting that the acquisition of sovereignty over Australia cannot be challenged in an Australian municipal court on the other.[7] In exploring one such permutation, this paper will advocate for implementing a co-governance scheme analogous to the *Te Awa Tupua (Whanganui River Claims Settlement) Act* (the "NZ Act")[8] as developed by the government of Aotearoa New Zealand in partnership with the Indigenous Māori of New Zealand.[9] This landmark legislative scheme captures the zeitgeist of our time – a new chapter wherein sovereign states dismantle anthropocentric environmental law frameworks through innovative legal devices that empower Indigenous custodians.[10]

2 *Chris Clarkson et al*, Human occupation of northern Australia by 65,000 years ago, Nature 547 (2017), p. 306.

3 *NSW Bureau of Crime Statistics and Research*, New South Wales Custody Statistics Quarterly Update December 2020, Part 1 Juveniles, pp. 5-8.

4 *Native Title Act 1993* (Cth).

5 *Margret Carstens*, 25 years of native title – Mabo and beyond, Verfassung und Recht in Übersee 52 (2019), p. 239.

6 *Love v Cth* [2020] HCA 3; 94 ALJR 198; 375 ALR 597, para. [364].

7 *Mabo v. Queensland (No. 2)* (1992) HCA 23; (1992) 175 CLR 1, para. [83].

8 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).

9 Ruruku Whakatupua (The Whanganui River Deed of Settlement) (5 August 2014).

10 *Toni, Collins and Shea Esterling*, Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand, Melbourne Journal of International Law 20 (2019), p. 198.

B. Understanding empowerment

Indigenous empowerment is an anticolonial project on a grand scale.[11] It encompasses several social, legal and political movements seeking to cultivate a modern Indigenous identity that can reconnect with its ancestral roots. In one form, empowerment concerns the extent to which Indigenous knowledge can be recovered and practised once again.[12] In doing so, the dominant colonial narrative regarding Indigenous knowledge as inferior and irrelevant to the modern world is confronted and exposed for its ignorance. Accordingly, this article recognises the importance of Indigenous knowledge recovery in the context of managing complex environmental ecosystems. In another form, empowerment concerns the implementation of governance systems that embrace legal pluralism. The extent to which Indigenous customary law can, or should be recognised in the context of criminal punishment remains highly contentious.[13]

More recently, the narrative underpinning Indigenous empowerment has placed an increasing emphasis on how the recognition of Indigenous Australians in the Australian Constitution can shatter the factitious dichotomy that persists between the supreme Crown authority and the subservient Indigenous subject.[14] In this light, the call for a First Nations Voice enshrined in the Australian Constitution was poignantly captured by the Uluru Statement from the Heart (the 'Uluru Statement').[15] In this powerful rendition, the Indigenous human experience is synthesised and elegiacally distilled into one, collective voice to convey the 'torment of [their] powerlessness'.[16] However, the Uluru Statement is equally an expression for systemic change, through a movement that connects an 'ancient [Indigenous] sovereignty' with Australia's contemporary nationhood 'for the Australian People'.[17] The Uluru Statement unequivocally calls for a reset to the relationship between Indigenous and Crown affairs by way of a Makarrata Commission, which would supervise agreement-making and truth-telling between both sovereign bodies.[18] Empowerment in this context would focus on building a dynamic and sustainable partnership at the highest echelons of government.[19] Professor Anne Twomey's constitutional analysis provides a future-focused insight into how the Australian Constitution could be amended to give effect to the Uluru

11 *Waziyatawin Angela Wilson*, Indigenous Knowledge Recovery Is Indigenous Empowerment, American Indian Quarterly 28 (2004), p. 359.

12 Ibid.

13 See *R v Wunungmurra* [2009] NTSC 24, para. [23].

14 *First Nations*, The Uluru Statement from the Heart, http://ulurustatement.org (last accessed on 24 September 2021).

15 Ibid.

16 Ibid.

17 Ibid.

18 *Shireen Morris*, International Inspiration. A First Nations Voice in the Australian Constitution, Oxford 2020, p. 164.

19 Ibid, pp. 171- 173.

Statement.[20] Drawing from these contemporary experiences, the substance of this article will explore meaningful empowerment in relation to land, a central facet running through the integrated Indigenous worldview.

C. Law, land and culture

This section compares Indigenous conceptions of the law-land relationship to the imposed system upon colonisation. Through a wave of legal distortions, the seemingly subaltern Indigenous worldview is suppressed and effectively eliminated. This analysis, in illuminating historical barriers to Indigenous empowerment, helps one to better understand the contours of the resulting Native Title scheme.

I. Conflicting perspectives and conceptions

At the heart of the Indigenous human experience is an intricate and inseparable synergy between law, land and culture emerging from The Dreaming.[21] As articulated by Irene Watson, The Dreaming (Kaldowinyeri) captures a hyper-reality of her ancestral origins, being a time where 'the first songs were sung, first dreams were dreamed.'[22] Her ancestors 'as they walked over the land, walked in the law.'[23] In conceptualising what Watson describes as 'Raw Law'[24] from an Indigenous ontology, one must understand that the law and the land were indivisible.[25] The law was not envisaged from a positivist, doctrinal perspective yet it still existed. The law was alive and breathing as her people 'sang the law, danced the law, [became] beings of the law, living in the way of the law.'[26] Moreover, principles of environmental and ecological sustainability were woven into the fabric of the Indigenous Kinship System, with totems and moieties obliging individuals to nurture 'ruwe',[27] protect native flora and fauna and to take 'no more than necessary to sustain life.'[28]

This ontological worldview contrasts with the relationship between land and law as conceptualised by the West, owing to the legal principles enunciated during the Roman Empire.[29] In the Western capitalist tradition, land is primarily an object with significant

20 *Anne Twomey*, Hearing other Voices from Uluru, Sydney Law School (2020), p. 4.

