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LOOT BOX REGULATION IN AUSTRALIA: CLASSIFICATION AND GAMBLING

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In September 2024, the Guidelines for the Classification of Computer Games 2023 came into force, allowing the Classification Board to rate digital games that contain loot boxes. This follows broad concerns in Australia and internationally regarding the parallels between loot boxes and gambling and a range of perceived harms, especially for children and young people. This paper argues that the Guidelines, although a first step, are limited in scope and focus, and further reforms are needed to adequately address predatory monetisation in digital games. These include uniform probability disclosure for loot boxes, changes to the ratings to focus on predatory game structures and amendments to bring specific games directly under the online gambling regime.

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I. INTRODUCTION

There is significant community anxiety surrounding the existence of 'loot boxes' in digital games, as it is more frequently considered that they create a pathway for children towards problem gambling.[1] In response, the Australian Government has recently introduced the *Guidelines for the Classification of Computer Games 2023* ('Guidelines'), which came into force in September 2024.[2] The Guidelines are a first step in the regulation of loot boxes for Australian players. However, this article argues that more

[1] Standing Committee on Social Policy and Legal Affairs, House of Representatives, *You Win Some, You Lose More* (Report, June 2023), 129-31 [6.1-6.20].
[2] *Guidelines for the Classification of Computer Games 2023* (Cth).

should be done to address the harmful practices of predatory monetisation in digital gaming.

The article is organised into three parts. The first part provides an overview of loot boxes, the anxiety caused by the relationship between loot boxes, children and gambling, and the Guidelines. The second part identifies that there are two primary problems with the Guidelines. First, the Guidelines potentially flatten the Mature classification[3] ('M rating') for games with loot boxes by not distinguishing between the existence of a loot box and separately, the predatory structures that funnel players into randomised benefit-for-cost mechanisms. Second, the conceptualisation of the harms caused by loot boxes remain limited, due to a focus on preventing legacy gambling forms. Although beneficial, the Guidelines should open the way for further reform. The third part suggests further reforms, including mandatory probability disclosure, refinement of the Guidelines to focus on predatory practices and bringing games with predatory randomised benefit-for-cost mechanics within the *Interactive Gambling Act 2001* (Cth) ('*Interactive Gambling Act*').

II. LOOT BOXES, COMMUNITY ANXIETY AND THE AUSTRALIAN GUIDELINES

Digital games are a major form of entertainment in Australia. In 2023, the Australian digital game market was valued at $AU4.21 billon.[4] Loot boxes are a contemporary feature in modern digital gaming. Generally loot boxes are considered as an in-game mechanism that provides players with a randomised benefit, for a cost.[5] The benefit is usually an item or upgrade that the player can use in-game; although a 'benefit' can include purely aesthetic prizes (often termed 'skins') that have no direct utility during gameplay, but might have a real-world value in a secondary market.[6] Precise definitions are contentious. Some limit loot boxes to randomised benefits purchased in-game with

[3] *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 7(3) ('*Classification Act*').
[4] James Batchelor, 'The Australian games industry in numbers', *Game Industry.biz* (Web Page, 12 November 2023) <https://www.gamesindustry.biz/the-australian-games-industry-in-numbers>.
[5] See, eg, Sebastian Schwiddessen and Philipp Karius, 'Watch Your Loot Boxes!–Recent Developments and Legal Assessment in Selected Key Jurisdictions from a Gambling Law Perspective' (2018) 1(1) *Interactive Entertainment Law Review* 17; Peter Cartwright and Richard Hyde, 'Virtual Coercion and the Vulnerable Consumer: 'Loot Boxes' as Aggressive Commercial Practices' (2022) 42(4) *Legal Studies* 555-575, 556.
[6] Aaron Drummond et al, 'Why Loot Boxes Could Be Regulated as Gambling' (2020) 4(10) *Nature Human Behaviour* 986.

real-world currency, while others extend the definition to include randomised benefits that are achieved through either gameplay or the use of in-game currency.[7]

Loot boxes are pervasive in digital games. A 2020 study identified that 58% of the top games on the Google Play store, 59% of the top iPhone games, and 36% of the top Steam games contained loot boxes.[8] The same study also identified that 93% of Android games (54 of 58) and 94% of iPhone games (56 of 59) that featured loot boxes were classified as suitable for children aged 12 and over.[9] Loot boxes available for purchase using real world currency are a form of microtransaction, a business model that appeared in the 2000s as a way for players to obtain extra items or services in-game.[10] Microtransactions have been a significant source of income for game companies. Electronic Arts (EA), one of the dominant game companies, reported income of $USD 4.3 billion from microtransactions in 2023.[11]

Although consumed by Australians of all ages,[12] digital games are particularly popular with children and young people. The three overarching concerns about loot boxes stem from this connection. The first concern is that game companies exploit compulsive behaviours in children to maximise loot box purchasing, leading to direct financial and mental health harms.[13] The second is that loot boxes have been linked to ongoing problematic gambling,[14] particularly because loot boxes have been found to generate

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[7] Matthew McCaffrey, 'Loot Boxes, Problem Gambling, and Problem Gaming: A Critical Review of the Emerging Literature' (2023) 52(1) *Communications of the Association for Information Systems* 132, 135.
[8] David Zendle et al, 'The Prevalence of Loot Boxes in Mobile and Desktop Games' (2020) 115(9) *Addiction* 1768, 1768 ('The Prevalence of Loot Boxes'). Subsequent studies have suggested that the prevalence of loot boxes in mobile games has increased: Leon Xiao, Laura Henderson and Philip Newall, 'Loot Boxes are more Prevalent in United Kingdom Video Games than Previously Considered: Updating Zendle et al. (2020)' (2022) 117(9) *Addiction* 2553; David Zendle et al, 'Response to Xiao et al.: If Everything is a Loot Box, Nothing Is' 117(9) *Addiction* 2555.
[9] Zendle et al (n 8) 1770.
[10] Schwiddessen and Karius (n 5) 19.
[11] Asif Zapata, 'From Play to Pay: How Microtransactions Took Over Gaming', *The Business Standard* (Web Page, 4 October 2023) <https://www.tbsnews.net/features/play-pay-how-microtransactions-took-over-gaming-712234>.
[12] 'Australian Games Industry Statistics', *Interactive Games & Entertainment Association* (Web Page, 5 May 2021) <https://igea.net/faq/australian-games-industry-statistics/#:~:text=Some%20of%20the%20highlights%20include%3A%201%2091%20per,those%20aged%2065%20and%20over%20identifying%20as%20gamers>.
[13] European Parliament, Committee on the Internal Market and Consumer Protection (IMCO), *Loot boxes in Online Games and Their Effect on Consumers, in Particular Young Consumers*, Policy Department for Economic, Scientific and Quality of Life Policies, PE 652.727, (July 2020, Luxembourg) 29.
[14] Leon Xiao, 'Regulating Loot Boxes as Gambling? Towards a Combined Legal and Self-regulatory Consumer Protection Approach' (2021) 4(1) *Interactive Entertainment Law Review* 27; Deirdre Leahy,

similar emotional responses as the thrill of gambling.[15] Third, because loot boxes functionally constitute a form of gambling, they should therefore be subject to the same regulation and controls as other forms of gambling.[16]

In response to these concerns, there have been attempts at regulation in different jurisdictions. The Belgium and Netherlands gambling regulators have decided that loot boxes purchased for real-world currency, that provide transferrable rewards were subject to the existing national gambling regulations and proceeded to take action against gaming companies that failed to adhere with these standards.[17] However, there has been some backsliding after the penalty initially imposed by the Netherlands regulator on EA was recently overturned, by the Netherlands Superior Administrative Law Court, the Council of State. That court decided that classifying a game with paid loot boxes as gambling requires consideration to the whole context of the game.[18]

In China, specific loot box regulations have been introduced that mandate probability disclosure. However, it has been identified that 'sub-optimal' compliance by game companies, has been caused by; weaknesses in drafting the definition for loot boxes, the visibility of the disclosures, the level of detail disclosed, and the overall utility of probability disclosures in influencing player choices.[19] In South Korea, games with loot boxes had been regulated under a self-regulatory rating system. This was maintained by the games industry within its context of broader statute regulation, concerned with

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'Rocking the Boat: Loot Boxes in Online Digital Games, the Regulatory Challenge, and the EU's Unfair Commercial Practices Directive' (2022) 45(3) *Journal of Consumer Policy* 561, 565.

[15] Andrew Brady and Garry Prentice, 'Are Loot Boxes Addictive? Analyzing Participant's Physiological Arousal while Opening a Loot Box' (2021) 16(4) *Games and Culture* 419.

[16] Kevin Liu, 'Global Analysis into Loot Boxes: is it "Virtually" Gambling?' (2019) 28(3) *Washington International Law Journal* 763.

[17] Xiao (n 14) 35-36.

[18] *Electronic Arts Inc & Electronic Arts Swiss S.A.R.L. v Kansspelautoriteit* (2020) 812 Rechtbank Den Haag [District Court of The Hague] (15 October 2020); Leon Xiao and Pieterjan Declerck, 'Paid Video Game Loot Boxes are Not Gambling Under Dutch Gambling Regulation? Shifting the goalpost In Electronic Arts V. Kansspelautoriteit' (2023) 27(9) *Gaming Law Review* 445.

[19] Leon Xiao, 'Drafting Video Game Loot Box Regulation for Dummies: A Chinese Lesson' (2022) 31(3) *Information & Communications Technology Law* 343; Leon Xiao and Philip Newall, 'Probability Disclosures are not Enough: Reducing Loot Box Reward Complexity as a Part of Ethical Video Game Design' (2022) 50 *Journal of Gambling Issues* 145.

children and excessive gaming.[20] In 2024, South Korea also introduced mandatory probability disclosure.[21]

In Australia, a 2018 Senate inquiry reviewed the existing loot box practices research on the evidence of harms and recommended to the Government a cautious regulatory approach, beginning with the *Australian Classification Scheme*.[22] The inquiry also affirmed the opinion of the Australian Communication and Media Authority (ACMA) that not all loot boxes fall within the purview of the *Interactive Gambling Act*.[23] In November 2022, South Australian independent MP and well known anti-gambling campaigner Andrew Wilkie introduced a private members bill that would have amended the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ('*Classification Act*') to compel the Classification Board to consider loot boxes when classifying games and specifying a minimum classification of Restricted ('R 18+ rating') (Restricted 18+ – legally restricted to adults) for games with loot boxes.[24] While the bill lapsed in August 2023, the Government did release the Guidelines in 2023 made under the *Classification Act* that came into force on 24 September 2024.[25]

The Guidelines prescribe that games that have 'in-game purchases linked to elements of chance' are not permitted in material classified lesser than a M rating(not recommended for children under the age of 15).[26] Further, games that have 'in-game purchases linked to elements of chance and simulated gambling' have an impact associated with no lower than an R 18+ rating.[27] The Guidelines define 'in-game purchases linked to elements of chance' as:

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[20] Leahy (n 14) 568; Stephanie Derrington, Shaun Star, and Sarah J. Kelly, 'The Case for Uniform Loot Box Regulation: A New Classification Typology and Reform Agenda' (2021) 46 *Journal of Gambling Issues* 302, 314.
[21] Leon Xiao and Solip Park, 'Better than Industry Self-Regulation: Compliance of Mobile Games with Newly Adopted and Actively Enforced Loot Box Probability Disclosure Law in South Korea' (OSFPreprints, 6 September 2024) <https://osf.io/preprints/osf/xnvqa>.
[22] The Senate Environment and Communications References Committee, *Gaming Micro-Transactions for Chance-Based Items* (Report, 18 September 2018) 72 [5.11].
[23] Ibid 73 [5.12].
[24] Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment (Loot Boxes) Bill 2022 (Commonwealth of Australia) 3.
[25] *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 12(1).
[26] *Guidelines for the Classification of Computer Games 2023* (Cth), 13.
[27] Michelle Rowland, 'New Mandatory Minimum Classifications for Gambling-like Games Content', *The Hon Michelle Rowland* (Web Page, 23 September 2023) <https://minister.infrastructure.gov.au/rowland/media-release/new-mandatory-minimum-

> 'Digital goods or services determined by chance, including Paid Loot Boxes, that can be acquired within a game:
>
> (a) using real world currency; or
> (b) using in-game virtual currency, items or credits that can be purchased using real-world currency.'[28]

'Simulated gambling' is defined as:

> 'Interactive activity within a game that:
>
> (a) resembles or functions like a real-world age restricted betting or gambling service; and
> (b) does not provide rewards that can be redeemed for real world currency or traded to other players in-game for real world currency.' [29]

Paid Loot Boxes are defined as:

> 'A virtual container, however described:
>
> (a) that can be purchased or unlocked using real world currency or using in-game virtual currency, items or credits that can be purchased using real world currency; and
> (b) that rewards players with an in-game digital item or items, where the exact reward the player is to receive is not disclosed to the player prior to purchase.' [30]

The Guidelines represent a first step in the regulation of loot boxes within digital games. They make loot boxes visible to the Classification Board and provide clear guidance to the Board that games with loot boxes that are connected to real-world currency are subject to an M rating and games that simulate restricted gambling are assigned an R 18+ rating. However, there are problems with the Guidelines, relating to scope and harms.

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classifications-gambling-games-content>.; Transport Department of Infrastructure, Regional Development, Communications and the Arts, 'New Mandatory Minimum Classifications for Gambling-like Games Content', *Australian Classification* (Web Page, 26 September 2023) <https://www.classification.gov.au/about-us/media-and-news/news/new-mandatory-minimum-classifications-for-gambling-games-content>.

[28] *Guidelines for the Classification of Computer Games 2023* (Cth) 13.

[29] Ibid 15.

[30] Ibid 14.

III. PROBLEMS WITH THE GUIDELINES

There are two problems with the Guidelines. The first relates to the scope of game features captured by the definitions. This could have the effect of 'flattening' the impact of ratings by not distinguishing between the scale of randomised benefit-for-cost mechanics and its structure and location within different games. This connects to the second problem in relation to the evidence base of harms in relation to loot boxes and gambling. Both highlight the need for a more targeted focus on the predatory practices associated with loot boxes.

A. *Scope of Game Features Caught by the Guidelines and the Potential Flattening of the 'M' Rating*

The Guidelines potentially misunderstand the ubiquity of loot boxes within contemporary gaming.[31] Loot boxes have their origins in a confluence of two deep features of digital gaming.

The first is the randomised benefit-for-cost mechanic. Stretching back to tabletop games, there have been mechanics where players sacrifice a resource of some kind for a randomised benefit (for example, using game currency to purchase a card from a deck). Due to the ease of digital systems undertaking random number generation (RNG), randomised rewards have been an enduring feature within digital games. Together with the capacity of digital systems to provide and keep track of in-game currencies and resources, combining the two to form a randomised benefit-for-cost mechanic has been a basic feature in digital gaming since the earliest games. The foundational games in the *Pokémon* franchise had a 'games corner' where in-game currency (coins) could be used in simulated 'slot machines' for randomised benefits.[32] Throughout the Nintendo *Zelda* franchise, there were 'stores' and 'mini-games' where players paid with in-game currency for the opportunity to receive a randomised benefit. Indeed, some of the earliest digital

[31] Heather Wardle, *Games Without Frontiers?: Socio-historical Perspectives at the Gaming/Gambling Intersection* (Springer Nature, 2021) 68.
[32] Game Freak, *Pokémon Red* (Nintendo, 1996); Game Freak, *Pokémon Blue* (Nintendo, 1996); Samuli Laato, 'Is Simulating Casino Environments in Video Games Worse than Gambling with Loot Boxes? The Case of the Removed Pokémon Game Corner' (2020) *Proceedings of the Conference on Technology Ethics*. In later re-releases, this was removed.

role-playing games (RPGs) had randomised benefit-for-cost mechanics.[33] The children's toy-to-game franchise *Skylanders*[34] from the early 2010s had internal minigames where players paid in-game currency to undertake a game of chance to win randomised benefits.

This means that mechanics that work like loot boxes are a ubiquitous part of digital gaming. This is where the narrower definition of a loot box as a 'randomised benefit for real-world currency' has an attraction. This does link the random benefit-for-cost mechanic to a real-world microtransaction. However, the Guidelines goes further in both the definition of 'in-game purchases linked to elements of chance' and 'Paid Loot Boxes' to 'using in-game virtual currency, items or credits that can be purchased using real world currency'.[35] This seems like a reasonable extension in limiting the new ratings regime to games that have either a direct, or a one step removed, microtransaction for a randomised benefit. One step removed games have a microtransaction portal where in-game currency or assets can be purchased, with real-world currency and those resources are then able to be used to purchase loot boxes. Seemingly, the Guidelines would exclude games that are 'sealed' and do not have portals where real-world currency can be used to purchase in-game currency or assets.

However, even games without an official microtransaction portal, secondary markets for in-game assets for real-world currency exist. A well-known example relates to *Pokémon*. Shiny Pokémon are unique skins of normal Pokémon that rarely spawn, usually the odds of finding a shiny Pokémon are one in thousands.[36] There are online secondary markets where shiny Pokémon can be bought and sold.[37] Through secondary markets for in-game assets, the distinction between games that have a microtransaction portal and sealed games becomes blurred. The potential for secondary markets is that 'sealed' games that have loot boxes and a capacity for converting in-game assets to in-game currency, a player could purchase an asset on a secondary market with real-world currency, bring it into the game, convert it to in-game currency and then use that to access loot boxes. The

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[33] Steven Wright, 'The Evolution of Loot Boxes', *PC Gamer* (Web Page, 9 December 2017) <https://www.pcgamer.com/the-evolution-of-loot-boxes/>.
[34] Toys for Bob, *Skylanders: Giants* (Activision, 2012).
[35] Department of Infrastructure, Transport Regional Development, Communications and the Arts (n 27).
[36] Maude Bonenfant et al, '"Finally! My First Shiny!": Assessing Text Mining Tools and Methodologies for the Study of the Pokémon Sword and Shield Twitter Online Community' (2020) *Canadian Society for Digital Humanities/Société Canadienne Des Humanités Numériques*, [5.4].
[37] For example: *Shiny24* (Web Page, 2024) <https://shiny24.com/>.

Guidelines do not provide direction as to whether the existence or even the possibility of secondary markets means a 'sealed' game with random benefit-for-cost mechanism would satisfy the threshold of an 'M' rating or below.

The Guidelines' definitions do not specify that the transaction purchasing the loot box needs to be entirely between the gamer and the gaming company. Rather, the definitions hinge on the transaction and the providence of the resources that the gamer brings to the transaction. Conceptually, nearly any game, and especially games within the sport, role-playing and deck building genres, where there is an emphasis on acquisition and use of in-game assets, could generate a secondary market. This could mean there is the potential for the Guidelines to apply to sealed games that might not come within the primary understanding of a loot box. This could have the effect of nullifying the ratings, rather than providing consumers with clear insight into the expected content and suitability of a game, it could flatten the scope to a point of meaninglessness. The flattening of a category occurs when there are too many diverse objects caught within the category. This is problematic for regulation as it means that often unintended targets are regulated. In a classification scheme where ratings exist to enhance consumer knowledge about what content to expect within a specific media product, flattening undermines the effectiveness of the rating as a guide to content because to signifies too wide a range of content. Potentially the wording of the Guidelines could capture games that have random benefit-for-cost mechanics that do not have an obvious or clear connection to real-world currency.

