



GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY

GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

Editor-in-Chief
Laurynn Williams

Executive Editors
Elizabeth Thomas
Emma Blake
Stephanie Chard

Editors
Anna Feng
Cameron Henderson
Charlotte Mitchell
Isaac Jeong
Jean Danielle Bernardino
Lia Hiron
Louise Sullivan
Luella Boyd
Luke Livesey
Moyosore Adesina
Natasha Kendall
Nicholas Drew
Nora Merralls

Consulting Executive Editor
Dr Allan Ardill

Volume 12 Issue 2
2024

Published on 29 July 2025, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

Contents

SALLY WORLAND AND KIERAN TRANTER	<i>LOOT BOX REGULATION IN AUSTRALIA: CLASSIFICATION AND GAMBLING</i>	1
BRUCE BAER ARNOLD, WENDY BONYTHON AND TESS ROONEY	<i>EMOTION RECOGNITION TECHNOLOGIES AND DIGNITY IN AI-BASED SURVEILLANCE CAPITALISM</i>	29
SCOTT CALNAN	<i>INDIGENOUS RIGHTS TO LAND UNDER THE AUSTRALIAN HUMAN RIGHTS ACTS</i>	46
MICHAEL HEAD	<i>AUSTRALIAN WAR POWERS PROPOSALS RAISE CONSTITUTIONAL, LEGAL AND POLITICAL CONCERNS</i>	81
TAYLAH GRAY	<i>NATIVE TITLE AND DISPOSSESSION HAVE THE SAME ADDRESS: HOW WESTERN LANGUAGE HAS DIMINISHED ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES RIGHTS TO LAND</i>	109

NATIVE TITLE AND DISPOSSESSION HAVE THE SAME ADDRESS: HOW WESTERN LANGUAGE HAS DIMINISHED BLACKFULLAS RIGHTS TO LAND

TAYLAH GRAY*

*** Viewer discretion is advised. Please note this article may include names of First Nations Peoples who have died.***

*This paper discusses the political and prejudicial undercurrents surrounding native title law in Australia. If the production of meaningful land rights has stagnated since the historical decision of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo (No 2)*'),¹ the 'language of savagery' is one of the contributing causes.² The historical undertones of 'savage' have permeated into Australian native title case law and legislation, destroyed and continue to repress non-western Peoples' rights to land.³ Further research into the language of savagery reveals previously hidden forces that have enabled the rights of private land ownership to prevail over Aboriginal and Torres Strait Islander Peoples' land rights and interests.*

When native title is considered with the understandings of racism and colonial attitudes of non-western societies, a more complete picture can be painted of the consequences of colonialism and how this has impacted Aboriginal and Torres Strait Islander Peoples' rights to land justice in Australia.

First Nations sovereignty must be at the forefront when considering ways to move forward as a Nation. This is particularly since resulting legislation and high court decisions have provided inadequate compensation to native title holders and have failed to progress forward by ensuring land equality is met for all.

* Taylah Gray (Wiradjuri) is a Senior Solicitor and PhD in Law Candidate at the University of Newcastle (UoN). Her thesis focuses on Native title Law, which seeks to increase economic growth and land reform for First Nations communities in Australia. Taylah works as a Sessional Academic and teaches in the Bachelor of Global Indigenous Studies at UoN.

¹ *Mabo v The Queen (No 2)* (1992) 175 CLR 1 ('*Mabo (No 2)*').

² Robert Williams, *Savage Anxieties: The Invention of Western Civilization* (Palgrave MacMillan, 2012) 1, 1-31.

³ *Ibid* 1.

CONTENTS

I	PREAMBLE.....	2
	A. <i>Personal Context</i>	2
	B. <i>Terminology</i>	4
II	INTRODUCTION	4
III	THE LANGUAGE OF SAVAGERY	5
IV	HISTORICAL OVERVIEW OF NATIVE TITLE.....	9
V	POSITION IN CASE LAW AND LEGISLATION	17
VI	CONCLUSION.....	35

I PREAMBLE

A. *Personal Context*

I would like to begin by honouring Country. This continent has nurtured, fed, and sustained our societies since time immemorial. I write on the unceded sovereign lands of the Wonnarua Nation. I honour their Elders both past and present. Although this Country is masked in buildings and roads, the spirits of our Ancestors still linger and safeguard the traditional and cultural ways of Aboriginal Peoples.

I pay respects to our creator spirit, Baiame, who has instilled such beauty and fair laws for our people on these sacred lands and waters. In Wiradjuri language, we say *Yindyamarra*, which means to honour, to respect, to go slowly, to take responsibility for myself and responsibility for others. It is the Wiradjuri way of '*being, knowing and doing*'.⁴ The Wiradjuri Nation is the largest Country in New South Wales. I appreciate the complexities around our Kinship systems and recognise that other Wiradjuri people will have different interpretations of this topic.

You will notice I have mentioned myself last. This is because I am the least important of the previously mentioned concepts. These respective concepts (Wonnarua and Wiradjuri Nation, Baiame, Country, Yindyamarra, lands, waters, and traditional laws) have existed well before my time and will continue to exist after I am gone. It is my responsibility to

⁴ *A New Wiradjuri Dictionary* (1st ed, 2010).

ensure that Wiradjuri ways of *being*, *knowing* and *doing* (Yindyamarra) are never forgotten. My name is Taylah Gray. I am a proud Wiradjuri woman, born and raised on my Ancestral Country. I now live on the lands of the Wonnarua Peoples. I am a law graduate and PhD candidate at the University of Newcastle's School of Law and Justice. I am a Sessional Academic within the Wollotuka Institute and I teach Aboriginal Tertiary Studies through a specialty pathway program called Yapug.

I write from my Wiradjuri standpoint, Yindyamarra. The concept of Yindyamarra is the practice of Wiradjuri philosophy, our epistemology (*knowing*), ontology (*being*), and axiology (*doing*).⁵ It is shared knowledge and about engaging in deep listening. It is how I research and conduct myself as Wiradjuri. Yindyamarra makes me answerable to my Ancestors, my Elders, and those who have walked before me. It also helps shape understandings of Indigenous relations to place and people.⁶

Western grammar requires the capitalisation of the initial letter when referring to formal names and titles. You may notice throughout this paper that I have not done this with terms such as british, crown, supreme court, high court, lord, privy council, judicial committee, chief justice, justice or western. This is deliberate and contrary to the position taken by high court judge, Dawson, in *Mabo (No 2)*.⁷ Not only did the western judge refuse to acknowledge native title rights for Aboriginal and Torres Strait Islander Peoples in this decision, but he abstained from capitalising Aboriginal. The capitalisation of Aboriginal conveys a form of respect and legitimises us as people — both are absent in Dawson's judgement. I wish to evoke a similar awakening to western academics and allow them to experience the alertness Aboriginal and Torres Strait Islander Peoples may feel when examining western literature

B. Terminology

In this article, I use the term Aboriginal and Torres Strait Islander Peoples, First Nations, and Indigenous Peoples interchangeably. The respective terminologies refer explicitly to the Indigenous Peoples of Australia unless reference to foreign jurisdictions is made otherwise. In addition, I use the term 'Peoples' to signify that Aboriginal and Torres Strait

⁵ Aliene Moreton-Robinson and Maggie Walter, 'Indigenous Methodologies in Social Research' in Maggie Walter (ed), *Social Research Methods* (Oxford University Press, 2010) 1.

⁶ Yoko Akama et al, 'Designing Digital and Creative Scaffolds to Strengthen Indigenous Nations: Being Wiradjuri by Practising Sovereignty' (2017) 28(1) *Digital Creativity* 58.

⁷ *Mabo No 2* (n 1).

Islander Peoples are not one unified collective group, but a collective society that consists of over 500 distinct communities, Peoples, and Nations. Each individual Nation has its own complex and dynamic systems of governance, language, and community responsible. In a decolonial approach, lowercase is used to de-centre western dominance.

II INTRODUCTION

In Australia, the legal architecture surrounding the native title regime has perpetuated colonial narratives that subjugate Aboriginal and Torres Strait Islander Peoples. As this article will show, a driving force of this harmful and self-feeding process is a rhetorical and legal tool originating from colonial and western ideologies, namely the recurring theme of 'the language of savagery'.

The language of savagery emerges from the historic western literature of Greek myths and storytelling. These works demonstrate how the demonisation of foreign tribes justifies territorial conquest of non-western societies. Without the historical determination of what constituted 'savage' peoples and tribes by the western civilisation, the preconceived idea of a superior society would not have been possible. Australian case law and legislation are evidence of how specific language used by eurocentric judges is recreating this conceptual split between westerners and the savage.

Part I of this article provides an analysis of the historical foundations of the language of savagery and its role in shaping western legal frameworks in Australia. Specifically, this section examines how Aboriginal and Torres Strait Islander Peoples are placed in a category of isolation and inferiority, which further justifies ongoing dispossession and land inequality within western legal structures. Part II of this article examines how western ideologies and perceptions have been utilised throughout native title case law and legislation. In turn, the persistence of this harmful language in a contemporary sense has stagnated any progression towards meaningful land reform under the native title regime. Part III considers how the role of Aboriginal sovereignty can help break the deadlock of the language of savagery and create a more equitable approach to land.

III THE LANGUAGE OF SAVAGERY

The use of 'savage language' was well underway in European nations centuries before the british arrival in Australia. It had become the underlying architecture for the extension of

the western empire. Without it, western civilisation would not have been able to invent itself or justify territorial conquest of non-western societies.⁸ This begs the question, *what is the language of savagery and where does it come from?* Robert Williams.⁹ defines the western conception of the savage as:

...a distant, alien, uncivilised being, unaware of either the benefits or burdens of modernity. Lacking in sophisticated institutions of government and religion, ignorant of property and laws, without complex social bonds or familial ties, living in a state of untamed nature, fierce and ennobled at the same time, the savage has always represented an anxious, negating presence in the world, standing perpetually opposed to western civilisation.¹⁰

The origins of this 'savage' were generated out of western colonial ideologies and ancient Greek myths of tribalism and barbarism inflicted on foreigners.¹¹ The savage is initially captured in the passages of the two foundational works of the ancient Greek poet, Homer — the *Iliad* and the *Odyssey*. Both poems are regarded as the first extant works of European literature, written in the 8th century BCE.¹²

The *Iliad* and the *Odyssey* share overt themes of conquest, dispossession and impose 'savage attitudes' towards tribes that represent different societal norms to those 'known' eurocentric ideas — a similar application that is often projected onto Aboriginal and Torres Strait Islander Peoples when considering rights to land. Historical acts of savage language have become the pathway for large-scale and systemic theft of land and resources.

Williams' conception of the savage is defined as 'perpetually opposed to western civilisation'.¹³ In both the *Iliad* and the *Odyssey*, one central focus involves conflicts between human characters and mythical creatures. In both instances, the western writer concluded with the triumph of the human characters over the mythical creatures. Of

⁸ Robert Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (University of Minnesota Press, 2005) 33.

⁹ Professor Robert Williams is an American lawyer and legal scholar specialising in the field of federal Indian law, international law, and Indigenous peoples' rights. Williams is also an enrolled member of the Lumbee Indian Tribe of North Carolina.

¹⁰ Robert Williams, *Savage Anxieties: The Invention of Western Civilization* (Palgrave MacMillan, 2012) 1 (*'Savage Anxieties'*).

¹¹ *Ibid*, 33.

¹² For an in-depth outline of each poem, see *Ibid*.

¹³ Williams, *Savage Anxieties* (n 10) 1.

course, the human characters were bound to win. The western writer saw himself in the human characters and not in the mysterious and 'dangerous' mythical creatures. Perhaps this approach is inadvertently used in native title decisions based on the conflict between western capitalistic imperatives and First Nations Peoples.