21 *Irene Watson,* Kaldowinyeri – Munaintya In the Beginning, Flinders Journal of Law Reform 4 (2000), p. 3 and *Mary Graham*, Some thoughts about the Philosophical Underpinnings of Aboriginal Worldviews, Australian Humanities Review 45 (2008), pp. 181- 183.

22 *Watson,* note 21, p. 3.

23 Ibid, p. 5.

24 Ibid, p. 3.

25 *Graham*, note 21, pp. 181-183.

26 *Watson*, note 21, p. 15.

27 *Land.

28 *Watson*, note 21, p. 6.

29 See *Barry Nicholas, Ernst Metzger*, An Introduction to Roman Law, Oxford 1996, Ch. III.

economic utility to be exploited and governed *by* a legal system. Rights in rem, including the all-pervasive fee simple estate granting individuals a bundle of powerful proprietary rights were ultimately, products of a common law legal system rooted in notions of absolute Crown ownership.[30] To Collins, this legal framework, coupled with a social hierarchal structure placing human beings at the apex legitimised the West's 'right to own and control nature.'[31] For the colonisers, the temptation to exploit Australia's fertile and pristine lands, to the exclusion of the native population was far too great.[32]

II. Deconstructing historical obstacles to indigenous empowerment

Evidently, the relationship between the law and the land can have multiple and competing manifestations. The colonial history of incorporating the doctrine of tenure and estates in Australia has drastically disempowered Indigenous Australians. Despite the evidence before Justice Blackburn in *Milirrpum v Nabalco*[33] revealing a 'subtle and elaborate system'[34] of laws 'highly adapted to the country in which the people led their lives',[35] his honour, writing in the narrow-minded English common law tradition held that the Indigenous plaintiffs could not demonstrate a 'proprietary interest' in land as 'as *our* law… understands that term.'[36] As reasoned by Davies, for those educated within a 'Eurocentric legal paradigm'[37] filled with 'obsessive taxonomies and entrenched distinctions',[38] comprehending the interconnectedness of First Nations approaches to law with their lands was near impossible.[39] Rather, the common law was employed as a tool to legitimise colonial land acquisition and extinguishment when two diametrically opposing conceptions of the land-law relationship clashed.[40] Where was the watchful eye of equity to soften and modify

30 See *Scott Grattan, Sheelagh McCracken*, Introduction to Property and Commercial Law, Australia 2016, pp. 4-20.

31 *Collins*, note 10, p. 205.

32 *Lindsey L Wiersma*, Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims, Duke Law Journal 54 (2005), pp. 1061-1088.

33 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, pp. 244-247.

34 Ibid, pp. 267-268.

35 Ibid.

36 Ibid; see *Robert Van Krieken,* From Milirrpum to Mabo: The High Court, Terra Nullius and Moral Entrepreneurship, UNSW Law Journal 23 (2000), pp. 63-104.

37 *Margaret Davies*, Keynote: Reforming Law – The Role of Theory, New directions for law in Australia: Essays in Contemporary Law Reform, Canberra 2017, p. 22.

38 Ibid.

39 Ibid.

40 *Bruce Kercher*, An unruly child: a history of law in Australia, London 1995, p. 20.

the many injustices of the common law, particularly when the remedies at law recognising Indigenous interests were inadequate or non-existent?[41] Notably absent.

In this light, the ruling in *Milirrpum v Nabalco*[42] was the final piece in a historical paradox propagated by the doctrine of *Terra Nullius*, the common law's shameful non-sequitur in deeming Australia as an uninhabited territory, or one inhabited by a race 'so inferior in the social structure hierarchy'[43] that no 'discernible government structure was apparent.'[44] Justice Blackburn, in factually recognising that Indigenous Australians had implemented a highly developed system of laws regulating their societies was clearly contrary to the latter justification of the doctrine.[45] Furthermore, his honour's findings were consistent with the early colonial authority of *R v Bonjon*,[46] the high-water mark with respect to unequivocally recognising and sympathising with Indigenous autonomy.[47] Justice Willis in *R v Bonjon* rejected arguments pertaining to the assumed jurisdiction of colonial courts over exclusively Indigenous criminal matters. On the contrary, his honour concluded that 'Aborigines must be considered and dealt with… as distinct though dependant tribes governed among themselves by their rude laws and customs.'[48] This powerful, albeit derogatory statement, recognising and accepting Indigenous autonomy was knowingly voiced notwithstanding the conflicting judgement of the NSWSC in *R v Murrell*[49] adjudicated five years prior.[50]

Yet Justice Blackburn, shackled by the chains of precedent was to slavishly follow the erroneous authority of the Privy Council in *Cooper v Stuart.*[51] In doing so, his honour propagated the *Terra Nullius* fiction and refused to empower Indigenous Australians in any legal shape or form. In Kercher's critical historical analysis, the decision in *R v Murrell* (and similarly in *Cooper v Stuart*) was 'based on a unitary principle of law... a fiction [as] Aborigines continued to exercise their own methods of resolving disputes and to be bound by their own laws.'[52] In this regard, the common law was employed as a legal

41 See *J. D. Heydon/M. J. Leeming/P G Turner*, Meagher, Gummow & Lehane's Equity: Doctrines & Remedies, Sydney 2014, Ch. 1.

42 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

43 *Peter Grose*, The Indigenous Sovereignty Question and the Australian Response, Australian Journal of Human Rights 3 (1996), p. 46.

44 Ibid.

45 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, pp. 244-247.

46 *R v Bonjon*, 16 September 1841, Supreme Court of New South Wales, Decisions of the Superior Courts of New South Wales 1788-1899.

