



25 YEARS OF NATIVE TITLE RECOGNITION

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Yolgnu claimants in the Land Rights case over the Gove Peninsula discuss aspects of the hearing outside the courtroom in Canberra, September 1970. Source: National Archives of Australia.

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THE ROAD TO NATIVE TITLE: THE LAND RIGHTS MOVEMENT

Settlement and dispossession

From the time of first European settlement, Aboriginal and Torres Strait Islander Australians have fought to maintain, and have recognised, their traditional rights to ownership of land.

In 1788 the colony of New South Wales was established and the founding of Australia as a British colony had begun. The colony was settled on the basis of the doctrine of international law whereby the continent was deemed to be terra nullius—land belonging to no-one. Despite the obvious presence of Indigenous people, in the eyes of the British the land was considered to be practically unoccupied, without settled inhabitants and without settled law. The Colony was claimed for the British Sovereign on 26 January 1788. There is ongoing debate about the legal status of the ‘settlement’ as the land was clearly occupied and; there was no treaty and no (declared) war.

The concept of terra nullius was applied in later decisions of Australian courts though not explicitly stated. In the Gove Land Rights case (Milirrpum), Blackburn J held that at the time of Sovereignty the land was ‘practically unoccupied’.

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The notion that Australia was ‘practically unoccupied’ at the time of its annexation, largely remained unchallenged as the legal basis upon which Australia was settled by Europeans until 1992. In *Mabo No 2*, the High Court rejected the ‘enlarged notion of terra nullius’ which, though unstated, had underpinned land law in Australia for over 200 years, and had justified the dispossession of Indigenous people from their lands. The rejection of that notion cleared away the fictional impediment to common law recognition of Indigenous rights and interests in land and waters.

Increasing activism: Some significant events of the land rights movement

Prior to the *Mabo* decision, the 1960s saw increasing activism by Aboriginal Australians for recognition of their land rights and civil rights. This occurred against the backdrop of civil rights movements globally, in India and South Africa and, perhaps most significantly, in the United States of America. These movements saw growing international and domestic awareness of the injustice and iniquities of segregation and race based laws and policies.

Yirrkala Bark Petitions 1963



Yirrkala Bark Petitions, 1963. Source: Courtesy of AIATSIS, AIATSIS Collection, item AIAS.049.CN-N00004_02

In 1963 the Yolngu People of Yirrkala presented two petitions to Federal Parliament in protest against the sale of part of the Arnhem Aboriginal Land Reserve to a bauxite mining company without any consultation with the traditional owners. The painted bark petitions, written in both Yolngu Matha and English, described the Yolngu People’s traditional connection to the Gove Peninsula in north eastern Arnhem Land in the Northern Territory.

The petitions affirm:

That the land in question has been hunting and food gathering land for the Yirrkala tribes from time immemorial; we were all born here.

That places sacred to the Yirrkala people, as well as vital to their livelihood are in the excised land, especially Melville Bay.

That the people of this area fear that their needs and interests will be completely ignored as they have been ignored in the past, and they fear that the fate which has overtaken the Larrakeah tribe will overtake them.

In response to these representations from the Yolngu People, a bipartisan Parliamentary Committee of Inquiry was established. In its report, the Committee acknowledged the rights of the Yolngu People as set out in the petitions and recommended the payment of compensation, protection for sacred sites and monitoring of the mining project by an ongoing parliamentary committee.

The Yirrkala bark petitions are significant as they marked a bridge between two traditions of law—Commonwealth law as it then stood, and the Indigenous laws of the land. They were the first traditional documents recognised by the Commonwealth Parliament, and are the first documentary recognition of Indigenous people in Australian law.

Though the recommendations of the Committee were not implemented and the Yirrkala bark petitions did not achieve the constitutional change sought, they did pave the way for eventual legal recognition of Indigenous rights in Australia.

The Freedom Ride 1965

[T]he Freedom Ride is a copy of what happened in America, where people wanted to go out, get in a bus, go out there and go to towns and cities and expose discrimination and prejudice wherever it may be. And racism. And that’s what we wanted to do, all of us students. And we thought, well we’ll go into the country towns of New South Wales.

