

CANADIAN NORTHERN CORRIDOR SPECIAL SERIES

INDIGENOUS LAND RIGHTS IN AUSTRALIA: LESSONS FOR A CANADIAN NORTHERN CORRIDOR

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FOREWORD

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This paper is part of a special series in *The School of Public Policy Publications*, investigating a concept that would connect the nation's southern infrastructure to a new series of corridors across middle and northern Canada. This paper is an output of the Canadian Northern Corridor Research Program.

The Canadian Northern Corridor Research Program at The School of Public Policy, University of Calgary, is the leading platform for information and analysis on the feasibility, desirability, and acceptability of a connected series of infrastructure corridors throughout Canada. Endorsed by the Senate of Canada, this work responds to the Council of the Federation's July 2019 call for informed discussion of pan-Canadian economic corridors as a key input to strengthening growth across Canada and "a strong, sustainable and environmentally responsible economy." This Research Program will benefit all Canadians, providing recommendations to advance the infrastructure planning and development process in Canada.

This paper, "Indigenous Land Rights in Australia: Lessons for a Canadian Northern Corridor", falls under theme *Legal and Regulatory Dimensions* of the program's eight research themes:

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INDIGENOUS LAND RIGHTS IN AUSTRALIA: LESSONS FOR A CANADIAN NORTHERN CORRIDOR

Sharon Mascher

KEY MESSAGES

- The Canadian Northern Corridor (CNC) research project is currently exploring the concept of creating a pan-Canadian infrastructure corridor consisting of a multi-modal (road, rail, pipeline, electrical transmission and communication) transportation right-of-way traversing Canada's north and near north. If the CNC is to be a forward-looking, nation-building project, it must be conceptualized in a manner that ensures respect for the rights and interests of Indigenous communities along the corridor.
- Given its shared British colonial history with Canada, Australia's experience may offer some relevant lessons for the CNC conceptualization. Several important foundational differences between the settler legal systems of these countries inform the development of the law and the transferability of lessons. Most notably, Australia also has no constitutional equivalent to s 35 of Canada's *Constitution Act*, 1982. Rather, it is the Commonwealth's *Racial Discrimination Act* 1975 (Cth) (RDA 1975 (Cth)), passed to give domestic effect to the International Convention on the Elimination of All Forms of Racial Discrimination, that affords Indigenous land-rights protection as a human right entitled to equality before the law.
- The RDA 1975 (Cth) protects Indigenous land rights from being singled out and treated differently from other types of property interests. This means that from October 31, 1975, when the RDA 1976 (Cth) took effect, legislative and executive acts that arbitrarily deprive native title holders of their property while leaving the property rights of others unimpaired are invalid.
- The *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (ALRA 1976 (Cth)), which applies in the Northern Territory, established a legislative mechanism for "traditional Aboriginal owners" to claim "traditional Aboriginal title" over unalienated Crown land. Once recognized, Aboriginal land cannot be alienated, resumed, compulsorily acquired or forfeited under any law and, except for mining, any dealings require the consent of the traditional Aboriginal owners. Any linear infrastructure corridor crossing Aboriginal land in the Northern Territories require consent to proceed.
- The *Native Title Act* 1993 (Cth) (NTA 1993 (Cth)), passed following the *Mabo v Queensland (No 2)* decision, establishes a statutory mechanism for determining (or recognizing) native title claims, provides for the validation of past acts and intermediate period acts that otherwise contravene the RDA 1976 (Cth), and legislates a mechanism to validate future dealings affecting native title.

- The “future acts” process in the NTA 1993 (Cth) allows for the validation of various categories of future acts, codifying the procedural rights prescribed for each category. The categories of potential relevance to the building of linear infrastructure contemplate procedural rights that range from procedural rights available to “ordinary title” (freehold) holders, to an objection process, to a legislated right to negotiate.
- The NTA 1993 (Cth) provides for the voluntary negotiation of an Indigenous Land Use Agreement (ILUA) between native title parties, government parties and “others” as an alternative to validation in accordance with the complex future acts process. Any future act done in accordance with a registered ILUA is valid, with the ILUA binding all persons holding native title in relation to the area covered.
- ILUAs are now commonly negotiated to allow for the doing of future acts, on agreed terms. These agreements do, in some ways, resemble Indigenous Benefit Agreements (IBAs), although the scope is potentially very broad, and relevant governments may also be parties.
- While not equivalent to the standard of consent adopted in the ALRA 1976 (Cth), the focus on agreement-making, allowing Indigenous communities to influence the outcome of decision-making processes affecting them, rather than merely being involved, is an important change in the Australian system.

