INDIGENOUS LAW CENTRE

NATIVE TITLE TIMELINE

1788 Settlement of Australia as a British colony begins.

1847 In *Attorney-General v Brown*,[1] the 'waste lands' of the Australian colonies are declared to be in the exclusive possession of the Crown from settlement (a situation now referred to as terra nullius).

1889 In *Cooper v Stuart*,[2] the Privy Council states that at the time of annexation to the Crown, New South Wales was 'practically unoccupied without settled inhabitants or settled law'.[3] This assumption that Australia's Indigenous inhabitants have no rights over their land will remain law until 1992.

1913 In *Attorney-General v Williams*,[4] the High Court says that upon settlement the Crown acquired full beneficial and legal ownership of all land in Australia.

1963 The Yolgnu people of Yirrkala send a bark petition to the Federal House of Representatives outlining grievances in relation to the excision of land from an Aboriginal Reserve in Arnhem Land. Earlier that year, without consulting the Yolgnu people, the Federal Government removed land from the Reserve to enable the mining of bauxite. A Parliamentary Committee of Inquiry acknowledged Yolgnu land use and sacred sites and recommended compensation, the protection of sacred sites and ongoing monitoring of the situation at Yirrkala.

1966 Over 200 Gurindji stockmen and their families walk off Wave Hill cattle station in the Northern Territory, protesting against poor living and working conditions and later demanding the return of their traditional lands from station owners. The nine year protest will be the first in Australia to attract significant public support for Indigenous land rights.

An Aboriginal Lands Trust is established to take ownership of Aboriginal reserves in South Australia under the *Aboriginal Land Trusts Act 1966* (SA). This is the first piece of legislation to provide Indigenous people with communal rights and interests in land.

1968 The Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) launches a national campaign for Aboriginal land rights. A protest march is held in Melbourne in response to the Government's refusal to grant traditional lands to the Gurindji people of Wave Hill.

1971 In the *Gove land rights case*,[5] the first litigated native title claim in Australia, the Yolgnu people claim before the Supreme Court of the Northern Territory that mining leases granted by the Crown in Arnhem Land are invalid. They argue that rights to land held by Indigenous communities under their law and customs had survived the acquisition of sovereignty, unless validly terminated by the Crown. The application is dismissed on the basis that the traditional rights of the Yolgnu do not amount to a proprietary interest in the Australian legal system, the doctrine of communal native title never formed part of Australian law and, if it did, then Yolgnu native title was extinguished by opening the land for grant to colonial settlers. The decision remains significant, however, in its acknowledgement that Indigenous communities have a recognisable system of law involving a relationship with the land.

1972 On Australia Day, a group of Aboriginal activists establish the Aboriginal Tent Embassy on the lawns of Parliament House in Canberra in protest against the McMahon Government's rejection of land rights. The embassy will become an important symbol of the ongoing Aboriginal land rights movement.

1973 The new Federal Government led by Gough Whitlam establishes the Aboriginal Land Rights Commission, chaired by Justice Edward Woodward, to report on the appropriate means of recognising the traditional land rights of Aboriginal people in the Northern Territory. As a result of the recommendations in its first report,[6] the Northern Land Council and Central Land Council are established to present to Woodward the views of Aboriginal people.

1974 A second report of the Aboriginal Land Rights Commission proposes statutory land rights for Aboriginal groups in the Northern Territory,[7] underpinned by a process of inquiry and recommendation by an Aboriginal Land Commissioner.

1975 The *Racial Discrimination Act 1975* (Cth) is passed by Federal Parliament, making it unlawful for the States and others to discriminate on the basis of race.

The Federal Government successfully negotiates the return of a portion of traditional lands to the Gurindji people. During an iconic ceremony Prime Minister Gough Whitlam pours sand into the hands of Vincent Lingiari, spokesman for the Gurindji people, and hands him the leasehold documents for 3,236 square kilometres excised from Wave Hill station. The Gurindji people later obtain freehold ownership after a successful land rights claim over the area.