Charles Perkins

In 1965, 29 Sydney University students embarked on the Freedom Ride led by Charles Perkins, an Arrernte man and third year Arts student. The Freedom

Ride was a bus tour of regional New South Wales (NSW) aimed at opposing racial discrimination and exposing mistreatment of Aboriginal Australians. In small country towns in NSW, Aboriginal people were barred from swimming pools, RSL clubs and cafes and often refused service at shops and bars. They endured segregation at schools, limited employment opportunities and were also forbidden to live in towns, being forced into reserves and missions on the edge of rural population centres. The Freedom Ride brought the issues of racism and racial discrimination to national attention.



Charles Perkins talking to a group of Aboriginal people outside a house. Source: Mitchell Library, State Library of New South Wales © Tribune/SEARCH Foundation

Wave Hill Station walk off 1966–1975

In 1966, Vincent Lingiari led 200 Gurindji stockmen and their families in a walk off from Wave Hill Station in the Northern Territory. The strike was in protest against poor work and pay conditions. Significantly, it was also a protest about the appropriation of traditional Gurindji lands for the creation of pastoral properties.

For nine years the Gurindji resided at Daguragu (Wattie Creek), until 1975 when Prime Minister Gough Whitlam ceremonially handed back a portion of the Gurindji traditional lands to the Gurindji People. This demonstration of resistance and resilience is an important achievement in the history of the struggle of Aboriginal Australians for recognition of their rights to, and responsibility for, land.

We want to live on our land, our way.

Vincent Lingiari

The Gurindji walk off contributed to the growing pressure on government to address the question of land rights.

From Little Things Big Things Grow is the well-known song by Australian artists, Paul Kelly and Kev Carmody.

The song tells the uplifting story of the Gurindji people's struggle for equality and land rights in the 1960s and 1970s.



Watch: [Kev Carmody and Paul Kelly perform "From Little Things Big Things Grow"](#)

On this great day, I, Prime Minister of Australia, speak to you on behalf of all Australian people – all those who honour and love this land we live in. For them I want to say to you: I want this to acknowledge that we Australians have still much to do to redress the injustice and oppression that has for so long been the lot of Black Australians.

Vincent Lingiari, I solemnly hand to you these deeds as proof, in Australian law, that these lands belong to the Gurindji People and I put into your hands part of the earth itself as a sign that this land will be the possession of you and your children forever.

Gough Whitlam, Prime Minister, 1975



Prime Minister Gough Whitlam pours soil into the hands of traditional land owner Vincent Lingiari, Northern Territory, 1975. Source: Mervyn Bishop/Art Gallery of New South Wales. Reproduced with permission from Department of the Prime Minister and Cabinet © Commonwealth of Australia

Gove Land Rights case 1968–1971

In 1968, after the recommendations of the Parliamentary Committee inquiry conducted in response to the Yirrkala bark petitions were not implemented, the Yolngu People from Yirrkala in north-east Arnhem Land took their case to the Northern Territory Supreme Court. This was the first litigation in Australia on native title.



Yolngu claimants in the Land Rights case over the Gove Peninsula containing bauxite deposits discuss aspects of the hearing outside the courtroom in Canberra, September 1970. Source: National Archives of Australia. Reproduced with permission from Department of Foreign Affairs and Trade © Commonwealth of Australia.

The Yolngu People challenged the validity of mining leases granted over their traditional lands on the basis that their rights to land held under traditional law and custom had survived the acquisition of sovereignty, unless validly terminated by the Crown.

In 1971, Justice Blackburn dismissed the action on the basis that the doctrine of communal title did not form part of Australian law, and if it did, that title was extinguished by opening the land to grant to colonial settlers. This latter conclusion relied on a series of earlier cases which reinforced the notion of Australia being 'practically unoccupied' in 1788.

Justice Blackburn did find that there existed a 'subtle and elaborate' system of Aboriginal law.

A system of social rules and customs which was highly adapted to the country in which the people lived and which provided a stable order of society remarkably free from the vagaries of personal whim or influence. The system was recognised as

obligatory by a definable community which made ritual and economic use of the areas claimed.

**(Milirrpum v Nabalco Pty Ltd (1971)
17 FLR 141 [4])**

The Gove Land Rights case created wider public awareness of the claim of the Yolngu and the legal problems of Indigenous people throughout Australia. Campaigns to change the law to provide just answers for Indigenous people increased. Another important step towards native title had been taken.

Aboriginal Tent Embassy 1972

After the decision in the Gove Land Rights case, Indigenous people travelled to Canberra to ask the Prime Minister of the time, William McMahon, to give them title to their land and to protect their interests, particularly in relation to mining. On the eve of Australia Day in January 1972, the Prime Minister issued a press statement which included the rejection of land rights in favour of 50 year leases to Aboriginal Communities. The Prime Minister made specific reference to the Yirrkala people's opposition to the mining venture on their traditional land, stating that the mine at Gove was 'in the national interest'.