Australia’s legislative response to Indigenous land rights is not transferable to Canada. However, the renewed focus on agreement-making is a high-level lesson that is transferable. As a nation-building exercise, the CNC concept should be built on a presumption that it will proceed in a manner that recognizes the importance of agreement with Indigenous communities whose rights and interests may be affected along the corridor.

SUMMARY

The Canadian Northern Corridor (CNC) research project is currently exploring the concept of creating a pan-Canadian infrastructure corridor consisting of a multi-modal (road, rail, pipeline, electrical transmission and communication) transportation right-of-way traversing Canada’s north and near north. With a goal of connecting Canada from north to south and coast to coast to coast, the CNC, and particularly any infrastructure built within it, would necessarily directly and indirectly affect a significant number of Indigenous communities and a diverse range of constitutionally protected rights and interests. As Canada commits to implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the CNC must be conceptualized in a manner that ensures respect for the rights and interests of Indigenous communities along the corridor if it is to be a forward-looking, nation-building project.

Canada is not the only country whose settler legal system has grappled with issues relating to recognition and protection of Indigenous land rights and large-scale infrastructure development. Australia has significant experience with the linear infrastructure development and infrastructure corridors affecting Indigenous land rights and interests,

though not of the geographic scale conceptualized by the CNC. The goal of this article, therefore, is to examine the Australian settler legal system relating to Indigenous land rights in the context of this type of development, with a view to drawing relevant lessons from the Australian model to inform development of the CNC concept.

Australia and Canada's shared British colonial history means their settler legal systems share similarities. However, several foundational differences affect the manner in which the legal framework relating to Indigenous land rights has developed and informs the transferability of lessons. Australia has no equivalent to the *Royal Proclamation 1763*, which underpinned the settlement of North America and led to the negotiation of historical treaties. In Australia, it was instead assumed that the Crown acquired title on the assertion of sovereignty. Colonial governments and, thereafter, state governments granted land to settlers and reserved land for public purposes without regard to the rights of Indigenous peoples. Australia also has no constitutional equivalent to s 91(24) of the Canadian *Constitution Act 1867*. Subject to legislative protection, Indigenous land rights can be dealt with, expropriated or extinguished by both the Commonwealth and state/territorial governments. Australia also has no constitutional equivalent to s 35 of Canada's *Constitution Act, 1982*. Rather, it is the Commonwealth's *Racial Discrimination Act 1975 (Cth)* (RDA 1975 (Cth)), passed to give domestic effect to the International Convention on the Elimination of All Forms of Racial Discrimination, that affords Indigenous land rights protection as a human right entitled to equality before the law.

In 1971 the Federal Court of Australia held in the *Milirrpum v Nabalco Pty Ltd* case that the doctrine of communal native title did not form a part of the law of Australia. The Commonwealth government responded by establishing an Aboriginal Land Rights Commission to inquire into appropriate means to recognise and establish the traditional rights and interests of Aborigines to and in relation to lands in the Northern Territory. Based on the Commission's recommendations, the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (ALRA 1976 (Cth)) was passed. This Act provided for the transfer of Aboriginal reserves in the Northern Territory into a form of inalienable freehold title. It also established a legislative mechanism for "traditional Aboriginal owners" to claim title over unalienated Crown land based on their spiritual affiliation to the land and entitlement by traditions, observances, customs and beliefs (i.e., Indigenous laws) to forage as of right over the land. Traditional Aboriginal land can be claimed by application to an Aboriginal Land Commissioner (a judge of the Supreme Court of the Northern Territory) or by Parliament exercising its power to recognize the land as Aboriginal land. Aboriginal land is held in fee simple by a land trust, subject to reservations of mines and minerals, and cannot be alienated, resumed, compulsorily acquired or forfeited under any law of the Northern Territory. Currently approximately 50 per cent of land in the Northern Territory is held by land trusts. Any dealings with land held by land trusts, including dealings for a public purpose, requires the consent of the traditional Aboriginal owners on agreed reasonable terms and conditions. Absent consent, the proposed use cannot proceed. The only exception to this relates to mining (minerals, petroleum and geothermal). Under the ALRA 1976 (Cth), exploration licences may be granted to a third party with either the consent of the traditional Aboriginal owners or a proclamation by the governor-general declaring that "the national interest requires that the licence be granted." However, a proclamation may