1976 The Federal Parliament enacts the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Aboriginal groups are able to claim title to unalienated Crown land and Aboriginal pastoral leases based on traditional affiliations,[8] and on the recommendation of the Aboriginal Land Commissioner. Existing Aboriginal reserves can be transferred to traditional owners without the need for a claims process. No development is to occur on Aboriginal land without the informed consent of its traditional Aboriginal owners.

1979 In *Coe v Commonwealth*,[9] the High Court comments that the existence of communal native title would be 'arguable...if properly raised'.

1982 On 20 May, Eddie Koiki Mabo and four other Murray Islanders lodge a statement of claim in the High Court, claiming 'native title' over Mer (Murray Island) in the Torres Strait.

1985 The Queensland Government attempts to pre-empt litigation by Eddie Koiki Mabo by enacting the *Queensland Coast Islands Declaratory Act 1985* (Qld). The Act purports to extinguish any native title that might exist in the Torres Strait, without compensation.

1986 The High Court remits the case over native title on Mer to the Queensland Supreme Court for a trial on the facts.[10]

1988 In *Mabo v Queensland (No 1)*,[11] the High Court finds that the Queensland Coast Islands Declaratory Act is inconsistent with the Racial Discrimination Act and therefore invalid. As a result, the original proceedings concerning the native title claim are permitted to continue.

1992 On 21 January, Eddie Koiki Mabo dies in Brisbane whilst being treated for cancer.

On 3 June, in *Mabo v Queensland (No 2)*,[12] **the High Court recognises native title as a common law property right**, rejecting the doctrine of *terra nullius*. The High Court declares that, subject to any acts of extinguishment, the Meriam people are 'entitled as against the whole world, to possession, occupation, use and enjoyment of the island of Mer', an exclusive possession form of native title.[13]

On 10 December, Prime Minister Paul Keating delivers his 'Redfern Speech' at Redfern Park, Sydney. In his address Prime Minister Keating highlights the importance of the *Mabo* decision: *'Mabo* is an historic decision – we can make it an historic turning point, the basis of a new relationship between Indigenous and non-Aboriginal Australians.'[14]

1993 The Wik peoples commence legal proceedings for a common law declaration of their native title rights to land on Cape York Peninsula, Queensland, part of which is subject to pastoral leases.[15]

The *Native Title Act 1993* (Cth) is passed by the Federal Parliament, establishing a process for the recognition of native title, national standards for future dealings affecting native title and permitting the validation of past official actions which had been attempted on native title land but breached the Racial Discrimination Act. The legislation follows lengthy debate and negotiations between Indigenous stakeholders, governments, pastoralists and the mining industry.

1994 The Native Title Act comes into effect, the National Native Title Tribunal is established and a number of Indigenous organisations are recognised as Native Title Representative Bodies.

1995 In *Western Australia v Commonwealth*,[16] the High Court rejects a constitutional challenge to the Native Title Act by Western Australia and invalidates the *Land (Titles and Traditional Usage) Act 1993* (WA) which offers less protection of Indigenous property rights than the Commonwealth Act.

The Indigenous Land Corporation (ILC) and the Aboriginal and Torres Strait Islander Land Fund are established. The ILC's main functions are to assist Indigenous peoples to acquire land and to manage Indigenous-held land in a sustainable way to provide cultural, social, economic or environmental benefits for themselves and for future generations.

1996 In *Wik Peoples v Queensland*,[17] the High Court finds that native title is not necessarily extinguished by a pastoral lease and may, as a non-exclusive property right, co-exist with such interests where no inconsistency arises in the enjoyment of rights. In the event of conflict, native title rights must yield to those of the lessee to the extent of the inconsistency.

1997 The Dunghutti people of northern New South Wales negotiate a consent determination which marks the first determination of native title on the Australian mainland under the Native Title Act. In return for the extinguishment of native title, compensation is paid by the State Government.