Setting up of the Aboriginal Tent Embassy, Australia Day, (L-R) Michael Anderson, Billie Craigie, Bert Williams and Tony Coorey under a beach umbrella, 1972.

*Source: Mitchell Library, State Library of New South Wales
© Tribune/SEARCH Foundation*

In protest against this statement, on Australia Day 1972, Michael Anderson, Billy Craigie, Bertie Williams and Tony Coorey placed a beach umbrella with an 'Aboriginal Embassy' sign on the lawns of Parliament House and the Tent Embassy was created.

Over the years the Aboriginal Tent Embassy has become an enduring sign of Aboriginal resistance and a focal point for protests and marches.



March to protest police action against the Tent Embassy, 1972.

Source: Mitchell Library, State Library of New South Wales
© Tribune/SEARCH Foundation

Racial Discrimination Act 1975

In 1975 the Whitlam Government introduced the Racial Discrimination Bill. The Bill was passed in Parliament and the Act came into effect in June 1975.

The Act was ground-breaking. It was the law that secured for all Australians, whatever their racial background, equality before the law.

Tim Soutphommasane, Race Discrimination Commission

The *Racial Discrimination Act* was a turning point in Australia, making unlawful any discrimination against people on the basis of their race, colour, descent, or national or ethnic origin. It has proven to be much more than a statement of good intentions.

The High Court used the law to strike down state legislation. Most famously, it cleared the way for the recognition of native title in the Mabo case in 1992. Queensland had sought to prevent that result by enacting legislation to pre-emptively extinguish native title. However, in Mabo No 1, the High Court found that the Queensland law conferred lesser property rights on Aboriginal peoples, and so struck it down as being inconsistent with the *Racial Discrimination Act*. As a result, Mabo No 2 was able to proceed.

In June 1975, the Whitlam government enacted the Aboriginal and Torres Strait Islanders Queensland Discriminatory Laws Act.

The law put to purpose the power conferred upon the Commonwealth Parliament by the 1967 referendum, finally outlawing the discrimination

my father and his father lived under since my grandfather was removed to the mission as a boy and to which I was subject [for] the first 10 years of my life.

Powers regulating residency on reserves without a permit, the power of reserve managers to enter private premises without the consent of the householder, legal representation and appeal from court decisions, the power of reserve managers to arbitrarily direct people to work, and the terms and conditions of employment, were now required to treat Aboriginal Queenslanders on the same footing as other Australians.

We were at last free from those discriminations that humiliated and degraded our people.

The companion to this enactment, which would form the architecture of indigenous human rights akin to the Civil Rights Act 1965 in the United States, was the Racial Discrimination Act.

It was in Queensland under Bjelke-Petersen that its importance became clear.

In 1976, a Wik man from Aurukun on the western Cape York Peninsula, John Koowarta, sought to purchase the Archer Bend pastoral lease from its white owner.

The Queensland government refused the sale. The High Court's decision in Koowarta versus Bjelke-Petersen upheld the Racial Discrimination Act as a valid exercise of the external affairs powers of the Commonwealth.

However, in an act of spite, the Queensland Government converted the lease into the Acher Bend National Park.

Old man Koowarta died a broken man, the winner of a landmark High Court precedent but the victim of an appalling discrimination.

The Racial Discrimination Act was again crucial in 1982 when a group of Murray Islanders led by Eddie Mabo claimed title under the common law to their traditional homelands in the Torres Strait.

In 1985 Bjelke-Petersen sought to kill the Murray Islanders' case by enacting a retrospective extinguishment of any such title.

There was no political or media uproar against Bjelke-Petersen's law. There was no public

condemnation of the state's manoeuvre. There was no redress anywhere in the democratic forums or procedures of the state or the nation.

If there were no Racial Discrimination Act that would have been the end of it. Land rights would have been dead, there would never have been a Mabo case in 1992, there would have been no Native Title Act under Prime Minister Keating in 1993.

Noel Pearson, Eulogy for Gough Whitlam 2014

Aboriginal Land Rights (Northern Territory) Act 1976

The Aboriginal Land Rights Commission, also known as the Woodward Royal Commission, was established in 1973 in response to the Gove Land Rights decision. Its task was to inquire into appropriate ways to recognise Aboriginal land rights in the Northern Territory. The recommendations of the Commission in its 1974 report led to the handing over of land to the Gurindji People in 1975.



