

FREE PRIOR AND INFORMED CONSENT in AUSTRALIA

INTERNATIONAL FORUM ON INDIGENOUS PEOPLES LEGAL AID – TAIPEI/ HUALIEN, TAIWAN
3- 7 SEPTEMBER 2024

TONY MCAVOY SC

Acknowledgements

- Indigenous Legal Aid Foundation
- The First Peoples of Taiwan
- The many distinguished speakers and delegates

Disclaimer

My views expressed here are my own and not the views of the Australian Law Reform Commission or the New South Wales Bar Association

Disclaimer notice

This map indicates only the general location of larger groupings of people, which may include smaller groups such as clans, dialects or individual languages in a group. Boundaries are not intended to be exact. The views expressed in this publication are those of the author and not those of the Australian Institute of Aboriginal and Torres Strait Islander Studies. For more detailed information about the groups of people in a particular region, contact the relevant land councils.

NOT SUITABLE FOR USE IN NATIVE TITLE
AND OTHER LAND CLAIMS



First Nations of Australia

- Approx 1 million people
- Approx 300 dialect groups/nations
- Over 630 positive native title determinations by the Federal Court of Australia
- Estimated \$AUD billions in compensation owed
- Occupation of continent for over 60,000



Area of land that is in the Indigenous estate, by separate Indigenous estate attributes

Areas comprising Australia's Indigenous estate are coloured according to the combination of attributes that apply to those areas.

Attribute

Indigenous owned



✓ ✓ ✓ ✓

Indigenous managed

✓ ✓ ✓ ✓

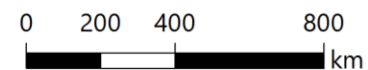
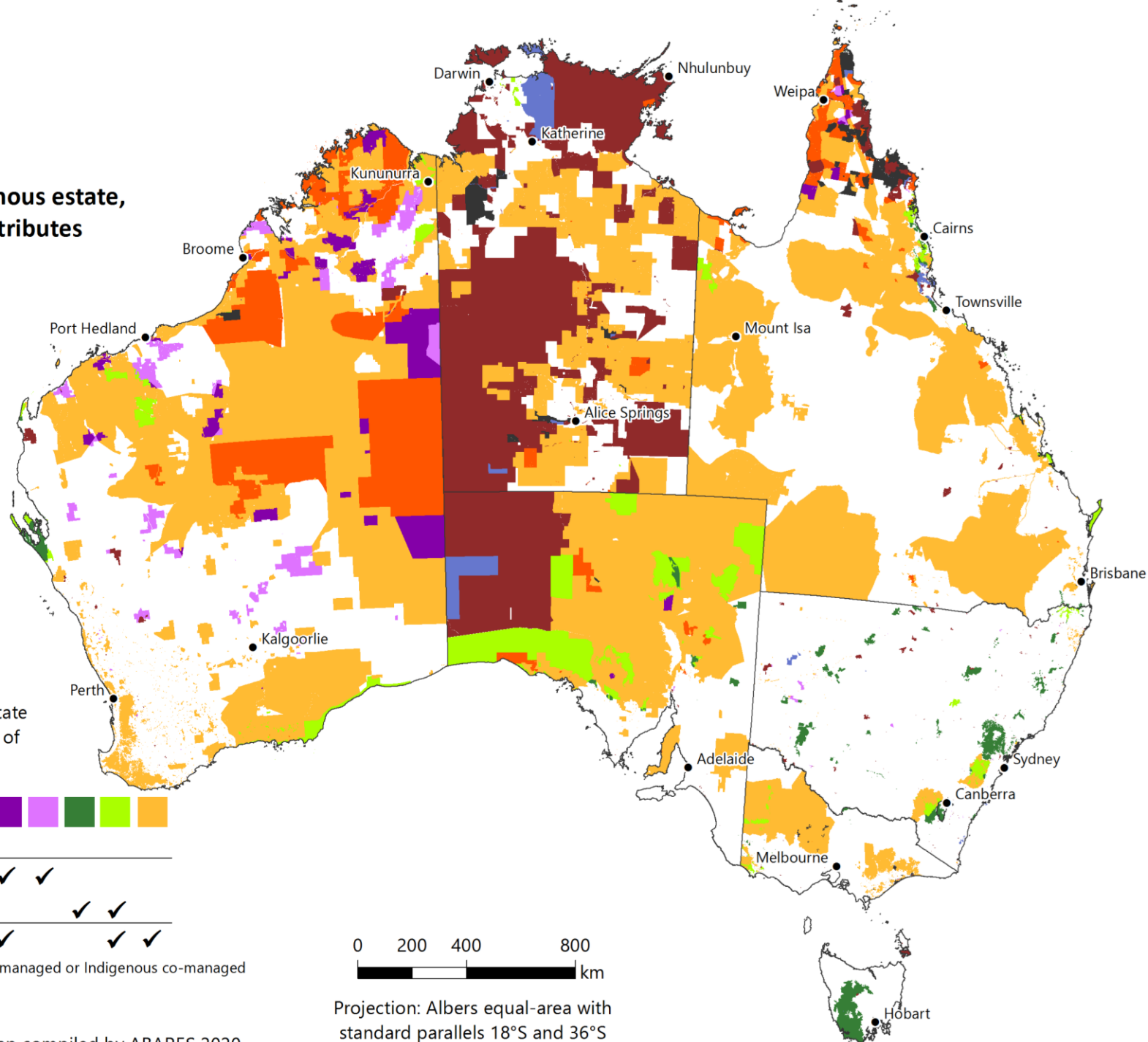
Indigenous co-managed