Partly in reponse to uncertainty created by the High Court's decision in *Wik Peoples v Queensland*, the Howard Government releases a 'Ten Point Plan' to amend the Native Title Act. The plan includes proposals for a higher registration test for all native title applications and a sunset clause putting a time limit on making further native title claims. It also proposes deeming native title extinguishment to have occurred in listed situations, validating certain invalid acts done by governments since 1994, changing the future act regime to make it more conducive to development in native title areas, winding back the Indigenous right to negotiate and establishing a new framework for legally recognising agreements.

1998 In *Fejo v Northern Territory*,[18] the High Court establishes that grants of freehold title will permanently extinguish native title.

Extensive amendments are made to the Native Title Act as the Ten Point Plan, in the form of the *Native Title Amendment Act 1998* (Cth), passes through Parliament at the third attempt, in a modified form. All claims must now commence in the Federal Court and must pass the higher registration test to qualify for protections under the future act regime.[19] The amendments also extend the categories of statutory extinguishment for past acts and widen the ambit of future acts that may be committed in relation to land without negotiation with native title holders.[20] More positively for native title holders, past extinguishment will be disregarded in certain defined circumstances and the Indigenous Land Use Agreement (ILUA) framework takes effect.

1999 The United Nations Committee on the Elimination of Racial Discrimination (CERD) urges the Australian Government to suspend the native title amendments, on the basis that they are discriminatory, and re-open negotiations with Indigenous peoples.[21]

In *Yanner v Eaton*,[22] the High Court holds that a native title right to hunt or fish for traditional purposes is not extinguished by Queensland legislation for fauna conservation. The right can be exercised without the need for a licence due to s 211 of the Native Title Act.

In *Hayes v Northern Territory*,[23] the first successfully litigated native title case since *Mabo (No 2)* and also the first successful claim to land in an urban setting, the Arremte people achieve recognition of their non-exclusive native title rights to land in and around Alice Springs.

2000 A series of consent determinations begin to be made, in particular over large remote areas in Western Australia[24] and over islands in the Torres Strait.[25]

2001 In *Commonwealth v Yarmirr*,[26] the test case for native title claims over sea country, the High Court conclusively affirms that native title rights can exist in offshore areas. However, upholding the lower court decisions, the High Court says that offshore native title is limited to non-exclusive rights. The Court reasons that exclusive rights would conflict with Australia's international obligations to allow innocent passage of ships and the rights of the public under the common law to fish and to navigate through waters.[27] A claim to qualified exclusivity which would accommodate these other rights is also rejected.[28]

2002 In *Western Australia v Ward* (the Miriuwung Gajerrong claim),[29] the High Court disparages talk of native title as 'ownership', preferring to view it as 'a bundle of rights' in relation to land and waters. The Court rejects the idea that pastoral leases merely suppress inconsistent native title rights, confirming that partial extinguishment of native title will be a widespread reality across Australia. The degree of extinguishment will depend upon the level of inconsistency between the rights conferred by native title, and those conferred by a statutory interest or grant.

In *Wilson v Anderson*, the High Court holds that a perpetual pastoral lease under the *Western Land Act 1901* (NSW) totally extinguished native title.[30]

In upholding the rejection of the native title claim brought by the Yorta Yorta people of southeastern Australia in *Members of the Yorta Yorta Aboriginal Community v Victoria*,[31] the High Court defines the test of traditional connection as requiring continuous observance of a 'normative system' of traditional laws and customs from sovereignty to present, without substantial interruption.[32] Earlier, the trial judge had held that the 'tide of history', including dispossession, had disrupted the continuing observance of traditional law and custom connecting the Yorta Yorta to their land.[33]

Celebrations on 3 June mark the 10th anniversary of the High Court of Australia's historic decision in *Mabo v Queensland (No 2)*.

