



25 YEARS OF NATIVE TITLE RECOGNITION

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*Native title holder Mary-Lou Buck signs the Dunghutti native title determination with former New South Wales Minister for Land and Water Conservation Kimberley Yeadon MP.
Source: National Native Title Tribunal*

NATIVE TITLE BECOMES LAW: FIRST FOUR YEARS 1994-1997

The Commonwealth responds to Mabo

Today is a milestone. A response to another milestone: the High Court's decision in the Mabo case. The High Court has determined that Australian law should not, as Justice Brennan said, be 'frozen in an era of racial discrimination'. Its decision in the Mabo case ended the pernicious legal deceit of terra nullius for all of Australia—and for all time. The court described the situation faced by Aboriginal people after European settlement. The court saw a 'conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal people'. They faced 'deprivation of the religious, cultural and economic sustenance which the land provides' and were left as 'intruders in their own homes'.

[S]ome seem to see the High Court as having just handed Australia a problem. The fact is that the High Court has handed this nation an opportunity. When I spoke last December in Redfern at the Australian launch of the International Year for the World's Indigenous People, I said we could make the Mabo decision an historic turning point: the basis of a new relationship between Indigenous and other Australians. For the 17 months since the High Court handed down its decision, the government has worked to meet this challenge.

**Paul Keating Prime Minister, Second Reading Speech:
Native Title Bill 1993, 16 November 1993**

NATIVE TITLE BECOMES LAW: FIRST FOUR YEARS 1994-1997

In 1993, the Keating Government sought to introduce legislation in response to the Mabo decision. The stated aims of the proposed legislation were:

- ungrudging and unambiguous recognition and protection of native title
- the provision for clear and certain validation of past acts if they have been invalidated because of the existence of native title
- a just and practical regime governing future grants and acts affecting native title, and
- rigorous, specialised and accessible tribunal and court processes for determining claims to native title and for negotiation and decisions on proposed grants over native title land.

Prior to introducing the legislation, the government undertook extensive consultation over the course of the year, holding discussions with Indigenous Australian leaders and organisations, State and Territory governments and the mining and pastoral industries. These discussions informed policy development and the drafting of the [Native Title Bill 1993](#).

Among the 21 Indigenous representatives who participated in the negotiation process with government were Gularrwuy Yunupingu, John Ah Kit, Noel Pearson, Lois O'Donoghue, Patrick Dodson, Mick Dodson, Marcia Langton, Rob Riley, and Peter Yu. There was strong opposition to the proposed legislation by the mining and pastoral industries and the debate was fierce and intense, receiving much media attention.

After a lengthy and complex consultation process, the Bill passed through both houses of Parliament, passing through the Senate on 21 December 1993, and receiving royal assent on 24 December 1993. The [Native Title Act 1993](#) (Cth) (*Native Title Act*) commenced operation on 1 January 1994.

High Court challenge by Western Australia

Although native title was now a part of the Australian legal and legislative landscape it still had its detractors, notably the State of Western Australia.

In 1993, the Western Australian (WA) Government enacted the [Land \(Titles and Traditional Usage\) Act 1993](#) (WA) (the WA Act). This law was intended to extinguish native title in WA and replace it with 'rights

of traditional usage'.

When the *Native Title Act* became law, the WA Government challenged its constitutional validity in the High Court of Australia (High Court), arguing that, even if the *Native Title Act* was valid, all native title in the state had been extinguished at the time of European settlement and therefore the *Native Title Act* could not apply to land in WA. Alternatively, the WA Act had extinguished all native title in WA before the *Native Title Act* was passed.

At the same time, the Wororra and Martu Peoples challenged the validity of the WA Act on the basis that it was inconsistent with the [Racial Discrimination Act 1975](#) (RDA) and the *Native Title Act*.

The High Court handed down its decision in [Western Australia v Commonwealth \(Native Title Act Case\) \[1995\] HCA 47](#) on 16 March 1995, finding that the *Native Title Act* was a valid exercise of the Commonwealth's constitutional power, the WA Act was inconsistent with the RDA and native title was not extinguished in WA at the time of European settlement.

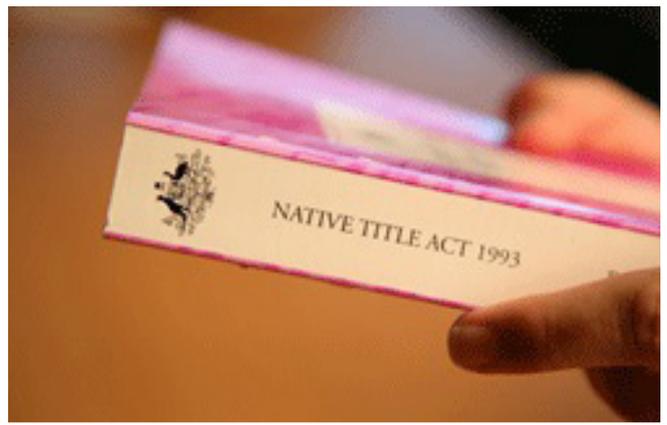
The case settled any doubts about the permanence of native title within the Australian legal system.