This concern with the Guidelines leading to M ratings for games with very different player experiences of random benefit-for-cost mechanisms, is also evident for games that fall within the primary target of the Guidelines; that is, games with a random benefit-for-cost mechanics, where the cost is a microtransaction or an in-game asset that is purchasable through a microtransaction. A study for the UK Department for Culture, Media and Sport emphasised the diversity of scope, experience, purpose, and level of engagement associated with loot boxes.[38] In some games, loot boxes are a marginal and optional experience, players can play through the game without engaging with loot boxes. In other games, loot boxes are front and centre of the gaming experience due to a range of design

[38] Darshana Jayemanne et al., *Loot Boxes and Digital Gaming: A Rapid Evidence Assessment* (Report, April 2021) 18-19.

strategies aimed at funnelling and pushing loot boxes onto players. These 'predatory' strategies can involve the necessity to engage with loot boxes to progress the game, timer alerts and countdowns to pressure players to buy loot boxes, monitored prompting that identifies a player struggling to progress and pops up a loot box, and awarding a player a 'key' but requiring purchasing of the corresponding loot box to use the key.[39] Further, there is a different emotional response to a loot box that is simply a mystery item purchasable in an in-game shop, compared to one that imposes onto the screen with graphical fanfare and bright imagery of wrapped presents, shiny eggs, or a buzzy, simulated casino game.[40] Further, there is the phenomena most well-known in association with *Counter Strike: Global Offensive* (CS:GO)[41] where loot boxes provide aesthetic skins (that do not change game playability) but due to the popularity and intensity of the CS:GO community, rarely-spawned skins have high real-world value in secondary markets as purely collectable digital assets.[42]

There are strong policy grounds for games where the design of the game is structured to funnel players towards loot boxes to be given a more restricted rating. There is also a difference between the secondary market for digital assets that is encouraged and authorised by the gaming company, as has happened with GS:GO, and the potential for secondary markets of otherwise sealed games. The approach in the Guidelines, which states that 'if a game has loot boxes, then it should receive a certain rating', does seem blunt. A more nuanced examination of the experience of the loot box within a game as a whole (and its surrounding culture, including secondary markets) is more apt. Although based on the specifics of the Netherlands gambling laws, this was one of the findings of the Council of State, that loot boxes must be assessed within the contexts of the game experience as a whole.[43]

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[39] On taxonomies of features associated with loot boxes see: Nick Ballou, Charles Gbadmosi and David Zendle, 'The Hidden Intricacy of Loot Box Design: A Granular Description of Random Monetized Reward Features' *Proceedings of DiGRA 2022 Conference: Bringing Worlds Together* Annex 2342-9666. See also Damian Bank, 'Problematic Monetization in Mobile Games in the Context of the Human Right to Economic Self-Determination' (2023) 149 *Computers in Human Behavior* 107958.
[40] Wardle (n 31) 69.
[41] Valve and Hidden Path Entertainment, *Counter-Strike: Global Offensive* (Valve, 2012).
[42] Simen Langeland, 'Adolescents and the Loot Box Phenomenon. A Study on the Most Controversial Phenomemon in Video Games' (Thesis, Høgskulen i Volda, 2021) 41.
[43] *Electronic Arts Inc and Electronic Arts Swiss S.A.R.L. v Kansspelautoriteit* (n 18); Although there are some criticisms of whose experience, which type of gamer and intensity of engagement and vulnerability to

The danger of the Guidelines is a flattening out of the scope of games that would receive a M rating. It could catch games because of the possibility of a real-world secondary market for in-game assets in what is otherwise a sealed game, and it bundles games with incidental loot boxes into the same rating as games with predatory monetisation features. By potentially having a large population of M rated games, the harms of predatory loot boxes become diluted. Furthermore, in flattening the M rating, the Guidelines possibly sends the wrong message to game companies. Under the Guidelines, games with incidental or restrained use of loot boxes are subject to the same rating as games with more attention grabbing and nudging loot boxes. The message could be understood that, as these games will be assigned the same rating, the Guidelines are an incentive to game companies to maximise income through incorporation of more predatory, randomised, benefit-for-costs mechanics.

B. *Evidence Base of Harms in relation to Loot Boxes and Gambling*

This potential flattening of the M rating because the Guidelines does not directly see that predatory monetisation features within games; it arises because they are not directly focused on digital gaming but are framed against a broader context of the known harms of established gambling.

This is revealed by the R 18+ rating for simulated gambling games. These are games that provide a virtual gambling experience that mirrors legacy real-world gambling games but are for virtual currency only. Some of the earliest commercial home digital games were simulated gambling games such as the 1978 *Casio* for the Atari 2600 console and the 1980 *Horse Racing* for the IntelliVision console. The contemporary descendants of these games would be R 18+ under the Guidelines. The rationale is that these games replicate what is otherwise a regulated activity that, under Australian law, requires that participants are 18 years and older. As such, there is a sense of treating like-as-like, and there is significant anxiety in the community that simulated gambling games enculturate problem gambling.[44]

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predatory nudges, the 'whole of game' experience should be considered from Xiao and Declerck (n 18) 451.

[44] See, Standing Committee on Social Policy and Legal Affairs (n 1) 129 [6.1].

However, there are *prima facie* some critical differences. First, these games are only for virtual in-game currency. Real-world gambling is regulated because real-word money is at stake. Simulated games are defined in the Guidelines as sealed, with only in-game currency at stake, and the style of these games would not likely generate a secondary market for rare in-game assets. These games do seem less problematic in terms of young people and financial harms than M rated loot boxes facilitating microtransactions. As such, the primary justification for the R 18+ rating comes from the concern that these styles of games socialise young people to adult gambling (that is legacy 19th and20th century forms of institutional gambling such as horse racing, card games and casino-style machines) and serve as a pathway to problem gambling.[45] The exception are 'social casino' style games. These games resemble online gambling sites and require real-world currency to purchase in-game currency to be used in-game. These games avoid direct regulation as online gambling by not having a facility to cash out, but winning unlocks in-game rewards.[46] These games, like the Australian developed *Heart of Vegas,*[47] that resembles a gaming lounge with different slot machines, have a clear connection to problem gambling.[48] A focus directly on social casino style games, where there is a real-world pay-to-play mechanic, does seem to warrant R 18+ rating. However, the Guidelines are framed more broadly than the real-world currency, pay-to-play social casinos, by directing the Classification Board R 18+ rate any game with 'simulated gambling.'

This is where the question of evidence-based regulation becomes important. There are many studies that have explored the impact of simulated gambling on real-world gambling. The evidence is contested. There is evidence that some players do 'graduate' to problem gambling in the real-world,[49] and there is evidence that many do not have any

[45] Laato (n 32).
[46] Alexander Ross and David Nieborg, 'Spinning is winning: Social casino apps and the platformization of gamble-play' (2021) 21(3) *Journal of Consumer Culture* 84, 85.
[47] Aristocrat 'Heart of Vegas', (Web Page) <https://heartofvegasslots.productmadness.com/auth>.
[48] Loretta Lohberger, 'Woman who Stole $940,000 from Vet to Gamble Online Jailed for Six Years', *ABC News* (Web Page, 9 December 2021) <https://www.abc.net.au/news/2021-12-09/rachel-naomi-perri-jailed-over-vet-theft-to-gamble-online/100686998>.
[49] Daniel L. King et al, 'Adolescent Simulated Gambling Via Digital and Social Media: An Emerging Problem' (2014) 31 *Computers in Human Behavior* 305; Ingo Fiedler et al, 'Simulated Gambling: An Explorative Study Based on a Representative Survey' (2023) 40(4) *Journal of Gambling Studies* 255; Nerilee Hing et al, 'Not All Games are Created Equal: Adolescents Who Play and Spend Money on Simulated Gambling Games Show Greater Risk for Gaming Disorder' (2022) 137(2) *Addictive Behaviors* 107525.

real-world gambling issues having played these games.[50] There is also evidence that people with real-world gambling addiction have reduced problematic conduct through transitioning to these games.[51] In this context, the R 18+ directive in the Guidelines could be seen as more about messaging than addressing actual harms, particularly in relation to young people and loot boxes specifically.

Messaging to the community and specific stakeholders are an important factor in regulation. The coming into force of the Guidelines indicates to game companies, parents, players, the gambling industry, and the community sector that the Australian Government is able and willing to engage with the issue of loot boxes. It also provides a measure to rate social casino games R 18+. However, in addition to the evidence base of harms from sealed simulated gambling games, the evidence base of harms in relation to loot boxes is also more complicated than might be suggested in the Minister for Communications' announcement of the Guidelines, where mention was made to the 'established links between in-game purchases, loot boxes, simulated gambling and gambling-related harm.'[52] In the release, the Minister refers to a 2022 report commissioned by the government. The report, a literature-based review, identified an association between loot boxes and negative health/behaviour outcomes like problem gambling and financial and psychological distress.[53] It did not identify causal relationships.[54] Rather, it mapped a complex set of unclear relationships between digital activity and harms. For example, in looking at literature that focused on loot boxes and internet gambling disorder, the report concluded there was 'medium evidence that loot box purchasing is associated with internet gaming disorder, with less evidence of an association between opening loot boxes for free or selling items from loot boxes and internet gaming disorder.'[55] The key word is association. Studies identified internet gaming disorder coexisting with loot box purchasing but could not discern whether loot

[50] Alex M T Russell et al, 'Order of First-Play in Simulated Versus Monetary Gambling' (2023) 12(4) *Journal of Behavioral Addictions* 992.
[51] Sally Melissa Gainsbury et al, 'An Exploratory Study of Interrelationships Between Social Casino Gaming, Gambling, and Problem Gambling' (2015) 13(1) *International Journal of Mental Health and Addiction* 136.
[52] Rowland (n 27).
[53] Nancy Greer, Cailem Murray Boyle and Rebecca Jenkinson, *Harms Associated with Loot Boxes and Simulated Gambling in Video Games: A Review of the Evidence* (Report, June 2022) 5.
[54] Ibid 5, 20.
[55] Ibid 20.

box purchasing was a pathway to internet gambling disorder or if internet gaming disordered was evidenced by loot-box purchasing.[56]

This is a recurring feature of the scholarship that attempts to summarise and synthesize the harms of loot boxes. Identifying causal relationships is difficult. There is a sense that paid loot boxes embedded in a game with predatory funnelling techniques can cause harms similar to gambling, but the diversity of players and the diversity of loot boxes makes it difficult to generalise.[57] There is also evidence that suggests that national and cultural differences impact on connections between loot box use and perceptions of gambling harms.[58] There is some evidence to suggest that majority of revenue from loot boxes comes from a small minority of players.[59] The focus on whether loot boxes are gambling or whether loot boxes *leads* to gambling problems, is potentially a barrier to effective loot box regulation.[60] The focus is trying to fit the diversity of loot boxes, games and players into preexisting understandings of gambling and gambling harms.

Australia does have a staggering gambling problem. Gambling harms are causing significant health, social and economic costs.[61] However, the deep history of gambling and the intertwining of the gambling industry with elements of Australian culture and government, has meant that effective regulation has been problematic.[62] Furthermore,

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[56] Ibid. See also: Aaron Drummond et al, 'The Relationship Between Problem Gambling, Excessive Gaming, Psychological Distress and Spending on Loot Boxes in Aotearoa New Zealand, Australia, and the United States—A Cross-National Survey' (2020) 15(3) *Plos one* e0230378; Phillip C. Raneri et al, 'The Role of Microtransactions in Internet Gaming Disorder and Gambling Disorder: A Preregistered Systematic Review' (2022) 15 *Addictive Behaviors Reports* 100415, 13.

[57] Leon Y. Xiao et al, 'Loot Boxes: Gambling-Like Mechanics in Video Games' cited in Newton Lee (ed), *Encyclopedia of Computer Graphics and Games* (Springer Nature, 2021) 3.

[58] Leon Y. Xiao, Tullia Fraser and Philip Newall, 'Opening Pandora's Loot Box: Weak Links Between Gambling and Loot Box Expenditure in China, and Player Opinions on Probability Disclosures and Pity-Timers' (2023) 39(2) *Journal of Gambling Studies* 645. In a later study this team suggests that it is possible that the findings in this research on cultural difference, might have stemmed from participant's interpreting the problem gambling scale differently to the researchers' understanding of the scale. See Leon Y. Xiao et al, 'Loot Boxes, Gambling-Related Risk Factors, and Mental Health in Mainland China: A Large-Scale Survey' (2024) 148 *Addictive Behaviors* 1, 2.

[59] David Zendle, Elena Petrovskaya and Heather Wardle, 'How Do Loot Boxes Make Money? An Analysis of a Very Large Dataset of Real Chinese CSGO Loot Box Openings' (2020) *PsyArXiv Preprints* <https://doi.org/10.31234/osf.io/5k2sy>.

[60] Wardle (n 31) 71.

[61] Sara Rolando and Heather Wardle, '"That's Why It's Gambling, Because You Don't Know What You Find In It!': Perceptions of the Relationship Between Gaming and Gambling Among Young Adult Gamers' (2024) 27(6) *Journal of Youth Studies* 869.

[62] Sarah Marko et al, '"Aussies Love a Bet": Gamblers Discuss the Social Acceptance and Cultural Accommodation of Gambling in Australia' (2022) 46(6) *Australian and New Zealand Journal of Public Health* 829.

this legacy has manifested in the emergence of online and mobile gambling platforms that are particularly targeted vulnerable demographics and are a pervasive feature in Australian media content and social environments.[63] In this context, loot boxes in digital gaming can be seen as generative of significant anxiety by socialising young Australians to the ubiquity of gambling within Australian social and cultural spaces, and, possibly, the gamer companies might appear to be an easier target than the established and politically savvy onshore gambling industry.[64]

C. *Summary of the Problems with the Guidelines*

In summary, the Guidelines manifest two related problems. The first is that it potentially flattens the range of games that would receive an M rating because of the broad definition of loot boxes that does not distinguish between incidental random benefit-for-cost features and predatory monetisation structures that nudge and entice players into loot box consumption. It also only focuses on the game itself and not the possibilities for secondary markets for in-game assets. Further, the Guidelines are framed according to established understandings of gambling and gambling harm. This means that the R 18+ is reserved for games that resemble legacy gambling forms, like social casinos, but might not, if they are free to play, cause direct material harm, yet leave games that have predatory random benefit-for-cost mechanics (which can have a significant real-world value) as only M rated. A suggested way forward for regulation is to go deeper than connecting loot boxes to gambling but focus on whether a game is using predatory techniques to target and entrap players to engage with randomised benefits for cost mechanics.[65] This approach deals directly with the specific game features related to monetisation. However, such an approach would need to go beyond the current approach outlined by the Guidelines.

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[63] Christine Parker et al, 'Addressing the Accountability Gap: Gambling Advertising and Social Media Platform Responsibilities' (2024) 32(4) *Addiction Research & Theory* 1; Samantha Thomas et al, '"It Is Always There In Your Face." Australian Young People Discuss Exposure to Gambling Activities and Promotions' (2023) 3 *SSM-Qualitative Research in Health* 100220.
[64] Maggie Johnson and Charles Livingstone, 'Measuring Influence: An Analysis of Australian Gambling Industry Political Donations and Policy Decisions' (2021) 29(3) *Addiction Research & Theory* 196.
[65] Daniel King and Paul Delfabbro, 'Video Game Monetization (eg.,'Loot Boxes'): A Blueprint for Practical Social Responsibility Measures' (2019) 17(1) *International Journal of Mental Health and Addiction* 166, 175.

IV. FURTHER LOOT BOX REGULATION FOR AUSTRALIA

There are three further reforms that could directly address the concerns of predatory monetisation in digital gaming. The first is updating the Guidelines to facilitate the Classification Board to focus more directly on the in-game experience as whole and predatory randomised benefit-for-cost mechanics. The second is in-game probability disclosure. The third is the inclusion of digital games with predatory randomised benefit-for-cost mechanisms, such as social casinos, under the *Interactive Gambling Act*.

A. *Revised Guidelines to Focus on Predatory Randomised Benefit-for-cost Mechanisms*

Rating regimes, as regulation, work through increasing the knowledge and awareness in consumers and, where appropriate, attempt to limit its sale. In the digital space, aged-based restrictions may impact sale, however, have little influence on access.[66] As such, the Guidelines themselves will not stop children from accessing games with loot boxes. Therefore, the Guidelines' regulatory power rests solely on the capacity to increase knowledge and awareness within the market, that certain games will have loot boxes. This is where problems inherent to the Guidelines framing could diminish it's effectiveness. In many respects, flattening out the M rating is desirable from a regulatory perspective because it captures a wider spectrum of games with randomised benefit-for-cost mechanics, however, it does not clearly connect the problematic game features with known harms. Consequentially, the Guidelines risk failing to adequately inform players of the prospects that randomised benefit-for-cost mechanics will manifest within a specific game.

Rather than distinguishing between games with loot boxes (rated M) and simulated gambling games (rated R18+), the Guidelines should be reframed to rate games with predatory randomised benefit-for-cost mechanisms as R 18+. In its June 2023 report '*You Win Some, You Lose More Report'* on online gambling, the House of Representatives Standing Committee on Social Policy and Legal Affairs referred to the recently announced Guidelines and suggested that:

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[66] See: Svetlana Smirnova, Sonia Livingstone, and Mariya Stoilova, *Understanding Of User Needs And Problems: A Rapid Evidence Review of Age Assurance and Parental Controls in Everyday Life* (Report, 30 June 2021).

> The Australian Government should consider applying a more granular approach to determining the classification of games with loot boxes through the National Classification Scheme. Games that contain loot boxes that can be purchased, and which closely resemble gambling, should be given a higher classification.[67]

Identifying loot boxes within a game is not difficult. Indeed, they work because they are obvious in compelling or nudging the player to increase engagement with randomised benefit-for-cost mechanics. Developers tactically demand of the player their attention and investment with loot boxes in many contexts. Most effectively, by offering a less attractive product (game) for those who do not engage with loot boxes or by manufacturing artificial stress and by deploying loot boxes at calculated moments. On this basis, the R 18+ rating should apply to games that will not allow in-game progression without loot box engagement, where there are count-downs for loot boxes, where the game monitors progress and offers loot boxes and where in-game incentives are 'rewarded' to unlock a loot box. It would not take the Classification Board long to identify games with these features and would not add excessively to the cost of the Board's determinations.

Further, due to the permeability between in-game assets and real-world money, the Guidelines distinction between in-game and real-world costs should be dispensed with. This might mean that sealed games that use predatory strategies would fall within the ambit of an R 18+ rating, even if the pathway to direct monetisation is not as structured. The risk is possibly a flattening of the rating. However, there are two mitigating factors. First, the Australian Government, in the current Guidelines, has 'simulated gambling' games getting an R 18+ rating, even when they do not have an obvious real-world financial connection, because they resemble legacy gambling games. Shifting the regulatory emphasis towards the predatory strategies focuses directly on the harmful game elements rather than game resemblance to historical forms of gambling. Second, there is a suggestion that predatory structures within games diminish the player experience and that games that over utilise these strategies often fail to attract a player community. The commonly referred to example is the 2017 EA title *Star Wars Battlefront II,*[68] where excessive use of loot boxes in the original iteration of the game caused

[67] Standing Committee on Social Policy and Legal Affairs, House of Representatives (n 1) 147 [6.91].
[68] DICE, *Starwars Battlefront II* (Electric Arts, 2017).

significant player backlash and media controversy which lead to an update that removed the loot boxes.[69] The reaction was because the overuse of loot boxes undermined players' sense of progression and enjoyment of the game. [70] Due to this, it is unlikely that many games would adopt predatory features without monetary gain, which limits the number of games that would otherwise flatten the rating.

B. *Probability Disclosure*

A further reform should be the mandating of probability disclosure for randomised benefit-for-cost mechanics in games. Like ratings, mandatory disclosure, regulates an activity by providing information to consumers about the likelihood of success. The Chinese experience with mandatory disclosure provides a range of lessons on how to make players aware of probabilities and how to ensure substantive compliance by gaming companies.[71] A particular lesson from China is the need for a mandated universal format that companies must use when disclosing probabilities.[72] While research indicates that probability disclosure will not stop a determined player, it will enhance awareness and knowledge of chances within player communities. Gaming companies have coded the randomised algorithm for these features, and it is not a difficult nor costly expectation that they publish these in a uniform manner.

C. *Regulating Games with Predatory Randomised Benefit-for-cost Mechanics as Gambling*

A further direction for reform is to include digital games with predatory randomised benefit-for-cost mechanisms under the *Interactive Gambling Act*. As Drummond et al has identified loot boxes where there the real-world money involved, such as the skin dropping in *CS:GO* does seem to fit within the broad understanding of gambling which are otherwise regulated under national laws.[73] Further, the clear parallels between 'social casino' and online gambling sites suggest the need to apply the same rules for both.

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[69] Brendan Scott, '"Loot Boxes" Drawing Regulatory Attention' (2018) 21(7) *Internet Law Bulletin* 124.
[70] Wardle (n 31) 68; See also: Rolando and Wardle (n 61) 879.
[71] Xiao (n 14).
[72] Xiao (n 14).
[73] Drummond et al (n 6) 987-988.

In Australia, bringing games with these features under the *Interactive Gambling Act* would require two amendments. First, to broaden the definition of 'gambling service' and clarify the term 'consideration' by including in-game currency or assets[74] and, second, a more detailed definition of 'game' to include the 'game-within-a-game' nature of randomised benefit-for-cost mechanics to avoid the argument that was successful in striking down the approach of the Netherlands regulator.

By bringing games with predatory randomised benefit-for-cost mechanics under the *Interactive Gambling Act,*, these games and their distributors would be subject to ACMA regulation, the statutory complaint process, expectations in relation to age limits, advertising controls and it would facilitate access to the self-exclusion registry for problematic gamblers.[75] The House of Representatives Standing Committee on Social Policy and Legal Affairs noted that reform to include loot box and social casino games within the definition of a 'gambling service' which had been recommended by a number of stakeholders in submissions, including the Australian Psychological Society, but was concerned about compliance and enforcement.[76] Eulenstein suggests that ACMA's reformed regulatory action in 2017 under the *Interactive Gambling Act* has been effective to regulate online betting platforms, with large overseas providers opting to either withdraw from the Australian market or become licenced under the Act.[77] The digital gaming market is dominated by large companies such as EA, Microsoft, Blizzard, and Nintendo who distribute through a limited number of platforms like Steam and the stores for Apple and Android devices. It would seem to share contextual similarities, as a known market with well identified international participants to that which the AMCA dealt with when the amended *Interactive Gambling Act* came into force in the mid-2010s. This possibly mitigates some of the concerns that the House of Representatives Standing Committee on Social Policy and Legal Affairs had in relation to compliance and effectiveness.