only be made after a prescribed negotiation period to allow for agreement to be reached on terms and conditions to which the grant of the licence will be subject. Despite the existence of this ability to use a proclamation to override lack of consent, the importance of proceeding with consent is exemplified by the fact that this provision has never been used.

Several states have now also passed land rights legislation, although generally this legislation allows only for the transfer of land held in reserves to traditional Aboriginal owners.

It was not until 1992 that the High Court of Australia in *Mabo (No 2)* affirmed that “native title” is recognized by the common law in Australia. Its earlier *Mabo v Queensland (Mabo (No 1))* decision also confirmed that the RDA 1975 (Cth) protects native title from being singled out and treated differently from other types of property interests. This means that from October 31, 1975, when the RDA 1976 (Cth) took effect, irrespective of a “clear and plain” intention to extinguish native title, legislative and executive acts that arbitrarily deprive native title holders of their property while leaving the property rights of others unimpaired were invalid. Prior to this date, however, the High Court of Australia recognized that the “parcel by parcel” extinguishment of native title had occurred from 1788 to October 31, 1975, meaning that native title no longer exists over large portions of settled area across the country.

Australia responded to the *Mabo (No 2)* decision by passing the *Native Title Act 1993* (Cth) (NTA 1993 (Cth)). The objects of the NTA 1993 (Cth) acknowledge the need to recognize and protect native title, but also affirm that certainty is required for other members of the Australian community affected by a native title determination. The resulting need is to “balance a range of considerations, while promoting an effective and efficient system.”

The legislation is very complex, with a very extensive body of case law developed around it. However, in very broad overview, the NTA (Cth) 1993 does three things: establishes a mechanism for determining (or recognizing) native title claims, provides for the validation of past acts and intermediate period acts that would otherwise be invalidated because of the existence of native title, and provides a mechanism to validate future dealings affecting native title.

The statutory definition of native title has led the courts to adopt a “strict tradition-focused approach to content,” demanding continuity of laws and customs from prior to the assertion of sovereignty through to the present. This very strict approach has resulted in a much more onerous burden of proof than in Canada, and, once proven, Australian native title rights do not necessarily include the right to exclusive use and possession but may instead amount to a “disaggregation” of rights and interests based on proven traditional laws and customs. In the last decade or so, however, shifting approaches to evidentiary requirements to prove exclusive possession, use and enjoyment have led to the majority of litigated and consent determinations providing for at least some rights of exclusive possession to land.

The NTA 193 (Cth) establishes a legislative procedure for the registration and determination of native title claims. A “registration test” determines whether a claim has a reasonable prospect of success. Once registered, native title claimants are accorded procedural rights

under the legislation. Following registration, parties interested in the area claimed participate in mediation with a view to agreeing on whether native title exists and, if so, who holds the title, what the nature and extent of the native title right and interests are, and how those rights and interests interact with other rights and interests in the claim area. If agreement is reached, the parties can apply to the Federal Court for a consent determination of native title. If no agreement is reached, the application is determined by the Federal Court at trial. The overwhelming majority of native title determinations in Australia now occur by consent, although depending on the complexity of the claim this may still take several years. After a claim is determined, native title is communally held by the native title group, which nominates a Registered Native Title Body Corporate to manage the rights and represent the group in relation to them.