When considering the meaning of property and possessory rights to land, the worldviews of Aboriginal and Torres Strait Islander Peoples and of westerners creates a conceptual split because of the contrasting views between the two societies.¹⁴ A similar phenomenon occurred in the way the mythical creatures in the *Iliad* and the *Odyssey* were demonised by the human characters. The demonisation of Aboriginal and Torres Strait Islander societies places First Nations Peoples into an isolated category that is separate and inferior to western civilisation, which further justifies western imperialism over Indigenous lands.

Racial and prejudicial attitudes inflicted on non-western cultures are not unique to the Australian context. The attitudes of negative portrayal and perception of the East — particularly the Middle East and North Africa— has also been recorded and critiqued. The influential work of Edward W. Said in *Orientalism* spotlighted the central issues exemplifying how western depictions of Eastern cultures perpetuates negative stereotypes and creates a power imbalance that benefits the west.¹⁵

Eastern societies were the focus of western 'orientalist' studies. Western writers, artists, scholars, and leaders placed a semi-mythical lens over eastern cultures by creating exotic depictions of their cultures. Said defined the concept of Orientalism as:

[T]he study of the whole Orient (including the civilisations of China, Japan, India and the Muslims) ... until the eighteenth century the 'orient' was considered in Europe to be Islam, or Turkey, or the lands of the Saracens. After the discovery of the large new portions of Asia during the second half of the eighteenth century, the 'orient' expanded accordingly, but in order to retain the coherence of the traditional idea of the Orient, 'Orientalism' is treated here as western attention to the near East.¹⁶

¹⁴ Veronica Strang, 'Knowing Me, Knowing You: Aboriginal and European Concepts of Nature As Self and Other' (2005) 9(1) *Worldviews: Global Religions, Culture and Ecology* 25-56.

¹⁵ Edward Said 'Orientalism' (1977) 31(1) *The Georgia Review* 162.

¹⁶ *Ibid* 162.

The 'language of savagery' explicated by Williams and the application of 'othering' by Said are the underlying foundation for colonial prosperity in Australia. It does not take much insight to understand that Williams and Said are not only reciting the historical wrongs practiced by *previous* westerners, but they are also discussing how these historical perceptions have trickled down into the real issues of the present century which are practiced by the *current* westerner. Like Williams and Said, not only do I seek to recite the historical wrongs of the earlier westerner — like the practice of *terra nullius* that occurred in 1788 in Australia— but I wish to emphasise that it is the *current* westerner who perpetuates the violence of land theft in Australia. The 'othering' referred to by Said, in this instance, includes the culturally mono-dimensional western judiciary. An example of this is how western judges may make decisions, or how western leaders write legislation with respects to Aboriginal affairs. There are repeated terms that have been put together by past judges who have consistently viewed First Nations societies as simplistic and lacking in modernity.¹⁷ This is a major failing, not because western judges may be inadvertently biased, but because western legal structures simply do not accommodate those at the bottom of the land rights ladder. The western judiciary is built on the premise of exclusion, particularly to Aboriginal Lawmen or Lawwomen.¹⁸

This then raises the question: how many judges have publicly identified as a First Nations person when deciding a native title decision? The answer, of course, is none. Perhaps we should suspect the real motive of maintaining these western benches is to keep the savages and their rights to land under colonial control. It still seems the pendulum for change is swinging unfavourably for shared decision-making.¹⁹ First Nations representation in the judiciary is important so that our perspectives have some representation, and degree of influence over decisions in inferior courts. Only in 2022,

¹⁷ See, eg, *Yanner v Eaton* (1999) 201 CLR 351, 493 where a western judge denigrated Aboriginal and Torres Strait Islander Peoples hunting activities. Callinan J remarked '[a]lthough for myself I might have questioned whether the use of a motorboat powered by mined and processed liquid fuel, and a steel tomahawk, remained in accordance with a traditional law or custom, particularly one of alleged totemic significance'.

¹⁸ Lawman or Lawwoman refers to a body of senior Aboriginal or Torres Strait Islander People who are the teachers and holders of Aboriginal law, which has been handed down from their Creation Ancestors since time immemorial. See, eg, Hilary Bond, 'We're the mob you should be listening to' Aboriginal elders talk about community school relationships on Mornington Islander' (2010) 39(1) *The Australian Journal of Indigenous Education* 40, viii.

¹⁹ In 2023, the Australian population overwhelmingly voted to reject the referendum on a First Nations Voice to Parliament by approximately 60 per cent (No) to approximately 40 per cent (Yes); see, eg, Mike Berry, 'The Voice Referendum' (2023) 92 (January) *Journal of Australian Political Economy* 240, 240.

was the first Aboriginal supreme court judge of Queensland appointed to preside over an Australian superior court.²⁰ Though overdue, this is splendid given that supreme court decisions of each State may influence another State's supreme court particularly in emerging areas of law. To go one step further —imagine what a high court bench, which is binding on all other courts, which equally represents First Nations People would look like. Perhaps, if this were realised, there would be no need for grassroots activists to advocate for proper land entitlements and native title.

That is not to suggest that the representations of inferiority of Aboriginal and Torres Strait Islander Peoples *are* true, it is quite the contrary. As Said and Williams propose, it is that western people (even if inadvertently or innocently) *believe* the representations to be true and so *act* on those representations as if they were true. Australian courts have used these inferior representations when determining Aboriginal and Torres Strait Islander Peoples interests in lands and waters.

The 'language of savagery' and 'otherness' play a sophisticated role in uplifting western society, particularly in legal disputes where land has been stolen and there are few instances where it has not been stolen. There are three aspects to consider when understanding how native title case law and legislation consistently endorse the colonial position that Aboriginal and Torres Strait Islander Peoples do not have equal rights to land occupation in Australia. First, western people have a long history of representing non-western people as 'savage' and therefore inferior. Second, western people do this by describing non-western people with words that suggest that they are inferior, and these words take on a *truth* in the minds of western society. This inadvertently results in outcomes that primarily privilege western interests over First Nations interests when deciding native title disputes. Lastly, with examination, it is possible to see that this is the process that is playing out in Australian case law and legislation regarding native title. What is important is not merely that the language of savagery is being *used* but instead that the language of savagery in fact represents a set of hidden processes that are animating the entire native title regime.

²⁰ Marty Silk, 'Australia's first Indigenous Supreme Court Judge Sworn in', *Financial Review* (online, 13 June 2022) <<https://www.afr.com/politics/federal/australia-s-first-indigenous-supreme-court-judge-sworn-in-20220613-p5atbk>>.

IV HISTORICAL OVERVIEW OF NATIVE TITLE

The concept of native title is *sui generis*, it is thus distinguishable from rights afforded by 'normal' proprietary interests such as fee simple. Under the native title regime, native title holders do not have the ability to transfer title, sell or surrender land to third parties (unlike a fee simple). The Australian legal system was particularly deliberate in placing native title rights into this straitjacket, because it provides the States and Territories the ultimate power to maintain control and authority over native title sanctioned lands. The only progressive solution to land inequality for Aboriginal and Torres Strait Islander Peoples is economic and social separatism. Native title does not afford this right.

The promises of land justice represented in *Mabo (No 2)*²¹ have been irreversibly damaged by later high court decisions such as in *Commonwealth of Australia v Yarmirr* ('Yarmirr')²², *Fejo v Northern Territory* ('Fejo')²³, *Western Australia v Ward* ('Ward')²⁴, *Members of the Yorta Yorta Aboriginal Community v Victoria* ('Yorta Yorta')²⁵, *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples*²⁶. Legislative instruments such as the 1998 amendments to the *Native Title Act 1993* (Cth) have also fuelled the language of savagery around native title and assisted in the extinguishment, or partial extinguishment of native title rights.²⁷ Williams²⁸ proposes that the use of savage language in a historical context continues to undermine the proprietary interests of 21st century Aboriginal and Torres Strait Islander claimants:

Despite *Mabo (No 2)*, the courts of the 21st century English speaking colonisers of Australia are still perpetuating the same racist language of savagery used by the 19th century English speaking colonisers of Australia every time they find that native title has disappeared by virtue of the 'extinguishing acts' of a supposedly higher form of civilisation.²⁹

²¹ *Mabo (No 2)* (n 1).

²² (1999) 168 ALR 426.

²³ (1998) 156 ALR 721.

²⁴ (2002) 213 CLR 1.

²⁵ (2002) 214 CLR 422.

²⁶ [2019] HCA 7.

²⁷ *Native Title Act 1993* (Cth) s 237A; See also, *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik Peoples*').

²⁸ Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990) was cited as learned authority in *Mabo (No 2)* (n 1), 33 (Mason CJ and McHugh J).

²⁹ Robert A. Williams Jr, 'What the Hell Happened to Mabo? The Search for the Missing Link' in Toni Bauman and Lydia Glick (ed), *The Limits of Change: Mabo and Native Title 20 Years On* (Australian Institute of Aboriginal and Torres Strait Islander Studies Research Publications, 2012) 1, 34. See also, *Yorta Yorta* (n

In the first Australian case to consider customary rights to land, Blackburn J in *Milirrpum v Nabalco Pty Ltd and the Commonwealth* ('*Milirrpum*')³⁰ demonstrated how western judges portray Aboriginal and Torres Strait Islander societies. This portrayal placed Aboriginal and Torres Strait Islander Peoples in a separate class that is perpetually opposed to western civilisation. Blackburn J commented:

[t]here is so little resemblance between property, as our laws... understand that term, and the claims of the plaintiffs for the clans, that I must hold that these claims are not in the nature of proprietary interests.³¹

Although Blackburn J was prepared to acknowledge that Aboriginal societies consisted of systematic governance structures and connections to the land, he was not willing to find any proprietary interests that were recognisable by the common law. He was only prepared to make concessions which completely disregarded the Aboriginal viewpoint. With a modest recognition from the court to acknowledge Aboriginal governance systems and connection to the land, it is a shame he still chose to adjudicate against Aboriginal People in this regard. The courts reasoning in this instance stipulated that western judges apply the recurring theme that proprietary rights operate merely from a western (eurocentric) perspective, which in turn, dismisses Aboriginal and Torres Strait Islander Peoples' perspectives on property. This puts Aboriginal and Torres Strait Islander Peoples in an awkward situation considering that we were transformed by proclamation into British subjects under the rule of a foreign legal system without giving our consent.

This legal system continues to dismiss and diminish our perspectives in claims for land where our laws have and continue to provide the means for resolution and disputes.³²

The facts in *Milirrpum*³³ were that the Nabalco Corporation (now known as Rio Tinto)³⁴ secured a 12-year bauxite mining lease from the Federal government over Yolngu land. The Yolngu People brought an action against Nabalco to continue their customary laws

25), 129. See also, Benjamin Langford, 'The Tide of History or a Trace of Racism? The Yorta Yorta Native Title Tragedy' (2003) 15(4) *The Journal of Indigenous Policy* 65, 65.

³⁰ (1971) 17 FLR 141 ('*Milirrpum*').

³¹ *Ibid* 273 (Blackburn J).

³² See Irene Watson 'There is No Possibility of Rights Without Law: So Until Then, Don't Thumb Print or Sign Anything!' (2002) 5(1) *Indigenous Law Bulletin* 4, 4-7.

³³ *Milirrpum* (n 30).