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[74] *Interactive Gambling Act 2001* (Cth) s 4 (e)(iii).
[75] On aspects of the *Interactive Gambling Act 2001* (Cth) see: Joachim Dietrich and Matthew Raj, 'Sports And Esports as Conduits for Gambling: The Legal Regulation of Gambling Advertising In Australia' (2023) 42(2) *University of Queensland Law Journal* 191.
[76] Standing Committee on Social Policy and Legal Affairs (n 1) 146-7 [6.88].
[77] Kristy Eulenstein, 'Legal Consciousness and the Australian Interactive Gambling Act-The Success of Expert Bureaucrats in Transnational Networks' (2018) 24 *Australian International Law Journal* 155 165-167.

Bringing games with predatory, randomised benefit-for-cost mechanisms into the statutory online gambling regulatory regime is intended to serve a deterrent effect. Digital gaming companies are likely to resist the restrictions applied to their online gaming platforms for the sake of a single type of microtransaction. Further, it is possible that these reforms would not greatly increase the regulatory load on the AMCA, as the effect of deterrence would motivate gaming companies to remove the features that attract regulation under these proposed reforms.

However, amending the Act to expand the AMCA's regulatory oversight would not ban Australian exposure to games with predatory randomised benefit-for-cost mechanisms. Access will remain available as there will always be a small number of rogue operators and the use of a VPN to access content allows Australian-based players to access this content as if they were located offshore. However, clarifying that digital games which have predatory structures connected to a randomised benefit-for-cost mechanics are gambling, and should be regulated as gambling, will reduce the prevalence and availability of these kinds of games for Australian based players.

V. CONCLUSION

In conclusion, the Guidelines are a good first step in the regulation of loot boxes. It shows a willingness by the Australian Government to engage with the possible harms that stem from loot boxes. However, there are some clear problems with the Guidelines that suggest the need for more focused reforms. The Guidelines manifest two problems. The first is that the Guidelines potentially flatten out the M rating because of its focus on the existence of loot boxes, rather than the location of these and the in-game structures that impact player experience. The second is that as a result of the concern with legacy gambling and gambling pathways, the Guidelines do not directly focus on the harms of predatory monetisation in games. It was recommended that further regulatory reform is needed, including reframing the Guidelines so that predatory practices fall within the R+ 18 rating, introduce uniform mandetory probability disclosure, and extend the existing online gambling regulations to games with predatory structures in relation to random benefit-for-cost mechanics.

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EMOTION RECOGNITION TECHNOLOGIES AND DIGNITY IN AI-BASED SURVEILLANCE CAPITALISM

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Businesses, governments and other entities are increasingly presented with AI-based 'emotion recognition' biometric systems, promoted as tools offering robust insights into the honesty, comprehension or health support needs of individuals, particularly students and employees. Australian universities may consider adopting this technology as they expand their AI engagement in learning/assessment platforms and student support systems. Automated emotion recognition systems pose legal and human rights challenges arising from their potential to be used deterministically; their potential lack of reproducibility, replicability and validity; and their susceptibility to bias, notwithstanding their possible utility. Further, they rely on non-consensual or co-opted participation of individuals whose dignity is eroded by consequent reduction from persons to data subjects. This article evaluates such systems through a dignitarian human rights lens, highlighting the need for a precautionary approach.

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The expansion of AI-based digital emotional recognition technologies (ERTs) is outpacing societal understanding and regulatory oversight. ERTs are promoted as capable of accurately interpreting emotions in real time, on a large scale. For example, reliably indicating honesty, distress, incomprehension, delight or disengagement for users of a corporate workspace platform or academic learning platform. ERTs are promoted as capable of accurately interpreting emotions in real time, on a large scale. For example, by monitoring all users of a corporate workspace platform or academic learning platform, it may thus reliably indicate honesty, distress, incomprehension, delight or disengagement. In contrast to traditional tools such as polygraphs and blood pressure monitors, which require individual physical contact, ERTs involve AI-based interpretation of indicators of mental states gathered automatically by AI 'reading' the appearance or sound of people online, for example; frowns, smiles, blinks, speech volume or speed, or even syntax. They potentially have diverse applications, including those which involve honesty; for example employee recruitment, border control, identification of unvoiced student distress in learning platforms, disengagement by precarious employees in call centres and logistics centres or prediction of potential terrorism in public transport hubs. As a manifestation of a new stage of surveillance capitalism,[1] the development and deployment of ERTs necessitates a dignitarian understanding, underpinned by a nuanced use of the precautionary principle.

This article offers a concise critique of ERTs through a dignitarian lens. Part One is genealogical, relating ERTs to historical attempts to determine character, cognitive capacity and truth, through phrenology, graphology and physiognomy, that were deemed to provide an objective and legally recognisable understanding of individuals and groups.

[1] Shoshana Zuboff, *The Age of Surveillance Capitalism* (Public Affairs, 2019).

Those attempts have been extensively critiqued on scientific, dignitarian, and legal grounds. Part Two evaluates emerging ERTs as a facet of surveillance capitalism, suggesting the need for caution about claims regarding trustworthy 'mind reading'. It highlights specific dignitarian concerns. Part Three engages with questions about regulation, noting benchmarks in the European Union. Part Four offers a conclusion.

I. FROM LOMBROSO TO EMERGING AI

Attempts to discern human emotion, character, and cognition through physical observation, represents a problematic legacy in science and law. Metaphors such as "eyes are the windows of the soul" reflect long-standing notions that an individual's integrity, bravery or other attributes could be discerned by observing that person during ordinary conversation or under coercive questioning. Systematic attempts to determine character through observation of eyes, grimaces, perspiration, twitches, blushes, or pallor have been unpersuasive. These attempts coexisted with heuristics such as phrenology (determining character and capacities on the basis of skull shape),[2] physiognomy (similar determination on the basis of facial features)[3] and graphology (determining character on the basis of handwriting).[4] They each claim scientific authority without an empirical foundation. As pseudo-sciences, epitomized by Lombroso's criminological theories, they embed societal, racial, gender, and class biases within purportedly 'objective' frameworks.[5] Contemporary legal systems rightly reject these approaches as scientifically invalid and incompatible with frameworks of human dignity.

Australians have become habituated to a range of identifier and individuation digital biometrics,[6] such as the facial recognition used in passports and driver licence cards and some mobile phones or the forensic use of fingerprint databases.[7] Those systems involve objectively verifiable physical measures of individuation, rather than utilising physical measures as proxies for determination of intangible attributes such as cognition,

[2] Nicole Rafter, 'The Murderous Dutch Fiddler: Criminology, History and the Problem of Phrenology' (2005) 9(1) *Theoretical Criminology* 65.
[3] David Horn, *The Criminal Body: Lombroso and the Anatomy of Deviance* (Psychology Press, 2003).
[4] Julie Spohn, 'The Legal Implications of Graphology' (1997) 75(3) *Washington University Law Quarterly* 1307.
[5] Mary Gibson, *Born to Crime: Cesare Lombroso and the Origins of Biological Criminology* (Praeger, 2002).
[6] James Wayman, 'Biometrics in Identity Management Systems' (2008) 6(2) *IEEE Security & Privacy* 30.
[7] Wendy Bonython and Bruce Arnold, 'Beyond the Corporeal: Extending Propertisation of Body Parts to Derivative Information' (2016) 23(3) *Journal of Law & Medicine* 688.

emotion, or character. This system employs pattern recognition algorithms to match specific biological characteristics against established databases to quickly, usefully, lawfully and accurately determine identity. Its use is framed by a range of law, notably the *Privacy Act 1988* (Cth). They do not purport to ascertain an individual's mental state, cognition or character.

The emergence of surveillance capitalism —network-based large-scale collection of data about individuals and algorithmic decision-making about those populations— has featured adoption by businesses, governments and educational institutions of digital platforms for uses that include delivery of academic content and assessment, advertising via social media, retailing and social service administration.[8] Organisations are increasingly embracing 'bossware'[9] —automated management tools in, for example, warehouses operated by logistics giants such as Amazon.[10] Advances in AI-based pattern recognition and the ease with which global-scale 'training sets' can be invisibly acquired from social media, are fostering both major research investment and corporate interest in the adoption of ERTS; some of which might be embedded in the digital learning platforms with which most Australian academics are familiar and also with real-time activity management systems in workplaces such as call centres. Those ERTs are conceptualised as offering an algorithmic view of minds, understanding and emotion, based on pattern matching, rather than workplace discipline through activity counts in conventional bossware.

II. MIND READING OR MISCHIEF

Corporate interest in AI is used to make sense of minds through sound, sight and algorithms reflects broader trends in surveillance capitalism. ERTs are a new panopticism, but with a different and problematic genealogy. Advocates promote broad application, ranging from risk assessment of employees and students at risk of self-harm, bullying or assault to traders in financial institutions who require performance guidance regarding unduly risky transactions because of substance abuse. The ERTs are promoted

[8] Bruce Baer Arnold, 'Surveillance Machines in Ivory Towers? Surveillance Capitalism, Dignity and Learning Management Systems' (2022) 19(1) *Canberra Law Review* 70.
[9] Luke Munn, 'Expansive and Invasive: Mapping the "Bossware" Used to Monitor Workers' (2024) 22(2) *Surveillance & Society* 104.
[10] Luc Cousineau, Ariane Ollier-Malaterre and Xavier Parent-Rocheleau, 'Employee Surveillance Technologies: Prevalence, Classification, and Invasiveness' (2023) 21(4) *Surveillance & Society* 447.

as cost-effectively 'reading minds' through AI-based remote observation (an unblinking digital eye, watching many), triggering beneficial interventions or performance evaluations alongside Foucauldian disciplining of those surveilled.

There is now substantial, but under-recognised, research on ERTs for the educational sector.[11] Advocates suggest that these systems can be cost-effectively incorporated in next-generation learning management systems to, for example; automatically alert education administrators that a student is distressed and therefore needs in-person support, is not understanding discussion in a virtual tutorial or is breaching academic integrity in an online assessment exercise. An ERT might be used to trigger intervention by an academic or chatbot to prompt the student to seek assistance, or provide assistance founded on scripting of the student as an abstraction (a data profile within a large data set) rather than an individual.

From both a dignitarian and managerialist perspective, the potential benefits of ERTs must be assessed against potential harms and questions about scientific validity and ethical implementation. Although ERTs employ more sophisticated methodological approaches than the pseudo-sciences, they face the same challenges in establishing replicability, reproducibility and validity that historic pseudo-scientific approaches encountered. Those challenges are not, as argued by some proponents, overcome simply by increasing the sample size of test populations. AI platforms have been demonstrated to be biased in some applications as a result of

[11] Kiavash Bahreini, Rob Nadolski and Wim Westera, 'Towards Multimodal Emotion Recognition in E-learning Environments' (2016) 24(3) *Interactive Learning Environments* 590; Yu Du, Rubén González Crespo and Oscar Sanjuán Martínez, 'Human Emotion Recognition for Enhanced Performance Evaluation in E-learning' (2023) 12(2) *Progress in Artificial Intelligence* 199; Myneni Madhu Bala, Haritha Akkineni, Siva Abhishek Sirivella, Siddharth Ambati and Krishna Venkata Sai, 'Implementation of an Adaptive E-learning Platform with Facial Emotion Recognition' (2023) 29(4) *Microsystem Technologies* 609; Gouizi, Khadidja, Bereksi Reguig and Choubeila Maaoui, 'Emotion Recognition from Physiological Signals' (2011) 35(6-7) *Journal of medical engineering & technology* 300; Müzeyyen Bulut Özek, 'The Effects of Merging Student Emotion Recognition with Learning Management Systems on Learners' Motivation and Academic Achievements' (2018) 26(5) *Computer applications in engineering education* 1862; Wenbin Zhou, Justin Cheng, Xingyu Lei, Bedrich Benes and Nicoletta Adamo, 'Deep Learning-based Emotion Recognition from Real-time Videos' *Human-Computer Interaction. Multimodal and Natural Interaction: Thematic Area, HCI 2020, Proceedings II* (Springer, 2020) 321; Archana Sharma and Vibhakar Mansotra, 'Deep-learning Based Student Emotion Recognition from Facial Expressions in Classrooms' (2019) 8(6) *International Journal of Engineering and Advanced Technology* 4691; Benisemeni Zakka and Hima Vadapalli, 'Detecting Learning Affect in E-learning Platform Using Facial Emotion Expression', *Proceedings of the 11th International Conference on Soft Computing and Pattern Recognition* (Springer, 2021) 217; and Chunyan Wang, 'Emotion Recognition of College Students' Online Learning Engagement Based on Deep Learning' (2022) 17(6) *International Journal of Emerging Technologies in Learning* 110.

deficiencies within the training datasets, including as a result of under-representation of ethnic or other minority groups. It is problematic to dismiss, as some proponents do, concerns about bias (which demonstrably affect the validity of results and potentially foster discrimination or other harms) as a 'function of inadequate training datasets' rather than from the technology. AI currently has inherent limitations, centred on what researchers call a 'stochastic parrot',[12] reaching outcomes on the basis of probabilities derived from the learning datasets it has been trained upon, rather than understanding and more saliently responding in a nuanced, individualised basis, informed by precautionary considerations.

Corporate actors may implement new algorithmic fairness mechanisms to detect and correct systemic biases as they are identified. Researchers are expanding their investigation into culture-specific emotional expression patterns. However, some caution these efforts remain insufficient, concluding 'we cannot speak of actual accuracy for facial emotion recognition systems for any practical purposes'.[13] Kang comments that speech emotion recognition is:

> 'a technology founded on tenuous assumptions around the science of emotion that not only render it technologically deficient but also socially pernicious'.[14]

Noone engaged with the nature of ERT advocacy, quoting an expert's comment:

> 'The knowledge that these systems don't work isn't compelling enough for governments to not throw money at it … [t]he allure of power, and computational power, is so high when it comes to emotion recognition that it's almost too interesting to give up, even though there's overwhelming scientific evidence to show that it actually doesn't work'.[15]

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[12] Zihao Li, 'The Dark Side of ChatGPT: Legal and Ethical Challenges from Stochastic Parrots and Hallucination' (2023) *arXiv preprint arXiv:2304.14347*; and Emily M Bender, Timnit Gebru, Angelina McMillan-Major and Shmargaret Shmitchell, 'On the Dangers of Stochastic Parrots: Can Language Models be too Big?', *Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency* (ACM, 2021) 610.

[13] Federico Cabitza, Andrea Campagner and Martina Mattioli, 'The Unbearable (technical) Unreliability of Automated Facial Emotion Recognition' (2022) 9(2) *Big Data & Society* 1, 1.

[14] Edward Kang, 'On The Praxes And Politics of AI Speech Emotion Recognition', *Proceedings Of The 2023 ACM Conference On Fairness, Accountability, and Transparency* (ACM, 2023) 455, 456.

[15] Greg Noone, 'Emotion Recognition is Mostly Ineffective. Why are Companies Still Investing in it' (2022) *Tech Monitor* <Https://Techmonitor.Ai/Technology/Emerging-Technology/Emotion-Recognition>.

Robust criticisms from within the AI community[16] and disagreements among regulators, mean that broad policymaking and institutional adoption should be informed by a nuanced precautionary approach rather than disregarding Kant's imperative that people should not be treated as a means to an end, in this instance; the furtherance of corporate profit and AI research.

The concerns are increasingly reflected in regulatory approaches adopted or recommended by overseas institutions. The International Working Group on Data Protection in Technology's (the 'Berlin Group') recent Working Paper on Facial Recognition Technology provides a comprehensive analysis of ERT's limitations.

The Berlin Group's research reveals fundamental flaws in the underlying assumption that there is a universal set of emotional expressions. It highlights the lack of evidence for consistent correlation between emotion and the physical expression of that emotion, emphasizing that such expression varies significantly across cultural and social contexts, which leads to persistent biases. It states:

> 'Biometric categorization systems similarly assume that certain biometric traits are linked to specific tendencies, inclinations, or characteristics – a premise virtually indistinguishable from phrenology or physiognomy. Companies have claimed that these systems can identify a range of traits, including sexuality, autism, likelihood of criminality, and more. However, these technologies rely on historical data containing its own biases, assumptions, and prejudices, frequently exacerbating historic and societal harms towards marginalized groups. We are yet to see evidence that these systems successfully identify anything but existing bias'.[17]

The United Nations Special Rapporteur on Freedom of Religion and Belief, in discussing the Right to Freedom of Thought (which includes the right not to be forced to reveal or disclose one thoughts and, by extension, feelings), explicitly referenced technologies like ERT as posing:

> 'dilemmas about how to protect mental privacy, how to protect thoughts from impermissible manipulation and modification, and how to prevent these

[16] Lisa Feldman Barrett, Ralph Adolphs, Stacy Marsella, Aleix Martinez And Seth Pollak, 'Emotional Expressions Reconsidered: Challenges to Inferring Emotion from Human Facial Movements' (2019) 20(1) *Psychological Science In The Public Interest* 1; Lauren Rhue, Racial Influence on Automated Perceptions of Emotions (2018) <Http://Dx.Doi.Org/10.2139/Ssrn.3281765>.

[17] International Working Group on Data Protection in Technology, Working Paper on Facial Recognition Technology (2022) 16-17.

> technologies from being used and abused to punish real or inferred thoughts, rather than an individual's conduct'.[18]

More directly, Article 5(1)(f) of the European Union's AI Act ('the AI Act')[19] prohibits use of emotion recognition systems in educational or employment settings. Apart from limited exceptions on medical or safety grounds —which may permit use if there are legitimate and serious concerns about student or employee psychological health— the prohibition appears to exclude use of ERT for many of the purposes in employment and education advocated by its proponents.

Under the AI Act's Annexe 3, ERT is identified as 'high-risk AI', subject to stringent regulatory oversight. Extrinsic materials associated with the AI Act expressly identify the scientific uncertainty —including variability in emotional expression between individuals and between cultures, along with the risk of discrimination and the vulnerability of students and employees in the context of the prohibition by application of recital 44. The materials further note the impact of discrimination and bias when AI is used in biometric applications, by application of recital 54.

III. REGULATION

Elizabeth I famously (and apocryphally) is quoted as not liking to make windows into men's hearts and secret thoughts. Her sentiment resonates in a potentially under-regulated era of 'surveillance capitalism 2.0'. AI neither thinks nor respects dignity. Tensions between AI surveillance and human dignity thus demand concrete solutions to protect individual autonomy while acknowledging legitimate institutional needs.

That is because ERTs, accurate or otherwise, pose dignitarian challenges in three fundamental ways. Firstly, they often operate without meaningful consent or accountability, a particular concern in emerging educational and workplace settings where people must be surveillable. Secondly, they reduce individuals to data subjects, clusters of attributes, that are analysable or countable, rather than complex human beings. Thirdly, they potentially infringe on the fundamental freedom of thought identified in Article 18 of the International Covenant on Civil and Political Rights

[18] UN Special Rapporteur on Freedom of Religion or Belief, Report on the Freedom of Thought, 5 October 2021, A/76/380, 94.
[19] *Regulation (EU) No 2024/1689 of the European Parliament and of the Council of 13 June 2024 on the Harmonised Rules on Artificial Intelligence (AI)* [2024] OJ L 1689/1.

('ICCPR')[20] and Article 9 of the European Convention on Human Rights ('ECHR').[21] That freedom encompasses a right to keep thoughts and emotions private and to be protected from undiscernible manipulation prevalent in many embodiments of surveillance capitalism[22] and free from penalisation for thoughts and emotions, as distinct from expression or action that is illegal.

Although not ratified in Australia, we contend that it is a paramount freedom in a world of increasingly pervasive surveillance.[23] It is an inseverable aspect of human dignity and flourishing. As such, Australian governments and institutions have an ethical, if not formally legal, obligation to actively consider the implications of the freedom when designing regulatory systems for emerging technologies such as ERTs.

Administrative justifications for the use of ERTs vary, as indicated above, ranging from the scope for assistance to distressed students or those otherwise requiring special support through to law enforcement at borders and other locations. Such justifications must be contextualised against the uncertain accuracy of the technology, scope for harms and the under-recognised but fundamental freedom of thought. One benchmark for construing harms and accountability is provided by Robodebt.[24] Another is provided by the Cambridge Analytica scandal, centred on undisclosed dataset building.[25]

Use of ERTs in online learning platforms within universities and secondary schools, for example, likely rely on false consent and weak accountability.[26] Existing learning platforms for example, do not offer university students scope to 'opt out' of those surveillance machines. Participation on those platforms is essentially the price of admission to modern education. Its operation is opaque and neither controlled nor understood by most academics, whose performance is increasingly assessed through

[20] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.
[21] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 11, ETS No 155 (entered into force 1 November 1998) art 9.
[22] Jan Trzaskowski, 'Manipulation By Design' (2024) 34(14) *Electronic Markets* 1.
[23] Simon Mccarthy-Jones, 'The Autonomous Mind: The Right To Freedom of Thought in the Twenty-First Century' (2019) 2(19) *Frontiers in Artificial Intelligence* 1.
[24] Justin Greggery, 'Justice for Robodebt' (2023) 29 *James Cook University Law Review* 27; and Adam Graycar and Adam Masters, 'Bureaucratic Bastardry: Robodebt/Debt Recovery, AI and The Stigmatisation of Citizens by Machines and Systems' (2022) 16(5-6) *International Journal of Public Policy* 333.
[25] Alexis Ward, 'The Oldest Trick in The Facebook: Would the General Data Protection Regulation have Stopped the Cambridge Analytica Scandal?' (2022) 25 *Trinity College Law Review* 221.
[26] Bruce Baer Arnold, 'A Tyranny Of Metrics In The Age Of Legal Big Data' In Luca Siliquini-Cinelli and Thomas Giddens (Eds), *Biopolitics And Structure in Legal Education* (Routledge, 2023) 248.

algorithms that objectify both students and their teachers. Students and other data subjects are unlikely to be told that they were singled out for their attention, or otherwise determined, or ignored on the basis that AI underlying a learning platform had identified smiles, frown, eye blinks, hesitations in speech or other indicia of a mental state, which is independent of ethnicity, neurodiversity, gender or other attributes, or that such data was collected and incorporated by the platform into its training datasets.