The Native Title Act 1993

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

The have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

[Native Title Act 1993](#) (Cth), Preamble



The Preamble to the Act specifically describes the legislation as a special measure for the advancement of, and protection of, Aboriginal Peoples and Torres Strait Islanders.

The *Native Title Act* sets out a national legislative framework for native title with its purpose being to provide a system for the recognition and protection of native title and for the co-existence of native title with state and territory land management systems.

The stated main objects of the *Native Title Act* are to provide for the recognition and protection of native title, to set out procedures which governments must follow before any act that affects native title can be done, to provide a mechanism for determining claims to native title and to validate past acts.

National Native Title Tribunal

The *Native Title Act* also established the National Native Title Tribunal (NNTT), setting out the NNTT's purpose and way of operating, along with specific powers and responsibilities.



National Native Title Tribunal, Perth Office

Some of the NNTT statutory functions are:

- future act applications, inquiries and determinations
- assistance and mediation generally
- research
- maintaining the National Native Title Register, the Register of Native Title Claims and the Register of Indigenous Land Use Agreements (ILUAs)
- assessing claimant applications for registration
- giving notice of native title applications and ILUAs, and
- registering ILUAs.

The NNTT has two main, but discrete, areas of responsibility:

- the powers of the Registrar under Part 5 of the *Native Title Act*, in relation to registering claims and ILUAs, and establishing and keeping certain public registers, and
- the functions of the Tribunal under Part 6 of the *Native Title Act*, in relation to applications, inquiries, determinations and mediations.

The Tribunal has an obligation to carry out its functions in a fair, just, economical, informal and prompt way. Importantly, in carrying out its functions, it may take account of the cultural and customary concerns of Indigenous Australians and is not bound by technicalities, legal forms or rules of evidence.

Representative Aboriginal/Torres Strait Islander Bodies

The *Native Title Act* makes provision for the establishment and funding of Representative Aboriginal/Torres Strait Islander Bodies. There are currently 15 recognised bodies or service providers nationally.

The functions of representative bodies are set out in the Act and include:

- researching and preparing native title applications
- assisting native title bodies corporate, native title holders and claimants in native title matters
- ensuring that notices in relation to activities on land or water are brought to the attention of persons who hold or may hold native title, and
- promoting understanding among Aboriginal and Torres Strait Islander Australians of the *Native Title Act*.

The Wik decision

The early years following the introduction of the *Native Title Act* were characterised by a number of litigated decisions, providing legal interpretation of the legislation and developing native title law. A key case, which clarified an outstanding issue regarding the type of land over which native title could be recognised, was the High Court decision in *Wik* where the Court considered whether pastoral leases extinguished native title rights and interests.

The claim was lodged by the Wik people of the Cape York region in Queensland and covered land which in the past, had been the subject of pastoral leases.