³⁴ Rio Tinto has continued to impact the interest of Aboriginal and Torres Strait Islander Peoples land rights in 2020. See, eg, Calla Wahlquist, 'Juukan Gorge: Rio Tinto Blasting of Aboriginal Site Prompts Calls to Change Antiquated Laws' *The Guardian* (online at, 30 May 2020) <<https://www.theguardian.com/australia-news/2020/may/30/juukan-gorge-rio-tinto-blasting-of-aboriginal-site-prompts-calls-to-change-antiquated-laws>>.

and cultural practices over the land, subject to this lease. The Yolngu Peoples' central contention was that they held an interest in the land on a communal native title basis, which had not been either validly extinguished or acquired under the *Lands Acquisition Act 1955* (Cth).³⁵ The western court —through its agent, Blackburn J— was thus required to decide whether the Yolngu people enjoyed the right to enforce their proprietary interests. Unsurprisingly, it made findings adverse to the interests of Aboriginal Peoples. What is often over-celebrated in this decision is one finding of fact by a western judge who recognised that Aboriginal and Torres Strait Islander Peoples maintained a system of governance recognisable by the common law. But that is not a victory for Aboriginal Peoples because the outcome still resulted in the erasure of the Yolngu peoples heritage by making findings by which the westerners saw they had no 'right ... in connection with the land'.³⁶ Blackburn J commented:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men' it is that shown in the evidence before me.³⁷

Blackburn J's findings that the Yolngu People retained complex and intricate governance structures prior to the assertion of British sovereignty heightened judicial 'anxieties' given that legally, Australia had been 'settled'.³⁸ It is important to note that settlement in Australia occurred in 1788 and was founded upon the racially discriminatory notion of *terra nullius* as the justification for the theft of Aboriginal land. This decision came in 1971, *after* 1788, which meant that the colony had a well-established western legal system. To give Aboriginal and Torres Strait Islander Peoples exclusive possession in this regard would go against the historic precedent previously established, that this land was empty, unoccupied and that the doctrine of tenure itself precluded any other title.³⁹ For instance, Blackburn J regarded himself bound by the distant authority of *Cooper v Stuart* (1889) 14 App Cas 286 ('*Cooper*'),⁴⁰ whereby the privy council endorsed the proposition

³⁵ *Lands Acquisition Act 1955* (Cth).

³⁶ *Milirrpum* (n 30) 143.

³⁷ *Ibid* 267-8 (Blackburn J).

³⁸ Julie Evans, 'Where Lawlessness is Law: The Settler-Colonial Frontier as a Legal Space of Violence' (2009) 30(1) *Australian Feminist Law Journal* 3, 12.

³⁹ *Cooper v Stuart* (1889) 14 App Cas 286 (lord Watson) ('*Cooper*').

⁴⁰ *Ibid*.

that New South Wales was an occupied State and rested on the presumption of 'settlement' rather than 'invasion' or 'conquest'. The timing of *Cooper*⁴¹ is significant as the decision came after 1788, when settlement was declared, and the British Westminster legal framework was well established in Australia. As a flow-on effect of this, the entire Australian legal identity is based 'on the disavowal of Indigenous sovereignty because the nation is socially and culturally constructed as a white nation'.⁴² Therefore, the westerners view is that to afford Aboriginal Peoples any meaningful rights of exclusive possession under the native title regime in this instance would erode the existing colonial powers and authority that are currently exercised over the land.

This was arguably a missed opportunity in reconciling that the two systems of law may operate concurrently, much like the parallel systems of common law and equity which recognise 'overlapping jurisdictions, overlapping rules, and overlapping remedies'.⁴³ Common law developed a slavish devotion to precedent, divorced from considerations of substantive justice. In other words, judicial officers are bound by the decisions of previous case law in every instance, no matter how unjust or unfair that previous decision is to the plaintiff or respondent. Equity developed as a response to the inflexible confines and lack of fairness exercised by the common law system. Thus, while both jurisdictions provide two separate systems of law with overlapping functions and remedies, these dual forces manage to co-exist. This ultimately lays the foundational argument that the Australian jurisdictions and Aboriginal and Torres Strait Islander legal systems could function concurrently too.

An 'absence' of any competing sovereign was critical in maintaining the legal fiction of settlement. Remarkably however, the application of land acquisition was not asserted over the entire continent 'in one magical action by the erection of a Union Jack'.⁴⁴ Some areas were arguably settled while others were and continue to be conquered. Nevertheless, the question of sovereignty remains undetermined. Despite the outcome in *Milirrpum*, Blackburn J rejected the Yolngu's claim, holding their interests to enjoy

⁴¹ Ibid.

⁴² Aileen Moreton-Robinson, *The white possessive: property, power and Indigenous sovereignty* (University of Minnesota Press, 2015) 1, xxi.

⁴³ Mark Leeming, 'Overlapping Claims at Common Law and in Equity – An Embarrassment of Riches' (2017) 11(3) *Journal of Equity* 229, 299.

⁴⁴ Frank Brennan, 'Mabo: and Its Implications for Aborigines and Torres Strait Islanders' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo, A Judicial Revolution: The Aboriginal Land Rights Decision and Its Impact on Australian Law* (University of Queensland Law Journal, 1993) 1, 27.

tangible and proprietary rights were incapable of protection under the common law.⁴⁵ The common law did not provide Aboriginal and Torres Strait Islander Peoples communal native title as a settled colony. To do so, would delegitimise the orthodox theory of settlement in which British sovereignty was declared. Despite the adequate evidence provided by the Yolngu claimants, the court's rejection of communal proprietary rights feeds the language of savagery and 'did violence to the facts'.⁴⁶ Even though Aboriginal claimants were capable of having their proprietary rights protected by the common law, the distant authority of *Cooper*⁴⁷ provided a contentious legal foundation that would upset and delegitimise the crown's acquisition of sovereignty which would enhance the notion that Aboriginal and Torres Strait Islander lands were in fact stolen. Especially in the circumstances of *Milirrpum*,⁴⁸ Blackburn J did not consider that the Yolngu were able to demonstrate the exact same connections to the area of land as their ancestors did prior to 1788. The court was of the belief that the evidence of the Yolngu witnesses stipulated that they were bound to become extinct and that their lands were to be 'subsumed' by surrounding nations.⁴⁹ Although the Yolngu claimants met the legal requirements to have their proprietary rights recognised under the common law, the respective court determinations meant that later Aboriginal and Torres Strait Islander claimants could not successfully hold existing ownership or possession rights within the western legal framework. Therefore, application of the English common law depended entirely upon the notion of settlement, and to uphold the Yolngu's claim, would negate such position.⁵⁰ The position of western judges in this instance is anchored in the language of savagery, when considering the conflict between two contrasting peoples. Just as the mythical creatures in the *Iliad* and the *Odyssey* were dominated by the human characters, the experiences of the Yolngu were deemed as separate and inferior to western civilisation and therefore their traditional lands could be stolen and conquered.

⁴⁵ *Milirrpum* (n 30) 245 (Blackburn J).

⁴⁶ Garth Nettheim, 'Judicial Revolution or Cautious Correction? *Mabo v Queensland*' (1993) 16(1) *University of New South Wales Law Journal* 1, 5.

⁴⁷ *Cooper* (n 39).

⁴⁸ *Milirrpum* (n 30).

⁴⁹ Tammy Wong, 'Blackburn's "error": The Ngaliwurru Nungali (Timber Creek) Case and the Future of Compensation in Native Title' (Presentation, State Chambers, 2 August 2019) 2.

⁵⁰ *Milirrpum* (n 30).

Not only are western judges failing to recognise this racist logic during their decision-making, but western legal academics speaking to *Cooper*⁵¹ and *Milirrpum*⁵² have also failed to recognise this afterwards. Emma Cunliffe notes:

The racist logic, however – the conclusion that Australian Aborigines and Torres Strait islanders were considered ‘uncivilised’ and primitive’ by the English common law – is not wholly apparent from the cases that we have so far considered. Rather, the presence of the Aborigines is either entirely ignored or it is badly stated that their rights were abrogated upon settlement.⁵³

I agree with the contrasting position taken by Martin Nakata,⁵⁴ Henry Reynolds⁵⁵ and Vine Deloria.⁵⁶ It is quite often western judges and legal professionals—who act as mere observers and know very little of Aboriginal and Torres Strait Islander Peoples overall circumstances—who suddenly become the voice of that Aboriginal community’s experience and interactions with any legal outcome they receive. These western legal ‘experts’—agents of a colonialism legal system—are the ones who determine what is ‘fair’ and ‘just’ for Aboriginal persons. Deloria has assessed the danger of western anthropologists⁵⁷ writing about Native Americans, I wish to draw parallels to the western legal expert writing about our communities:

An anthropologist comes into Indian reservations to make OBSERVATIONS. During the winter these observations will become books by which future anthropologists will be trained, so that they can come out to reservations years from now and verify the observations they have studied... perhaps we should suspect the real motives of the academic community. They have the Indian field well defined and under control. Their concern is not the ultimate policy that will affect the Indian people, but merely the creation of new slogans and doctrines by which they can climb the university totem pole.⁵⁸

It did not matter if it was the primary argument suggested by Cunliffe or the latter of Deloria. The fact is, Aboriginal and Torres Strait Islander Peoples are without land and

⁵¹ *Cooper* (n 39).

⁵² *Milirrpum* (n 30).

⁵³ Emma Cunliffe, ‘Anywhere but Here: Race and Empire in the Mabo Decision’ (2007) 13(6) *Social Identities* 751, 758.

⁵⁴ Martin Nakata, *Disciplining the Savages: Savaging the Disciplines* (Aboriginal Studies Press, 2007) 1.

⁵⁵ Henry Reynolds, *The Law of the Land* (Penguin Books, 3rd ed, 2003) 5.

⁵⁶ Vine Deloria, *Custer Died for Your Sins: An Indian Manifesto* (University of Oklahoma Press, 1988) 79.

⁵⁷ Nakata (n 54) 103.

⁵⁸ Deloria (n 56) 79.

without meaningful compensation for the loss of land because of western legal structures. Even if Cunliffe does suggest that our existence is either “entirely ignored or it is badly stated that their rights were abrogated upon settlement”⁵⁹ this still forms part of the language of savagery exercised by western judges and its overt ignorance to recognise our systems of laws. This will always have an impact on the later generations when lodging native title claims. Reynolds succinctly noted:

What was even more extraordinary about this judgement [*Cooper v Stuart*] by an English law lord who knew little about Australia or the Aborigines was that it was binding on Australian courts as late as the 1970s and even now its status is not fully determined... Aborigines in question had a feeling of obligation towards the land but not the actual ownership of it. The local clans belonged to the land, but the land didn't belong to them and hadn't done so since 1788. It was an amazing dismissal of Aboriginal tenure...⁶⁰

Even prior to the establishment of native title, the extinguishment of rights to land and its natural resources consistently occurred for Aboriginal and Torres Strait Islander claimants. In *Walden v Hensler* (1987) 163 CLR 561 (*Walden v Hensler*),⁶¹ a respected Elder of the Gungalida nation, Herbert Walden, hunted and possessed a wild turkey for personal food without a licence permit. Under the *Fauna Conservation Act 1974* (Qld) (*the Fauna Act*)⁶² turkeys fell within the scope of the Queensland's protected species and were therefore deemed as crown property.⁶³ Thus, any person who removed protected fauna would be found in breach pursuant to the Fauna Act.⁶⁴ Putting aside the fact the high court engaged in an empty victory by completely discharging Mr Walden,⁶⁵ the decision ultimately amplified the extinguishment of Aboriginal hunting rights. What is disturbing—in understanding the conceptual split between the western and the savage—is how readily ‘extinguishment’ of non-western hunting rights can be destroyed by western regulations. Brennan J held:

⁵⁹ Cunliffe (n 53).

⁶⁰ Reynolds (n 55) 5.

⁶¹ *Walden v Hensler* (1987) 163 CLR 561.

⁶² *Fauna Conservation Act 1974* (Qld) (*the Fauna Act*).

⁶³ *Ibid* s 5.

⁶⁴ *Ibid* ss 7, 51(1)(a).

⁶⁵ Mr Walden was completely discharged pursuant to the *Criminal Code 1975* (Qld) s 657A(1).