These concerns are highlighted by the problematic implementation of assessment surveillance technologies during Covid-19 like ProctorU and Proctorio. These automated proctoring services have been criticised for false positives, false negatives, and punitive real-time interactions contrary to claims of reliability in identifying academic integrity breaches in online exams.[27] Similar concerns regarding validity and reliability of results —and the associated resourcing implications for educators in investigating and responding to false positive and false negative results, occur in the context of other AI-based academic integrity measures. The services demonstrate how automated systems, without proper human oversight and dignity-centred safeguards, can harm rather than help students.

An AI's ethical boundaries are set by the instructions which have been built into the code. It is not a moral person and is not concerned with truth, irrespective of the anthropomorphism that has resulted in critics endowing it with 'hallucinations', or inherent values and ethics.[28]

Questions about dignity in the use —and likely misuse, of ERTs are therefore questions about both the agency of the entities that deploy the systems, and the governance provided by legislators and regulatory bodies that shape decision-making by users, for example data protection and human rights agencies. Effective preservation of dignity requires action at multiple levels. At the institutional level, organisations must develop clear consent mechanisms, including the right to opt out, and implement robust human oversight protocols, beyond that of a notional 'human in the loop'. Regular audits must examine system impact on vulnerable populations, alongside accessible appeal processes

[27] Jade Vu Henry and Martin Oliver, 'Who Will Watch the Watchmen? The Ethico-political Arrangements of Algorithmic Proctoring for Academic Integrity' (2021) 4 *Postdigital Science and Education* 1
[28] Carl Bergstrom and Brandon Ogbunu, 'Opinion: ChatGPT isn't 'Hallucinating.' It's Bullshitting' (2023) *Undark* <https://undark.org/2023/04/06/chatgpt-isnt-hallucinating-its-bullshitting/>; and Michael Townsen Hicks, James Humphries and Joe Slater, 'ChatGPT is Bullshit' (2024) 26(38) *Ethics and Information Technology* 1.

for academic staff and students, to protect individual rights. Regulatory frameworks that recognise dignity and require rights impact assessments, along with clear accountability structures, should be mandatory before the deployment of any ERT in an educational or employment context. Technical solutions must integrate 'dignity by design' principles alongside emerging considerations of privacy protections, [29] while incorporating user-controlled privacy settings and transparent data protocols.

IV. CONCLUSION

Three decades of social media platform regulation are salient reminders of the challenges of retrospective governance in protecting human dignity and rights. As ERTs proliferate, proactive measures will become crucial. Education institutions, as probable early adopters, have the opportunity and responsibility to develop models that promote dignity while leveraging technological benefits.

There is unlikely to be a global consensus in the near future about whether ERTs will remain what Wyden dismissed as 'bunk science'.[30] Governments and other entities will continue to fund research on AI, seen as a prerequisite for international competitiveness, and research on ERTs. In part that reflects the inherent difficulty in developing algorithms that make sense of the mind. In part it is because organisations are attracted by potential applications of global- scale 'mind reading'.

From a dignitarian perspective, neither AI or AI-based emotion recognition technology is inherently problematic. Instead, it is the current regulatory environment, or lack thereof, in the Australian context that raises significant concerns regarding its implementation. Addressing ERTs as tools rather than outcomes may indeed foster human flourishing. Effective use requires careful consideration of accuracy limitations and potential discriminatory impacts. Development and deployment must demonstrate awareness of, and guard against, historically problematic "scientism" in technological adoption,[31] preventing harm to marginalised groups who differ from a technologically or algorithmically decided 'norm', including neurodiverse individuals. Using ERTs as a 'truth

[29] Ira Rubinstein, 'Regulating Privacy by Design' (2011) 26(3) *Berkeley Technology Law Journal* 1409.
[30] Ron Wyden, 'EU Restrictions on AI Emotion Detection Products' (Media release, June 15 2023).
[31] Richard Williams and Daniel Robinson (eds), *Scientism: The New Orthodoxy* (Bloomsbury, 2015).

machine', akin to a polygraph, would exacerbate racial profiling in law enforcement where individuals unjustly incur penalties or experience other negative outcomes.

Much ERT research will continue outside constraints provided by university ethics boards and filters built into funding provision by bodies such as Australia's National Health & Medical Research Council and Australian Research Council. Claims that ERTS will alleviate harms such as violence at public transport nodes or suicides at particular locations, will continue to gain media attention and support for trials by public/private sector bodies. There is scope however, for national moratoria on adoption of emotion recognition by Australian universities and the Tertiary Education Quality Standards Authority,[32] robust questioning by industrial organisations such as the National Tertiary Education Union and rigorous scrutiny by privacy regulators such as the Office of the Australian Information Commissioner, drawing on insights provided by peer data protection agencies in the EU, notably the Berlin Group.

Discourse about emotion recognition capabilities, priorities, necessities and accountability is ultimately a manifestation of individuals exercising their dignity—participating in public decision-making rather than leaving responsibility to entities that may value administrative convenience, profit or career advancement over public goods.

[32] Philip Dawson, 'Strategies for Using Online Invigilated Exams' (Tertiary Education Quality Standards Authority) <https://www.teqsa.gov.au/sites/default/files/2022-10/strategies-for-using-online-invigilated-exams.pdf> notes use of AI products from vendors such as Proctorio, ProctorU, Examity and IRIS Invigilation.

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INDIGENOUS RIGHTS TO LAND UNDER THE AUSTRALIAN HUMAN RIGHTS ACTS

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This article examines the extent to which the *Human Rights Act 2004* (ACT), the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the *Human Rights Act 2019* (Qld) ('the Australian human rights acts') protect the rights of Indigenous peoples to their traditional lands. It firstly sets out the approach of Australian courts to interpreting the Australian human rights acts. Next, it considers the rapidly expanding and detailed jurisprudence in international human rights law concerning the rights of Indigenous peoples to their traditional lands. Finally, it concludes that this jurisprudence is incorporated in the Australian human rights acts and that if this jurisprudence contains more extensive land rights to Indigenous peoples than existing laws, it may open a new legal frontier with significant implications for future Indigenous struggles as regards traditional lands in Victoria, Queensland, and the ACT.

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CONTENTS

I INTRODUCTION

This article sets out how the human rights acts in the Australian Capital Territory ('ACT'), Victoria, and Queensland[1] ('the Australian human rights acts') incorporate the recent, considerably expanded, Indigenous rights to land set out in international human rights law. It argues that because of this incorporation, the Australian human rights acts, influenced by international jurisprudence, open up an alternative avenue for Indigenous peoples in some parts of Australia to pursue land rights beyond existing land rights and native title law. This article focuses on the nature of the alternative avenue itself, and does not address the complications of how that avenue may function in relation to broader issues, such as its interaction with Australian

[1] *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld) (together, the 'Australian human rights acts').

native title law or how it may deal with issues such as overlapping Indigenous claims to land. While these issues may qualify, to some extent, the following analysis, they are left to be dealt with in other scholarship in the future.

Approaches based on human rights have become increasingly influential in advocacy for Indigenous peoples at the international level. This increasing influence has fuelled a rapid expansion of international human rights jurisprudence concerning Indigenous rights to traditional lands. In Australia, however, the impact of native title as founded by the High Court in *Mabo (No 2),*[2] and the lack of general human rights legal protections through a bill of rights or human rights acts in most jurisdictions, have thus far impeded the growth of such a human rights approach. That international human rights jurisprudence on Indigenous rights to land would be imported into state and territory law by human rights acts was argued in Australian legal commentary some time ago.[3] However, since that commentary, both the international human rights jurisprudence on Indigenous rights to land and the statutory provisions and jurisprudence in Australia associated with human rights acts have expanded considerably, changing the nature of the issue itself. As such, an updated consideration of this topic is well overdue.

This article will first, in Part II, consider the relevant general provisions and case law of the Australian human rights acts to provide a general outline of why that legislation is capable of incorporating the jurisprudence on Indigenous rights to land set out in international human rights law. It will then, in Part III, set out the extensive development of international human rights law in relation to the rights of Indigenous peoples to land that would be the subject of that incorporation. Lastly, in Part IV, it will consider how the specific jurisprudence under the Australian human rights acts relevant to Indigenous rights to land and demonstrate, in a more detailed way, why and how such incorporation has occurred.

II GENERAL APPROACHES TO INTERPRETING THE AUSTRALIAN HUMAN RIGHTS ACTS

[2] *Mabo* v *Queensland (No 2)* (1992) 175 CLR 1.
[3] Jackie Hartley, 'Indigenous Rights Under the Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic)' (2007) 11(3) *Australian Indigenous Law Review* 6.

A *Statutory Construction Shows that the Australian Human Rights Acts Incorporate Human Rights as Understood in International Law*

It is clear from the relevant supplementary documentation that the parliaments of the ACT, Victoria, and Queensland intended that their human rights acts would enforce rights found in international human rights law. In the ACT, the Explanatory Memorandum to the Bill that became the *Human Rights Act 2004* (ACT) ('HRAACT') makes this point clear.[4] In Victoria, the Explanatory Memorandum to the Bill that eventually became the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('CHRRV') uses very similar terms.[5] In Queensland, similar statements were made in the Explanatory Notes to the Bill that became the *Human Rights Act 2019* (Qld) ('HRAQ').[6]

Statutes that are intended to embody the provisions of international agreements in domestic law would normally have the benefit of the common law principle of statutory interpretation that if an Act purports to give effect to an international agreement, a court is at liberty to look at the agreement in an endeavour to resolve any uncertainty or ambiguity in the Act.[7] Unusually, compared to other statutes giving effect to rights in international agreements, each of the Australian human rights acts also has provisions that expressly authorise courts to take account of relevant judgments of domestic, foreign, and international courts and tribunals in interpreting them ('the authorising provisions'). In that regard, s 31 of the HRAACT provides:

> (1) International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.

[4] Explanatory Memorandum, Human Rights Bill 2003 (ACT) 3.
[5] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (VIC) 1; See also: Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Mr Hulls, Attorney-General).
[6] Explanatory Notes, Human Rights Act 2019 (Qld) 1. See also: Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3184 (Hon. YM D'Ath, Attorney-General and Minister for Justice).
[7] In interpreting the CHRRV, courts have also taken into account international non-binding rules on detention – see: *Certain Children* v *Minister for Families and Children* (2016) 51 VR 473, [154]; *Certain Children* v *Minister for Families and Children (No 2)*(2017) 52 VR 441, [264]-[265] and *De Bruyn* v *Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, [176]-[178].

> (2) In deciding whether material mentioned in subsection (1) or any other material should be considered, and the weight to be given to the material, the following matters must be taken into account:
>
> (a) the desirability of being able to rely on the ordinary meaning of this Act, having regard to its purpose and its provisions read in the context of the Act as a whole;
>
> (b) the undesirability of prolonging proceedings without compensating advantage;
>
> (c) the accessibility of the material to the public.

In a less detailed way, s 32(2) of the CHRRV provides: 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.'[8] Section 48(3) of the HRAQ has identical terms to s 32(2) of the CHRRV.

B *Relevant Case Law on This Incorporation of International Human Rights*

Australian courts have approached the authorising provisions above in several ways. There have been some statements by courts in the relevant jurisdictions about international human rights jurisprudence having significant importance in the interpretation of the Australian human rights acts. In *PJB* v *Melbourne Health* (*'Patrick's Case'*)[9] Bell J considered the weight to be given to Views of the United Nations Human Rights Committee and remarked, 'The opinions of the committee represent an important body of jurisprudence on the interpretation and application of the covenant. Australian courts of high authority have referred to and relied on the opinions and general comments of the committee when interpreting the provisions of the covenant or domestic legislation to which it is relevant.' Similarly, Refshauge J in the Supreme Court of the ACT, remarked in *Hakimi* v *Legal Aid Commission (ACT),*[10] 'The process of identification of the content of rights enshrined in the Human Rights Act is properly to be assisted by the jurisprudence of international courts and

[8] The definition of 'statutory provision' in s 3 of the CHRRV includes the CHRRV itself.
[9] *PJB* v *Melbourne Health (Patrick's Case)* (2011) 39 VR 373, [64]-[72] (Bell J).
[10] *Hakimi* v *Legal Aid Commission (ACT)* (2009) 3 ACTLR 127, [70]-[71].

tribunals, which consider the same or relevantly similar rights expressed in instruments similar to the Human Rights Act.'[11]

This approach is consistent with the approach adopted by the UK House of Lords and UK Supreme Court in the interpretation of the *Human Rights Act 1998* (UK) ('HRAUK'). In *R (Ullah)* v *Special Adjudicator,*[12] Lord Bingham remarked that the duty of UK courts was to keep pace with, and reflect, the jurisprudence of the European Court of Human Rights on the human rights protected in the HRAUK.[13] It is also reflective of approaches taken by courts in New Zealand to the interpretation of the *Bill of Rights Act 1990* (NZ).[14] However, there have also been a number of statements by Australian judges calling for caution in the application of the above principle. In *Momcilovic* v *The Queen*[15] French CJ cautioned that, 'International and foreign domestic judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them.'

Even more stridently, Kaye J in *WBM* v *Chief Commissioner of Police*[16] remarked that care needed to be taken in relying on and following the decisions of foreign and international courts and tribunals 'literally and in their entirety'. He said that this was because the terms in which rights were expressed in the CHRRV were not necessarily the same as in international treaties, and the constitutional structures of those other countries were not necessarily the same as those in Victoria. He expressed particular concern with courts relying on decisions of the United Nations ('UN') Human Rights

[11] See also: *WBM* v *Chief Commissioner of Police* (2012) 43 VR 446, [103] (Warren CJ). A similar approach to that of Warren CJ was taken by Martin J in: *Owen D'Arcy* v *Chief Executive Queensland Corrective Services* (2021) 9 QdR 250, [114]-[117].
[12] *R (Ullah)* v *Special Adjudicator* [2004] 2 AC 323, [20].
[13] See: Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013) 39-40.
[14] See, for example: *Simpson* v *Attorney-General ['Baigent's Case']* [1994] 3 NZLR 667, 691-702 (New Zealand Court of Appeal) where Hardie-Boys J remarked 'Citizens of New Zealand ought not to have to resort to international tribunals to obtain adequate remedy for infringement of Covenant rights this country has affirmed by statute. I consider that the Courts are obliged to provide those remedies by domestic law.'; See also: Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2nd ed, 2015) 104.
[15] *Momcilovic v The Queen* (2011) 245 CLR 1, [18]-[19].
[16] *WBM* v *Chief Commissioner of Police* (2010) 27 VR 469, [49].

Committee because he said that those decisions involved value judgments at odds with the traditional judicial function in Victoria and Australia as a whole.[17]

III RELEVANT INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE ON THE RIGHTS OF INDIGENOUS PEOPLES TO TRADITIONAL LANDS

The above jurisprudence indicates the extent to which courts have taken into account rights provided for in international human rights law in interpreting the Australian human rights acts. In the next section, the specific rights to land of Indigenous people likely to be incorporated are outlined. This article focuses on the human rights that have been the primary basis on which Indigenous rights to land have been asserted in international human rights law. These rights have been the foundation of Indigenous rights to culture and minority rights to establish legal ownership over property. The principal international bodies that have articulated these rights are the UN Human Rights Committee, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights.

A *Minority Cultural Rights*

Although in reviewing UN Member states' ('States') reports; the UN Human Rights Committee ('the Committee') has called upon States parties to demarcate Indigenous lands and provide effective civil and criminal penalties for deliberate trespass on those lands,[18] the Views of the Committee on individual complaints have not been as explicit in stating that Article 27 of the ICCPR require such measures. In its decisions on individual complaints, the Committee has recognised, however, that the rights protected by Article 27 include the rights of Indigenous people, in community with other Indigenous people, to engage in economic and social activities that are not part

[17] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomson Reuters, 2nd ed, 2019) 281.
[18] William Schabas, *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N.P.Engel, 3rd ed, 2019) 827, citing the Committee's Concluding Observations on the report of Brazil. See also: Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committees' Monitoring of ICCPR Rights* (Cambridge University Press, 2020) 820.

of the culture of the wider community.[19] Insofar as a resource extraction activity or other activity hinders or prevents such Indigenous economic or social activities, it can lead to a finding that Article 27 rights have been violated.[20] This is so even where traditional culture has changed and now uses more modern technology.[21]

However, measures that have a limited impact on the way of life of persons belonging to an Indigenous people will not necessarily amount to a denial of rights under Article 27.[22] A form of proportionality test is clearly being used by the Committee to determine whether the interference with the right is sufficient to deny the right in substance.[23] In many circumstances, however, the Committee has found that it is unable to find sufficient facts to enable it to come to a finding on a violation of Article 27 rights.[24] Because of its limited ability to engage in fact finding, commentators have noted that the Committee tends either to give States considerable leeway before finding that measures pose a threat to traditional cultures[25] or to be influenced by the fact that Indigenous minority representatives effectively participated in consultations concerning the impugned decision that affected them. As a result, adherence to appropriate consultative processes has become a good indicator of Article 27 compatibility.[26]

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[19] Human Rights Committee, *Views: Communication No 167/1984*, UN Doc Supp No 40 (A/45/40) (26 March 1990) [32.2] (‘*Lubicon Lake Band* v *Canada’);* Human Rights Committee, *Views: Communication No 547/1993*, UN Doc CCPR/C/55/D/547/1993 (13 October 1995) (‘*Mahuika* v *New Zealand‘)*.

[20] The approach of the UN Human Rights Committee in this regard appears to have been echoed by the African Court on Human and Peoples’ Rights in its interpretation of Indigenous cultural rights in Article 17(2) of the *African Charter on Human and Peoples’ Rights* in *African Commission on Human and People’s Rights* v *Republic of Kenya (Judgment)* (African Court of Human and Peoples’ Rights, App No 006/2012, 26 May 2017) [190] (‘*Ogiek Case*’); See also: Human Rights Committee, *Views: Communication No 3624/2019*, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) [8.14] (‘*Billy* v *Australia’)* where the Committee found that Australia’s inadequate response to climate change interfered with such activities.

[21] Human Rights Committee, *Views: Communication No 511/1992,* UN Doc CCPR/C/52/D/511/1992 (8 November 1994) [9.3] *(‘Länsman* v *Finland’)*(‘*Länsman I*’) ; See also: Human Rights Committee, *Views: Communication No 671/1995,* UN Doc CCPR/C/58/D/671/1995 (30 October 1996) [10.7] (‘*Länsman* v *Finland’)* (‘*Länsman II*’).

[22] *Länsman* I (n 21) [9.4].

[23] Taylor (n 18) 810.

[24] See, for example: Human Rights Committee, *Views: Communication No* 779/1997, UN Doc CCPR/C/73/D/779/1997 (4 February 1997) [7.6] ('*Äärelä and Näkkäläjärvi* v *Finland’).*

[25] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2013) 852.

[26] Ibid 855.

In earlier cases, the UN Human Rights Committee had given significant weight to mere consultation with Indigenous people. However, in *Poma Poma* v *Peru,*[27] the Committee appeared to require free, prior, and informed consent rather than just consultation. This may have been because of the extent of the damage done to cultural activities and the fact that no consultation at all had been undertaken by the State party in that matter.[28] As a result, it is currently unclear whether the Committee requires free, prior, and informed consent in all cases or only in certain cases where there is extensive infringement of Article 27 rights.