47 *Kercher*, note 40, p. 7.

48 *R v Bonjon*, note 46.

49 *R v Murrell and Bummaree* (1836), 5 February 1836, Supreme Court of New South Wales, Decisions of the Superior Courts of NSW 1788-1899.

50 *Ann Patricia Hunter*, A different kind of subject: Aboriginal legal status and colonial law in Western Australia, 1829-1861, Perth 2006, pp. 288-295.

51 *Cooper v Stuart* (1889) 14 App Cas 286, 291.

52 *Kercher*, note 40, p. 11.

smokescreen, a device used to mask the multiplicity of legal systems operating within colonial Australia. Ultimately, the legal position of Indigenous Australians with respect to their land, sovereignty and human rights was severely distorted. This bloody reality is juxtaposed to the prevailing jurisprudential view romanticising the common law as a source of ultimate justice.[53] And within the common law's oppressive 'maze of rules and regulations',[54] the Indigenous body of land tenure law 'was buried, barely breathing.'[55]

D. Empowerment by Native Title

This section explores Australia's ageing Native Title scheme through the lens of contemporary legal precedents. Whilst significant in their own right, this analysis exposes a piecewise and inherently limited means of empowering Indigenous Australians with respect to their traditional lands. Thus, Native Tile is challenged as being *the* archetypal legal mechanism delivering a balanced solution to the empowerment debate.

I. Mabo, Terra Nullius and the NT Act

The dominant depiction of Indigenous exclusion from proprietary legal frameworks was challenged and subsequently overruled in the landmark decision of *Mabo v Queensland (No 2)* (the 'Mabo Decision').[56] The Mabo Decision rejected long-standing legal authorities and precedents that emphatically propagated a *Terra Nullius* fiction fed by 'a discriminatory denigration of indigenous inhabitants, [and] their social organisation and customs.'[57] His Honour Brennan J held that the Crown was not the absolute owner of the lands of Australia after the British assertion of territorial sovereignty in 1788.[58] Rather, the Crown acquired a 'radical title' – a 'postulate of the doctrine of tenure and a concomitant of sovereignty'[59] that co-existed with the common law's recognition of Indigenous Native Title.[60] Importantly, Indigenous Australians possessed, and continue to possess 'unique and exclusive rights and duties' [61] that are 'determined by Indigenous laws and customs'[62] within the territory of Australia.

53 Ibid, p. 20.
54 *Watson*, note 21, p. 4.
55 Ibid.
56 *Mabo v. Queensland (No. 2)*, note 7.
57 Ibid, para. [39] (Brennan J).
58 Ibid, para. [57] (Brennan J).
59 Ibid, para. [50] (Brennan J).
60 Ibid, para. [83] (Brennan J).
61 *Love v Cth*, note 6, para. [357].
62 Ibid.

In delineating the relationship between radical title and Native Title, the latter is characterised as a bundle of rights that *burden* the Crown's acquired radical title.[63] On one interpretation, the characterisation of Native Title as a burden creates a relationship of dependency and inferiority within the highly paternalistic socio-political framework of 20th century Australia. This inherent power-play is evident throughout Brennan J's judgement.[64] Rather extraordinarily, Brennan J held that the common law granted the Crown a power to extinguish Native Title rights to the extent of an inconsistency if a sovereign power was validly exercised.[65] The inherent vulnerability and subservience of Native Title stands in contrast to traditional proprietary interests validly granted by the Crown. Such traditional proprietary interests cannot be unilaterally extinguished by the Crown without statutory authority.[66] The existence of this exorbitant extinguishment power has been repeatedly affirmed in subsequent cases before the HCA.[67]

Further, the court in the Mabo Decision had intentionally limited the capacity of the common law to protect and preserve Native Title rights in a range of scenarios falling short of an inconsistency. As such, the Crown's radical title would expand to complete and unqualified beneficial ownership in circumstances where Indigenous groups ceased to acknowledge their customary laws, lose their connection with the land or on the death of the last surviving member of the clan.[68] Evidently, the interplay between the Crown's radical title and Indigenous Native Title is overly pragmatic and a timid attempt to reconcile the unchallengeable axiom of Crown sovereignty on one hand, with meaningful Indigenous empowerment on the other.[69] Thus, the Mabo Decision was truly a missed opportunity for Brennan J to radically reshape the principles underpinning Australian property law given that his honour provided 'virtually no legal authority for his rules of extinguishment.'[70] His honour was therefore empowered to develop a novel Native Title system centred on egalitarian principles as opposed to a weaker proprietary right characterised as a burden on the Crown's radical title.

II. Analysing the Native Title system

Whilst the common law recognition of Native Title is overshadowed by Crown supremacy and Indigenous subservience, the legislative recognition of Native Title under the NT Act remains a significant development towards empowering Indigenous Australians with

63 *Mabo v. Queensland (No. 2)*, note 7, para. [39] (Brennan J).

64 Ibid, para. [83].

65 Ibid.

66 *Kent McNeil*, Racial Discrimination and Unilateral Extinguishment of Native Title, Australian Indigenous Law Reporter 2 (1996), p. 213.

67 See *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.

68 *Mabo v. Queensland (No. 2)* note 7, para. [67] and [83].

69 *McNeil*, note 66, p. 219.

70 Ibid.

respect to their traditional lands. Under the legislative scheme, Native Title is defined broadly and captures communal, group or individual rights with the lands or waters of Australia that are recognised by the common law of Australia.[71] However, the practical effectiveness of the NT Act is diminished through the imposition of 'extremely difficult and divisive'[72] legalistic barriers imposed on prospective claimants.