The [*Fauna Conservation*] Act eliminated any right which Aborigines might have enjoyed at common law to take and keep fauna (assuming such an entitlement had survived the alienation by the crown over the land the Aborigines had traditionally hunted).⁶⁶

Brennan J indicates here that section 7 of the Fauna Act altered the common law position by vesting all the protected fauna species as property of the crown.⁶⁷ In other words, Aboriginal traditional hunting rights were inferior to the crown's regulations. This specific language which is used by western (eurocentric) judges recreates the conceptual split between the western (viewed as 'modern', 'superior' and 'morally good') and the savage (viewed as 'primitive', 'bad' and 'inferior'). Anderson rightfully highlights, '[n]ot only was traditional hunting prohibited, but it would seem also that any attempts to validate traditional hunting rights via native title at common law would fail due to statutory extinguishment'.⁶⁸ Additionally, the decision provided a missed opportunity to reconcile the relationship between Aboriginal customary practices and western law, like the equity and the common law jurisdictions.

Since *Milirrpum*,⁶⁹ the question of sovereignty has not been fully determined by the courts. Even post *Mabo (No 2)*,⁷⁰ the issue of separate sovereignty has deliberately been left unanswered and courts have been careful not to confuse sovereignty with native title rights. This is evident in Mason CJ's obiter in *Coe v The Commonwealth* (1993) 118 ALR 193:⁷¹

Mabo (No 2) is entirely at odds with the notion that sovereignty adverse to the crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a 'domestic dependent nation'.⁷²

The court's concern was title to and use of the land. Thus, the question of sovereignty remains undecided. This is also due to the potential legitimacy issues that would be raised around Australian law⁷³ as highlighted previously in *Cooper*⁷⁴ and *Milirrpum*.⁷⁵ If

⁶⁶ *Walden* (n 62) 566-567 (Brennan J).

⁶⁷ The *Fauna Act* (n 62) s 7.

⁶⁸ Glen Anderson, *Property Law Concepts and Doctrine* (LexisNexis, 2022) 197.

⁶⁹ *Milirrpum* (n 30).

⁷⁰ *Mabo (No 2)* (n 1).

⁷¹ *Coe v The Commonwealth* (1993) 118 ALR 193.

⁷² *Ibid* 200 (Mason CJ).

⁷³ See, eg, Michael Mansell, 'The Court gives an inch but takes another mile' (1992) 2(57) *Aboriginal Law Bulletin*, 24, 26.

⁷⁴ *Cooper* (n 39).

⁷⁵ *Milirrpum* (n 30).

Aboriginal and Torres Strait Islander land law was to be recognised, then our communities would enjoy protections under the common law legal system. Aboriginal and Torres Strait Islander communities would not only be entitled to rights afforded under the fee-simple regime, but entitlements would also include self-management and self-determination to lands and waters within the common law domain.

V POSITION IN CASE LAW AND LEGISLATION

The language of savagery is not a new concept, and its global application in property law has been circulating for quite some time. In the early twentieth century of colonial law and policy, the influential decision *Re Southern Rhodesia*⁷⁶ provided a racial science framework by the ‘English self-view of superiority’ compared to Indigenous societies.⁷⁷ Speaking for the judicial committee of the privy council, lord Sumner stated:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.⁷⁸

The *Mabo (No 2)*⁷⁹ decision is considered a judicial revolution and a means to reconcile Britain’s great land theft from Aboriginal and Torres Strait Islander Peoples. One underlying feature of this decision that is often overlooked, is that the high court did not produce or consider anything new from Aboriginal and Torres Strait Islander claimants.

In fact, the colonial office officials in 1847 considered the same issues that were exerted by the high court in *Mabo (No 2)*⁸⁰ — that is, was pastoral occupation ‘wholly or partially inconsistent with a continuing right to enjoy native title’.⁸¹ They were of the impression it ‘certainly was not’ and so the pastoralists’ right of pasturage were able to co-exist with Aboriginal Peoples right of use and occupancy to land.⁸² Conversely, the high court in

⁷⁶ *Re Southern Rhodesia* (1919) AC 211.

⁷⁷ Cunliffe (n 53) 751-2; Anderson (n 68) 160.

⁷⁸ *Re Southern Rhodesia* (60) (1919) AC 211, 233-4 (Sumner).

⁷⁹ *Mabo (No 2)* (n 1).

⁸⁰ *Ibid.*

⁸¹ Henry Reynolds, ‘The *Mabo* Judgement in the Light of Imperial Land Policy’ (1993) 16(1) *UNSW Law Journal* 27, 35.

⁸² Reynolds (n 81) 35.

*Mabo (No 2)*⁸³ affirmed that the extinguishment of Aboriginal and Torres Strait Islander Peoples' interests were possible where that was the clear and plain intention of the legislature or the executive. Brennan J (with whom Mason CJ and McHugh J agreed) clarified:

[w]here the crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus, native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g. authority to prospect for minerals).⁸⁴

It begs the question Reynolds validly asked before, 'what then of pastoral leases? Did they extinguish native title?'⁸⁵ This could not have been the intention of colonial office officials between 1830 and 1840, where the clear intention of the imperial governments permitted only the use of 'exclusive right of pasturage in runs' and not the 'exclusive occupation of the land, as against the Natives using it for ordinary purposes'.⁸⁶ While it must be confessed that Aboriginal and Torres Strait Islander Peoples did not prosper under the ministrations of these imperial land regulations,⁸⁷ their interests to land were given more consideration than the considerations exercised by the mind of the high court in *Mabo (No 2)*. For instance, there were approximately 3,000 pastoral runs in the colony at this time, only 148 were held under lease in New South Wales (NSW).⁸⁸ This landmark decision provided a reframed and harsher version of what the colonial office officials originally intended, when they proposed to harmonise squatter and public interest groups rights with Aboriginal and Torres Strait Islander Peoples' interests clearly in mind. The judges of the twentieth century have not done much to bring the language of savagery to an end. Instead, they have revamped the status-quo of exclusion and made Aboriginal and Torres Strait Islander Peoples' interests in land preliminary to all, by introducing the need of extinguishing native title rights when it conflicts with other western interest groups.

⁸³ *Mabo (No 2)* (n 1).

⁸⁴ *Ibid* 83 (Brennan J).

⁸⁵ Reynolds, (n 81) 43.

⁸⁶ *Ibid*.

⁸⁷ Henry Reynolds and Jamie Dalziel, 'Aborigines and Pastoral Leases – Imperial and Colonial Policy 1826-1855' (1996) 19(2) *UNSW Law Journal* 315, 376. For a comprehensive overview of land regulations in NSW, see *Mabo (No 2)* (n 1) 39-45 (Dawson J) and Reynolds (n 81) 35.

⁸⁸ *Mabo (No 2)* (n 1).

*Mabo (No 2)*⁸⁹ created no more than mere legal restrictions.⁹⁰ For instance, Brennan J constructed a nine-point summary, which is now recognised and accepted as common law native title.⁹¹ Another beautiful example of nonsensical judicial drivel that placed native title rights into a pro-western straitjacket. This is, in a sense, problematic, because it did not include the overall delivery of real land ownership for Aboriginal and Torres Strait Islander Peoples. Instead, it delivered their mere right to exert native title on lands that had not already been stolen.

This approach would have been tolerable, if westerners viewed property and the land the same way Aboriginal and Torres Strait Islander nations did. However, when we look at western property laws, we are observing their feudal systems, their right to exclude others, their divine right to rule, christian colonial conquest and all the events that went towards building their territories and colonial empire. Aboriginal and Torres Strait Islander Peoples do not share that heritage; nor did we create the English common law and so any western property doctrines inflicted upon our nations, are bound to be problematic and unsettling. Aboriginal and Torres Strait Islander Peoples' rights and interests under native title do not even need to correspond with the common law perceptions of land.⁹²

The outcome of *Mabo (No 2)*⁹³ must be repeatedly critiqued more than it is celebrated as a 'judicial revolution' because arguably, all the decision represented was a reanimation of the spectre of terra nullius by covert means.⁹⁴ The trick, according to their comprehensive system of land regulations, was to give native title applicants remaining lands that had either not been used or stolen, used for excavating resources, or deemed as unsuitable for farming purposes.⁹⁵

Devastatingly, the initial advancement of native title doctrine was stalled and consistently eroded through subsequent high court decisions in each State and Territory in Australia,

⁸⁹ *Ibid.*

⁹⁰ Aden Ridgeway, *Mabo Ten Years on Small Step or Giant Leap?* (Canberra Aboriginal Studies Press, 2003) 185.

⁹¹ See Chris Davies, *Property Law Guidebook* (Oxford University Press, 2nd ed, 2015) 43.

⁹² *Yarmirr* (n 22) 38-9 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Yorta Yorta* (n 25) 422 (Gleeson CJ, Gummow, and Hayne JJ); *Fango v Northern Territory of Australia* [2006] FCA 318, 556-557 (Sackville J); and *Anderson* (n 69) 151.

⁹³ *Mabo (No 2)* (n 1).

⁹⁴ Lisa Strelein, 'Compromised Jurisdiction: Native Title Cases Since Mabo' (2010) *Aboriginal Studies Press* 1, 1.

⁹⁵ *Mabo (No 2)* (n 1) 43-4 (Dawson J).

such as *Ward*,⁹⁶ *Yorta Yorta*,⁹⁷ *Yarmirr*,⁹⁸ *Wik Peoples v Queensland* ('*Wik Peoples*'),⁹⁹ *Fejo*,¹⁰⁰ *Barngarla Determination Aboriginal Corporation CNTBC v District Council of Kimba (No 2)*,¹⁰¹ the *Native Title Act 1993* (Cth), the *Native Title Amendment Act 1998* (Cth) and the *Native Title Legislation Amendment Bill 2019* (Cth). These listed cases and legislative instruments are not exhaustive, but demonstrate that there is a continued and often ignored problem around the construction of native title in Australia

Following *Mabo (No 2)*,¹⁰² the landmark decision in *Wik Peoples*¹⁰³ dealt with the competing interests between common law and pastoral leases. This decision was the high point of native title jurisprudence as the pastoral lease did not extinguish native title, as Brennan J (with whom Mason CJ and McHugh J agreed) in *Mabo (No 2)*¹⁰⁴ suggested it would.

The *Wik Peoples* claim (and the Thayorre people who also asserted native title over tracks of land intersecting with the Wik claim) encompassed an area of land over the Holroyd River holding, that also consisted of two pastoral leases issued by the Queensland government under the *Land Act 1910* (Qld) namely, the Holroyd lease and the Mitchellton lease.¹⁰⁵ The Wik Peoples brought an action against the Queensland government asserting that native title had not been extinguished by granting two pastoral leases. The pastoral leases were granted for the purposes of mining gold and minerals and to allow access to individuals surveying the land.

The Holroyd lease was initially issued in 1945, functioning as a pastoral lease. In 1973, the lease was forfeited and renewed in 1975 for a period of 30 years, commencing at the beginning of January 1974. The lease renewal attached specific conditions which required the applicants to construct a house, barricades, airstrips, patios and cultivate the prescribed area of land. On inspection in 1988, many of the listed conditions were unmet, including, the absence of a managers' residence or workers' quarter. The

⁹⁶ *Ward* (n 24).

⁹⁷ *Yorta Yorta* (n 25).

⁹⁸ *Yarmirr* (n 22).

⁹⁹ *Wik Peoples v Queensland* (1996) 187 CLR 1.

¹⁰⁰ *Fejo* (n 23).

¹⁰¹ [2020] FCAFC 39.

¹⁰² *Ibid.*

¹⁰³ *Wik Peoples* (n 99).

¹⁰⁴ *Mabo (No 2)* (n 1) 92 (Brennan J).

¹⁰⁵ *Wik Peoples* (n 99).