A significant amount of the Committee's case law has concerned situations where Indigenous individuals have been in conflict with larger Indigenous societies. In a number of matters, the Committee has found that, in such circumstances, restrictions on the Article 27 rights of members of an Indigenous minority must be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the Indigenous minority as a whole.[29] In its decision in *Mahuika* v *New Zealand,* it also appeared to suggest that, as with limitations of Article 27 rights in general, adequate consultation will carry weight with the Committee in finding that any such justification is reasonable and objective.[30]

In its recent decision*, Roy in representation of the members of the Wunna Nyiyaparli Indigenous People* v *Australia* (*'Roy'*),[31] the Committee decided that Articles 14 and 27 require that, in any mechanism for delimiting, demarcating, and granting collective titles to the traditional territories of Indigenous peoples, there must be prior consultation with the Indigenous people involved,[32] as well as effective participation

[27] Human Rights Committee, *Views: Communication No 1457/2006,* UN Doc CCPR/C/95/D/1457/2006 (27 March 2009) *('Poma Poma* v *Peru')* [7.6].
[28] Joseph and Castan (n 25) 857. In the recent decision of *Ailsa Roy, in representation of the members of the* '*Wunna Nyiyaparli Indigenous People* v *Australia'* the Committee required effective participation by Indigenous people in judicial proceedings regarding their traditional lands.
[29] Human Rights Committee, *Views: Communication No 24/1977,* UN Doc CCPR/C/OP/1 (14 August 1979) [16]-[17] ('*Lovelace* v *Canada')*; Human Rights Committee, *Views: Communication No 197/1985,* UN Doc CCPR/C/33/D/197/1985 (27 July 1988) [9.8] *('Kitok* v *Sweden')*; *Mahuika* v *New Zealand* (n 19) [9.6]; Human Rights Committee, *Views: Communication No 2102/2011,* UN Doc CCPR/C/110/D/2102/2011 (26 March 2014) [7.6] *('Paadar* v *Finland').*
[30] *Mahuika* v *New Zealand* (n 19) [9.8].
[31] Human Rights Committee, *Views: Communication No 3585/2019,* UN Doc CCPR/C/137/D/3585/2019 (15 March 2023) ('*Wunna Nyiyaparli Indigenous People* v *Australia'*).
[32] Ibid [8.5].

of those Indigenous people in the relevant proceedings.[33] This includes that the State must take all effective measures to ensure that Indigenous people can understand and be understood in such proceedings, including the provision of legal aid to ensure Indigenous people are represented in relevant proceedings.[34] While the Committee did not rule whether traditional lands needed to be under Indigenous ownership and control, it did refer to the right of Indigenous people to their traditional territory as a 'fundamental right'.[35] Therefore, the question of whether Article 27 can lead to a requirement of Indigenous ownership or control of traditional lands is an open one that has yet to be directly ruled on by the Committee. However, the statements in the *Roy* decision appear to suggest that the Committee might be open to such an argument in an appropriate matter.

B *Property Rights*

Beginning in 2001, the Inter-American Court of Human Rights has found that traditional ownership by Indigenous peoples of their traditional lands gives rise to a property right in international law, which has the equivalent legal effect of a state-granted full property title.[36] This analysis was then adopted by the African Commission on Human and Peoples' Rights[37] and the African Court of Human and Peoples' Rights.[38]

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[33] Ibid [8.7].
[34] Ibid [8.13], [10].
[35] Ibid [8.7].
[36] See a summary of this jurisprudence in:Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights Series C No 400, February 6 2020) [173] ('*Lhaka Honhat*') [93]-[98]. For another overview of most of the case law see generally: Mariana Monteiro de Matos, *Indigenous Land Rights in the Inter-American System; Substantive and Procedural Law* (Brill Nijhoff Publishers, 2020).
[37] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of the Endorois Welfare Council v Kenya (*African Commission on Human and Peoples Rights, Case No 276/2003, 4 February 2010) [199], [238] ('*Endorois Decision*'). This decision marked a turning point for the African Commission in favour of Indigenous land rights, especially in terms of its rejection of a system of land access for Indigenous people in favour of one of land ownership, see: Jérémie Gilbert, 'Indigenous Peoples' Human Rights in Africa: A Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) 60(1) *International and Comparative Law Quarterly* 245, 246, 260.
[38] *African Commission on Human and People's Rights* v *Republic of Kenya (Judgment)* (African Court of Human and Peoples' Rights, Application No.006/2012, 26 May 2017) [123]ff ("Ogiek Case"). In this case the African Court interpreted the right to property in the light of Art 26 of the UNDRIP to come to a similar conclusion to that of the Inter-American Court: Lucy Claridge, 'The Approach to UNDRIP Within the African Regional Human Rights System' (2019) 23(1-2) *International Journal of Human Rights* 267, 274. See also: *African Commission on Human and Peoples' Rights* v *Republic of Kenya*

The Inter-American Court's jurisprudence[39] on this issue began with its seminal 2001 judgment in *Mayagna (Sumo) Awas Tingni Community* v *Nicaragua* ('Awas Tingni').[40] The Court's reasoning in that matter began with an analysis that the right to property in Article 21 of the American Convention on Human Rights[41] had an autonomous meaning distinct from that of the right to property in the domestic law of member states.[42] It further held that the right to property under the American Convention included the rights of members of Indigenous communities to their traditional lands.[43]

The Inter-American Court then set out why the right to property should include the right of Indigenous peoples to their traditional lands in the following well-known passage:

> Indigenous groups, by the fact of their existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession or production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[44]

Originally, in *Awas Tigni*, it was said by the Inter-American Court that what was needed to be shown by an Indigenous people to avail themselves of this property right was possession of traditional lands.[45] However, in later decisions, the Court clarified that it is the all-encompassing relationship of Indigenous people with their traditional

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(Reparations) (African Court of Human and Peoples' Rights, App No 006/2012, 23 June 2022) ('*Ogiek Reparations*').

[39] One commentator has referred to the Inter-American Court of Human Rights as a world leader in the adjudication and redress of Indigenous land claims – influencing authorities around the globe – see: Thomas Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous peoples' (2014) 25(1) *Duke Journal of Comparative and International Law* 1, 3.

[40] *Case of the Mayagna (Sumo) Awas Tingni Community* v *Nicaragua (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 79, August 31 2001) ('*Awas Tingni*').

[41] *American Convention on Human Rights*, opened for signature 22 November 1968, 1144 UNTS 123 (entered into force 18 July 1978).

[42] *Awas Tingni* (n 40) [146].

[43] Ibid [148].

[44] Ibid [149].

[45] Ibid [151].

lands, as outlined in the quote above, that must be shown for Indigenous people to avail themselves of the property right.[46] The Court also developed a set of flexible evidential rules as guidance on when such a relationship exists.[47]

Because the Court has said that it is the nature of the relationship that Indigenous people have with their land that gives rise to a property right in international human rights law, it has also said that tribal peoples who are not Indigenous to an area but have the same sort of relationship to areas of land can have the same property right in relation to that land.[48] As a result, the Inter-American Court has also occasionally developed the jurisprudence applicable to Indigenous people in cases concerning tribal peoples who are not Indigenous.[49]

In its subsequent 2005 judgment in *Yakye Axa Indigenous Community* v *Paraguay,* the Court emphasised that State parties were required not only to acknowledge the right to communal property but to make this 'truly effective in practice'.[50] This was then clarified in its 2006 judgment in *Sawhoyamaxa Indigenous Community* v *Paraguay,*[51] where the Court stated that traditional possession of their lands by Indigenous people has equivalent effects to those of a state-granted full property title, and that traditional possession entitles Indigenous people to demand official recognition and registration of that property title.

In its recent judgment on reparations in the *Ogiek Case*, the African Court of Human and Peoples' Rights suggested that, in relation to the common law jurisdiction of

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[46] See, for example: *Case of the Kaliña and Lokono Peoples v Suriname (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 309, November 25 2015) [150] ('*Kaliña and Lokono Peoples*')

[47] Ibid [151];

[48] *Case of the Saramaka People v Suriname (Judgment, Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 172, November 28 2007) *('Saramaka')* [84]-[85].

[49] In that regard, see also: *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Columbia (Judgment, Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, November 20 2013) ('*Operation Genesis*');) *Case of the Garífuna Punta Piedra Community and its Members* v *Honduras*, Judgment (Inter-American Court of Human Rights, Series C No.304, October 8, 2015)("Garifuna Punta Piedra"); *Case of the Community Garífuna Community of Triunfo De La Cruz and Its Members* v *Honduras (Judgment)* (Inter-American Court of Human Rights, Series C No 305, October 8 2015) ('*Triunfo De La Cruz*').

[50] *Case of the Yakya Axa Indigenous Community* v *Paraguay (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 12, June 17 2005) [141] ('*Yakya Axa*').

[51] *Case of the Sawhoyamaxa Indigenous Community* v *Paraguay (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 146, March 29 2006) [128] ('*Sawhoyamaxa*').

Kenya, this may not require that a State provide a fee simple title to an Indigenous people in all circumstances as long as the Indigenous people can control access to traditional lands.[52] The status of this obiter comment is unclear. It may be that the African Court and the Inter-American Court disagree as to the meaning of what any 'full property title' might be that would need to be granted to an Indigenous people in such circumstances.

In subsequent cases, the Inter-American Court has indicated that, in addition to the obligation to grant title, the State also has an obligation to delimit and demarcate traditional lands so that there is 'geographical certainty'.[53] In more recent cases, the Court has also held that the process of demarcation, titling, and removal of land encumbrances must occur within a reasonable time period, [54] and that the State must ensure that Indigenous people control and own their territory without any type of outside interference by third parties.[55]

If Indigenous people have unwillingly left their traditional lands or lost possession of them according to this jurisprudence, they continue to have property rights in them even though they lack legal title, unless those lands have been lawfully transferred to third parties in good faith.[56] The members of Indigenous peoples who have unwillingly lost possession of their lands to third parties where lands have been lawfully transferred in good faith are entitled to restitution of those lands or to obtain other lands of equal size and quality.[57] In such situations, the Court has indicated that selection and transfer of alternative lands or payment of compensation is not purely at the discretion of the State, but rather a consensual agreement must be reached with

[52]. *Ogiek Reparations* (n 38), [111].
[53] See, for example: *Case of the Kuna Indigenous people of Madungandí and the Emberá Indigenous people of Bayano and Their Members* v *Panama (Judgment)* (Inter-American Court of Human Rights, Series C No 284, October 14 2014) [119] ('*Kuna*') and *Case of the Xucuru Indigenous People and Its Members* v *Brazil (Judgment, Preliminary Objections, Merits, Reservations and Costs)* (Inter-American Court of Human Rights, Series C No 346, January 5 2017) [118] ('*Xucuru*').
[54] *Xucuru* (n 53) [132]-[135]; *Kuna* (n 53) [137].
[55] *Kaliña and Lokono Peoples* (n 46) [132]; *Saramaka* (n 48) [115]; *Triunfo De La Cruz* (n 49) [153].
[56] *Sawhoyamaxa* (n 51) [128].
[57] Ibid; *Lhaka Honhat* (n 36) [95].

the Indigenous people involved, in accordance with their consultation mechanisms, values, customs, and customary law.[58]

The right of Indigenous people to property in their traditional lands is not absolute. The Court has also set out circumstances where a State can limit Indigenous property rights by issuing concessions or mining permits for natural resources on traditional lands. In *Saramaka People* v *Suriname* the Inter-American Court stated that the right to property protects those natural resources traditionally used and necessary for the very survival, development, and continuation of the relevant tribal or Indigenous people.[59] It then stated that a State can limit Indigenous property rights where the restrictions are a) previously established by law, b) necessary, c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society and, additionally, when it does not deny the survival of the Indigenous or tribal people.[60]

It then added to this, in order to ensure that the restriction of Indigenous or tribal property rights does not amount to a denial of their survival as an Indigenous or tribal people, the State must abide by three safeguards: 1) the State must ensure the effective participation of the Indigenous or tribal people, in accordance with their customs or traditions, in any decision regarding any development, investment, exploration, or extraction on their lands; 2) the State must ensure that the Indigenous or tribal people receive a reasonable benefit from any such plan; and 3) the State must ensure that no concession will be given by it on Indigenous or tribal land unless and until independent and technically competent agencies, under the State's supervision, perform a prior environmental and social impact assessment of the proposed concession.[61]

The requirement of consultation in situations of restriction of Indigenous and tribal property rights was expanded upon by the Court in *Kitchwa Indigenous People of the*

[58] *Lhaka Honhat* (n 36) 102; *Yakya Axa* (n 50) [151].
[59] *Saramaka* (n 48) [122]. As a result, at least one commentator has argued that the rules as to limitation of property rights for extraction of resources only concern resources not traditionally used by the Indigenous people concerned: Alejandro Fuentes, 'Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards' (2017) 24(3) *International Journal of Minority and Group Rights* 229, 242.
[60] Ibid [127]-[128].
[61] Ibid [129].

Sarayaku v *Ecuador*.[62] In that decision, the Court set out that such consultation must be conducted in good faith, using culturally appropriate procedures, and must be aimed at reaching an agreement. In addition, it stated that the people or community must be consulted in accordance with their own traditions during the early stages of the development or investment plan, and not only when it is necessary to obtain the communities' approval, and that the State must ensure that the community is aware of the potential benefits and risks so that they can decide whether to accept the proposed development or investment plan.[63]

With regard to legislative proposals, it was held that Indigenous peoples or communities must be consulted in advance during all stages of the process of producing the legislation, and that those consultations must not be restricted to proposals.[64] The onus is on the State, and not the Indigenous people or community, to prove that the requirements of prior consultation have been adhered to.[65] In addition, according to the Court consultation is the responsibility of the State and cannot, therefore, be delegated by the State to private companies or third parties.[66]In addition to reviewing the adequacy of any participation, the Inter-American Court has also not been hesitant in reviewing the adequacy of any environmental and social impact statement.[67] A special case of such limitations on Indigenous property rights in traditional lands appears to be when such property rights are limited in order to create nature reserves or national parks to protect the environment. In those

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[62] *Case of the Kitchwa Indigenous People of the Sarayaku* v *Ecuador (Judgment, Merits and Reparations)* (Inter-American Court of Human Rights, Series C No 172, June 27 2012) ('*Kitchwa*') According to some commentators the Court has found that this requirement of consultation is a general principle of international law – see: Lisl Brunner and Karla Quintana, 'The Duty to Consult in the Inter-American System; Legal Standards After Sarayaku' (2012) 16(35) *American Society of International Law – Insights*.

[63] Ibid [177].

[64] Ibid [181].

[65] Ibid [179].

[66] Ibid [187]. Some commentators have argued that in some circumstances under this jurisprudence the consent of Indigenous people is what is required and not mere consultation – see: Efren Olivares Alanis, 'Indigenous Peoples' Rights and the Extractive Industry; Jurisprudence from the Inter-American System of Human Rights' (2013) 5(1) *Goettingen Journal of International Law* 187, 213. Other commentators, however, are of the view that the Court has not required consent in any circumstances – see: Jo Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27(2) *Wisconsin International Law Journal* 51, 90.

[67] Ibid [207]. In this instance the Court found the report inadequate.

circumstances, the Court has found that traditional Indigenous practices assist, rather than hinder, environmental protection.[68] As a result, it has been found that the failure of a State to allow participation of Indigenous people in the management of nature reserves on their traditional lands and to prevent them from accessing land in such nature reserves can constitute a violation of the right to property in international human rights law.[69]

In addition to the above, the Inter-American Commission in *Mary and Carrie Dann* v *United States* [70] set out certain standards that States must adhere to in the determination of the property rights of Indigenous peoples to their traditional lands.[71] Specifically, any determination by States of the extent to which Indigenous claimants maintain property interests in their traditional lands must be based upon a process of fully informed and mutual consent on the part of the Indigenous community as a whole. This requires, as a minimum, that all members of the community are fully and accurately informed of the nature and consequences of the process and are provided with an effective opportunity to participate both individually and as a collective in the process.[72]

The collective interests of Indigenous people in their ancestral lands are not to be asserted to the exclusion of the participation of individual members in the process.[73] In addition, the process must be effective and fair in the sense that it sufficiently reviews and actually comes to a conclusion on the evidence concerning issues such as the extinguishment of Indigenous title on such traditional land so that whether an Indigenous people can properly claim title to all or part of their traditional lands can be determined as a matter of fact.[74]

The above summary of the relevant jurisprudence sets out the rulings of the Inter-American Court (or Commission) of Human Rights and the African Court (or Commission) of Human and Peoples' Rights. It should be noted, however, that the

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[68] *Kaliña and Lokono Peoples* (n 46) [173].
[69] Ibid [198].
[70] *Mary and Carrie Dann* v *United States* (Inter-American Commission on Human Rights, Case No 11.140, December 27 2002) ('Dann').
[71] It should be noted, however, that these findings were based on both the right to property and the right to due process and judicial protection read together.
[72] *Dann* (n 70) [140].
[73] Ibid [165].
[74] Ibid [142].

view of the third regional human rights court globally, the European Court of Human Rights, does not feature in the above discussion. Although the European Commission on Human Rights has stated in passing in Indigenous rights cases that the right to 'possessions' (i.e. the right to property) applies to the claims made by Indigenous peoples regarding their lands, no case involving such an issue has, in fact, passed the admissibility stage and been ruled upon in the European system on its merits.[75]

Legal scholars are in disagreement as to what this position in the European Court and Commission means.[76] Some are critical of the European system for its lack of protection of Indigenous rights, with at least one attributing that lack of protection to a private law concept of property and a reluctance to adapt its jurisprudence to that of the other regional human rights systems.[77] However, other scholars see the European Court as only one step away from adopting the recognition of Indigenous ancestral tenure as property in a similar form to that adopted in the other regional systems once it has before it a 'good case'.[78]

The best view appears to be that the European Court of Human Rights currently has no position on the issue and that, as a result, the current international law of human rights regarding Indigenous property rights to traditional lands is determined by the jurisprudence of the Inter-American and African regional human rights systems.

IV HOW THE ABOVE HUMAN RIGHTS ARE PROPERLY INTERPRETED IN THE AUSTRALIAN HUMAN RIGHTS ACTS

In terms of the above discussion of applicable internationally recognised human rights, the right to culture/minority cultural rights exists in all the Australian human rights acts, while the right to property exists in the CHRRV and the HRAQ, but not in the HRAACT.

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[75] Péter Kóvacs, 'Indigenous Issues Under the European Convention on Human Rights, Reflected in an Inter-American Mirror' (2016) 48 *George Washington International Law Review*, 781, 786.
[76] Ibid 796.
[77] Elena Abrusci, 'Judicial Fragmentation on Indigenous Property Rights: Causes, Consequences and Solutions' (2017) 21(5) *International Journal of Human Rights* 550, 551.
[78] Kóvacs (n 75) 806.

A *Indigenous Right to Culture/Minority Cultural Rights*

Both specific Indigenous rights to culture and more general cultural rights of minorities that encompass Indigenous rights are included in all three of the Australian human rights acts. Because there is less jurisprudence on these rights, I will first consider the specific Indigenous rights to culture in each of the Australian human rights acts. After that, I will consider the protection of general minority cultural rights.

1 *Specific Indigenous Cultural Rights*

Section 27(2) of the HRAACT contains specific cultural rights for Aboriginal and Torres Strait Islander peoples. The 'Notes' just below the text of section 27(2) state that the primary sources of the rights there are Articles 25 and 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')[79] and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').[80] Similarly, s19(2) of the CHRRV also protects the distinctive cultural rights of Indigenous Australian peoples. According to the Explanatory Memorandum to that Act, s19(2) is based on Art 25 of UNDRIP and Article 27 of the *International Covenant on Civil and Political Rights* ('ICCPR')[81] (as considered above). Lastly, s28(2) and (3) of the HRAQ also protect the distinctive cultural rights of Indigenous peoples. According to the Explanatory Notes for this provision it is based on Articles 25, 29 and 31 of UNDRIP and Article 27 of the ICCPR.

It is noteworthy that none of s27(2), HRAACT, 19(2), CHRRV and s28(2) and (3) of the HRAQ ('the specific Indigenous cultural provisions') were stated to be based on Article 26 of the UNDRIP, which specifically provides rights to Indigenous people regarding the land they have traditionally occupied or used.

By itself, this omission suggests that the intention behind the specific Indigenous cultural provisions, at least in Victoria and Queensland, was not that they would lead to Indigenous rights to traditional lands that approach those in a fee simple title, but

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[79] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted September 13 2007).
[80] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[81] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

rather that Indigenous people could have statutory rights to do certain things on the lands owned by other people. However, commentators on Article 25 of the UNDRIP have stated that in some cases, exclusive possession may be necessary for Indigenous people to fully realise their spiritual relationship with lands, territories and resources under Article 25 alone.[82] Article 25 thus certainly provides statutory rights of access for Indigenous peoples to some lands owned by non-Indigenous people. However, in some circumstances, on the basis of the authoritative commentary, it may also require the transfer of ownership or control to Indigenous peoples.

This result appears to be confirmed by a matter that was recently before the Queensland Human Rights Commission for conciliation. In that matter, a leader in the Aboriginal community and his family were camping, practicing their culture and performing traditional ceremonies on land subject to a pastoral lease. Police officers approached the group and asked them to leave, stating that an international mining company occupying the land had claimed they were 'trespassing'. The family told the police that they had expert advice that they could lawfully exercise their cultural rights and responsibilities on the land; despite this, the police required the group to pack up their equipment and leave within the hour. At the conclusion of the conciliation in the Queensland Human Rights Commission, the Queensland Police Service provided a public statement of regret and committed to taking into account the relevant legal and cultural issues in future responses.[83]

This seems to suggest that in Queensland s28(2), HRAQ certainly provides statutory rights of access to some Indigenous people to traditional lands, perhaps even to the extent of providing a defence to a charge of trespass. It also appears that it was because of the specific facts of the complaint that the wider question of whether the exercise of cultural rights required the transfer of rights to land to Aboriginal people was not addressed.