In the name of “certainty,” the NTA 1993 (Cth) provides for the statutory validation of a range of “past acts” and “intermediate period acts” that would otherwise be invalid because of the RDA 1975 (Cth). It is, however, the “future acts” process in the NTA 1993 (Cth) that determines whether an otherwise valid future act that affects native title rights and interests may proceed. Originally, the NTA 1993 (Cth) reflected the principle that future acts may be validly done only if they could also be done to “ordinary title” (meaning freehold land), and, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders or registered native title claimants (native title parties) through a special right to negotiate. However, the Act now allows for the validation of various categories of future acts, codifying the procedural rights prescribed for each category. Three categories are potentially relevant to linear infrastructure corridors and/or linear infrastructure.

The first category (Subdivision K of the Act) relates to facilities (defined to include roads, railways, gas pipelines, electricity transmission and distribution facilities) “operated for the general public.” Provided native title parties are not prevented from having reasonable access to the land on which the facility is built, and provisions are in place to preserve and protect areas or sites of traditional significance to Indigenous peoples, Subdivision K gives native title parties the same procedural rights they would have if they instead held ordinary title. The extent of the procedural rights is dependent on those available in the relevant jurisdiction to ordinary title holders. The second category (Subdivision M of the Act) applies when native title rights and interests are compulsorily acquired. If these rights and interests are acquired for the benefit of government, native title parties are again accorded the same procedural rights as ordinary title holders. However, if the compulsory acquisition is for the purpose of conferring rights on persons other than government, a two-month objection period applies to the compulsory acquisition. If a party objects, the government must consult with the objectors on ways to minimize the impact on native title rights and interests or the way anything authorized by the Act might be done. If the objection is not withdrawn within eight months, then it must be referred to an independent person or body to determine whether to allow the act to be done on specified conditions. This determination must then be complied with “unless” the relevant minister considers it is not “in the interests” of the relevant jurisdiction, which interests includes social and economic benefits. Subdivision M treats a “right to mine” granted for the purposes of constructing mining infrastructure in the same way, although it is unlikely that a major linear

pipeline, for example, would be treated as infrastructure associated with a “right to mine.” The final category of future act applies to the creation of a right to mine, which is not specific to infrastructure. The strongest procedural right available in the future act regime applies to this type of future act, although it is unlikely to be applicable to any of the linear infrastructure within a dedicated corridor.

As an alternative to the complex future acts process, the NTA 1993 (Cth) also allows for the validation of any future act through negotiated Indigenous Land Use Agreements (ILUAs). Any future act done in accordance with an ILUA is valid. An ILUA may be negotiated between native title parties, government parties and “others” to allow for, and condition, the doing of one or more future acts. Who may, and must, be a party to the agreement, and what type of matters may be covered, depends on the type of ILUA, but each is potentially very broad in scope. While registered, an ILUA takes effect as if it were a contract among the parties to the agreement, and it is binding on all persons holding native title in relation to the area covered. ILUAs are now commonly negotiated rather than resort to the future acts process when native title rights and interests will be affected by the doing of a future act.

The complex legislated approach adopted in Australia is not transferable to the Canadian experience. However, if there is a lesson to be taken, it is that as the system in Australia has matured, there is now a renewed focus on settlement by agreement. While the ALRA 1976 (Cth) adopts a standard of consent, the NTA 1993 (Cth) cannot be said to do the same. However, the use of negotiated agreements, in the form of ILUAs, does offer a “pathway to consent” that allows Indigenous communities to determine the terms and conditions upon which a future act may proceed. This appears to take a step closer to allowing Indigenous communities to influence the outcome of decision-making processes affecting them, rather than merely being involved or having their views heard, in keeping with the principle of free prior informed consent in the UNDRIP. There is, of course, significant reason to challenge the presumption that ILUAs are, indeed, “the holy grail of agreement-making,” with the availability of the future acts validation process consequentially impacting the freedom with which native title holders enter agreements. However, there is reason to explore best practice agreement-making, drawing on the Australia experience and recognizing the significant role Indigenous Benefit Agreements (IBAs) already play in the Canadian context, to consider whether a framework agreement with affected Indigenous communities might provide a way forward.