Mitchellton lease was initially granted in 1915. It was surrendered and replaced by another pastoral lease in 1919 and surrendered again in 2020. The lease never functioned as a pastoral lease. Critically, the area was continuously occupied by Aboriginal Peoples, with 300 reported to have lived in the area in 1919. In 1922, the area later became an Aboriginal reserve, which is still its current position.

The Wik Peoples claimed that native title rights co-existed with the Mitchellton lease from 1945 and with the Holroyd lease from 1915 and 1920. Thus, laying the foundation that competing interests operate concurrently. During the proceedings, 42 per cent of Australian land masses functioned under pastoral lease and some States comprised of 70 and 80 per cent alone.¹⁰⁶ This consideration before the court was critical to the progression of Aboriginal and Torres Strait Islander Peoples rights under native title, as a large proportion of land operated on a pastoral lease basis.

By a 4-3 decision, the high court was of the position that the rights of pastoral lease holders extinguished native title rights to the extent of any inconsistency.¹⁰⁷ In the event conflict did not arise between pastoralist and native title holders, the interests of both groups would operate concurrently.¹⁰⁸ One reason why the court had taken this position is because pastoral leases were creatures of statute, which did not give exclusive possession as conferred by common law leases.¹⁰⁹

Pastoral leases derived from an Order in Council of 1847 which then developed into a range of statutory tenures in both New South Wales and Queensland and were ultimately unknown in the common law sphere.¹¹⁰ The movement of statutory regulations was intended to secure rights for pastoralists to enter the land for the purposes of grazing and farming livestock. Squatters on the other hand, did not hold any form of title or protection by the law and so the land went unsurveyed, activities were uncontrolled, and squatters relocated. To this extent, if pastoral leases were capable of operating parallel to common law leases, native title claims would rigorously reduce the application of native title rights. This is so, because pastoral leases covered an extensive proportion of land in

¹⁰⁶ Brian Stevenson, *The Wik Decision and After* (Queensland Parliamentary Library, 1997) 1, 1.

¹⁰⁷ *Wik Peoples* (n 99) (Toohey, Gaudron, Gummow and Kirby JJ [Majority]; Brennan CJ, Dawson and McHugh JJ [Minority]).

¹⁰⁸ *Ibid*, 84 (Brennan J).

¹⁰⁹ *Ibid* 171 (Toohey J).

¹¹⁰ Daniel Gal, 'An Overview of the Wik Decision' (1997) 20(2) *University of New South Wales Law Journal* 488, 490.

Australia, equivalent to sections in England. Disturbingly, the decision did not indicate how long the period of suspension was to occur. That is, did the inconsistency between a pastoral lease and native title holder suspend native title merely for the operation of the grant of the pastoral lease? Or conversely, could native title be merely regulated as opposed to being extinguished by a pastoralist grant? That question was shamefully determined in *Wik Peoples*¹¹¹ and *Fejo*¹¹² which concluded that the grant of a pastoral lease extinguished native title to the extent of any inconsistency. Native title rights were again inferior to other western property interests. The extinguishment was not automatic, but merely occurred to the extent where it was 'necessary'.

The decision in *Fejo*¹¹³ further contributed to the undercurrents of systematic racism by endorsing the notion that extinguishment is permanent. There were two issues for the court's determination. First, whether a grant of freehold title could be permanently extinguished under native title. The court found in the affirmative and held any native title interests the Larrakia Peoples held in the land had been extinguished on a permanent basis by the grant of freehold title. The second consideration was whether native title could then be revived following land being reverted to crown land. The court found in the alternative and held that native title could not be restored, nor could native title operate concurrently with other competing interests.¹¹⁴ The notion of extinguishing native rights on a permanent basis places our communities into an isolated and inferior category, distinct from western property interests. Again, this conceptual split between Aboriginal and Torres Strait Islander Peoples and westerners further reinforces the domineering attitudes that were imposed on us, the same as they were imposed on the mythical creatures in the *Iliad* and the *Odyssey*. Applying the lens of othering suggested by Said, this perpetual and negative stereotype placed on native title groups reinforces the power imbalance that benefits the west.

Concerning decisions around native title continued. The outcome of *Yarmirr*¹¹⁵ indicated how the application of native title operated offshore, which *Mabo (No 2)*¹¹⁶ and preceding

¹¹¹ *Wik Peoples* (n 99).

¹¹² *Fejo* (n 23).

¹¹³ *Ibid.*

¹¹⁴ *Ibid* 740 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹¹⁵ *Yarmirr* (n 22).

¹¹⁶ *Mabo (No 2)* (n 1).

cases had not considered.¹¹⁷ *Yarmirr*¹¹⁸ reinforces the notion that the judicial system is more satisfied with symbolic victories, as opposed to providing land justice and economic equity for Indigenous peoples. Olney J determined that native title claimants held the right to utilise the sea and seabed for traditional ceremonies tied to Indigenous peoples' cultural practices and way of life.¹¹⁹ However, such native title rights could not exclude the broader public from fishing or engaging in commercial activities within that prescribed area of land.¹²⁰ Aboriginal and Torres Strait Islander Peoples sovereign rights to manage, conserve, explore and cultivate the natural resources of the seabed has nonetheless been robbed by the broader public for the purpose of economic exploitation of the zone. Consequently, Aboriginal and Torres Strait Islander Peoples were deprived of the economic and financial opportunities that were embedded into property which they held native title in.¹²¹ The effect of this decision imposed vigorous constraints on native title sea rights and undermined exclusive continued possession of Indigenous claimants. Namely, the rights that existed under the common law and the *Native Title Act 1993* (Cth)¹²² were inadequate and incapable of ensuring that Aboriginal and Torres Strait Islander Peoples were lawfully able to exercise their rights, traditions, and economic independence. This meant that all other competing economic interests relating to the seabed were placed above Aboriginal and Torres Strait Islander Peoples rights. The continuous practice of placing non-Indigenous interests over Aboriginal and Torres Strait Islander Peoples interests to land is the same application evident by the distant, alien, savage, referred to by historical western literature— simply because it perpetually opposes the superior society's civilisation and institutions.

The outcome of *Yarmirr*¹²³ continues to be detrimental to the economic position of Aboriginal and Torres Strait Islander Peoples today. In 2019, the Gumatj people of the Northern Territory threatened to initiate legal proceedings against the Federal Government. They asserted the Government failed to act on just terms in circumstances when the land was attained for mining purposes by the Nabalco Company without

¹¹⁷ *Ward* (n 24); *Yorta Yorta* (n 25); *Yarmirr* (n 22); *Wik Peoples* (n 99); *Fejo* (n 23).

¹¹⁸ *Yarmirr* (n 22).

¹¹⁹ *Ibid* (Olney J).

¹²⁰ *Ibid* 4 (Olney J).

¹²¹ Noel Pearson, 'Transcript of Speech by Noel Pearson' (Speech, Gilbert and Tobin) 3.

¹²² *Native Title Act 1993* (Cth).

¹²³ *Yarmirr* (22).

properly requesting permission from the landowners.¹²⁴ Nabalco has an extensive reputation for abusing Aboriginal and Torres Strait Islander Peoples rights to land, as previously reflected in *Milirrpum*¹²⁵ and again in Adani's Carmichael coalmine which was subsequently blocked by traditional owners in Queensland. The outcome in *Yarmirr*¹²⁶ permitted commercial and private rights to also operate over the seabed, which ultimately intervened with Aboriginal Peoples economic rights embedded in those native title territories. The court applied a similar principle in *Wik*,¹²⁷ which also allowed commercial and private rights to co-exist with native title holders. Compellingly, the high court on appeal in *Yorta Yorta* rejected the argument brought by native title claimants due to the Yorta Yorta Peoples inability to prove their continuous connection to the land.¹²⁸ Apart from the decision impacting immediately on the Yorta Yorta claimants, the judgement of Olney J provided a substantially detrimental principle that would severely limit claims for future native title claimants who had been dispossessed of their Nation. Olney J stated:

The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs. The foundation by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title.¹²⁹

This precedent represents the sad rhetoric that Aboriginal and Torres Strait Islander Peoples law and traditional customs are bound to dissolve, and as a consequence, native title will have the same effect. Therefore, it is just a matter of time before Aboriginal and Torres Strait Islander Peoples can no longer prove their continual and physical connections to the land, which is then advantageous in maintaining the colonial rule of western legal structures.¹³⁰ This is the language of savagery in operation and a prime example of what western judges think about Aboriginal and Torres Strait Islander

¹²⁴ Ed Wensing, *The relevance of the Federal Court's decision in Yunupingu v Commonwealth [2023] FCAFC 75 and Commonwealth of Australia v. Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors [2023] HCA Case No. D5/2023 and s.47C in the Native Title Act 1993 (Cth) to the ACT*, (Symposium Position Paper, 10 March 2025), 9.

¹²⁵ *Milirrpum* (n 30).

¹²⁶ *Yarmirr* (n 22).

¹²⁷ *Wik Peoples* (n 99).

¹²⁸ *Yorta Yorta* (n 25).

¹²⁹ *Mabo (No 2)* (n 1), 59-60 (Brennan J) as cited by Olney J in *Yorta Yorta* (n 25), 3 (Olney J).

¹³⁰ *Yorta Yorta* (n 25) 107 (Brennan J).

systems —they believe Aboriginal culture is bound to dissolve merely *on its own*. But it is so evident that western courts have become the ultimate pathway for our disrupted culture and ongoing displacement, because of the unrealistic evidentiary and statutory requirements they subject us to.

It is so clear to us as Aboriginal Peoples that it is the western colonial structures which continue the disruption of our societies by dismissing our cultural ways in their courtrooms. It is their irrational perception of how they distinguish us as a people which amplifies the language of savagery. Their aim, like the functions of the language of savagery, is to dominate and control groups that are ‘inferior’. They reinforce western legal legitimacy and application of their rule of law.¹³¹ At the same time, the land problem is perpetuated. The moral standards reflected in the Australian legal structures mirror the ongoing brutality and oppression that Indigenous claimants face when utilising the court system. Regardless of the immeasurable and historic land struggles faced by Aboriginal and Torres Strait Islander Peoples, the findings of Olney J demonstrate the lack of leniency courts are willing to apply when it contemplates proprietary interests for the Yorta Yorta Peoples. The metaphorical statement ‘tide of history’¹³² is expressed in an insensitive and passive tone, especially since such tides linger in the contemporary experiences of native title claimants today. However, an argument is made, that these theoretical ‘tides’ are capable of shifting, and when they do, Aboriginal and Torres Strait Islander Peoples’ proprietary rights will be on the horizon. The *Yorta Yorta*¹³³ decision was captured at a low point of the tide, and as the political tides change, western society will become disenchanted with the court’s findings.

Extinguishment is a prominent feature of native title law, and even in the event extinguishment has not occurred, *Queensland v Congoo* (*‘Congoo’*)¹³⁴ indicated just how tempting it can be for the court to apply this principle. The high court in *Congoo*¹³⁵ provided a sharply divided 3:3 split decision. Although the native title applicants were successful at the federal court of Australia full court (‘FCAFC’) instance, it is anxiously unsettling how easily western judges resolve to terminating Aboriginal and Torres Strait

¹³¹ See, eg, Ann McGrath, *Modern Stone-Age Slavery: Images of Aboriginal Labour and Sexuality* (Liverpool University Press, 1995) 30, 32.

¹³² *Yorta Yorta* (n 25) 129 (Brennan J).

¹³³ *Ibid.*

¹³⁴ *Queensland v Congoo* (2015) 256 CLR 239.

¹³⁵ *Ibid.*

Islander Peoples land interests, and to do it swiftly. Apart from western legislatures and executives, the western legal profession as a whole play one of the greatest roles in the continual disposition of Aboriginal and Torres Strait Islander Peoples from their traditional lands and western judges have continued to perpetuate this moral injustice through the instrument of the law.