Regrettably, the HCA has repeatedly affirmed the existence of an 'extremely high burden of proof'[73] falling onto the Indigenous claimants to prove their identity by demonstrating a continuing acknowledgement of traditional laws and customs to the very 'sovereign who fractured that ownership.'[74] Further, the authenticity of one's claim is to be judged according to non-Indigenous standards and legal frameworks – an overt display of the marked indifference towards how Indigenous cultures collate and present their evidence coupled with a lack of acknowledgement of Indigenous legal customary laws and norms. Ultimately, such stringent requirements work to secure a very limited class of Indigenous claimants to Native Title recourse; namely, those fortunate to have their connection to land and culture relatively unhindered by the colonisers. For the vast majority of Indigenous Australians, the consequences of the Imperial hegemony meant forcibly adapting to a hostile world to survive. For the NT Act to then impose legalistic barriers that ignore that Indigenous cultures can change, evolve and may perhaps be 'internally diverse or contradictory' [75] due to these external pressures is inequitable, hypocritical and disempowering.

Thus, a great inequity exists at the very foundation of Native Title when those most adversely affected by colonial dispossession are 'prevented or seriously prejudiced'[76] from asserting their rights through the NT Act. In this regard, The Bringing them Home Report [77] is a sombre recount of how Indigenous Australians from the Stolen Generation were prevented from 'acquiring their language, culture and the ability to carry out traditional responsibilities.'[78] For many, the imposed assimilation policies had prevented them from establishing their 'genealogical links' to their Indigenous culture.[79] For individuals endeavouring to fill this cultural void, acceptance back into their communities was not assured, given their lengthy absence from the cultural and customary practices of their

71 *Native Title Act 1993* (Cth), s. 223.

72 *Carstens*, note 5, p. 230.

73 *Larissa Behrendt et al.*, Aboriginal and Torres Strait Islander Legal Relations, Melbourne 2019, p. 172.

74 *Catherine Howlett/Rebecca Lawrence*, Accumulating Minerals and Dispossessing Indigenous Australians: Native Title Recognition as Settler-Colonialism, Antipode 51 (2019), p. 824.

75 *Linda Tuhiwai Smith*, Decolonizing Methodologies: Research and Indigenous Peoples, London 2012, p. 142.

76 *Human Rights and Equal Opportunity Commission*, note 1, p. 178.

77 See *Human Rights and Equal Opportunity Commission*, note 1, p.178.

78 Ibid, pp. 2-3.

79 Ibid.

community.[80] In such cases, the disentitlement to Native Title as a member of a group is a direct consequence of forced separation. This is because an individual's Native Title rights depend 'upon the existence of communal Native Title and are carved out of that title.'[81] When individual identities are obliterated by the operation of the NT Act, the social and cultural consequences are devastating. For some, the perpetuating cycle of intergenerational trauma, grief, abuse and disempowerment suggests that the challenge to belong to both the dominant contemporary culture and the subaltern family can be so overwhelming that the individual, forced between two mutually exclusive paradigms, ultimately chooses neither. If the Native Tile system continues to operate in a manner that is dismissive of the causal connection between cultural dislocation and a rise in criminal activity, reducing the rates of Indigenous youth incarceration in Australia will at best, be a nebulous social aspiration.

In essence, an excessively legalistic Native Title framework, divorced from the consequences of historical dispossession has rewarded colonial institutions for their own wrongdoings.[82] More recently, the ALRC[83] in recognition of the persisting inequities propagated by the NT Act has recommended abolishing requirements that demand claimants to establish a continuing acknowledgment of traditional laws and customs that have remained substantially uninterrupted since sovereignty,[84] or the need for them to be observed by each generation since sovereignty.[85] Frustratingly, these crucial recommendations have been largely ignored by the Commonwealth Government.[86]

Despite these inherent limitations, the NT Act nonetheless provides *a* vehicle for Indigenous empowerment and it is acknowledged that Native Title has been recognised over approximately 32% of the Australian landmass.[87] Subsequent case studies illuminate the positive developments in the context of empowering Indigenous Australians through this means.

80 *Human Rights and Equal Opportunity Commission*, note 1, p. 179.

81 *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 21.

82 *Behrendt et al*, note 73, p. 173.

83 *Australian Law Reform Commission*, Connection to Country: Review of the Native Title Act 1993 (Cth) (Final Report No 126, April 2015) 33, recommendation 5-2.

84 Ibid.

85 Ibid, recommendation 3-5.

86 *Carstens*, note 5, p. 21.

87 *Australian Trade and Investment Commission*, Native Title (Web Page) https://www.austrade.gov.au/land-tenure/Native-title/native-title#:~:text=At%2030%20September%202015%2C%20nativegrant%20of%20title%20from%20government (last accessed on 11 November 2020).

III. The Akiba decision

Indigenous Australians were an integral component of aquatic ecosystems across Australia.[88] Extensive archaeological evidence reveals that Indigenous Australians had altered the physical environment to 'enhance the survival and growth of fish'[89] and therefore carried 'out a form of aquaculture.'[90] In this light, the HCA's decision in *Akiba v Commonwealth*[91] was significant in empowering Indigenous Australians to reflect the historical milieu. The HCA held that Torres Strait Regional Seas Claim Group (the 'Seas Claim Group') was entitled to non-exclusive Native Title rights over large areas of the Torres Strait that included the right to exploit the land and the seas for its resources.[92]

In exploring the vulnerability of Native Title to Crown extinguishment, the HCA rejected the Commonwealth and Queensland Government's misconceived assertion that the legislative intention, deriving from the repeated statutory injunction prohibiting the commercial exploitation of fish without a licence had extinguished such Native Title rights outside the licencing scheme.[93] Further, the court reinforced that a 'clear and plain intention'[94] to extinguish Native Title must be demonstrated by the Crown. The relevant question at all material times was one of inconsistency, and that inquiry requires an objective analysis.[95] Through an objective analysis (and consistent with *Yanner v Eaton*[96]), it can be rationalised that the Crown, in regulating 'particular aspects of the usufructuary relationship'[97] that Indigenous Australians share with their traditional lands or waters does not sever that connection and nor was it inconsistent with the continued existence of those rights.[98]

Whilst the Akiba Decision establishes a legal precedent with far-reaching implications in theory, questions pertaining to its practical implications for Indigenous communities remain unanswered.[99] With commercial fishing regimes now subject to the NT Act, it largely falls onto government departments to negotiate in good faith with Native Title

88 *Paul Humphries*, Historical Indigenous use of aquatic resources in Australia's Murray-Darling Basin, and its implications for river management, Ecological Management & Restoration 8 (2007), pp. 106-108.