✓ ✓ ✓ ✓

Other special rights

✓ ✓ ✓ ✓

Note: All Indigenous owned land is either Indigenous managed or Indigenous co-managed



Projection: Albers equal-area with
standard parallels 18°S and 36°S

The Significance of Native Title

- **630 positive determinations** of native title across Australia, with vast areas still subject to claim and yet to be determined.



- In each of those 630 cases the Federal Court of Australia has had to be satisfied there was an appropriate basis for a finding that native title has continued to exist.
- An element of that satisfaction is that there was and is a normative system of law and custom having its origins in the pre-British societies.
- Each native title determination evidences the continued existence of substantial systems of law not governed, controlled or regulated by Australian law.

Constitutional Protections

- The Australian Constitution was enacted as an act of the British Parliament in 1901.
- It did not and does not contain provisions for the protection of human rights or First Nations rights.
- Failed Constitutional referendum October 2023 – to provide for “Voice to Parliament”
- There is no protection in domestic legislation for the articles of the ICCPR, ICESCR or the UNDRIP



Domestic Human Rights Legislation

Federal

- There is human rights legislation protecting against:
 - Racial discrimination and racial vilification (Racial Discrimination Act 1975 (Cth))
 - Sex discrimination including sexual harassment (Sex Discrimination Act 1984 (Cth))
 - Disability discrimination (Disability Discrimination Act 1992 (Cth))

Australian Capital Territory, Victoria and Queensland

- Human rights legislation protecting
 - Right to life
 - First Nations cultural rights
- Must be piggy-back onto other substantive relief
- Allows for declaration of incompatibility (does not make provisions unlawful)
- Public entities must take rights into account, and failure to take into account makes decision unlawful.

Domestic Land Rights Legislation

Native Title Act 1993 (Cth)

- Native Title Act provides for:
 - Recognition of rights and interests in land;
 - Entitlement to compensation for extinguishment or impairment;
 - Mechanism to validate acts affecting native title:
 - By notice with right to comment for certain acts;
 - By agreement with respect to mining and compulsory acquisition; or
 - Where no agreement by order of National Native Title Tribunal
 - No veto

Aboriginal Land Rights Acts (2)

- The **Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)** and **Aboriginal Land Rights (NSW)** both provide for:
 - Freehold title
 - Rights to alienate land
 - Rights of veto for mining and other uses
 - Rights of access to other lands
 - Hunting and fishing rights

Domestic Litigation

Historical Cases

There were numerous 19th century cases which questioned the legitimacy of the British asserted acquisition of sovereignty, and the lawful acquisition of ownership of Crown lands in the Australian colonies.

These questions are being tested in the “Truth Telling” inquiries happening in Victoria and commencing in Queensland on 16 September 2024



Domestic Litigation

Gerhardy v Brown (1985) 159 CLR 70

High Court of Australia

- Racial Discrimination Act 1975 (Cth)
- section 8 “special measure”
- Brennan J – four indicia including as the third Indicium that it is for the sole purpose of securing the advancement of the beneficiaries of the measure

At [37] The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.

Domestic Litigation

Maloney v Queen [2013] 87 ALJR 755

- In 2006, the Queensland state government imposed alcohol restrictions on a discreet Aboriginal and Torres Strait Islander community at Palm Island, off the North Queensland coast.
- The restrictions was challenged in the High Court
- EMRIP comment and UNDRIP - The HC found that those matters were extrinsic material not permitted to be taken into account by the *Acts Interpretation Act 1901* (Cth)



Domestic Litigation

Santos Ltd v Gomeroi People [2022] NNTTA 74

Application to the National Native Title Tribunal for approval of petroleum leases for natural gas wells in central New South Wales.

Opposed by Gomeroi People who argued that Santos had not negotiated in good faith, and that in determining whether the Santos had negotiated in “good faith”, the Tribunal should take into account the principles of Free Prior and Informed consent set out in the UNDRIP.