2004 In *Lardil Peoples v Queensland*,[34] the Federal Court affirms that native title confers non-exclusive rights over sea country. The traditional owners have their native title recognised over the Wellesley Islands in the Gulf of Carpentaria, based on laws and customs which exhibit a relationship of 'sustenance and religious and spiritual belonging' with the land.[35]

2005 In a South Australian pastoral lease case, the Full Federal Court finds that it is possible for groups to continue acknowledging traditional law and custom even when they have not maintained a continuous physical connection with the area.[36] Members of two Aboriginal groups are recognised as holding non-exclusive native title over De Rose Hill Station, excepting areas where it was extinguished by improvements constructed under the pastoral lease.

2006 Two claims involving urban areas illustrate the difficult question of traditional connection as defined in *Yorta Yorta*. The Larrakia claim to areas in and near Darwin is rejected[37] on the basis that observance of tradition was interrupted for some decades in the mid-20th Century (later affirmed on appeal).[38] The Federal Court decides that traditional connection is established in that part of the Noongar claim which concerns the Perth metropolitan area,[39] but the State later successfully appeals against the decision[40] and the matter reverts to comprehensive settlement talks between the parties.

2007 The *Native Title Amendment Act 2007* (Cth) makes further amendments to the Native Title Act, expanding the powers and functions of the National Native Title Tribunal in relation to mediation.[41]

2008 In *Bodney v Bennell*,[42] the Federal Court re-affirms that the reasons for a substantial interruption in the practice of traditional laws and customs, including the impacts of colonisation, are irrelevant to the decision whether or not native title rights and interests exist.

In *Griffiths v Minister for Lands, Planning and Environment*,[43] the High Court finds that s 24MD of the Native Title Act permits the Crown to extinguish native title by compulsory acquisition of land, even where the only interests existing in the area concerned are native title rights and interests.[44]

In *Blue Mud Bay*,[45] a statutory land rights case in the Northern Territory, the High Court determines that the land rights of the traditional owners extend to the low-water mark, giving them the right to exclude others from the inter-tidal zone (a contrast to the native title conclusion in *Yarmirr* in 2001). Holders of fishing licences under Territory law must seek permission from the traditional owners to enter the area.

2009 The Australian Government endorses the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), increasing the potential for international law to influence the course of Indigenous law and policy in Australia.

The *Native Title Amendment Act 2009* (Cth) is enacted. It reverses the effect of the 2007 amendments, putting the Federal Court more fully in charge of handling the pre-trial as well as trial stages of native title claims. It also introduces new exceptions for the admission of evidence and allows for agreements involving matters other than native title.

In *Holocene*,[46] the Martu people are successful in having a mining lease blocked by the National Native Title Tribunal. The Tribunal refused to permit the grant of the mining lease over recognised native title land because it was found that the interests, proposals, opinions and wishes of the native title party in relation to the use of the area in question should be given greater weight than the potential economic benefit or public interest in the proposed development.[47]

2010 The *Native Title Amendment Act (No 1) 2010* (Cth) is passed to assist in implementing the Council of Australian Governments' National Partnership Agreement on Remote Indigenous Housing. It provides a new future act process for Crown construction of public housing and facilities on native title land belonging to Indigenous communities.[48]

2011 The 500th ILUA is registered.[49]

2012 The Australian Government announces legal and institutional reforms aimed at improving the native title system, including a more complete transfer of pre-trial management responsibilities from the National Native Title Tribunal to the Federal Court.[50] A subsequent exposure draft of legislation contains changes to good faith requirements for mining and compulsory acquisition proposals, more scope to disregard past extinguishment on parks and reserves and further changes to the ILUA framework. The Government also releases, for public comment, draft tax legislation that will exempt native title payments and related benefits from income tax.[48]

Celebrations on 3 June mark the 20th anniversary of the High Court of Australia's historic decision in *Mabo v Queensland (No 2)*.