89 Ibid, p. 107.

90 Ibid.

91 *Akiba v Commonwealth* [2013] HCA 33; 250 CLR 209.

92 Ibid.

93 Ibid, para. [16].

94 Ibid, para. [62].

95 Ibid, para. [63].

96 *Yanner v Eaton* (1999) 201 CLR 351, para. [100].

97 *Akiba v Commonwealth*, note 91, para. [64].

98 Ibid.

99 *Lauren Butterly*, Unfinished business in the Straits: Akiba v Commonwealth of Australia (2013) HCA 33 Indigenous Law Bulletin 8 (2013), pp. 3-6.

holders to empower them in a commercial capacity. It must be remembered that the Akiba Decision is a testament to the determination of the Seas Claim Group for 'persevering through three rounds of litigation'[100] since lodging their claim in 2001. Empowerment has come at a great physical and emotional cost when fighting successive governments who have been relentless in confining the Native Title burden imposed by the common law on their radical title.

IV. The Timber Creek decision

The Timber Creek Decision[101] represents a powerful shift in the receptiveness of the common law towards recognising the synergy between the physical and metaphysical for Indigenous Australians. Importantly, the HCA affirmed that Native Title compensation, pursuant to section 51 of the NT Act included compensation for economic and non-economic losses, with the latter representing compensation for the loss, diminution, and impairment of rights attaching to the claimant's 'unique spiritual connection to the land.'[102] In agreeing with the valuation of the non-economic loss by the Full Federal Court of Appeal at $1.3 million, the HCA stressed the importance of exercising lateral judicial reasoning. Accordingly, losses stemming from proposed mining prospects sites that threatened sites of 'Dreaming and spiritual significance'[103] under traditional laws and customs could not be 'equated with loss of enjoyment of life or other notions … in the law relating to compensation for personal injury.'[104] The majority recognised that these Western constructs do not 'go near to capturing the breadth and depth of what is a spiritual connection with land.'[105] Evidently, the HCA was conscious to avoid importing the common law to interpret alien conceptions of the land-law relationship. For lead claimant Mr Griffiths, the decision's symbolic overtones were of equal significance, as the ruling was tangible proof that his people's 'culture is still alive'[106] and that their 'law is still in the land, [their] blood is still running in the country.'[107]

However, repeated incursions and infringements on traditional lands reinforce the vulnerability of Native Title to commercial interests. Indigenous Native Title holders are effectively coerced to engage in lengthy litigation for financial empowerment. Thus, the

100 Ibid.

101 *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7.

102 *Native Title Act 1993* (Cth) s 51.

103 *Northern Territory v Mr A. Griffiths*, note 101, para. [178] and [183].

104 Ibid para. [187].

105 Ibid.

106 *Felicity James*, High Court awards Timber Creek native title holders $2.5m, partly for 'spiritual harm, ABC News, https://www.abc.net.au/news/2019-03-13/native-title-high-court-land-rights-spiritual-connection/10895934 (last accessed on 2 November 2020).

107 Ibid.

law in this regard is responsive to the primacy of commercial interests. For many Indigenous Australians, compensation is a limited form of empowerment[108] when compared to a bundle of rights that preserve their traditional lands:

'Every time I come … there seems to be something new in Timber Creek…Might be a new building… or someone taking gravel…. There are places … where the Dreaming has been cut up …other Aboriginal people, think that I can't look after country properly. That makes me feel ashamed.'[109]

V. Synthesis

The long and oppressive history of Indigenous dispossession was challenged by the Mabo Decision and marked the beginning of a new chapter in contemporary Australian history. Indigenous Australians were held to possess certain rights and duties that are unique to their being.[110] Over 25 years later, these rights have regrettably crystallised, exclusively in the form of Native Title to empower Indigenous Australians. However, it is acknowledged that the perceived injustices of Native Title are amplified in the contemporary context when one understands that the NT Act was never intended to provide a comprehensive response to the Mabo Decision.[111] Rather, the NT Act was one of three pillars proposed by the Keating Government in a multifactorial approach to achieving Indigenous empowerment. Specifically, the NT Act was to be supported by a land fund (administered by the Indigenous Land Corporation) and a powerful social justice package. The latter pillar, modelled on the recommendations of the ATSIC integrated constitutional forms of Indigenous recognition, which would have functioned as an important form of symbolic empowerment.[112] Regrettably, the social justice package in its entirety was abandoned by the Howard Government in 1996 and is regarded as an 'underlying reason'[113] as to why the contemporary Native Title system is under immense strain. A *Native Title Bill*[114] introduced in 2019 purported to improve Indigenous decision-making and dispute resolution processes[115] was lapsed due to the dissolution of Parliament. For structural issues that transcend the electoral cycle, reform has been incredibly difficult to achieve.