PART I: INTRODUCTION

While the concept of creating a pan-Canadian infrastructure corridor is not new, the Canadian Northern Corridor (CNC) research project is currently exploring it afresh (School of Public Policy, 2022). Responding to Canada’s “need to increase interregional and international trade,” the modern iteration conceptualizes “a new multi-modal (road, rail, pipeline, electrical transmission and communication) transportation right-of-way” traversing Canada’s north and near north (Sulzenko and Fellows, 2016; Fellows et al., 2020). As envisaged, the corridor would include policy, regulatory and governance structures “to ensure business certainty and a clear path forward for project approvals and development”

of private infrastructure projects within it (Fellows et al., 2020). With the goal of connecting Canada from “north to south and coast to coast to coast” (School of Public Policy, 2022), the proposed corridor and any infrastructure built within it, would necessarily directly and indirectly affect a significant number of Indigenous communities¹ who hold a diverse range of constitutionally protected rights and interests. Ensuring that the CNC is conceptualized in a manner that accords full respect to these Indigenous communities and their rights is therefore essential to its success.

Examining the complex range of rights and interests held by Indigenous communities—which arise in the non-treaty, modern treaty and historical treaty context—across Canada, Wright has identified a “significant tension” between the abstracted corridor concept and the duty-to-consult framework developed in the contemporary Canadian jurisprudence (Wright, 2020). In particular, he concludes that the context-specific nature of the duty to consult means that in addition to the need for “meaningful consultation” with all potentially affected Indigenous communities regarding the proposed corridor envelope, “significant additional consultation will almost certainly be required as each specific project is pursued” (Wright, 2020, 2). Further, Wright flags the evolution of the law as Canadian governments move to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and operationalize its principles.

Canada is not the only country whose settler legal system has grappled with issues relating to recognition and protection of Indigenous land rights and large-scale infrastructure development. In this respect, Australia offers a notable example. While not of the geographic scale conceptualized by the CNC, Australia has significant experience with the linear infrastructure development and infrastructure corridors crossing land in which Indigenous land rights exist. The goal of this article, therefore, is to examine the Australian settler legal system relating to Indigenous land rights in the context of this type of development, with a view to drawing relevant lessons from the Australian system to inform development of the CNC concept.

This article commences, in Part II, with an overview of some key foundational differences between Australia and Canada that inform the development of the applicable settler law and, in many respects, limit the transferability of the Australian approach to Canada. Part III explains how the Australian settler legal framework recognizes Indigenous land rights, drawing as relevant a comparison with the comparable Canadian settler law. It then turns to discuss the procedural and substantive rights accorded Indigenous rights holders in relation to infrastructure development that affects or interferes with those rights. Drawing on the preceding discussion, Part IV then turns to consider three separate case studies relating to major infrastructure development and the intersection with Indigenous land rights. This part also very briefly explains other Australian legislation relevant to large infrastructure and corridor development. Part V concludes with a discussion of the lessons to be learned from the Australian experience that may inform the CNC concept and highlights opportunities for further research and engagement.

¹ In keeping with the approach adopted by Wright (2020), the deliberately broad terms “Indigenous communities” and “Indigenous land rights” will be used in this article except in reference to legislation that adopts other language, in which case the language of the legislation will be used.

PART II: FOUNDATIONAL DIFFERENCES IN AUSTRALIAN AND CANADIAN SETTLER LAW

There are many similarities between the Australian and Canadian settler legal frameworks relevant to the recognition and protection of Indigenous land rights. The countries share a British colonial history, with the acquisition of sovereignty proceeding by way of ‘settlement,’ built on the underlying premise of *terra nullius*. As a result, the applicable English common law was applied in disregard of the existing laws of the sophisticated Indigenous communities already in occupation of the land. The common law of each country has belatedly recognized “Aboriginal title”² and “native title”³ (adopting the language used by each nation’s highest courts), with a seemingly “close affinity” (Bartlett, 2020, 8) in the Australian and Canadian jurisprudence revealing their shared colonial history.