Following a 2010 Federal Court judgment in the *Torres Strait Regional Sea Claim*[49]—which recognised the non-exclusive native title rights of Torres Strait Islanders, as a single society, in the waters of the Torres Strait—special leave is granted to the claimants to appear before the High Court to determine whether their native title rights include taking fish and other marine resources for commercial purposes, or whether those native title rights have been extinguished by fisheries legislation.

Queensland's most enduring native title claim is finalised after the Federal Court recognises the final component of the Wik peoples' claim to native title rights over land on Cape York Peninsula, Queensland.[50]

1 (1847) 1 Legge 312, 316 (Stephen CJ).
2 (1889) 14 App Cas 286, 291.
3 Ibid 291 (Watson LJ).
4 (1913) 16 CLR 404, at 439.
5 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (NTSC).
6 Aboriginal Land Rights Commission, *First Report*, Parl Paper No 139 (1973).
7 Aboriginal Land Rights Commission, *Second Report*, Parl Paper No 69 (1973).
8 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 11(1)(a).
9 *Coe v Commonwealth (No 1)* (1979) 24 ALR 118.
10 *Mabo v Queensland* (1986) 64 ALR 1.
11 (1988) 166 CLR 186.
12 (1992) 175 CLR 1.
13 Ibid 76 (Brennan J).
14 Heather McRae et al, *Indigenous Legal Issues* (4th ed, 2009) 296.
15 *The Wik Peoples v Queensland* (1994) 49 FCR 1.
16 (1995) 183 CLR 373.
17 (1996) 187 CLR 1.
18 (1998) 195 CLR 96, 120-31 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
19 *Native Title Amendment Act 1998* (Cth), s 3 sch 2.
20 Ibid s 3 sch 1.
21 <www.unhchr.ch/tbs/doc.nsf/0/a2ba4bb337ca00498025686a005553d3?Opendocument>.
22 (1999) 201 CLR 351.
23 [1999] FCA 1248; (1999) 97 FCR 32.
24 For example, the Spinifex People's claim over 55,000 km² in *Anderson v Western Australia* [2000] FCA 1717 and the Martu's claim over 136,000 km² in *James v Western Australia* [2002] FCA 1208.
25 For example, *Saibai People v Queensland* [1999] FCA 158 and *Kaurareg People v Queensland* [2001] FCA 657.
26 (2001) 208 CLR 1.
27 (2001) 208 CLR 1, 56 (Gleeson CJ, Gaudron, Gummow & Hayne JJ).
28 Ibid 68.
29 (2002) 213 CLR 1.
30 (2002) 213 CLR 401.
31 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (Gleeson CJ, Gummow & Hayne JJ).
32 Ibid 456 (Gleeson CJ, Gummow & Hayne JJ).
33 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [126] (Olney J).
34 *Lardil Peoples v Queensland* [2004] FCA 298 (Cooper J).
35 *Lardil Peoples v Queensland* [2004] FCA 298, 174 (Cooper J).
36 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306.
37 *Risk v Northern Territory* [2006] FCA 404 (Mansfield J).
38 *Risk v Northern Territory* (2007) 240 ALR 75.
39 *Bennell v Western Australia* (2006) 153 FCR 120.
40 *Bodney v Bennell* (2008) 167 FCR 84.
41 *Native Title Amendment Act 2007* (Cth).
42 (2008) 167 FCR 84, 109.
43 (2008) 235 CLR 232.
44 Subject to the fulfilment of prescribed conditions in s 24MD, *Native Title Act 1993* (Cth).
45 *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24.
46 *WDLAC (Jamukurnu–Yapalikunu)/Western Australia/Holocene Pty Ltd* [2009] NNTTA 49.
47 Ibid [216].
48 Commonwealth Attorney-General and Minister for Families, Communities and Indigenous Affairs, 'The future of native title' (Joint Media Release, 6 June 2012).
49 *Akiba v Queensland (No 2)* (2010) 270 ALR 564.
50 *Wik and Wik Way Native Title Claim Group v Queensland* [2012] FCA 1096.

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