108 *Australian Institute of Aboriginal and Torres Strait Islander Studies*, Timber Creek compensation case https://aiatsis.gov.au/explore/articles/timber-creek-compensation-case#:~:text=The%20Timber%20Creek%20compensation%20case,Title%20Act%201993%20(Cth) (last accessed on 15 November 2020).

109 *Northern Territory v Mr A. Griffiths*, note 101, para. [190].

110 *Love v Cth*, note 6, para. [357].

111 *Behrendt*, note 73, p. 163.

112 *Indigenous Law Centre*, Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures, Australian Indigenous Law Reporter 1 (1996), p. 79.

113 *Australian Law Reform Commission*, note 83, para. 3.75-3.88.

114 Native Title Legislation Amendment Bill 2019 (Cth).

115 *Carstens*, note 5, p. 232.

E. Beyond Native Title

When the tides of history 'wash away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title disappear[s].'[116] A Native Title system superimposed within a 'Eurocentric legal paradigm'[117] that is characterised by Crown supremacy and Indigenous subservience can only go so far in empowering Indigenous Australians. In light of the fact that the common law recognises the 'unique'[118] and 'continued two-way connection'[119] Indigenous custodians share with Australia's land and waters, some alternative vehicle for empowerment is needed. The urgency for legal innovation was stressed by Gordon J in *Love v Cth*.[120] Her honour recognised that the tendency to employ a unilateral approach that equates Indigenous interests as wholly subsumed within a Native Title scheme 'must be curbed'[121] as Indigenous culture is multifaceted, can 'change and evolve.'[122] This inherent tension imposes a moral duty (at the very least) on Australian parliamentarians and law-makers to consider how alternative schemes of empowerment can be implemented whilst respecting that the acquisition of sovereignty over Australia is unchallengeable.[123] In this final section, an alternative framework is considered and applied to the Australian context.

I. An alternative means of achieving empowerment

With contemporary environmental pressures increasing in their complexity, the underrepresentation of Indigenous Australians in decision-making processes is an alarming and insulting reality.[124] The arrogance and disrespect demonstrated by successive governments in ignoring the accumulation of Indigenous knowledge and teachings over 40 millennia, particularly with respect to understanding Australia's complex ecosystems is palpable.[125] Shattering Australia's paternalistic approach to the Indigenous worldview requires a co-governance model of legal empowerment.[126] Such a model must remove barriers that draw artificial lines between systems of law and governance, as the spiritual and metaphysical paradigms for Indigenous custodians are 'translated into the legal' within their integrated

116 *Mabo v. Queensland (No. 2)*, note 7, para. [66] (Brennan J).

117 *Davies*, note 37, p. 22.

118 *Love v Cth*, note 6, para. [347].

119 Ibid.

120 Ibid.

121 Ibid, para. [347].

122 Ibid, para. [363].

123 *Mabo v. Queensland (No. 2)*, note 7, para. [83] (Brennan J).

124 *Erin O'Donnell, Julia Talbot-Jones*, Creating legal rights for rivers: lessons from Australia, New Zealand, and India, Ecology and Society 23 (2018), p. 9.

125 Ibid.

126 See *Collins*, note 10.

worldview.[127] In exploring one such permutation, meaningful Indigenous empowerment can be achieved by dismantling archaic anthropocentric environmental law frameworks through novel legal devices.[128]

In this innovative spirit, there are two compelling reasons to extend legal rights to nature. Firstly, the true environmental costs are obscured when observed through an anthropocentric lens, as the law inevitably fails to capture the devastation caused to ecological systems by human activities.[129] Secondly, granting legal personality to nature increases the efficiency and cost-effectiveness of environmental litigation. This is because the broader issues associated with the health of the ecosystem can be considered independent of any economic factors through a human voice empowered to speak on nature's behalf.[130] In March 2017, an international legal precedent was established through the *Te Awa Tupua (Whanganui River Claims Settlement) Act*[131] (the 'NZ Act'), being the first piece of legislation to declare a river – the Whanganui River a 'legal person'. This marked a significant turning point in legalising negotiations between the government of Aotearoa New Zealand and the Indigenous Māori Tribes, who emphatically expressed their desire to manage the Whanganui River as they had once done so prior to European settlement.[132]

The NZ Act establishes *Te Awa Tupua* (the 'Entity') with legal personhood and with corresponding rights, powers, duties, and liabilities of a legal person including the right to sue and to be sued.[133] Further, the Entity has standing as a public authority under the *Resources Management Act*[134] and as a body corporate for various conservational purposes.[135] This flexibility permits decentralised decision-making at the local level, whilst ensuring that the Entity has a legal capacity to engage with larger governmental and corporate bodies. Importantly, the NZ Act harmonises Indigenous empowerment and Crown sovereignty over the Whanganui River by assigning a legal guardian from each body to represent the river through one unified voice.[136] Arguably, this compromise is a meaningful form of Indigenous empowerment within a system where the State's sovereignty is not challenged, but moderated. Under this legal framework, the ecological status of the water body remains the primary consideration and is consistent with the Indigenous ontological worldview.[137]

127 *Love v Cth*, note 6, para. [363].

128 *Collins*, note 10, p. 198.

129 *O'Donnell*, note 124, pp. 7-9.

130 Ibid, p. 8.

131 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).

132 Ruruku Whakatupua: Te Mana o Te Iwi o Whanganui, Whanganui Iwi-Crown, signed 5 August 2014 (Deed of Settlement).

133 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 14.

134 *Resource Management Act 1991* (NZ).

135 *O'Donnell*, note 124, p. 10.

136 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ)* ss 20(1)-(2).