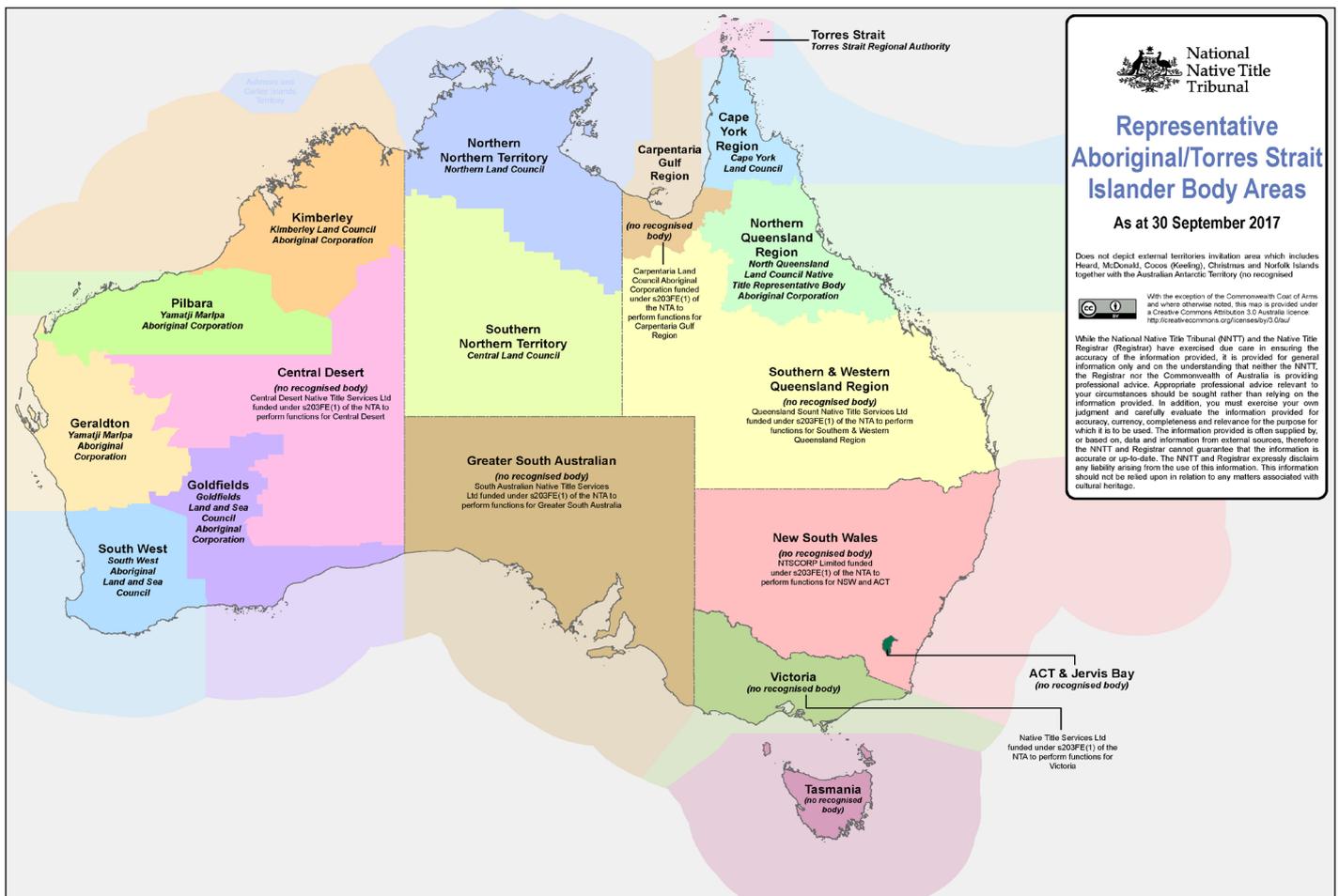
The case which led to the HCA decision in *Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] HCA 40 began in the Federal Court of Australia (FCA) on 30 June 1993. This was after the Mabo decision but before the enactment of the *Native Title Act*.

On 23 December 1996, the High Court handed down its decision. It found by a majority of four to three that native title was not extinguished by the grant of the pastoral leases.

[O]rdinary common law principles for the protection of a proprietary right, found to have survived British settlement, extended to

the protection of the Indigenous peoples of Australia, in exactly the same way as the law would protect other Australians. Because pastoral leases in Queensland are not necessarily, in law, incompatible with the survival of native title rights, the latter survived unless shown, by particular evidence, on the particular facts, to be inconsistent and thus extinguished.

Kirby J, *Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] HCA 40



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Prepared by: Geospatial Services, National Native Title Tribunal 11/10/2017 Geodock Number: G270171626

The Court declared that, if there was any inconsistency between the rights of the native title holders and the rights of the pastoralist, the rights of the pastoralist prevailed.

The Ten Point Plan

The reaction to the Wik decision was hostile in some sectors and pastoralists claimed that the decision complicated and confused the terms under which they operated and created uncertainty of tenure. Misinformation was widely disseminated about the possible implications of the decision, including suggestions that pastoralists and farmers could be

removed from the land. Calls were made for the Government to amend the *Native Title Act*.

Responding to these concerns, the Howard Government developed the Ten Point Plan. As part of the media statement releasing the Plan, the Prime Minister said:

From the very beginning, I said it was simply not possible for the state of the law immediately post-Wik to be maintained. I have never denied that major changes to the right to negotiate were essential.

Indigenous leaders have repeatedly been told by me that pastoralists and farmers must be guaranteed the right to carry on their normal day to day activities without fear of interference or hindrance.

My aim has always been to strike a fair balance between respect for native title and security for pastoralists, farmers and miners.

That is one reason why I staunchly oppose blanket extinguishment of native title on pastoral leaseholds.

The fact is that the Wik decision pushed the pendulum too far in the Aboriginal direction. The Ten Point Plan will return the pendulum to the centre.

The 10 Point Plan included a proposal for an amended registration test for all native title applications and a sunset clause placing a time limit on future lodgement of native title claims. It also proposed deeming native title extinguishment to have occurred over tenures identified by the States and Territories as being exclusive in nature (validating any invalid acts done since the commencement of the *Native Title Act*), amending 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 recognised agreements.