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[82] Claire Charters, 'Indigenous Peoples' Rights to Lands, Territories and Resources in the UNDRIP' in Jessie Hohmann, Marc Weller (ed), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 411.
[83] Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 9 November 2023) 49-50.

The situation may be similar, but for different reasons, in the ACT. The notes in the text of s 27 of the HRAACT state that the primary sources of the rights in s27(2) are Articles 25 and 31 of the UNDRIP. However, in a note directly under this, it also states, 'The primary source of these rights is the International Covenant on Economic, Social and Cultural Rights.'[84]

Cultural rights are protected by Article 15 of the ICESCR. In its interpretation of Article 15, the UN Economic and Social Rights Committee has interpreted the right to take part in cultural life as encompassing, in appropriate cases, the right of Indigenous peoples to their ancestral land and natural resources.[85] This statement seems to suggest a requirement that ownership and control must be provided where it is necessary to preserve the exercise of Indigenous culture.

Whether the position of Indigenous people in the ACT is stronger than that of Indigenous people in Victoria and Queensland under the specific Indigenous cultural provisions may depend on how readily a court would accept academic commentary on Article 25 of the UNDRIP as compared to the more explicit statement of the UN Social and Economic Rights Committee.

As mentioned above, these specific cultural rights are contained in s 27(2), HRAACT, s 19(2), CHRR and s 28, HRAQ. However, almost all the existing case law on such specific cultural rights has occurred in Victoria interpreting s 19(2), CHRR.

In *Clark-Ugle* v *Clark*[86] the Victorian Court of Appeal at [140]-[149] held that s 19(2)(d) does not distinguish between Aboriginal persons who live on the land to which they have connection under traditional law and customs and other Aboriginal people who do not live on such land, but who nevertheless maintain a distinctive spiritual, material, and economic relationship with that land. More recently, in

[84] It is noted that in the ACT and Victoria such a note is not part of an Act: *Legislation Act 2001* (ACT) s 127(1) and *Interpretation of Legislation Act 1984* (Vic) s 36(3A). The case may be otherwise in Queensland where such notes may, depending on their nature, be part of an Act: *Acts Interpretation Act 1954* (Qld) s 14(4). It would seem arguable though, however, that merely because a note is not part of an Act does not mean that a court may not take it into account – see, for example: s 36(4) of the *Interpretation of Legislation Act 1984* (Vic).

[85] Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15, para, 1(a))*, 43rd session, UN Doc E/C.12/GC/21 (21 December 2009) [36]. See also: Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, 2014) 1198.

[86] *Clark-Ugle* v *Clark* [2016] VSCA 44 (Tate JA, with whom Ferguson & McLeish JJA agreed).

Gardiner v *Attorney-General (No.2)*[87] Richards J in the Supreme Court of Victoria held that it is at least arguable that the cultural rights protected by s 19(2) may be enjoyed by Aboriginal persons beyond the members of a traditional owner group within the meaning of s 3(a) of the *Traditional Owner Settlement Act* 2010 (Vic). Neither of these decisions, however, reaches the question of the extent to which Indigenous people might have rights to land owned by third parties or whether the cultural rights of Indigenous people may necessitate ownership of such land, and so they are not of much assistance.

A starting point for the interpretation of all provisions of the Australian human rights acts, as recently mentioned by Martin J in the Supreme Court of Queensland in *Owen-Darcy* v *Chief Executive, Queensland Corrective Services,*[88] is that each of those human rights acts is beneficial and remedial legislation, and that their provisions should, as a result, be given a wide construction. A further starting point, as set out above is that both common law principles of statutory interpretation and specific authorising provisions of each of the Australian human rights acts authorise the relevant courts to interpret provisions of the Australian human rights acts in line with the treaties and international instruments that they are intended to implement. Lastly, as also detailed above, there have been statements in the Supreme Courts of both Victoria and the ACT to the effect that the relevant courts are properly assisted by international jurisprudence, although there are also judicial statements, including statements made by the High Court of Australia, to the effect that the weight to be given to international jurisprudence is to be carefully weighed according to the circumstances.

A beneficial and remedial interpretation of the specific Indigenous Australian cultural provisions in the three Australian human rights acts would suggest that both Indigenous Australian cultural rights on land privately owned by third parties and rights to ownership of lands where the enjoyment of culture requires it, as set out in international human rights law, would be created by those provisions. There are several reasons, however, why a relevant court may be reluctant to reach such a

[87] *Gardiner* v *Attorney-General (No.2)* [2020] VSC 252 [53].
[88] *Owen-Darcy* v *Chief Executive* (n 11) [118]-[119].

conclusion. First, this result is not explicitly stated in the statutory provisions, and an Australian court may favour a literal interpretation of the relevant provisions. Second, there may be an argument that this outcome reflects foreign legal views and is incompatible with the property law system in the relevant Australian jurisdictions.

The first objection to the argument that the specific Indigenous cultural provisions fully incorporate the results of international law is reflected in the wording of s 32(2) of the HRAACT, as outlined above. The reservations in s 32(2) are often linked to the view that for an Australian court to go beyond the natural language of a statute would be to act beyond the traditional conception of the judicial function. In light of the above, it may be argued that understanding the specific Indigenous cultural provisions of the Australian human rights acts in the context of international instruments such as the UNDRIP or the ICESCR undermines the desirability of people relying on the ordinary meaning of the statutory provision. It may also be argued that UNDRIP and documents such as General Comments of the ICESCR are not generally accessible to the public and that resorting to such documents would unduly prolong proceedings by requiring an Australian court to ascertain the international law position on various human rights issues. It may also be argued that for a court to go beyond the text of the relevant statutory provisions would involve a court making political rather than legal decisions.

However, there are a number of strong arguments as to why the above approaches to interpreting the specific Indigenous cultural provisions should not prevail. First, as set out above, it is clear from the second reading speeches, explanatory memoranda, and notes in the text of the provisions that the provisions were intended to implement international human rights standards. The idea was that any such human rights complaints would be dealt with under an Australian human rights act so that Australian individuals would not have to complain to international human rights bodies.[89] An approach that interprets such provisions differently from international standards would defeat that statutory purpose and would require people to seek

[89] This point was made in relation to remedies in the human rights act in New Zealand by Hardie Boys J in the NZ Court of Appeal in *Simpson* v *Attorney-General (Baigent's Case)* [1994] 2 NZLR 667. See also *Hosking* v *Runting* [2005] 1 NZLR1, [6] (Gault P and Blanchard J).

remedies for human rights violations from international bodies. This would be an undesirable result.

Second, for a statute that is intended to implement standards contained in international agreements and instruments, a literal approach would be contrary to the common law rules concerning the interpretation of such statutes, as well as the long-standing practice of courts in interpreting the Australian human rights acts by drawing upon international law decisions.[90] In this context, it is hard to see how statutory rights to enter private property or to have land transferred for Indigenous people would be reflective of foreign legal views and incompatible with the legal systems in Victoria, Queensland, or the ACT. Statutory limits on property rights and the resumption of property rights are common in all three jurisdictions. Such statutory rights under the Australian human rights acts would simply be additional such rights.

2 *Minority Cultural Rights*

A threshold question in relation to how general rights in Australian human rights acts are interpreted in the context of Indigenous peoples would appear to be whether all cultural rights of Indigenous people are subsumed under the specific Indigenous cultural provisions of the Australian human rights acts. If this was the case, then the general minority cultural rights provisions in such statutes would essentially have nothing to do in the context of Indigenous cultural rights. If this is not the case, then the question is whether Indigenous people under the Australian human rights acts have cultural rights under both the specific Indigenous cultural provisions and the general minority cultural rights provisions. Given that the specific Indigenous cultural provisions are more specific it might be argued that it would be more logical and more in line with the common law principles of statutory interpretation[91] to conclude that Indigenous people would only have cultural rights under the specific Indigenous cultural provisions.

[90] In relation to that practice see: Pound and Evans (n 17) 280.
[91] At common law this is the ejusdem generis rule of statutory interpretation: D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 2014) 171.

However, as stated above, the Australian human rights acts are remedial and beneficial legislation whose provisions should be given a wide construction. On this basis, it may be argued that a wide view should be taken that allows for Indigenous cultural rights to be derived both from the specific Indigenous cultural provisions and the more general minority cultural rights provisions. If this was the case, then the general minority provisions would be likely, for similar reasons to those set out above in relation to the specific Indigenous rights provisions, to be understood by courts in the light of the jurisprudence of the of the UN Human Rights Committee on Article 27 of the ICCPR as set out above.

B *Property Rights*

Given, as outlined above, that two of the three regional systems in international human rights law base their protection of Indigenous rights to traditional lands on the human right to property, it is a matter of some significance as to how the rights to property (and protections against their deprivation) are interpreted in Victoria and Queensland, where human rights to property have been legislated into State law. Surprisingly, however, none of the secondary sources of statutory interpretation of these provisions, such as Explanatory Memorandums or Second Reading Speeches, nor the text of the CHRRV and the HRAQ, provides any explicit guidance as to whether the protections against deprivation of property include a property right of Indigenous people in their traditional lands.

There are a number of different conclusions that could be drawn from this. One is that the Victorian and Queensland Parliaments were unaware of the jurisprudence of the Inter-American and African human rights systems on Indigenous property rights to land and operated on the view that the property rights protected under the CHRRV and the HRAQ would be those known to common law. However, that view is clearly at variance with secondary materials explicitly specifying that the human rights in those statutes were to be interpreted in line with principles and instruments in international human rights law. Another view may be that Parliament simply wanted to state the right and leave it to the courts to interpret the full implications of the right to property. Such a view would be consistent with explanations of the right to

property in scholarly expositions of that legislation,[92] as well as the Judicial College of Victoria *Charter of Human Rights and Responsibilities Bench Book,*[93] which draw heavily on the jurisprudence of the European Court of Human Rights when considering the right to property. If the jurisprudence of the European Court can be drawn on to clarify the full implications of the right to property, it is hard to see why the jurisprudence of the Inter-American and African human rights systems could not also be drawn on for the same purpose, provided that they were consistent with the legal framework in Victoria and Queensland.

Understanding the rights to property in the CHRRV and the HRAQ in light of the Inter-American and African Indigenous human rights jurisprudence would also be consistent with the broad and liberal way in which the Victorian and Queensland courts have approached the right to property. In *PJB* v *Melbourne Health (Patrick's Case),*[94] Bell J stated that the terms of the right should be interpreted 'liberally and beneficially to encompass economic interests and deprivation in a broad sense.' Similarly, the Land Court of Queensland in *Cement Australia (Exploration) Pty Ltd & Anor* v *East End Mine Action Group & Anor*[95] distilled three principles from the above decision in *Patrick's Case*. First, deprivation of property encompasses economic interests and deprivation in a broad sense. Second, formal expropriation is not required, and de facto expropriation of property is sufficient to breach the right. Third, while it is not contained in the Charter or the HRA, the right to ownership and peaceful enjoyment of property are key features of common law. This last point does not appear to be saying that the right to property under the HRAQ is limited to what would amount to deprivations of the same right at common law. Rather, it appears to indicate that the common law understanding of the right to property and the right under the HRAQ may overlap and reinforce each other in some circumstances.

[92] Pound and Evans (n 17) 183.
[93] *Charter of Human Rights and Responsibilities Bench Book* (Judicial College of Victoria, 9 November) <https://judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57496.htm>
[94] *PJB* v *Melbourne Health* (n 9) [87].
[95] *Cement Australia (Exploration) Pty Ltd & Anor* v *East End Mine Action Group & Anor* [2021] QLC 22, [388].

The conclusion that the right to property encompasses Indigenous property rights in traditional lands as outlined in the Inter-American and African human rights systems is also reinforced by (1) the remedial and beneficial purposes of the CHRRV and the HRAQ; (2) the provisions in both statutes empowering the courts to draw on international human rights jurisprudence; (3) the practice of courts in both jurisdictions in drawing on international human rights jurisprudence;[96] as well as (4) the common law principle of statutory interpretation that requires statutes implementing international instruments to be interpreted in light of the meaning attributed to those instruments in international law. A view that the rights to property in the CHRRV and the HRAQ extend to Indigenous rights to traditional land is also reinforced by the fact that other provisions in both pieces of legislation require such a result. It is a general common law principle of statutory interpretation that statutory provisions are to be construed to be consistent with the language and purpose of all the provisions of the statute.[97]

Section 8(3), CHRRV and s 15(3), HRAQ both contain rights to equality and equal protection of the laws and arguably require the result that the right to property extends to Indigenous rights to traditional land. In Victoria, the right to equality has been seen to be capable of violation where provisions of legislation are applied in an unequal way by courts, and the right to equal protection of the law has been stated to require equality as a matter of substance.[98] An interpretation by courts of the rights to property in the CHRRV and the HRAQ that they protected other people's rights to property but did not extend to the protection of the rights of Indigenous peoples to their traditional lands would be likely to result in a breach of the rights to equality and equal protection of the law guaranteed under those statutes.[99] In that sense, the CHRRV and the HRAQ both appear to provide that a narrow interpretation of the right to property and what circumstances would lead to a breach of their provisions.

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[96] See for example: In *Owen-Darcy* v *Chief Executive* (n 11) [254] Martin J draws on the jurisprudence of the European Court of Human Rights.

[97] *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355, [69]; *K & S Lake City Freighters Pty Ltd* v *Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J).

[98] *Re Lifestyle Communities Ltd (No3) (*2009) 31 VAR 286, [136]–[137] (Bell J).

[99] This analysis echoes that of the Inter-American Court of Human Rights where it also found that equal protection of the laws required the right to property to be interpreted to include property rights for Indigenous peoples in land: *Sawhoyamaxa* (n 51) [120].

Whether it technically leads to a breach of the rights to equality and equal protection of the laws or not, it would certainly be undesirable as a matter of statutory construction that an interpretation of the right to property be inconsistent with other statutorily protected human rights. As such, it would appear likely that courts would lean towards a liberal interpretation of the right to property that includes Indigenous rights to traditional lands.

Lastly, interpreting the right to property to include the right of Indigenous peoples to their traditional lands would not, as French CJ warned in *Momcolovic*, import law from alien legal systems that would be at odds with legal approaches and principles in Victoria and Queensland. The Inter-American human rights system has applied its approach to Indigenous property rights in land to the United States[100] and Belize[101] and the African human rights system has applied it to Kenya[102] – all countries with common law systems comparable to those in Victoria and Queensland. The legal systems of these countries are at least as similar to those in Victoria and Queensland as that in many civil law countries that feature in the jurisprudence of the European Court of Human Rights, such as France and Germany. Indeed, in many ways, they are much more similar.

V CONCLUSION

As set out above, when the common law rules of statutory interpretation are considered along with the interpretation provisions in the Australian human rights acts themselves, and the text of the relevant provisions and the relevant case law in relation to them, it points strongly to the conclusion that the recently expanded international human rights jurisprudence on Indigenous rights to land forms part of the human rights enforceable under the Australian human rights acts. This conclusion opens up a series of other legal issues to be considered in future scholarship. However, what is clear is that based on the above analysis, the Australian human rights acts open a new avenue for Indigenous peoples to claim land outside of existing

[100] *Dann* (n 70).
[101] *Maya Indigenous Community of the Toledo District v Belize* (Inter-American Commission on Human Rights, Case No 12.053, 12 October 2004) ('Maya Indigenous Community'*)*.
[102] *Endorois Decision* (n 37); *Ogiek Case* (n 22); *Ogiek Reparations* (n 38).

land rights and Native Title law. This new frontier of the use of the Australian human rights acts to assert the rights of Indigenous people to traditional lands could be of some importance in future Indigenous struggles for rights to land in the ACT, Victoria, and Queensland

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AUSTRALIAN WAR POWERS PROPOSALS RAISE CONSTITUTIONAL, LEGAL AND POLITICAL CONCERNS

MICHAEL HEAD*

The issue of who has the political, constitutional and legal power to launch military operations acquires great importance in a period of rising global conflicts. In this context, the Australian government conducted a review of its war powers. In 2023, it welcomed the primary recommendation of a parliamentary committee that 'decisions regarding armed conflict are fundamentally a prerogative of the Executive', exercised by the prime minister and the national security committee of cabinet.

Past experiences demonstrate the dangers of leaving these powers in the hands of executive governments without genuine and effective democratic control. Notably, documentary evidence exists that both the Vietnam War and the 2003 invasion of Iraq were conducted on the basis of false information.

At the same time, the government adopted recommendations to give the appearance of greater parliamentary involvement in these decisions, primarily by holding a debate in parliament on a ministerial statement regarding a military operation—but only after the operation was already underway. This leaves Australia with a weak parliamentary role, according to the criteria proposed in a study of European parliamentary war powers.

Overall, this response leaves the issues of legality, compliance with international law and exposure to judicial review shrouded in uncertainty. Moreover, it leaves the war powers in executive hands, relying on the continued existence of what were once royal prerogative powers, without adequate parliamentary or public scrutiny or control.

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CONTENTS

I. INTRODUCTION

Amid increasing global war tensions, the issue of who has the political, constitutional and legal power to launch overseas military operations that can involve or lead to war acquires great importance. Past experiences demonstrate the dangers of leaving these powers in the hands of executive governments without effective democratic control. Notably, documentary evidence exists that both the Vietnam War and the 2003 invasion of Iraq were conducted on the basis of false information.

In August 2023, the Australian government released its response to a parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry report on the power to send troops overseas for international armed conflict.[1] The government welcomed the committee's primary recommendation that 'decisions regarding armed conflict are fundamentally a prerogative of the Executive', exercised by the prime minister and the national security committee of cabinet.[2] This review took place under conditions where, according to media and government commentary, war was becoming a greater

[1] Australian Government, Australian Government response to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into international armed conflict decision making*, (August 2023) ('Response') <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Armedconflict/Government_Response>; Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into international armed decision making* (March 2023) ('Report').
[2] Response (n 1) Recommendation 1 Response 2.

possibility, making it necessary to prepare for war, re-examine the war powers, prepare public opinion for wartime conditions and implement an "all-of-nation" military readiness.[3] A war was already underway in Europe, in the US-NATO conflict with Russia over Ukraine, and the AUKUS military pact between the United States ('US'), United Kingdom ('UK') and Australia signalled concerns about a possible war against China.[4]

At the same time, the government adopted recommendations to give the appearance of greater parliamentary involvement in these decisions. Deputy Prime Minister and Defence Minister Richard Marles said it was important, 'that parliament has effective mechanisms to examine and debate such decisions'.[5] The government accepted a proposal to require a debate in parliament on a ministerial statement regarding a military operation—but only after the operation was already underway. This leaves Australia with a weak parliamentary role, according to the criteria proposed in a study of parliamentary war powers in European countries.[6] The proposed procedure would offer no real protection against decisions to launch wars without any effective public oversight or approval. Rather, it would seek to justify or politically legitimise military engagements already commenced.

II AUSTRALIAN GOVERNMENT UPHOLDS THE WAR PREROGATIVE POWER

In March 2023, the Defence Subcommittee of parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade released a report on how Australian governments should make decisions to send service personnel into international armed conflict. The report had been requested by Defence Minister Marles in September 2022.[7]

In the report's foreword, Defence Subcommittee Chair Julian Hill wrote: 'The power to declare war and send military personnel into conflict is arguably the most significant and

[3] See Australian Government, *National Defence: Defence Strategic Review* (Review, 2023) <https://www.defence.gov.au/about/reviews-inquiries/defence-strategic-review>, discussed below.
[4] See generally ibid and media commentary discussed below.
[5] Richard Marles, 'Government's response to the inquiry into international armed conflict decision making' (Media Release, 8 August 2023) <https://www.minister.defence.gov.au/media-releases/2023-08-08/governments-response-inquiry-international-armed-conflict-decision-making>.
[6] Sandra Dietrich, Hartwig Hummel and Stefan Marschall, *Parliamentary War Powers: A Survey of 25 European Democracies* (Occasional Paper No 21, Geneva Centre for the Democratic Control of Armed Forces, 2010).
[7] Parliamentary Joint Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into international armed conflict decision making* (March 2023) ('Report') 6 [1.25].

serious institutional power, and the gravest decision a government can make'.[8] Having stated the enormity of such decisions, the committee recommended that the power remain 'fundamentally a prerogative of the Executive'.[9]

The report suggested a variation. It proposed that these prerogative powers be exercised preferably by giving 'advice to the Governor-General as Commander in Chief under section 68 of the Constitution,' rather than solely through section 8 of the *Defence Act 1903* (Cth) ('*Defence Act*'), 'particularly in relation to conflicts that are not supported by resolution by the United Nations Security Council, or an invitation of a sovereign nation given that complex matters of legality in public international law may arise in respect of an overseas commitment of that nature'.[10]

Evidently, this contemplated the possibility of joining or initiating military conflicts that are not approved by the UN Security Council or the result of an invitation by another government. The UN Security Council has not always proven an obstacle to unsanctioned military interventions, such as the 2003 US-led invasion of Iraq, for which no explicit Security Council resolution was obtained in advance.[11] Nevertheless, a war conducted without formal Security Council approval, could run the risk of exposing those responsible to accusations of violating international law.