137 Ibid, s 13.

Opponents of such seemingly radical reforms may argue that NZ Act significantly compromises private proprietary rights and economic interests associated with rivers. This potential argument is highly relevant in the hypothetical Australian context with respect to managing major river systems such as the Murray-Darling Basin (MDB). However, the NZ Act is well balanced to address such concerns as the legislation does not vest complete ownership of the Whanganui River to the Entity; only the fee simple estate in the Crown-owned parts of the bed of the Whanganui River vests in the Entity.[138] Existing property rights in the forms of roads, railway infrastructure or structures are not automatically included but can be subsequently transferred.[139] This delicate balancing act effectively adds a temporal dimension to the analysis, as only future economic development is prohibited. The operation of the NZ Act stands in stark contrast to the Australian Native Title scheme, which adopts a compensatory function when competing economic interests intervene, as highlighted in the Timber Creek Decision.

Surprisingly, the NZ Act vesting the Crown-owned parts of the bed of the Whanganui River to the Entity does not create a proprietary interest in water or the wildlife, fish, aquatic life, seaweeds and plants.[140] At first instance, this stands at odds with section 12 of the NZ Act which describes the Entity as an 'indivisible and living whole…from the mountains to the sea, incorporating *all* its physical and metaphysical elements.'[141] As observed by Collins, this is an 'anomaly because [the Entity] does not own the very aspect of the river that makes it a river: the water'.[142] Notwithstanding this anomaly, the decision to separate the economic aspects of the Entity is understandably pragmatic, as it reflects the importance of competing considerations with respect to managing natural resources. Notably, the economic regulation of the Entity under the *Resource Management Act*[143] remains consistent with fundamental environmental principles including the sustainable management of the Entities' natural and physical resources.[144]

It is apparent that balancing the economic, environmental and cultural dimensions of a complex ecosystem is possible through innovative legal devices and sheer political will. As demonstrated by the NZ Act, a co-governance scheme empowering Indigenous groups is extremely effective in achieving shared environmental objectives. The reconciliatory overtones of the NZ Act foreshadow its instrumental operation; as stated in the preamble, the legislation is in part an official apology by the Crown to the Māori peoples of New Zealand.[145] Further, the NZ Act explicitly incorporates an understanding of the synergy

138 Ibid, s 41(1).

139 Ibid, s 41(2), s 48.

140 Ibid, s 46.

141 Ibid, s 12.

142 *Collins*, note 10, p. 202.

143 *Resource Management Act 1991* (NZ).

144 Ibid, s 5.

145 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ)* s 3.

between the physical and metaphysical spheres of the Māori human experience.[146] Powerful and loosely elegiac statements recognise that 'water is central to identity, life, the economy and spirituality' of the Maori Peoples.[147] In this aspect, the imagery of unity and receptiveness embedded within the NZ Act serves an extremely important symbolic function that complements the legislation's instrumental value.

II. The Murray-Darling Basin: An Australian equivalent?

'If the Murray-Darling River were a person, they would have almost no tears left to cry.'[148] In recent years, the Murray-Darling Basin (MDB) has suffered three unprecedented mass fish death events,[149] a widespread increase in toxic algal blooms and a rapid decline in the health of its intricate ecosystems.[150] Regrettably, the critical condition of the MDB is a consequence of poor water management, resource exploitation and the complex interplay between the many drivers of climate change amplifying in a negative synergy.[151] The Basin's deteriorating health is a stark reminder that current legal mechanisms are inadequate and ineffective in protecting Australia's national rivers or sustaining Indigenous cultural wellbeing. The Federal Government's reluctance to innovate beyond the confines of the Native Title system is vexing when compared to the progressive co-governance model of empowerment implemented in New Zealand.

As highlighted by Nicholson, a major deficiency under the Australian framework is the subservience of Indigenous land, cultural and water rights and interests when weighed against the economic interests of capitalist stakeholders.[152] For the Barkandji People, the ancestral gatekeepers of Murray Darling in NSW, river health is essential to their cultural and spiritual wellbeing.[153] In this regard, the Barkandji People do possess Native Title rights. However, these rights are heavily circumscribed in the context of participation in the economic management of the MDB. Without ancillary rights imposing a legal or political obligation on governments to consult and negotiate with Indigenous Native Title groups

146 Ibid, s 13.

147 *Collins*, note 10, p. 208.

148 *Stephanie Kerr*, Aboriginal rights must be respected if the Murray-Darling is to survive, Native Title Newsletter 1 (2019), p. 12.

149 See *Australian Academy of Science*, Investigation of the causes of mass fish kills (Youtube, 31 March 2020) https://youtu.be/TkpRsY81FIg (last accessed on 9 November 2021).

150 *Climate and Health Alliance*, Water for the Murray-Darling – Healthy Rivers, Healthy People (Briefing Paper No 4) http://d3n8a8pro7vhmx.cloudfront.net/caha/legacy_url/286/CAHA-Briefing-Paper-No-4_Water.pdf?1439938307 (last accessed on 11 November 2020).

151 *Anne Davies*, The Darling will die: Scientists say mass fish kill due to over-extraction and drought, The Guardian, https://www.theguardian.com/australia-news/2019/feb/18/the-darling-will-die-scientists-say-mass-fish-kill-due-to-over-extraction-and-drought (last accessed on 10 November 2020).

152 *Kerr*, note 148, p. 13.