In *Congoo*, the Bar Barrum Peoples filed a native title application over the Atherton Tablelands situated in Queensland.¹³⁶ The facts were largely uncontested and the existence of native title was accepted. However, an argument was raised that native title had since become extinguished when part of the land was acquired by the Commonwealth to use as an artillery and live fire range during World War II. Between 1943 to 1945, the military occupation excluded other interest groups from using the land. The respective orders were made pursuant to regulation 54 of the *National Security (General) Regulations 1939* (Cth)¹³⁷ by application of section 5 of the *National Security Act 1939* (Cth) s 5 ('the Security Act').¹³⁸

It was relevant for each court to consider whether the Parliament intended the Security Act to extinguish native title rights.¹³⁹ Fortunately, the federal court of Australian full court was of the position that there was no objective intention from Parliament to do so:

It is true that the Commonwealth's exclusive possession, for the duration of the exercise of the power, precluded the exercise of native title rights and interests. But proper characterisation of the rights the Commonwealth took, as described above, does not lead to the conclusion of any objective intention to extinguish native title rights and interests. The inconsistency of incidents test, as noted, requires a comparison between rights and thus can lead to no different result.¹⁴⁰

On appeal to the high court, French CJ and Keane J (with whom Gageler J agreed)¹⁴¹ were also of this position and provided parallel judgements. Concerningly however, Hayne, Kiefel and Bell JJ held that native title had become extinguished.¹⁴² The land controversy can be stated simply: Aboriginal and Torres Strait Islander Peoples do not have the same

¹³⁶ Ibid.

¹³⁷ *National Security (General) Regulations 1939* (Cth) reg 54.

¹³⁸ *National Security Act 1939* (Cth) s 5.

¹³⁹ Anderson (n 68) 200-201.

¹⁴⁰ *Congoo on Behalf of the Bar-Barrum People #4 v State of Queensland* [2014] FCAFC 9, 57 (North and Jagot JJ).

¹⁴¹ *Congoo* (n 135) 266 (French CJ and Keane J), 301 (Gageler J).

¹⁴² Ibid 239 (Hayne J), 287-290 (Kiefel J), 298 (Bell J).

rights as eurocentric groups and we are affected by legislation in ways that no other group is. This is magnified in the reasoning provided by Kiefel J (soon to be Australia's chief justice), who stated:

[t]he test of inconsistency of rights is predicated upon the fact that native title rights and interests are different from others and that they are affected by the grant of further rights over land in a way different from other rights and interests in the land.¹⁴³

Further emphasising the unfair and contradictory standards placed on native title holders and not on non-Aboriginal and Torres Strait Islander interests' groups, the *National Security (General) Regulations 1939 (Cth)*¹⁴⁴ extinguished native title rights but would only *suspend* eurocentric property rights. In the circumstances of a 3:3 split decision in the high court, the inferior court decision would apply. Thankfully in these proceedings, the FCFCA ruled in favour of the Bar Barrum Peoples. However, it is overwhelmingly concerning how readily available it is to the high court to extinguish Aboriginal and Torres Strait Islander Peoples rights and interests to land, not to mention, the discriminatory standards imposed on native title claimants compared to the other eurocentric groups. Arguably, the high court's treatment of Aboriginal and Torres Strait Islander property rights breaches the peremptory norm prohibiting systematic racial discrimination and apartheid.

In a more contemporary stance, *Barngarla Determination Aboriginal Corporation CNTBC v District Council of Kimba (No 2)* ('*Barngarla (No 2)*') demonstrates the ongoing exclusion and discriminatory practices inflicted on native title groups.¹⁴⁵ In *Barngarla (No 2)*,¹⁴⁶ the court was asked to consider if Barngarla Determination Aboriginal Corporation ('BDAC'),¹⁴⁷ as native title holders, could reject the construction of a radioactive waste management facility ('the facility') in the District Council of Kimba's area of responsibility. The disputed area is affixed to land Aboriginal People held recognised native title rights

¹⁴³ Ibid 290 (Kiefel J).

¹⁴⁴ *National Security (General) Regulations 1939 (Cth)* reg 54.

¹⁴⁵ *Barngarla Determination Aboriginal Corporation CNTBC v District Council of Kimba (No 2)* [2020] FCAFC 39.

¹⁴⁶ Ibid.

¹⁴⁷ The BDAC is a corporation that was established to administer and assert native title rights and interests.

and interests in. These rights and interests applied to approximately 10 per cent of the disputed area of land in the Eyre Peninsula, South Australia.¹⁴⁸

Section 19 of the *National Radioactive Waste Management Act 2012* (Cth) ('NRWMA')¹⁴⁹ functions as a broad statutory power to acquire or extinguish the rights and interests in land. The NRWMA¹⁵⁰ also provides power allowing the commonwealth minister to select and declare the location for the purposes of constructing a facility on that area of land.¹⁵¹ Both powers have been exercised by the Minister in this respect. Once a location is declared, the NRWMA s 22¹⁵² confers a broad discretionary power on the Minister to establish a regional community consultation committee that converses between Commonwealth delegates and the individuals residing in communities of which the facility is expected to be situated. As part of the community consultation process, the District Council conducted a community ballot in accordance with the *Local Government (Elections) Act 1999* (SA)¹⁵³ in 2018, as proposed by the commonwealth minister. The resolution created a narrow criterion for the eligible voters. Therefore, the only consideration that was catered for, was for the people who could vote and pay Local Government rates. Native title holders fell outside of this criterion and therefore their interests were not considered. Of the 690 eligible voters who completed the ballot, 54.4 per cent voted in favour of the establishment of the facility, as opposed to the 42.6 per cent who opposed it.¹⁵⁴

The appellants in *Barngarla* assert that the resolutions passed pursuant to the *Local Government (Elections) Act 1999* (SA),¹⁵⁵ to exclude native title members from participating in a community ballot, which contravenes the *Racial Discrimination Act 1975* (Cth).¹⁵⁶ The language of savagery and the notion of otherness play a very sophisticated role in uplifting the interests of western voters in this respect. Aboriginal Peoples in this instance experience similar circumstances of exile to the isolated savage excluded and placed away from western society in the *Iliad* and the *Odessey*. By placing

¹⁴⁸ *Barngarla Determination Aboriginal Corporation CNTBC v District Council of Kimba* [2019] FCA 1585, 1 (Colvin J) ('*Barngarla*').

¹⁴⁹ *National Radioactive Waste Management Act 2012* (Cth) s 19.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid* s 23.

¹⁵² *Ibid* s 22.

¹⁵³ *Local Government (Elections) Act 1999* (SA).

¹⁵⁴ *Barngarla (No 2)* (n 146), 14 (Mckerracher, Rangiah and Charlesworth JJ).

¹⁵⁵ *Local Government (Elections) Act 1999* (SA).

¹⁵⁶ *Racial Discrimination Act 1975* (Cth).

native title interests into an isolated category only reinforces the functions of savage language. The basis of the appellant's submission is not the effect of which they have been excluded from the consultation process, but instead, that they were excluded from participating in a community ballot. This is significant because the NRWMA is not contingent upon the approval from local governments, planning, or community.¹⁵⁷ However, section 14 of the NRWMA¹⁵⁸ does confer a duty upon the Minister to consider community members whose rights and interests may be affected, which undeniably incorporates the rights and interests of native title holders neighbouring the nominated site.¹⁵⁹

After being excluded from participating in the community ballot, the BDAC held their own independent vote through the Australian Election Company. Their ballot paper asked members if they supported the construction of a radioactive waste management facility in the area. There were 209 eligible BDAC voters with the overall number of 83 members participating in the ballot. The votes undertaken by the BDAC differed substantially to the results conducted by the local government. Of the 83 Aboriginal Peoples voting in the BDAC ballot, the results returned with a unanimous 'No', whereas, in the community ballot, there were 824 eligible voters, and of the 734 formal votes returned, 451 voted Yes and 282 voted 'No'.¹⁶⁰ Aboriginal Peoples nonetheless unanimously opposed the facility and advocated for twenty years against the proposed national nuclear waste dump facility, their voices were ignored, and they were excluded from the voting process. This decision sets a subtle precedent of ways in which the Federal Government can exclude the concerns and voices of native title holders and support their abstention from consultations duties without being subject to accountability.

As a result of exclusion in *Barngarla*,¹⁶¹ the concerns of native title holders remain unconsidered and the seriousness of Aboriginal and Torres Strait Islander Peoples rights and interest in the land are impacted. This formal exclusion by western governments reinforces the racial undertones of savage language by diminishing communal

¹⁵⁷ *Barngarla* (n 149) 14 (Colvin J).

¹⁵⁸ *National Radioactive Waste Management Act 2012* (Cth) s 14.

¹⁵⁹ *Ibid* s 14(5)(b).

¹⁶⁰ Kim Mavromatis, Submission No 93 to Senate Standing Committee Inquiry, *Inquiry into the National Radioactive Waste Management Amendment (Site Specification, Community Fund and other Measures)* Bill (9 April 2020) 9-10.

¹⁶¹ *Barngarla* (No 2) (n 145).

proprietary interests of twenty-first century native title holders. The rights afforded to Aboriginal and Torres Strait Islander Peoples under the common law have since heightened concerns for the broader public in relation to property interests. This has also been an advantageous window of political opportunity for government elections. Consequently, the weakening of native title rights has also seeped into legislation.

The Australian government attempted to extinguish native title rights a year after the victory attained in *Mabo (No 2)*.¹⁶² In 1993, the implementation of the *Native Title Act 1993 (Cth)* ('the Act')¹⁶³ was formalised, which further restricted the circumstances of Aboriginal and Torres Strait Islander land ownership. The Act recognises Aboriginal and Torres Strait Islander Peoples' unique rights and interests to the land and waters.¹⁶⁴ Native title claimants can apply for a native title determination over a specific area of land, which has no other approved application of native title.¹⁶⁵ In particular, s 223 outlines the criteria native title claimants must establish in order to have native title rights recognised under law.¹⁶⁶ This includes a collective or individual interest to land or waters. Critically however, s 223¹⁶⁷ also prescribes a standard that is often unachievable for contemporary claimants, including, traditional rights and interests being recognised and acknowledged by contemporary Aboriginal and Torres Strait Islander Peoples.¹⁶⁸ Such traditional customs require a continual connection with the land and waters preceding and post colonisation.¹⁶⁹ This is often a difficult requirement to establish as colonisation in Australia had (and continues to have) a devastating impact on Aboriginal and Torres Strait Islander Peoples and the natural landscape. This is significant because of the nature of our oral history being affixed to ecological knowledge and laws.¹⁷⁰ The Federal opposition leader at the time, Paul Keating, described the Act being associated

¹⁶² *Mabo (No 2)* (n 1).

¹⁶³ *Native Title Act 1993 (Cth)*.

¹⁶⁴ *Ibid* s 3.

¹⁶⁵ *Ibid* s 61(1).

¹⁶⁶ *Ibid* s 223.

¹⁶⁷ *Ibid* s 223.

¹⁶⁸ *Ibid* s 223(1)(a).

¹⁶⁹ *Ibid* s 223(1)(b).