The committee proposed utilising the combined powers of s 68 and s 61 of the Australian Constitution.[12] Section 61 vests the executive power of the Commonwealth in the monarch, exercisable by the Governor-General. Section 68 states: 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative'. The Report argued that this constitutional power would afford the government and military personnel a range of legal protections in domestic and international law.[13] The committee's report cited the opinion of Professor Charles Sampford, whom it said suggested during a committee hearing that the use of s 68 of the

[8] Ibid iii.
[9] Ibid 31 [2.97].
[10] Ibid 33 [2.106].
[11] Ronald Kramer and Raymond Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq' (2005) 45(4) *The British Journal of Criminology* 446–469.
[12] Report (n 1) 25 [2.7].
[13] Ibid 32 [2.101].

Constitution was 'bulletproof, constitutionally', whereas s 8 of the *Defence Act* was less reliable as a source of authority.[14]

In an extensive *Griffith Law Review* article dealing with the war powers, on the contrary, Sampford and Margaret Palmer argued that a decision under s 61 that involved the Governor-General was preferable. They wrote: 'Professor George Winterton has suggested that the Governor-General's exercise of the war power would be implemented under section 61 of the Constitution rather than section 68. The authors consider this interpretation to be the better view'.[15]

Clearly, by suggesting a combination of reliance on ss 61 and 68 of the Constitution, a focus of the committee's recommendation was to protect executive war-making decisions and subsequent military operations from constitutional or legal challenges. Such challenges could also generate public discussion and possibly help trigger political opposition to the dispatch of armed forces, although the report does not mention that.

Section 8 of the *Defence Act* provides that: '(1) The Minister has general control and administration of the Defence Force' and '(2) In performing and exercising functions and powers under this Part, the Chief of the Defence Force and the Secretary must comply with any directions of the Minister.' However, the section notes that: 'Command in chief of the Defence Force is vested in the Governor-General: see section 68 of the Constitution.'

In effect, the 1901 Australian Constitution retained the prerogative powers of the British monarchy, which include the power to declare war, and vested them in the hands of the Governor-General. In the UK, the courts have ruled that exercises of the prerogative to conduct military operations abroad are non-justiciable.[16] A similar view is likely to prevail in the Australian courts. In her review of the prerogative powers and some

[14] Ibid 12 [2.16].
[15] Charles Sampford and Margaret Palmer, 'The Constitutional Power to Make War: Domestic Legal Issues Raised by Australia's Action in Iraq' (2009) 18(2) *Griffith Law Review* 350, 354.
[16] *R (on the Application of Gentle and Clarke) v Prime Minister, the Secretary of State for Defence, and the Attorney General* [2007] QB 689, 26; *Campaign for Nuclear Disarmament v Prime Minister, Defence Secretary, and Foreign Secretary* [2002] EWHC 2777 (Admin), 47; *Evans v Attorney General* [2015] UKSC 21, [2015] 1 AC 1787, 52; *R (Miller and Others) v Secretary of State for Exiting the European Union* [2017] UKSC 5, 53.

'uncertainty' surrounding their exercise,[17] Anne Twomey argued that while this power was given a constitutional source in s 68 of the Constitution, it remained a prerogative power and 'the nature and scope of the power is prerogative'.[18]

At the same time, citing previous authority, Twomey contended that the prerogative war power was subject to civilian control, via the government of the day. She wrote:

Section 68 of the Constitution provides that the command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General. In this regard, the Governor-General, pursuant to the system of responsible government, acts upon the advice of his or her responsible ministers. This means that the ultimate command of the Australian Defence Force ('ADF') is in civilian hands.[19]

For this proposition, Twomey cited an article by then Governor-General Sir Ninian Stephen and one by Margaret White, a Supreme Court of Queensland Justice and Commander in the Royal Australian Navy Reserve.[20]

Reliance on the article by Stephen is problematic. On the one hand, he noted that constitutional scholars regarded as 'lacking in substance' the 'splendidly wide sweep of military power which the express words of s 68 exhibit'.[21] Stephen also stated that it seemed clear that no question of any reserve power of the monarchy or its vice-regal representative lurked within the terms of s 68, and said practical considerations too indicated that s 68 conferred no independent discretion on the Governor-General.[22] Quoting Professor Richardson, he argued that if the Governor-General exercised the command of the armed forces, vested in the Governor-General under section 68, without, or contrary to, ministerial advice, that

> could result in the non-observance of an Act of Parliament dealing with defence or be rendered ineffective in appropriate instances because

[17] Anne Twomey, 'The Prerogative and the Courts in Australia' (2021) 3 *The Journal of Commonwealth Law* 55.
[18] Ibid 76, citing John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 713.
[19] Twomey (n 17) 67–8.
[20] Sir Ninian Stephen, 'The Governor-General as Commander in Chief' (1984) 14(4) *Melbourne University Law Review* 563, 570–71; Margaret White, 'The Executive and the Military' (2005) 28(2) *University of New South Wales Law Journal* 438, 442–43.
[21] Stephen (n 20) 564.
[22] Ibid 570.

> Parliament had not voted the necessary moneys under sections 81 and 83 of the Constitution to support the activity embarked on by the Governor-General.[23]

On the other hand, these arguments contemplate a situation in which the Governor-General acts in a manner conflicting with ministerial advice, rather than one in which the government of the day relies upon the powers vested in the Governor-General under section 68 to enter military conflict. Moreover, Stephen asserted a 'quite special relationship' between the Governor-General and the armed forces. He concluded:

> Purely titular my title of Commander-in-Chief may be, but it does reflect the quite special relationship that I believe exists between the Governor-General and the armed forces of the Commonwealth. It is a close relationship of sentiment, based neither upon control nor command but which in our democratic society expresses on the one hand the nation's pride in and respect for its armed forces and, on the other; the willing subordination of the members of those forces to the civil power.[24]

The precise nature and extent of this 'quite special relationship', said to be based on 'sentiment', the nation's 'pride in and respect' for the armed forces, and the 'willing subordination' of the members of the armed forces to the 'civil power', seems inherently vague and uncertain. In particular, it could possibly be invoked, and tested, in the event of a controversial decision to enter a potentially catastrophic war.

Indeed, the other main concern of the committee's report was how to best justify and legitimise the executive exercise of the war power in the eyes of a worried and distrustful population. As discussed below, its report referred to two public opinion surveys that reflected these popular concerns. The report suggested that 'greater legitimacy' would arise 'from an open constitutional s 68 process invoking the duty of members of the ADF'.[25] This pointed to political considerations, in terms of generating acceptance and support in the public, and within the ADF itself, for the decision to entire armed conflict.

The committee said its recommended process would not prevent rapid military deployments by the government. It proposed that s 8 of the *Defence Act* could be used to

[23] Ibid, quoting Richardson in Leslie Zines, *Commentaries on the Australian Constitution* (1977) 52.
[24] Ibid 571.
[25] Report (n 1) 14 [2.25].

initiate a deployment, without the Governor-General's involvement, and then the s 68 constitutional power could be invoked to backdate the order.[26] The report noted that research had shown that in recent conflicts, including the 2003 invasion of Iraq, s 8 of the *Defence Act* had been more commonly relied upon.[27]

Uncertainty remains about the precise decision-making processes involved in 2003 because the government's legal advice has not been released. The war prerogative has a contorted history. In the UK, it has evolved from being held by the absolute monarchy to being exercised by the executive government, in effect the prime minister and perhaps a cabinet sub-committee.[28] In Australia, reflecting the country's gradual evolution from British colonial status to an independent state, the major decisions to enter military conflict since Federation in 1901 have gone from being made in the name of the monarch via the Governor-General, as the constitutional commander-in-chief of the military forces, to the prime minister and cabinet, sometimes evidently without any consultation with the Governor-General.[29]

In its response to the committee's report, the government insisted that any decision to deploy ADF forces into international armed conflict was 'a decision for the elected Government and not the Governor-General.'[30] Moreover, it reserved 'its right to determine the appropriateness of disclosures with respect to questions of international law and advice on questions of legality'.[31] Furthermore, the government said the 'existing arrangements support timely and flexible decision making as well as the security of highly-classified information that is necessary for governments to make critical decisions' to enable the military to 'effectively and efficiently deploy into contested environments'.[32] These 'existing arrangements' appear to be reliant on ministerial directions issued under s 8 of the *Defence Act*.

[26] Ibid 32 [2.102].
[27] Ibid 9 [2.1].
[28] Rosara Joseph, *The War Prerogative: History Reform and Constitutional Design* (Oxford University Press, 2013) 22-41; Veronika Fikfak and Hayley Hooper, *Parliament's Secret War* (Legal Studies Research Paper Series, Paper No 6/2018, January 2018) 1.
[29] Sampford and Palmer (n 15).
[30] Response (n 1) [Recommendation 2 Response].
[31] Ibid.
[32] Ibid [Introduction].

The Australian Greens had filed a dissenting report.[33] It urged support for a Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020 requiring a joint sitting of parliament to approve military deployments overseas. That bill would still have allowed the Governor-General, 'by proclamation' to declare that an 'emergency' required a deployment beyond the territorial limits of Australia without parliamentary approval.[34] This bill was rejected by the Senate on 29 March 2023. It was the latest in a line of similar proposals, dating back to 1985, which have each failed to gain passage, as the majority report noted.[35] That indicates a consistent lack of support within the parliament for proposals that it must approve deployments in advance.

The government rejected recommendations made in the dissenting report for the release of any legal advice it has sought or received on its interpretation of s 8 of the *Defence Act* as an alternative to s 68 of the Constitution, and for the release of legal advice given to the Howard government for the invasion of Iraq in 2003. On both recommendations, the government stated that 'as a matter of convention' and 'a longstanding and fundamental practice in the Westminster system', governments do not publicly disclose the confidential deliberations of former governments.[36]

Overall, this response leaves the issues of legality, compliance with international law and exposure to judicial review shrouded in uncertainty. Moreover, it leaves the war powers in executive hands, without adequate parliamentary or public scrutiny or control.

III PARLIAMENTARY MEASURES

The government accepted the committee's recommendation that once the ADF was 'engaged in major military operations,' a written statement be tabled in parliament setting out the objectives of the intervention, the orders made and its legal basis.[37] However, there was a significant caveat. The government insisted that it must be able to

[33] Report (n 1) 107-110.
[34] *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020* (Cth), s 29(3) of the proposed amendment to the *Defence Act 1903* (Cth).
[35] Report (n 1) 3 [1.14].
[36] Response (n 1) Response to Australian Greens additional comments.
[37] Ibid Recommendation 2 Response; Report (n 1) xiii[2.106].

withhold information about its legal advice, again stating that this was a principle of the Westminster system inherited from Britain.[38]

No time frame was proposed for the process of tabling a statement in parliament, except that a debate be conducted in both houses of parliament 'not later than 30 days from the deployment of the ADF, subject to any considerations of national security or imminent threat to Australian territories or civilian lives.'[39] Thus, the 30-day timeline could be dispensed with, based on government assertions about 'national security' or imminent threats to Australian lives. As this author has discussed elsewhere, the expanded and contested concept of 'national security' can and has been used to justify decisions taken for political or geo-strategic reasons. [40]

The committee's report recommended that the Cabinet Handbook require that parliament be recalled 'as soon as possible to be advised' of a deployment. This requirement could be set aside if 'not possible due to extenuating and appropriate circumstances.'[41] Prior to a parliamentary debate, a formal ministerial statement would be made which explained the reasons for the operation, as well as a 'statement of compliance with international law and advice as to the legality of the operation.'[42] These stipulations could be set aside as well. The Governor-General could 'approve deferral of any of these requirements in specific circumstances, such as high risks to national security or imminent threat to Australian territories or civilian lives.'[43]

Moreover, the government did not agree that the Cabinet Handbook was the appropriate mechanism for codifying these practices. While publication in the Cabinet Handbook would not, by itself, be legally binding, and could allow for 'extenuating' circumstances, as the committee proposed, the government proposed a weaker, even less binding, alternative—to publish on the Department of the Prime Minister and Cabinet's website, alongside the Cabinet Handbook, a statement on international armed conflict decision making. No such statement appears with the 15th edition of the Cabinet Handbook,

[38] Ibid Response to Australian Greens additional comments.
[39] Ibid Recommendation 3 Response; Report (n 1) xiii-xiv [3.55].
[40] Michael Head, 'A critical response to "National Security and the Law"' (2022) 96(8) *Australian Law Journal* 595-613.
[41] Report (n 1) xiv [3.55].
[42] Ibid.
[43] Ibid.

published in 2022.[44] Annex G to the Handbook states that the Cabinet's National Security Committee (NSC), consisting of the prime minister and seven other ministers, 'considers the highest-priority, highest-risk and most strategic national security matters of the day' and declares that 'Decisions of the NSC do not require the endorsement of the Cabinet'.[45]

The parliamentary committee further proposed that the government introduce standing resolutions of both houses of parliament to establish parliament's 'expectations in relation to accountability for decisions in relation to international armed conflict,' while 'providing for sensible exemptions to enable timely and flexible national security responses'.[46] No suggestions were provided as to what 'sensible exemptions' should entail. No such standing resolutions have been introduced. The report also proposed regular prime ministerial and ministerial statements and updates to parliament during a military conflict.[47] None of these standing resolutions would be legally binding, nor would the requirement for ministerial statements and updates.

The committee recommended that the government introduce legislation to establish a Parliamentary Joint Committee on Defence to 'supersede and enhance' the Defence-related functions undertaken by the Joint Standing Committee of Foreign Affairs, Defence and Trade ('JSCFADT').[48] An examination of that proposal, which the government accepted, and the role of such oversight committees is beyond the scope of this article. It should be noted, however, that as with the JSCFADT, the new committee's membership would likely be shared exclusively between the government and the official opposition, excluding parliamentary crossbenchers.[49] Its members would be sworn to not divulge any classified information to the public. The committee's access to intelligence and operational information would be restricted, and its staff would require security clearances, as is the case with the JSCFADT.[50]

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[44] Department of the Prime Minister and Cabinet, Australian Government, *Cabinet Handbook 15th Edition* (Handbook, 2022) <https://www.pmc.gov.au/sites/default/files/resource/download/cabinet-handbook_0_0.pdf>.
[45] Ibid Annex G.
[46] Report (n 1) xiv [3.60].
[47] Ibid.
[48] Report (n 1) 58 [3.97].
[49] Controversy had surrounded a 2023 bill to extend the JSCFADT's membership to potentially include parliamentary crossbenchers. See, eg, Justin Bassi, Bec Shrimpton and Alex Bristow, 'Government proposals on war powers strike the right balance', *The Strategist* (online, 18 August 2023) <https://www.aspistrategist.org.au/government-proposals-on-war-powers-strike-the-right-balance/>.
[50] Report (n 1) 55 [3.85], 57 [3.91], 58-9 [3.97].

The government's *Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024* (Cth) was intended to establish such a committee, but failed to pass the Senate on 4 July 2024, after the government refused to rule out the prospect that Greens or crossbenchers could become members. The Liberal-National Coalition refused to support the bill without a guarantee that the committee's membership would be restricted to Labor and the Coalition, arguing that membership must not be open to anyone 'who do not represent Australia's best interests in defence and national security'.[51] That reflects the view, embodied in the similarly restricted membership of the JSCFADT, that any consultation over war decisions must be confined to members of the two traditional governing parties, who arguably would be least likely to call into question actions and decisions taken in the name of 'defence and national security.' The Greens also refused to back the bill, arguing that two positions should be reserved for crossbenchers. The government had reportedly told the Coalition leaders it did not intend to appoint any crossbenchers to the committee in the current parliament, but refused to specifically rule out the prospect in the bill.[52]

IV. POLITICAL CONSIDERATIONS

In proposing a role for parliament, the parliamentary committee was evidently seeking to have parliament function as a political instrument to build public support for a war decision and as a safety-valve for anti-war opposition. The committee was manifestly conscious of public concerns about being plunged into war. Its report referred to two surveys that at least partially measured these concerns. A 2021 Digital Edge poll found that 87% of Australians agreed with the proposition that 'war decisions should be subject to parliamentary approval always or unless there is immediate danger to Australia'. Roy Morgan research conducted in 2020 said 83% of respondents supported reforms to require parliamentary approval prior to any decision being taken.[53] The committee added: 'Witnesses also pointed to previous public demonstrations of public sentiment, particularly during the 2003 Iraq conflict, as examples of public opinion being misaligned

[51] Ben Packham, 'Defence committee scuttled over Greens' membership prospect', *The Australian* (online, 4 July 2024) <https://www.theaustralian.com.au/nation/defence/defence-committee-scuttled-over-greens-membership-prospect/news-story/ea206ece04e956a2fd071bc054af2d13>.
[52] Ibid.
[53] Report (n 1) 37 [3.11].

to the Executive's decision.'[54]

A subsequent opinion poll, conducted in April 2023 by Essential Research, reported 90% support for the proposition that the prime minister should be required to get approval from parliament before making a decision to go to war.[55]

Proposals for a parliamentary role in such decisions often cite a need to politically legitimise a war and seek to build popular support for it. The report noted that in a submission to the inquiry, Cameron Moore said community support, expressed via parliamentary engagement, can have a significant impact on the outcomes of operations by way of providing legitimacy for the operations.[56] The report also cited George Williams' view. He stated: 'One of the parliament's main functions is … to build community confidence in contentious and difficult areas by demonstrating that the people's representatives have gone through a deliberative process and listened to the arguments publicly and transparently.'[57] He added: 'It's when there's the absence of that, as we've seen in Iraq, Vietnam, and other contexts—there are a number of them—that, in fact, sometimes it's much more difficult, I think, to actually sustain community confidence.'[58]

A similar stance was taken by a submission and testimony by Australians for War Powers Reform ('AWPR'). The report noted that a AWPR submission said: 'Parliament served as a means for the Government to convince the Australian public regarding the necessity for the war'. At committee hearings, AWPR witnesses assured the inquiry that parliamentary disapproval would be implausible, 'due to Australia's general bipartisanship on matters relating to defence'.[59]

Previous arguments in favour of introducing parliamentary checks have been motivated by similar concerns to provide war-making decisions with apparent democratic legitimacy, so as to generate or bolster public support for the military mobilisation. For example, in a treatise on the war prerogative, Rosara Joseph argued that legislation should require the UK government to obtain a vote in the House of Commons before

[54] Ibid 37 [3.12].
[55] Essential Research, 'Approval to go to war' (Web Page, 3 April 2023 <https://essentialreport.com.au/questions/approval-to-go-to-war>.
[56] Report (n 1) 39 [3.20].
[57] Ibid.
[58] Ibid.
[59] Ibid 25 [2.68,2.69].

deploying armed forces. Joseph attributed to parliament four political functions.[60] The first was a 'legitimation function'—the attachment of a 'stamp of approval' of 'initiatives taken elsewhere'. Second, parliament performed a 'mobilising consent function' of building public acceptance of the war mobilisation and the 'coercions placed on the citizen by the government'. A third function was a 'scrutinising' one, which Joseph described as parliament exerting influence on the conduct of an ongoing war, but without any power of veto. The fourth function was 'expressive'—to express public opinion and sentiment. Joseph characterised this as a 'tension-release' function, with parliament essentially acting as a political safety-valve for opposition and dissent.[61]

Similarly, in a 2016 Australian essay, James Brown, a former military officer, argued that Australians were dangerously resistant to, or politically and psychologically unprepared for, war, particularly one against China. Having been twice deployed to Iraq since the 2003 invasion, he deplored the fact that the Iraq 'disaster' fuelled anti-war sentiment. One means of overcoming that problem was to seek to restore 'public trust' in war-making by involving parliament in the process.[62]

V. A "WEAK" PARLIAMENTARY WAR POWERS MODEL

The committee's proposals, even if fully implemented, would be classified as 'weak' according to the five-grade classification suggested by a 2010 study of the parliamentary war powers provisions in 25 European Union countries. The study detected a trend since the 1990s to reverse previous moves after World War II to strengthen parliamentary roles, 'with the executive (re)gaining autonomous decision-making power over military deployments.'[63] The share of countries without parliamentary war powers lay between 53% (in 1990) and 65% (in 2004).[64] Notably, several Central and Eastern European states had abolished parliamentary prior veto powers in the process of NATO (North Atlantic Treaty Organization) accession.[65]

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[60] Rosara Joseph (n 28) 107-08.
[61] Ibid.
[62] James Brown, 'Firing Line: Australia's Path to War' (2016) 62 *Quarterly Essay* 5.
[63] Wolfgang Wagner, Dirk Peters and Cosima Glahn, 'Parliamentary War Powers Around the World, 1989–2004. A New Dataset' (Occasional Paper No 22, Geneva Centre for the Democratic Control of Armed Forces, 2010) 25.
[64] Ibid 23.
[65] Ibid 25.