153 Ibid.

on economic matters, or in formulating MDB water management plans, the environmental and cultural dimensions of the MDB will continue to remain neglected.[154] The systemic marginalisation of the Indigenous voice in higher-level discussions for Nicholson, is the embodiment of the gap between 'two incompatible cultural paradigms'[155] and governmental paternalism. This narrative of incompatibility is contrasted to the operation of the NZ Act, where matters relating to the Entity are decided by registered persons who possess the skills, knowledge, and experience in a range of disciplines including tikanga Māori and knowledge of the Whanganui River.[156]

However, it is conceded that there are difficulties in mirroring the NZ Act within the MDB context. Firstly, the MDB is a geographical area spanning five state and territory jurisdictions in addition to Commonwealth jurisdiction. Any legislative scheme must reflect Australia's federal body politic and the constitutional division of powers between state governments and the Commonwealth.[157] Secondly, the MDB is home to over 40 First Nations.[158] A representative body akin to the Entity created by the NZ Act would need to reflect the diversity in norms and customs held by affected First Nations. The systemic reforms sought in the Uluru Statement, coupled with Professor Twomey's constitutional analysis provide a powerful framework for augmenting the Indigenous voice in the economic and cultural management of the MDB.[159] An amendment to the Australian Constitution in the form of a stand-alone provision (the 'Amendment') would be as follows:

> *'127: The Commonwealth shall make provision for Aboriginal and Torres Strait Islander peoples to be heard by the Commonwealth regarding proposed laws and other matters with respect to Aboriginal and Torres Strait Islander affairs, and the Parliament may make laws to give effect to this provision.'*[160]

This Amendment would impose a 'constitutional duty' on the Commonwealth of Australia as a nation – one that explicitly recognises the rights of Indigenous Australians to be heard regarding 'proposed laws and other matters' that are connected to their affairs.[161] Whilst the content of this duty is somewhat amorphous on one interpretation, the state and Commonwealth jurisdictions would be afforded a high degree of flexibility to co-operate and innovate to meet their obligations on another. This could range from a direct voice to Parliament, a Makarrata Commission or an Indigenous representative body directed to

154 Ibid.

155 Ibid.

156 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 62 (2).

157 See Australian Constitution, s. 51, 52.

158 *Murray Darling Basin Authority*, Traditional Owners map land and water use in northern Murray-Darling, https://www.mdba.gov.au/media/mr/traditional-owners-map-land-water-use-northern-murray-darling (last accessed on 18 November 2020).

159 *Twomey*, note 20, p. 3.

160 Ibid.

161 Ibid.

managing their economic, cultural and environmental interests in the MDB. It is proposed that a board of representatives, compromising a member from each First Nation, states and the Commonwealth could be created to represent the 'voice' of the MDB.

An important dimension to the effectiveness of the Amendment is the Commonwealth of Australia's accountability to meeting the underlying obligation. As Professor Twomey outlines, the Amendment encompasses a political obligation and is one that is not legally enforceable by the judiciary.[162] This is because a right to be 'heard' by the Commonwealth forms an 'imperfect obligation' as the judiciary would have no power to direct the Commonwealth to enact legislation or act in a particular manner to give effect to the contents of the duty.[163] Despite this limitation, the constitutional duty contained within the Amendment is one that a 'responsible government' could not ignore.[164] Whilst the Amendment would strengthen the imperative towards empowering Indigenous Australians beyond the Native title system, constitutional reform remains notoriously difficult to achieve in the Australian context.[165] Only eight constitutional referenda have succeeded since 1901.[166] The difficulty in achieving constitutional reform according to Levy's empirical research stems from the voting constituency's distrust in the legitimacy of the constitutional reform process itself.[167] The preceding analysis is by no means a thorough consideration of all the constitutional complexities arising from operating within the Australian federation. Yet despite these complications, for governments to begin this process would be a significant step towards opening a 'real dialogue'[168] that seeks to empower Indigenous Australians with respect to their lands, culture and future.

F. Conclusion

The history of the colonisation of Indigenous Australia encompasses a dark narrative of abuse and disempowerment.[169] Cultural genocide was legitimised through a combination of destructive government policies and legal decisions rooted in the proscriptive common law tradition. The existence of humanity's oldest civilisation for the greater part of Australian history was denied.[170] Emerging from the darkness was a powerful legal recognition of

162 Ibid.

163 Ibid.

164 Ibid.

165 *Ron Levy*, Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change, Melbourne Law Review 34 (2010), p. 806.

166 Ibid.

167 Ibid, p. 810.

168 *Reverend Dr Djiniyini Gondarra*, Assent Law of the First People: Views from a traditional Owner, National Indigenous Times, p. 12.

169 *Behrendt et al.,* note 73, p. 231.

170 *Kercher*, note 40, p. 6.

historical wrongs through the Mabo Decision which radically re-charted the course of Indigenous empowerment within Australian proprietary frameworks.

However, as this article explores, Australia's colonial legacy has fundamentally shaped the contours of the Native Title system from its inception,[171] all the way to modern interpretations of these unique bundles of rights exclusive to the Indigenous human experience. In this light, the inherent subservience of Native Title to the Crown is a major limitation in this mode of empowerment. It must be universally acknowledged that the concept of Native Title is only one Western legal construct attempting to recognise the significance of the Indigenous connection to the lands and waters of Australia.

Instruments of empowerment must be innovative and sensitive to the intricate and inseparable synergy between law, land and culture that emerges from The Dreaming. The NZ Act stands as one exemplar of legal innovation developed in an inclusive and reconciliatory spirit. We must remember that Indigenous Australians have a genealogy that can be traced to the beginning of humanity and well before the 26th of January 1788. The torment of their 'powerlessness' cannot be forgotten.[172] And upon reflecting on the enduring implications of Australia's colonial legacy, I find myself thinking of Monica Morgan and her moving description highlighting the strength and resilience of the Indigenous spirit:

At 'the end of the day….when white fellas have had their fill and used all the resources from our lands and waters',[173] the First Nations people of Australia will 'always be here where they belong; in their traditional country.'[174]

171 *Behrendt et al,* note 73, p. 168.

172 *First Nations*, note 14.

173 *Monica Morgan*, What has Native Title done for me recently?, ALRC Reform Journal 93 (2009), 25.

174 Ibid.