¹⁷⁰ Patricia Gwatkin-Higson, 'What is the Role of Oral History and Testimony in Building our Understanding of the Past?' (2019) 4(1) *University of Technology Sydney ePRESS* 39, 39. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2865 (Paul Keating, Leader of the Australian Labor Party).

with 'political gain' which the Liberal party used as a 'divisive tactic to exploit race and to exploit differences in the community'.¹⁷¹

There is an unachievable onus on native title claimants in the twenty-first century to satisfy the element of 'continual connection' to their traditional land and waters prior to 1788. To meet this statutory criterion, the evidence must represent the traditional laws and customs of our Ancestors prior to 1788 and post 1788.¹⁷² This is an unrealistic burden placed on native title applicants, given the environmental catastrophe of climate change and our connections to our non-human kinship system like the ecosystem, the occupancy of mining companies on our traditional lands, or even the destruction of our traditional sacred Aboriginal sites that demonstrate our connection to the land prior to 1788. In 2020, Rio Tinto legally destroyed the 46,000-year-old sacred rock shelters in Juukan Gorge for the sole purpose of expanding an iron ore mine. Another example of foreigners profiting from not only Aboriginal lands, but the resources attached to that land as well. In a spiritual sense, which is often overlooked by non-Aboriginal people, how devastating this must have been for the Puutu Kunti Kurrama and Pinikura (Binigura) Peoples who maintained a 4,000-year-old genetic link.¹⁷³ Our oral practices which have been handed down by the previous generations have been disrupted by the coercive government assimilation policies. These assimilation policies occurred between 1938 to the late 1970s, where Aboriginal and Torres Strait Islander children were forcibly removed from their parents and placed into western institutions to work as domestic servants through a system of forced labour.¹⁷⁴ The exercise of western farming practices has severely disrupted the landscape and the impact of climate change too, alters ecological systems. Western ways have consistently harmed not only our rights to land, but also us as a race who have never invaded the lands or territories of others.

¹⁷¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2936 (Christopher Haviland, Minister for Community Affairs).

¹⁷² *Bodney v Bennell* (2008) 214 CLR 422, 168; *Yorta Yorta* (n 25) 80-86.

¹⁷³ Calla Wahlquist, 'Rio Tinto blasts 46,000-year-old Aboriginal site to expand iron ore mine', *Business and Human Rights Resource Centre* (online at, 28 May 2020) <[¹⁷⁴ Sharlene Leroy-Dyer, A Brief History of Aboriginal and Torres Strait Islander Involvement in the Australian Labour Market, \(2021\), 24\(1-2\), *Journal of Australian Indigenous Issues* 35, 53. See also Shirleene Robinson, 'We Do Not Want One Who is Too Old: Aboriginal Child Domestic Servants in Late 19th and Early 20th Century Queensland' \(2003\) 27\(1\) *Aboriginal History Inc* 162, 163.](https://www.business-humanrights.org/en/latest-news/rio-tinto-blasts-46000-year-old-aboriginal-site-to-expand-iron-ore-mine/#:~:text=Wahlquist%2C%20The%20Guardian-,Rio%20Tinto%20blasts%2046%2C000%2Dyear%2Dold%20Aboriginal%20site,to%20expand%20iron%20ore%20mine&text=A%20sacred%20site%20in%20Western,of%20an%20iron%20ore%20mine.>.</p>
</div>
<div data-bbox=)

A 'bizarre jurisprudence' subsists within the realm of native title.¹⁷⁵ The systemic discrimination and displacement of Aboriginal and Torres Strait Islander Peoples from their homelands, joined with the requirement to establish continual connection is central to preposterous legal reasoning when attempting to regulate the foundation of native title. Lawyer and land rights activist, Noel Pearson, highlighted the absurdity imposed on native title applicants, stating that there exists a bizarre jurisprudence whereby native title claimants need to prove that each berry extracted from a branch must be referenced back to the traditional laws prior to 1788.¹⁷⁶ The requirements under native title legislation continue to be detrimental and problematic for Aboriginal and Torres Strait Islander Peoples' due to the inadvertent destruction and natural occurrences of the landscape. Again, there are no other public interest groups in Australia which bear the obligation to prove their connection at the time of their western ancestors' settlement. Aboriginal and Torres Strait Islander Peoples are continually placed into an isolated category of inferiority. This is the operation of the language of savagery in effect.

As a response to the *Wik*¹⁷⁷ decision, the introduction of the *Native Title Amendment Act 1998* (Cth)¹⁷⁸ emerged. Such amendments were compelled by the need to produce 'bucket-loads of extinguishment'.¹⁷⁹ The legislative mechanism was established by the Coalition-led Government, which amended the *Native Title Act 1993* (Cth)¹⁸⁰ and created a 10-point plan, which Prime Minister John Howard described as a 'practical response which provides certainty to pastoralists and miners but respects native title'.¹⁸¹ The amendments provided a scheme advantageous to pastoralist and mining interest groups, simultaneously placing grave limitations on native title claims. The objectives of the 1998 amendments were fundamental in preserving the rights of pastoralists and other competing interests which collided with native title rights. For instance, s 23B specifies a list of property interests which have the capacity to extinguish native title.¹⁸² The

¹⁷⁵ Noel Pearson, 'Transcript of Speech by Noel Pearson' (Speech, Gilbert and Tobin) 3.

¹⁷⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2936 (Christopher Haviland, Minister for Community Affairs).

¹⁷⁷ *Wik Peoples* (n 99).

¹⁷⁸ *Native Title Amendment Act 1998* (Cth).

¹⁷⁹ See Richard Nile and Michael Peterson, *Becoming Australia* (University of Queensland Press, 1998) 28, before the implementation of the *Native Title Amendment Act 1998* (Cth), Deputy Prime Minister at the time, Tim Fischer, stated that the purpose of these amendments was to produce 'bucket loads of extinguishment' for native title.

¹⁸⁰ *Native Title Act 1993* (Cth).

¹⁸¹ Prime Minister John Howard, 'Wik 10 Point Plan' (Media Release, 1 May 1997) 1.

¹⁸² *Native Title Amendment Act 1998* (Cth) s 23B.

consequence of this provision allows the commercial interests of mining corporations to trump Indigenous people's native title rights. The application of s 24GB¹⁸³ provides a broader scope to permit farm tourism generally, which is now unconfined to farm-stay tourism. This makes it easier for non-exclusive pastoral and agricultural leases to expand and utilise the land without having to negotiate with native title holders. Additionally, s 24JA¹⁸⁴ contains three provisions which condenses the rights of native title holders.

Registered native title holders have a right to comment on the future acts relating to national park management plans, the grant of forestry licences and water resources. However, they are not afforded the rights offered to ordinary title holders. They are also not entitled to be consulted or object to the respective future acts. This fundamentally reveals just how tenuous the *Native Title Act 1993* (Cth)¹⁸⁵ is when competing interests arise. By way of example, consider the 2019 implications of the Queensland Government's ability to extinguish native title to allow Adani Mining Pty Ltd ('Adani') to proceed.¹⁸⁶ This gave Adani freehold title over the land to extract mineral resources. If the project were to proceed, it will be counted among the most substantial new coal mine globally.¹⁸⁷ Under the *Native Title Amendment Act 1998* s 24MD,¹⁸⁸ native title holders are prohibited from having any objection heard. Thus, the traditional owners as native title holders, no longer have the same legal significance. Recent amendments have continued to stagnate land rights for Aboriginal and Torres Strait Islander Peoples. This is evident from the recent *Native Title Legislation Amendment Bill 2019* (Cth)¹⁸⁹ Clayton UTZ has the following position on the amendments:

Importantly, if enacted, the Native Title Legislation Amendment Bill 2019 (Cth) would also confirm the validity of mining and exploration-related "section 31 agreements" made by resources project proponents with registered native title claimants that included one or more deceased members. The validity of these agreements was called into question following the *McGlade* decision (*McGlade v*

¹⁸³ *Ibids* 24GB.

¹⁸⁴ *Ibid* s 24JA.

¹⁸⁵ *Native Title Act 1993* (Cth).

¹⁸⁶ Dominic O'Sullivan, 'Indigenous People No Longer Have the Legal Right to Say No to the Adani Mine – Here's What it Means for Equality' *The Conversation*, (online, 5 September 2019) 1 <<https://theconversation.com/indigenous-people-no-longer-have-the-legal-right-to-say-no-to-the-adani-mine-heres-what-it-means-for-equality-122788>>.

¹⁸⁷ Catherine Howlett and Rebecca Lawrence, 'Accumulating Minerals and Dispossessing Indigenous Australians: Native Title Recognition as Settler-Colonialism' (2019) 51(3) *Antipode* 818, 830.

¹⁸⁸ *Native Title Amendment Act 1998* (Cth) s 24MD.

¹⁸⁹ *Native Title Legislation Amendment Bill 2019* (Cth).

Native Title Registrar & Ors [2017] FCAFC 10). These amendments will, if passed, provide greater clarity and efficiency for native title agreements.¹⁹⁰

Recent amendments have continued to stagnate independent land rights for Aboriginal and Torres Strait Islander Peoples by employing the execution of agreements between mining companies. This is evident from *McGlade v Native Title Registrar* ('*McGlade*')¹⁹¹ which ignited the *Native Title Legislation Amendment Bill 2019* (Cth).¹⁹² *McGlade*¹⁹³ which found that Indigenous Land Use Agreements ('ILUA')¹⁹⁴ were only valid upon the signatures of all native title claimant representatives of that specific area of land. The agreement would be invalid if it were signed only by the majority, including in circumstances where a member may be deceased or legally incapable. The recent amendments gave clarity to section 31 agreements between industries and native title groups. Although this appears as a victory for native title claimants, it is nonetheless just a quick fix that enables land access to mining industries, simply because native title claimants do not have veto power to acquire or deny access.¹⁹⁵

*Mabo (No 2)*¹⁹⁶ has changed nothing on the concept of property law for Aboriginal and Torres Strait Islander Peoples.¹⁹⁷ Williams suggests that in fact, the promises established in *Mabo (No 2)*¹⁹⁸ frequently endorse and reiterate the notion of extinguishment belonging to Australia under the doctrine:

Each time Australia law affirms 'extinguishing acts' which make it impossible for Aboriginal people to enjoy their native title, Australia is relying upon and perpetuating the same 19th century European colonial era language of savagery English-speaking colonisers of Australia used in affirming the complex of ideas that

¹⁹⁰ Mark Geritz, Tosin Aro and Georgia Davis, 'Enhancing efficiency in native title agreement-making: the Federal Parliament makes a move' Clayton UTZ (Web Page, 21 March 2019) <<https://www.claytonutz.com/knowledge/2019/march/enhancing-efficiency-in-native-title-agreement-making-the-federal-parliament-makes-a-move>>.

¹⁹¹ *McGlade v Native Title Registrar* [2017] FCAFC 10 ('*McGlade*').

¹⁹² *Native Title Legislation Amendment Bill 2019* (Cth).

¹⁹³ *McGlade* (n 191).

¹⁹⁴ Indigenous Land Use Agreements (also interchangeable with the phrase 'section 31 agreements') refers merely to the grant of mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights.

¹⁹⁵ Lily O'neill, 'The Role of State Governments in Native Title Negotiations: A Tale of Two Agreements' (2014-2015) 18(2) *Australian Indigenous Law Review* 29, 30.

¹⁹⁶ *Mabo (No 2)* (n 1).

¹⁹⁷ Williams (n 28) 36.

¹⁹⁸ *Mabo (No 2)* (n 1).

asserted Western's civilisation's racial superiority over the world's Indigenous tribal peoples.¹⁹⁹

Thus, the failure to reject the racist and prejudicial principle of extinguishing acts sustains the notion of savage language whereby Aboriginal and Torres Strait Islander Peoples rights to their traditional lands can only be imposed by an alleged superior form of civilisation. It appears private rights for Aboriginal and Torres Strait Islander Peoples have no place within the law of this country.

When examining the core issue of denied communal rights to land within western legal structures, it is evident that the practice of land inequality goes much deeper than when Europeans arrived on this continent. An underlying theme contributing to the stagnation of native title rights in Australia is the notion of savage language and its intrusion on property law jurisdictions.

VI CONCLUSION

Native title illustrates how indispensable the language of savagery is in maintaining the land and economic interests of private ownership. Australian courts and parliamentary lawmakers have demonstrated this on every occasion where justification has been given for affirming 'extinguishing acts' that purportedly abolish native title rights.