That study proposed the highest grade of 'very strong war powers' for political systems in which parliaments participate in each individual decision on the use of violence in foreign relations, and in which they have the power effectively to block or veto any war involvement, for example by deployment law, budgetary powers or neutrality provisions.[66]

The second highest grade of 'strong' was attributed to parliaments which in principle must approve the deployment of armed forces in advance, but do not decide on each individual case of war involvement because of exception clauses that allow the government to bypass parliamentary decision-making under certain conditions. The third category of 'medium' covered parliaments that cannot veto war involvement before the event, but can terminate it ex post. The fourth grade of 'weak' referred to parliaments that the respective government is obliged to inform about the deployment of armed forces but which otherwise do not have the powers to veto, or terminate, war involvement. The lowest degree of 'very weak' marked parliaments that governments do not even have to inform about the deployment of armed forces.[67]

The survey indicated that, as of 2003, no single European parliament scored a 'strong' ranking. No country could serve as a 'best case' prototype.[68] Nevertheless, the study found that the 2003 Iraq war showed that high parliamentary war powers were significantly correlated to low war involvement. That conclusion was somewhat tempered, however. 'Just about all countries with strong parliamentary war powers did not provide more than logistical support for the intervention', the study stated, but 'the Danish Parliament approved deployment of naval forces, disregarding overwhelming public opposition'.[69]

It must be said that the study's correlation between parliamentary powers and war involvement was simplistic. It did not take into account the geo-strategic interests of the various governments involved in the Iraq invasion. It also did not consider the capacity of governments to camouflage those interests and deceive the public about the true nature of wars. Arguably, as reviewed below with the regard to the experiences of the US

[66] See Ibid 12-29.
[67] Ibid.
[68] Wolfgang Wagner, Dirk Peters and Cosima Glahn, 'Parliamentary War Powers: A Survey of 25 European Parliaments' (Occasional Paper No 21, Geneva Centre for the Democratic Control of Armed Forces, 2013) 71.
[69] Ibid 72.

and UK, and to the experiences of the Vietnam and Iraq wars, it is the underlying geo-strategic interests that determine decisions to enter military conflicts, rather than the existence or not of parliamentary scrutiny mechanisms.

VI. RELEVANT US AND UK EXPERIENCES WITH CONGRESSIONAL OR PARLIAMENTARY APPROVAL

In both the US and UK, congressional or parliamentary war powers have proven largely ineffective in preventing executive decisions to launch military interventions. Despite the US Constitution explicitly vesting the power to declare war in the hands of the Congress, US presidents since Harry Truman launched the three-year Korean War in 1950 have gone to war without Congressional approval.[70] In 1973, facing rising popular opposition to the wars in Vietnam, Cambodia and Laos, Congress passed the War Powers Resolution, purporting to place limits on presidential war-launching. It stated that only a congressional declaration of war, 'a national emergency created by attack upon the United States, its territories or possessions, or its armed forces' or 'specific statutory authorization' by Congress could legally sanction the deployment of the armed forces to any conflict. Without such sanction, presidential military deployments would be subject to a 60-day limit.[71]

This resolution, however, effectively allowed presidents to trigger wars by claiming to be responding to an attack upon the United States, its territories, or its armed forces. In terms of congressional enforcement, the resolution has proved mostly toothless. Every president since has found ways around the resolution. From 2001, successive administrations primarily relied for series of military interventions upon Authorizations for Use of Military Force obtained in 2001 and 2002 based on false assertions, such as that Iraq had the 'capability and willingness to use weapons of mass destruction against other nations and its own people'.[72] These interventions included those in Afghanistan, Iraq, Syria, Libya and Niger. Attempts to mount legal challenges to these interventions were dismissed, including on grounds of non-justiciable political questions or lack of

[70] Michael Head and Kristian Boehringer, *The Legal Power to Launch War: Who Decides?* (Routledge, 2019) 65-104.
[71] Ibid 83-85.
[72] Ibid 66.

standing.[73]

The tendency to presidential arrogation of war powers has long been recognised in many legal, media and political circles, yet it has only continued. One US legal scholar commented:

> This type of presidential power is dangerous, especially when presidents act unilaterally, in secret, and on the basis of false, deceptive, and unreliable information. Beginning with President Truman's use of military force against North Korea in June 1950, presidents have systematically circumvented Congress, violated statutes and the Constitution, and undermined democratic government. Even before Truman, presidents invoked threats to national security—sometimes real, sometimes exaggerated—to justify emergency power.[74]

In the UK, the exposure of the misinformation used to justify the invasion of Iraq led to attempts to constrain the war prerogative, including by requiring the House of Commons to vote an any decision to enter a war.[75] Each proposal to legislate along those lines, however, ultimately failed.[76] It was argued that Prime Minister Tony Blair's decision to obtain parliamentary approval of the Iraq operation established a convention that a prime minister must allow the House of Commons to debate the deployment of forces, obviating the need for legislation.[77] That convention was noted in the Cabinet Manual, which stated:

> In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate.[78]

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[73] Ibid 67.
[74] Louis Fisher, 'Foreword' in Chris Edelson, *Emergency Presidential Power, From the Drafting of the Constitution to the War on Terror* (The University of Wisconsin Press, 2013) ix.
[75] Head and Boehringer (n 70) 49-59, 108-119.
[76] Ibid 132-141.
[77] Ibid 133-35.
[78] HM Government, *The Cabinet Manual: A guide to laws, conventions and rules on the operation of Government* (The Stationary Office, 1st ed, 2011) 44 [5.38].

With the 2013 exception of an embarrassing defeat for Prime Minister David Cameron on a vote on unpopular proposed military operations in Syria, that convention has proved ineffective, not least because of the ambiguities surrounding the concept of 'emergency', as well as apparent exceptions for non-combat, Special Forces and drone operations.[79] The convention was essentially brushed aside by Prime Minister Theresa May in 2018 in the context of US and UK missile strikes on Syria, which were undertaken without parliamentary approval. May cited the Cabinet Manual and a 2016 defence secretary's ministerial statement that stated:

> In observing the convention, we must ensure that the ability of our armed forces to act quickly and decisively, and to maintain the security of their operations, is not compromised… If we attempt to clarify more precisely circumstances in which we would consult Parliament before taking military action, we would constrain the operational flexibility of the armed forces and prejudice the capability, effectiveness or security of those forces.[80]

In 2018, a briefing paper by the House of Commons Library concluded that: 'Despite the emergence of the Convention it remains the case that Parliament has no legally established role in approving the deployment of the Armed Forces'.[81] The paper suggested that on the basis of recent deployments a nominal threshold for prior parliamentary approval appeared to have been established when 'the possibility of premeditated military action exists' or 'military forces are to be deployed in an offensive capacity'. Retrospective approval was required when 'emergency' military action was taken to 'prevent a humanitarian catastrophe' and/or 'protect a critical national interest'.[82] Each of these terms and circumstances could be broadly interpreted, however.[83]

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[79] James Strong, 'The war powers of the British parliament: What has been established and what remains unclear?' (2018) 20(1) *The British Journal of Politics and International Relations* 19-34.
[80] United Kingdon, *Parliamentary Debates*, House of Commons, 17 April 2018, vol 639, col 200.
[81] House of Commons Library (UK), *Parliamentary approval for military action: Debate to 2018* (CBP 7166, 2018) 6 <https://researchbriefings.files.parliament.uk/documents/CBP-7166/CBP-7166.pdf>.
[82] Ibid 5.
[83] For further discussions of the legal uncertainties and political calculations in the UK see Teemu Hakkinen, 'Challenging the Royal Prerogative: The Decision on War against Iraq in Parliamentary Debates in 2002-3' (2016) 35(1) *Parliamentary History* 54; Ryan Patrick Alford, 'War with ISIL: Should Parliament Decide?' (2015) 20(1) *Review of Constitutional Studies* 118; Norman Hillmer and Philippe Lagassé et al, 'Parliament will decide: An interplay of politics and principle' (2016) 71(2) *International Journal* 328-337. For an examination of the impact of multilateral military deployments, under the auspices of the European Union's Common Security and Defence Policy on weaknesses in parliamentary scrutiny see

In her previously-mentioned treatise, Joseph argued, after a review of four centuries, that the UK House of Commons has played a 'varying, but influential, role in the exercise and scrutiny of' decisions to go to war.[84] She said this was contrary to the 'orthodox view', which asserted the executive's exclusive control over war. Nevertheless, she concluded that the effectiveness of parliament's involvement in the decision-making process leading up to the 2003 invasion of Iraq was 'questionable'.[85] As she recounted, the case that the British governments presented to parliament for deployment was not only 'selective and misleading' in relation to false claims of supportive legal advice, but was based on an intelligence 'dossier' that was subsequently discredited.[86] Moreover, the government had pre-empted parliament:

> The timing of the Commons' debate and vote on a substantive motion of support for the deployment reduced the Commons' input to essentially a rubber stamp of a fait accompli: 40,000 British troops had already mobilised into the region. Britain could not withdraw without a massive loss of credibility and authority, a factor which influenced many of the MPs speaking in the debate.[87]

It has been argued that the convention finally involved parliament in a meaningful manner on issues of war.[88] A study by Fikfak and Hooper, however, concluded: 'If the convention initially looked like it would level the playing field between Parliament and the Government, the analysis of practice since its codification in the Cabinet Manual reveals that this is simply not true'.[89] The authors stated: 'Precedent by precedent, dispute by dispute, successive governments have made use of both the timing and the "emergency argument" to avoid prior debates or votes in Parliament'.[90] Moreover:

> additional exceptions to the operation of the convention have been created incrementally—first, by excluding the use of drones from parliamentary

Daniel Schade, 'Limiting or liberating? The influence of parliaments on military deployments in multinational settings' (2018) 20(1) *The British Journal of Politics and International Relations* 84-103.
[84] Joseph (n 28) 107.
[85] Ibid 105.
[86] Ibid.
[87] Ibid.
[88] For example, James Strong, 'Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq' (2014) 17(4) *The British Journal of Politics and International Relations* 604.
[89] Fikfak and Hooper (n 28) 23.
[90] Ibid.

> oversight and secondly, by exempting special forces embedded in other countries' military forces and their subsequent participation in military actions abroad under the public interest exception.[91]

And governments 'carefully managed public disclosure of claims based on classified information (secret intelligence)'.[92]

VII. VIETNAM AND IRAQ LEGACIES

Some of the reasons for the public mistrust that the Australian parliamentary committee noted, and the dangers of leaving the war powers effectively solely in the hands of the executive, can be gauged from the experiences of the Vietnam and Iraq wars.

The 'Pentagon Papers' were officially released in 2011,[93] 40 years after they were initially leaked by Daniel Ellsberg, a former Pentagon and RAND Corporation official, and published in the *New York Times*. They showed that successive US governments repeatedly deceived the American people, carried out secret illegal operations in Vietnam, militarily intervened on false pretences and killed tens of thousands of Vietnamese civilians.

Commissioned by then-US Secretary of Defense Robert McNamara in 1967, the 7,000-page study, officially known as the 'Report of the Office of the Secretary of Defense Vietnam Task Force,' documented, for example, that at the end of World War II, President Truman had rejected urgent appeals from Vietnamese leader Ho Chi Minh for US assistance; while the 1954 Geneva peace conference was in session, the US was planning paramilitary operations against North Vietnam; President Kennedy's 'advisers' in Vietnam had participated directly in military operations; and the 1964 Gulf of Tonkin incident was misrepresented, giving President Johnson the pretext for obtaining a congressional resolution for US military intervention, falsely accusing North Vietnam of attacking a US warship.[94]

The Chilcot inquiry into the role of the British government in the 2003 US-led invasion of

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[91] Ibid 23-4.
[92] Ibid 24.
[93] 'Pentagon Papers', National Archives (Web Page, 2011) <https://www.archives.gov/research/pentagon-papers>.
[94] Geoffrey Stone, *Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism* (W W Norton, 2004) 500.

Iraq, released in July 2016, provided further evidence of how governments have misled their populations about the reasons for, and the need for, going to war. The 13-volume report showed that the UK government's decision to join the invasion was based on concoctions and geo-strategic calculations, not the publicly-stated justifications. Personal testimony, confidential documents and private memos demonstrated that Prime Minister Blair opted to support a US war for regime change in Iraq that was prepared at least from the start of 2002, all while publicly claiming there were no such plans. Chilcot's report stated that Blair decided to join the war knowing that 'President Bush decided at the end of 2001 to pursue a policy of regime change in Iraq'.[95]

Chilcot summed up his report's central finding as follows: 'We have concluded that the UK chose to join the invasion of Iraq before the peaceful options for disarmament had been exhausted. Military action at that time was not a last resort'.[96] The inquiry concluded that Iraq's Saddam Hussein did not present an 'imminent' threat at the time, and claims that Iraq possessed weapons of mass destruction ('WMD') were 'not justified'.[97] The invasion was launched on the basis of 'flawed intelligence and assessments' that were not challenged when they should have been.[98]

VIII. POTENTIAL WARS

The Australian parliamentary report and the government response were prepared against the backdrop of a war in Ukraine and media and government discussion of potential wars, notably with China. That was evident from the committee's references to scenarios posited by several submissions and witnesses. The report noted: 'Concerns were also raised that the likely reality of a future war may not lend itself to preauthorisation by the Parliament'.[99] Professor Moore gave the following example, which was cited in the committee's report:

> If China blockaded Taiwan, as it practised doing in August, or if the ongoing incidents in the South China Sea turned deadly, or if civil war erupted again in the Solomon Islands—as it threatened to do only a year ago, and the ADF

[95] Committee of Privy Counsellors, *The Report of the Iraq Inquiry* (Her Majesty's Stationery Office, 2016) Executive Summary, 6 [24].
[96] John Chilcot, 'Statement by Sir John Chilcot' (The Iraq Inquiry, 6 July 2016) 1.
[97] Ibid 2, 11.
[98] Ibid 6.
[99] Report (n 1) 27 [2.77].

> deployed there—these situations would pose a direct threat to Australia's interests, but they would not need the direct defence of Australia. The government would have to make difficult decisions with limited time and with limited information.[100]

The report's release followed the government's March 2023 announcement of the allocation of up to $368 billion over 30 years for the purchase of nuclear-powered attack submarines, along with hypersonic missiles and other weaponry, as part of the AUKUS pact with the US and UK governments.[101] That announcement came amid prominent media material highlighting the prospect of a war with China. An Australian Broadcasting Corporation (ABC) series reported that four former senior figures inside the military-intelligence community had warned of the political alarm if people in Australia suddenly found themselves at war with China.[102] A March 2023 'Red Alert' series in the *Sydney Morning Herald* and other Nine network newspapers and television outlets declared the need to be ready for a war against China within three years.[103] US Air Force General Michael Minihan had written, in a memo obtained by NBC news and seen by the *Financial Times*, that his forces needed to be prepared for a war by 2025.[104] The redacted public version of the Australian government's Defence Strategic Review, released in April 2023, declared that China's assertion of sovereignty in the South China Sea 'threatens the global rules-based order in the Indo-Pacific' and called for a 'whole-of-government' and 'whole-of-nation' military effort.[105]

A potential war with China is generally presented by the media and the US and Australian governments as a response to alleged Chinese aggression. But American governments have designated China as the chief threat to the global power that America ultimately

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[100] Ibid.
[101] Prime Minister, Deputy Prime Minister, Minister for Defence, 'AUKUS nuclear-powered submarine pathway' (Media Release, 14 March 2023) <https://www.pm.gov.au/media/aukus-nuclear-powered-submarine-pathway>.
[102] John Lyons, 'What would war with China look like for Australia?', *Australian Broadcasting Corporation* (online, 19 February 2023) < https://www.abc.net.au/news/2023-02-20/what-would-war-with-china-look-like-for-australia-part-1/101328632>.
[103] Peter Hartcher and Matthew Knott, 'Australia faces the threat of war with China within three years—and we're not ready', *The Sydney Morning Herald* (online, 7 March 2023) < https://www.smh.com.au/politics/federal/australia-faces-the-threat-of-war-with-china-within-three-years-and-we-re-not-ready-20230221-p5cmag.html>.
[104] Demetri Sevastopulo, 'Top US air force general predicts China conflict in 2025', *Australian Financial Review* (online, 29 January 2023) < https://www.afr.com/policy/foreign-affairs/top-us-air-force-general-predicts-china-conflict-in-2025-20230129-p5cg89>.
[105] Australian Government, *National Defence: Defence Strategic Review* (Review, 2023) 23-4.

established through the defeat of Germany and Japan in World War II. The Biden administration's National Security Strategy, issued in October 2022, asserted that the United States remained 'the world's leading power' but China was 'America's most consequential geopolitical challenge'.[106] The unstated but clear implication of this statement was the need to prepare for war, if necessary, to defend and reassert US global hegemony.

In practice, whatever the formalities of invoking the powers of the Governor-General, any Australian decision to go to war would be largely determined by the actions of the United States government. If the US government entered a military conflict with China, Australia would be almost certainly involved in that confrontation, including as a target. Australia hosts vital US military and intelligence facilities, such as the Pine Gap communications and surveillance station in central Australia and other facilities across northern Australia that play a critical role in US military operations.[107] Australia is also a member of the Five Eyes intelligence network, alongside the US, UK, Canada and New Zealand, which supplies, among other things, military information.[108] It monitors shipping traffic passing through strategic maritime areas, foreign satellite deployments and the 'military activities of relevant air forces'.[109]

Moreover since 2011, when US President Obama announced Washington's military and strategic 'pivot to Asia' on the floor of the Australian parliament, Australian governments have increasingly integrated the Australian armed forces into US military capacities and operations.[110] The AUKUS alliance, announced in September 2021, involves Australia, the US and the UK in the joint development of submarines, missiles and other weaponry, and the associated training and interchange of military personnel, as well as enhanced US and

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[106] The White House, *National Security Strategy* (October 2022) 7 & 11.
[107] Desmond Ball, Bill Robinson, and Richard Tanter, 'The Antennas of Pine Gap', *NAPSNet Special Reports* (Web Page, 22 February 2016) < https://nautilus.org/napsnet/napsnet-special-reports/the-antennas-of-pine-gap/ >; Desmond Ball, *Pine Gap: Australia and the US geostationary signals intelligence satellite program* (Allen & Unwin, 1988).
[108] Jeffrey Richelson and Desmond Ball, *The Ties That Bind: Intelligence Cooperation Between the UKUSA Countries – the United Kingdom, the United States of America, Canada, Australia and New Zealand* (Allen & Unwin, 1985).
[109] J Vitor Tossini, 'The Five Eyes: The Intelligence Alliance of the Anglosphere', *UK Defence Journal* (online 14 April 2020) <https://ukdefencejournal.org.uk/the-five-eyes-the-intelligence-alliance-of-the-anglosphere/>.
[110] John Garrick and Michael Hatherell, 'As Australia's military ties with the US deepen, the Top End becomes even more vital to our security', *The Conversation* (Online, 2 March 2023) <https://theconversation.com/as-australias-military-ties-with-the-us-deepen-the-top-end-becomes-even-more-vital-to-our-security-199783>.

UK access to Australian military bases and ports.[111] The defence and foreign ministers of the US and Australia affirmed in December 2022 that 'Australia and the United States would continue the rotational presence of U.S. capabilities in Australia, across air, land, and maritime domains'.[112]

IX. CONCLUSION

As the record of the Vietnam and Iraq wars underscores, serious dangers lie in the leaving the war powers solely in the hands of the executive. The decision of the Australian government to leave the powers shielded from public scrutiny as much as possible, regardless of the consequent legal uncertainty, is of grave concern. That is especially so under conditions of intensifying geo-strategic tensions and indications of preparations for conflicts that could involve nuclear weapons. Equally, measures or proposals to curtail these powers by parliamentary or congressional means have proven largely ineffective in the US and UK, as demonstrated by the evasions and misinformation utilised to initiate the disastrous Vietnam and Iraq interventions.

What this author would recommend to avert the threat of war lies beyond the scope of this article. Proposals have been made in the past, including in the US before World War II and on the eve of the first Gulf War of 1990-91, for referenda to allow the population to vote on war. Yet none have ever been conducted and there are doubts about their capacity to halt a war in any case.[113] This author has argued elsewhere, drawing conclusions from these experiences, that the causes of war are rooted in the socio-economic structure and social relations of the capitalist profit system based on rival nation states.[114]

[111] Prime Minister, Deputy Prime Minister (n 101).
[112] 'Joint Statement on Australia-US Ministerial Consultations (AUSMIN) 2022' (Media Release, 6 December 2022) <https://www.defense.gov/News/Releases/Release/Article/3238028/joint-statement-on-australia-us-ministerial-consultations-ausmin-2022/>.
[113] Head and Boehringer (n 70) 283-301.
[114] Ibid 303-322.

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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.

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[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 McMillian, 2012) 1, 1-31.

[3] Ibid 1.

CONTENTS

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] Alieen 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 McMillian, 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] Williams[28] 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]

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[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 Yolnguland. 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 ritish 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 Reynolds[55] 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 anthropologists[57] 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

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[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:

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[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 law[73] 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 Britian'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 ministration 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.

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[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,

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[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 People*s 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 was 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

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[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 spilt 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 to1945, 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 hourt, 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

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[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 spilt 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 NRWMA[150] 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 22[152] 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 Iilad 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 NRWMA[158] 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 223[167] 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 devasting 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.

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[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) <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.>.
[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.

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 24GB[183] 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 24JA[184] 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 flowing 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.

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