Not only was the 10 Point Plan opposed by Indigenous peoples and their supporters, it was also criticised by most farmers, and pastoralists in particular, who demanded that all native title be extinguished.

In contrast to the integral involvement of Indigenous representatives in the drafting of the *Native Title Act*, there was minimal engagement between Indigenous people and the Government in relation to the 10 Point Plan and subsequent draft legislation. As a consequence, Indigenous leaders formed the National Indigenous Working Group to provide input to the amendment process, but the Working Group was constrained by a lack of willingness on the part of certain politicians and stakeholders to engage with them.

The Working Group issued a paper entitled “Coexistence, Negotiation and Certainty”, where they stated that the 10 Point Plan did “not provide a fair and reasonable response to Wik...[and] will result in a significant windfall for pastoralists, with the potential for a massive compensation bill to be funded by the taxpayer...in the process, the legal and human rights of Indigenous Australians are being eroded.”

Proposed reforms to the *Native Title Act* were not restricted to the issues raised by the Wik decision, with commentators suggesting that, after three years of operation, it was clear that some aspects of the legislation required adjusting. One of the issues which followed the Brandy decision, questioned whether the NNTT had the power to perform many of the functions anticipated in the legislation.

The [Native Title Amendment Bill 1997](#) (Cth) was introduced into the House of Representatives on 4 September 1997, where it passed relatively easily.

The ensuing debate in the Senate, by contrast, was fierce and protracted. The Bill was introduced in November 1997, with four major areas of disagreement:

- the proposed sunset clause
- the terms of the registration test
- the relationship between the Native Title Bill and the *Racial Discrimination Act*, and
- the right to negotiate on pastoral leases.

The Bill was amended three times before it finally passed through the Senate in July 1998.

The decision of the High Court in the Wik People v Queensland (1996) 187 CLR 1 marked a watershed in the development of the law relating to native title and the future shape of the [Native Title] Act.

At the time that the Wik decision was handed down a host of other issues relating to the practical operation of the legislation had arisen. In the event, in the context of an acrimonious and sometimes bitter debate, extensive amendments to the [Native Title] Act were passed through the Parliament in 1998.

Chief Justice French

The first determination on mainland Australia: Dunghutti People of Crescent Head

The first determination of native title on mainland Australia was made on 7 April 1997, when the Federal Court determined that the Dunghutti People held native title to land at Crescent Head on the mid-north coast of New South Wales (NSW).

The process towards determination began in 1993 when Kempsey Council identified the need for more residential land to cater for an increasing population. Kempsey Council and the NSW Government subdivided Crown land in Crescent Head

and earmarked another area for future residential development. Following the commencement of the *Native Title Act*, the NSW Government suspended development on the basis that native title rights may be affected.

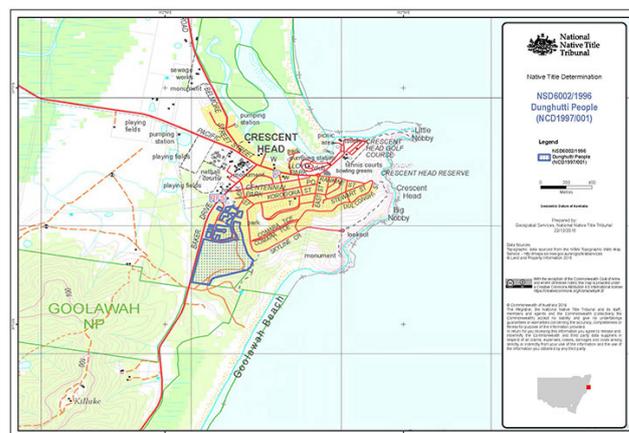
On 1 July 1994, the NSW Government lodged a non-claimant application to confirm whether native title rights and interests existed. In response to the non-claimant application, the Dughutti People lodged a claimant application on 10 October 1994.

The NSW Government gave notice that it wanted to compulsorily acquire the land as it wished to proceed with the residential development.

The NNTT assisted in negotiations in relation to the settlement of the claimant application and the notice of intention to compulsorily acquire land. The negotiations resulted in the NSW Government recognising that the Dughutti People continued to hold native title rights and they were owed compensation for the area which had been subdivided and sold before 1994. The State also agreed to

compensation for the extinguishment of all continuing native title rights and interests in the claim area.

Under the terms of the agreement, the Dughutti People surrendered their native title to the NSW Government shortly after the Federal Court handed down its determination.



Map of Dughutti People Native Title Determination Area.
Source: NNTT

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Published by the National Native Title Tribunal © Commonwealth of Australia, 2017.

ISBN: 978-0-9807613-2-0

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