At [768] it was held

... it is submitted at para 253 that if the project is to proceed, it should do so only in accordance with the Gomeroi applicant’s agreement, made with the full, free prior and informed consent of the native title claim group. That formula is used extensively in the Gomeroi applicant’s contentions.

... As to para 253, the Tribunal must exercise its jurisdiction in accordance with the Native Title Act.

Domestic Litigation

Waratah Coal v Youth Verdict (No 6) [2022] QLC 21

- In Queensland Land Court
- Objections under Human Rights Act 2019 (Qld)
- Was a climate change case against a coal mine in Central Queensland

The President found:

- She was a ‘public entity’ for the purposes of the Human Rights Act 2019 (Qld)

At [1528]

The First Nations right is about the survival of culture. The Torres Strait Island peoples face an existential risk from sea level rise. Already First Nations peoples in the north of Australia are experiencing the effects of climate change impacts on their ability to enjoy, maintain, control, and develop culture. More severe impacts mean greater interference with cultural rights. **Displacement has the potential to destroy culture. Something that cannot be measured in monetary terms, is at odds with the purpose of s 28 and, set against the history of dispossession of First Nations peoples in this country, counts against the Project being approved.**

Present Policy Position

Human Right

- Self determination

- Free prior and informed consent

Policy

- From Attorney General's Department website

While there is no universally accepted agreement as to the content of the right to self-determination, it is agreed that at a minimum, it entails the entitlement of peoples to have control over their destiny and to be treated respectfully. This includes peoples being free to pursue their economic, social and cultural development.

- From National Indigenous Australians Agency submission to parliamentary inquiry into UNDRIP (2022)

Free, Prior and Informed Consent is a concept, outlined in the UNDRIP. The scope and content of FPIC is not defined in the UNDRIP, nor settled at international law and is still subject to debate in international fora. However, the NIAA continues to engage and work in partnership with Aboriginal and Torres Strait Islander peoples on a range of issues, recognising their self-determination and in a way that is meaningful.

Present Policy Position

The Parliamentary Inquiry into the UNDRIP recommended

The Committee recommends development of a **National Action Plan**, in consultation with Aboriginal and Torres Strait Islander peoples, that outlines the approach to implementing the United Nations Declaration on the Rights of Indigenous Peoples in Australia.

This recommendation follows a similar approach in New Zealand, and failed to follow the Canadian models.

The recommendation has not been acted upon.



Potential Legislative and Policy Development

- In May 2020, the mining giant Rio Tinto, destroyed caves in the **Juukan Gorge** in Western Australia.
- The caves contained evidence of human habitation that was estimated to be **46,000 years old**.
- The caves were destroyed notwithstanding their global significance, the existence of a native title determination, state heritage law and commonwealth heritage law.
- A parliamentary inquiry was held which in 2022 recommended an overhaul of the **Aboriginal and Torres Strait Islander Heritage Protection Act 1984** (Cth), and also a review of the **Native Title Act 1993**.
- The consultation on the ATISHPA has been underway for a number of years and was interrupted by the referendum in 2023.
- The review of the Native Title Act 1993 has been referred to the Australian Law Reform Commission. I have appointed as commissioner.

ALRC Review of the Native Title Act

Terms of Reference provide

“In particular, the ALRC is asked to consider:

- the intention of the Native Title Act, as stated in its preamble, to be a special measure for the advancement of First Nations peoples, and to ensure native title holders are able to fully enjoy their rights and interests
- the current operation of the future acts regime, including Indigenous land use agreements (ILUAs), and related parts of the Native Title Act, with the aim of rectifying any inefficacy, inequality or unfairness
- options for efficiencies in the future acts regime to reduce the time and cost of compliance for all parties
- **the rights and obligations recognised in the international instruments to which Australia is a party or which it has pledged to support, including the United Nations Declaration on the Rights of Indigenous Peoples ...”**

What strategies are open?

Given that:

- The principle of Free Prior and Informed Consent is expressed as aspirational and adaptive to the circumstances of each nation state;
- Governments are relying on international developments as basis for deferral of policy formulation of the right to self determination and the principles of FPIC;
- The relative political strength of industry compared to First Nations.

What strategies are open?

The following strategies are open:

1. Development of international agreement on FPIC mechanisms in relation to land, resources and development (noting Equator Principles and Sustainable Development Goals), maybe in form of domestic policy;
2. Development of domestic policy positions, in each jurisdiction, creating norms, which are gradated according land holding, eg
 1. Full consent/ right of veto on exclusive First Nations lands, or non-exclusive where no third party interest
 2. Full consent / right of veto on non-exclusive First Nations lands where third party consents to veto;
 3. Reversal of onus on non-exclusive First Nations lands where third party does not consent to veto, ie proponent must prove “withholding of consent by First Nation is unreasonable”.