*Mr Justice Woodward at an Aboriginal Land Rights hearing at Yirrkala. Also in the picture are Frank Purcell and Roy Marika. Unknown.
Source: Northern Territory Library, ABC.T.V.*

The *Aboriginal Land Rights (Northern Territory) Act 1976* was largely the product of the recommendations of the 1974 Woodward report. The legislation allowed Aboriginal people in the Northern Territory to make claims on land to which they could prove traditional ties. Importantly, the statute is the first attempt by an Australian government to legally recognise the Aboriginal system of land ownership and put into law the concept of inalienable freehold title.

Noonkanbah

Beginning in 1978, a dispute over drilling on sacred sites on Noonkanbah station in the Kimberley region of Western Australia drew national and international attention to Indigenous rights.

The late 1970s saw extensive resource exploration in the Kimberley. Amax Iron Ore Corporation was conducting an oil exploration program that included the proposed drilling of an exploration well near Pea Hill or Umpampurru on Noonkanbah station. This area was part of a site complex 'significant in both a religious and economic context' to the Yungnora People. The Yungnora People strongly opposed drilling which would impact the significant Pea Hill site, and undertook various legal actions and petitioned the Western Australian Parliament in 1979. The Premier of Western Australia, Sir Charles Court, was adamant that drilling proceed and when re-elected in February 1980, renewed his government's commitment.

The Yungnora and the Western Australian government failed to reach agreement and, in August 1980, a convoy of trucks carrying drilling equipment left Perth with a police escort, bound for Noonkanbah. The convoy was met by protesters along its route and, together with union action in support of the Yungnora people, there was a short reprieve. However, these actions ultimately failed and drilling began on 30 August 1980. The drilling did not result in the discovery of any commercial reserves of oil.

Although the 'battle' of Noonkanbah was one that the protestors lost, its aftermath is considered a significant turning point in the land rights movement. It led to the first delegation of Indigenous Australians to address the United Nations Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and was the catalyst for the establishment of the Kimberley Land Council bringing Kimberley Aboriginal people together as 'one mob, with one voice'.

In a legal sense, Noonkanbah highlighted the vulnerability of Indigenous rights and the weakness of remedies then available to protect Indigenous interests in land. The failure of statute to protect these interests was a key factor in the commencement of the Mabo litigation seeking common law recognition of native title.

Mabo No 2 1982–1992

In 1982 Meriam People brought an action against the State of Queensland and the Commonwealth of Australia, in the High Court, claiming 'native title' to the Murray Islands.

On 3 June 1992, after 10 years of litigation, the High Court upheld the claim and ruled that the lands of this

continent were not terra nullius or 'land belonging to no-one' when European settlement occurred, and that the Meriam people were 'entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands'.

With these words, the doctrine of native title was inserted into Australian law.

Paul Keating Redfern speech 1992

Six months after the Mabo decision, Prime Minister Paul Keating gave a speech in Redfern Park to mark the coming International Year of the World's Indigenous People. The speech is celebrated as historically significant. It is the first time an Australian political leader had publicly acknowledged the impact of European settlement, and colonial and contemporary government policies, on Indigenous Australians.

It begins, I think, with that act of recognition.

Recognition that it was we who did the dispossessing.

We took the traditional lands and smashed the traditional way of life.

We brought the diseases. The alcohol.

We committed the murders.

We took the children from their mothers.

We practised discrimination and exclusion.

It was our ignorance and our prejudice.

And our failure to imagine these things being done to us.

With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds.

We failed to ask - how would I feel if this were done to me?

As a consequence, we failed to see that what we were doing degraded all of us.

Paul Keating, Redfern Speech, 1992



Watch: [Prime Minister Paul Keating Launch of International Year of the World's Indigenous Peoples, 1993](#)

[It was] a great speech because it was about leadership, principle and courage... He placed before Australians the truths of our past and the sad reality of our contemporary society. He laid down the challenge for our future, as a nation united and at peace with its soul.

Patrick Dodson, 2007

The Native Title Act 1993

The Commonwealth's legislative response to Mabo No 2, the *Native Title Act*, was passed in 1993 and commenced operation on 1 January 1994. It is a legislative framework which recognises and protects native title, and deals with past and future implications of Mabo No 2.



Watch: [Mr Greg McIntyre, Barrister for Eddie Mabo 1981-1992](#)

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