Undertones of the language of savagery animate native title law. A variety of high court decisions have extended the scope of extinguishment introduced in *Mabo (No 2)*, and various legislative amendments to the *Native Title Act 1993 (Cth)*²⁰⁰ such as those introduced in 1998, have stacked the 'legal deck' against native title claimants. The result is that Aboriginal and Torres Strait Islander Peoples do not have the right to equal land ownership in Australia. The principles developed in *Mabo (No 2)*²⁰¹ have invented the power of extinguishment and systemic removals have occurred by violent means. Thus, for native title to develop in a manner beneficial to Aboriginal and Torres Strait Islander Peoples, there needs to be a willingness by the governments to be accountable not only to their past misdeeds but also to the ongoing cycle of racist language that impacts court

¹⁹⁹ Williams (n 28) 37.

²⁰⁰ *Native Title Act 1993 (Cth)*.

²⁰¹ *Mabo (No 2)* (n 1).

decisions and legislation. invariably any change requires a policy of understanding, learning and mutual respect to make two separate systems whole.

REFERENCE LIST

A. *Articles/Books/Reports*

Akama, Yoko, Debra Evans, Seth Keen, Faye McMillan and Peter West, 'Designing Digital and Creative Scaffolds to Strengthen Indigenous Nations: Being Wiradjuri by Practising Sovereignty' (2017) 28(1) *Digital Creativity* 58

Anderson, Glen, *Property Law Concepts and Doctrine* (LexisNexis, 2022)

Bond, Hilary, 'We're the mob you should be listening to' Aboriginal elders talk about community school relationships on Mornington Islander' (2010) 39(1) *The Australian Journal of Indigenous Education* 40

Brennan, Frank, 'Mabo: and Its Implications for Aborigines and Torres Strait Islanders' in Margaret Stephenson and Suri Ratnapala (ed), *Mabo: A Judicial Revolution The Aboriginal Land Rights Decision and Its Impact on Australian Law* (University of Queensland Law Journal, 1993)

Cunliffe, Emma, 'Anywhere but Here: Race and Empire in the Mabo Decision' (2007) 13(6) *Social Identities* 751

Davies, Chris, *Property Law Guidebook* (Oxford University Press, 2nd ed, 2015)

Deloria, Vine, *Custer Died for Your Sins: An Indian Manifesto* (University of Oklahoma Press, 1988)

Evans, Julie, 'Where Lawlessness is Law: The Settler-Colonial Frontier as a Legal Space of Violence' (2009) 30(1) *Australian Feminist Law Journal* 3

Gal, Daniel, 'An Overview of the Wik Decision' (1997) 20(2) *University of New South Wales Law Journal* 488

Grant, Stan and John Rudder, *A New Wiradjuri Dictionary* (Restoration House, 2010)

Gwatkin-Higson, Patricia, 'What is the Role of Oral History and Testimony in Building our Understanding of the Past?' (2019) 4(1) *University of Technology Sydney ePRESS* 39

Howlett, Catherine and Rebecca Lawrence, 'Accumulating Minerals and Dispossessing Indigenous Australians: Native Title Recognition as Settler-Colonialism' (2019) 51(3) *Antipode* 818

Langford, Benjamin, 'The Tide of History or a Trace of Racism? The Yorta Yorta Native Title Tragedy' [2003] (November) *The Journal of Indigenous Policy* 65

Leeming, Mark, 'Overlapping Claims at Common Law and in Equity – An Embarrassment of Riches' (2017) 11(3) *Journal of Equity* 229

Leroy-Dyer, Sharlene, A Brief History of Aboriginal and Torres Strait Islander Involvement in the Australian Labour Market, (2021), 24(1-2), *Journal of Australian Indigenous Issues*, 35

- Mansell, Michael, 'The Court gives an inch but takes another mile' (1992) *Aboriginal Law Bulletin* 2(57) 24
- McGrath, Ann, *Modern Stone-Age Slavery: Images of Aboriginal Labour and Sexuality* (Liverpool University Press, 1995)
- Moreton-Robinson, Aileen and Maggie Walter, 'Indigenous Methodologies in Social Research' in Maggie Walter (ed), *Social Research Method* (Oxford University Press, 2010)
- Moreton-Robinson, Aileen, *The white possessive: property, power and Indigenous sovereignty* (University of Minnesota Press, 2015)
- Nakata, Martin, *Disciplining the Savages: Savaging the Disciplines* (Aboriginal Studies Press, 2007)
- Nettheim, Garth, 'Judicial Revolution or Cautious Correction? Mabo v Queensland' (1993) 16(1) *University of New South Wales Law Journal* 1
- Nile, Richard and Michael Peterson, *Becoming Australia* (University of Queensland Press, 1998) 28
- O'Neill, Lily, 'The Role of State Governments in Native Title Negotiations: A Tale of Two Agreements' (2014-2015) 18(2) *Australian Indigenous Law Review* 29
- Reynolds, Henry and Jamie Dalziel, 'Aborigines and Pastoral Leases – Imperial and Colonial Policy 1826-1855' (1996) 19(2) *UNSW Law Journal* 315
- Reynolds, Henry, *The Law of the Land* (Penguin Books, 3rd ed, 2003)
- Reynolds, Henry, 'The Mabo Judgement in the Light of Imperial Land Policy' (1993) 16(1) *UNSW Law Journal* 27
- Ridgeway, Aden, *Mabo Ten Years on Small Step or Giant Leap?* (Canberra Aboriginal Studies Press, 2003)
- Robinson, Shirleene, 'We Do Not Want One Who is Too Old: Aboriginal Child Domestic Servants in Late 19th and Early 20th Century Queensland' (2003) 27(1) *Aboriginal History Inc* 162
- Said, Edward W, 'Orientalism' (1977) 31(1) *The Georgia Review* 162
- Stevenson, Brian, *The Wik Decision and After* (Queensland Parliamentary Library, 1997)
- Strang, Veronica, 'Knowing Me, Knowing You: Aboriginal and European Concepts of Nature As Self and Other' (2005) 9(1) *Worldviews: Global Religions, Culture and Ecology* 25
- Strelein, Lisa, 'Compromised Jurisdiction: Native Title Cases Since Mabo' (2010) *Aboriginal Studies Press* 1
- Watson, Irene, 'There is No Possibility of Rights Without Law: So Until Then, Don't Thumb Print or Sign Anything!' (2002) 5(1) *Indigenous Law Bulletin* 4

Williams, Robert, *Savage Anxieties: The Invention of Western Civilization* (Palgrave McMillian, 2012)

Williams, Robert, 'The Savage as a Wolf' in Robert A. Williams (ed) *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (University of Minnesota Press, 2005)

Williams, Robert, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990)

Williams, Robert, 'What the Hell Happened to Mabo? The Search for the Missing Link' in Toni Bauman and Lydia Glick (ed), *The Limits of Change: Mabo and Native Title 20 Years On* (Australian Institute of Aboriginal and Torres Strait Islander Studies Research Publications, 2012) 1

Wong, Tammy, 'Blackburn's "error": The Ngaliwurru Nungali (Timber Creek) Case and the Future of Compensation in Native Title' (Presentation, State Chambers, 2 August 2019)

B. Cases

Barngarla Determination Aboriginal Corporation CNTBC v District Council of Kimba [2019] FCA 1585

Barngarla Determination Aboriginal Corporation CNTBC v District Council of Kimba (No 2) [2020] FCAFC 39

Bodney v Bennell (2008) 214 CLR 422, 168

Coe v The Commonwealth (1993) 118 ALR 193

Commonwealth v Yarmirr (2001) 208 CLR 1

Congoo on Behalf of the Bar-Barrum People #4 v State of Queensland [2014] FCAFC 9

Cooper v Stuart (1889) 14 App Cas 286

Fango v Northern Territory of Australia [2006] FCA 318

Fejo v Northern Territory (1998) 156 ALR 721

Love v Commonwealth of Australia [2020] HCA 3

Mabo v The Queen (No 2) (1992) 175 CLR 2

McGlade v Native Title Registrar [2017] FCAFC 10

Members of the Yorta Yorta Aboriginal Community v Victoria [2002] 214 CLR 422

Milirrpum v Nabalco Pty Ltd and the Commonwealth (1971) 17 FLR 141

Queensland v Congoo (2015) 256 CLR 239

Re Southern Rhodesia (60) (1919) AC 211

Walden v Hensler (1987) 163 CLR 561

Western Australia v Ward (2002) 213 CLR 1

Wik Peoples v Queensland (1996) 187 CLR 1

Yanner v Eaton (1999) 201 CLR 315

Yorta Yorta Aboriginal Community v Victoria (1998) FCA 1606

C. Legislation

Criminal Code 1975 (Qld)

Fauna Conservation Act 1974 (Qld)

Lands Acquisition Act 1955 (Cth)

Local Government (Elections) Act 1999 (SA)

National Radioactive Waste Management Act 2012 (Cth)

National Security Act 1939 (Cth)

National Security (General) Regulations 1939 (Cth)

Native Title Act 1993 (Cth)

Native Title Amendment Act 1998 (Cth)

Native Title Legislation Amendment Bill 2019 (Cth)

Racial Discrimination Act 1975 (Cth)

D. Other

Berry, Mike, 'The Voice Referendum' (2023) 92 (January) *Journal of Australian Political Economy* 240

Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2936 (Christopher Haviland, Minister for Community Affairs)

Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2865 (Paul Keating, Leader of the Australian Labor Party)

Geritz, Mark, Tosin Aro and Georgia Davis, 'Enhancing efficiency in native title agreement-making: the Federal Parliament makes a move' Clayton UTZ (Web Page, 21 March 2019) <<https://www.claytonutz.com/knowledge/2019/march/enhancing-efficiency-in-native-title-agreement-making-the-federal-parliament-makes-a-move>>

Mavromatis, Kim, Submission No 93 to Senate Standing Committee Inquiry, *National Radioactive Waste Management Amendment (Site Specification, Community Fund and other Measures) Bill* (9 April 2020) 9-10

O'Sullivan, Dominic, 'Indigenous People No Longer Have the Legal Right to Say No to the Adani Mine – Here's What it Means for Equality' *The Conversation*, (online, 5 September 2019) 1 <<https://theconversation.com/indigenous-people-no-longer-have-the-legal-right-to-say-no-to-the-adani-mine-heres-what-it-means-for-equality-122788>>

Pearson, Noel, 'Transcript of Speech by Noel Pearson' (Speech, Gilbert and Tobin) 3

Silk, Marty, 'Australia's first Indigenous Supreme Court Judge Sworn in', *Financial Review* (online, 13 June 2022) <<https://www.afr.com/politics/federal/australia-s-first-indigenous-supreme-court-judge-sworn-in-20220613-p5atbk>>

Wahlquist, Calla, 'Juukan Gorge: Rio Tinto Blasting of Aboriginal Site Prompts Calls to Change Antiquated Laws' *The Guardian* (Online, 30 May 2020) <<https://www.theguardian.com/australia-news/2020/may/30/juukan-gorge-rio-tinto-blasting-of-aboriginal-site-prompts-calls-to-change-antiquated-laws>>

Wahlquist, Calla, 'Rio Tinto blasts 46,000-year-old Aboriginal site to expand iron ore mine', *Business and Human Rights Resource Centre* (online, 28 May 2020) <[148](https://www.business-humanrights.org/en/latest-news/rio-tinto-blasts-46000-year-old-aboriginal-site-to-expand-iron-ore-mine/#:~:text=Wahlquist%2C%20The%20Guardian-,Rio%20Tinto%20blasts%2046%2C000%2Dyear%2Dold%20Aboriginal%20site,to%20expand%20iron%20ore%20mine&text=A%20sacred%20site%20in%20Western,of%20an%20iron%20ore%20mine.>></p>
</div>
<div data-bbox=)