However, despite these similarities, there are significant differences in the complex rules developed by the respective settler legal systems to recognize and protect Indigenous land rights. As these differences are explained, at least in part, by some key foundational differences in Australian and Canadian settler law, and must inform the transferability of lessons, it is necessary to briefly highlight three at the outset.

First, there is no Australian equivalent to the *Royal Proclamation 1763*, which underpinned the settlement of North America. While not the “source” of Indigenous title to land in Canada,⁴ the proclamation’s implied intention that “no lands would be taken from First Nation peoples without their consent” (Borrows, 1997) formalized the imperial policy of acquisition by purchase and resulted in the negotiation of historical treaties through large parts of Canada (see Wright, 2020). In Australia, meanwhile, it was assumed that the Crown acquired title on the assertion of sovereignty. As a result, first local colonial governments and then state governments granted land to settlers, or dedicated and reserved land for public purposes, without regard to the pre-existing rights of Indigenous peoples (Bartlett, 2020, 4). As Justices Dean and Gaudron of the High Court of Australia state in *Mabo v Queensland (No 2)* (*Mabo (No 2)*), the legal justification for the “dispossession and oppression” of Indigenous Australians in this manner flowed from two propositions: “that the territory ... was, in 1788, *terra nullius* in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants.”⁵ To the extent that reserves were established, it was to advance protectorates to regulate residence and missions (Wishart, 2005, 792).

Second, Australia has no constitutional equivalent to s 91(24) of the Canadian *Constitution Act 1867*, which assigns the Parliament of Canada exclusive jurisdiction over “Indians and lands reserved for Indians” and encompasses within it “the exclusive power to extinguish aboriginal rights, including aboriginal title.”⁶ In Australia, the colonial and then state governments were invested with “the entire management and control of waste lands

² *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *R v. Marshall*, [1999] 3 SCR 456; *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44.

³ *Mabo v Queensland (No 2)* [1992] HCA 23 (hereinafter *Mabo (No 2)*).

⁴ *Calder et al.*, 322.

⁵ *Mabo (No 2)*, para 55 (per Brennan J).

⁶ *Delgamuukw*, para 173.

belonging to the Crown”⁷ As a result, the Australian settler legal system allowed Indigenous land rights to be “dealt with, expropriated, or extinguished” without consent by valid Commonwealth legislation or state or territorial legislation operating within the state or territory in which the land in question is situated.⁸ While the Parliament of Australia is constitutionally required to acquire property on “just terms,”⁹ no similar limitation applies to the states. As a practical consequence, a significant amount of “parcel by parcel” extinguishment occurred across Australia by virtue of colonial and then state governments exercising power “to grant interests in some of those parcels and to appropriate others of them for the use of the Crown” in disregard of Indigenous rights to land.¹⁰

Finally, there is also no constitutional equivalent in Australia to s 35 of Canada’s *Constitution Act*, 1982, which recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada.”¹¹ Rather, in Australia the “constitutional protection” (Bartlett, 2020, 128) afforded Indigenous land rights is founded on the Commonwealth Parliament’s “external affairs power” (Commonwealth Constitution, s 51 (xxix)),¹² pursuant to which the *Racial Discrimination Act* 1975 (Cth) (RDA 1975 (Cth)) was passed to give domestic effect to the International Convention on the Elimination of All Forms of Racial Discrimination. Section 10(1) of the RDA 1975 (Cth) provides:

10(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

While the purpose underlying s 35 of the *Canadian Constitution Act* 1982 is reconciliation,¹³ s 10 of the RDA 1975 (Cth) sets a human rights standard of equality before the law. As Commonwealth laws are paramount over inconsistent state or territory legislation,¹⁴ the RDA 1975 (Cth) offers Indigenous land rights protection from state laws that do not meet the standard of equality before the law. The RDA 1975 (Cth) also binds the Commonwealth. However, unlike s 35 protections in Canada, The Commonwealth Parliament retains the power to enact legislation that supersedes or amends it,¹⁵

⁷ *Australian Waste Lands Act* (1855) (Imp); *New South Wales Constitution Act* 1855 (Imp); *Queensland Constitution Act* 1867 (Imp); *South Australian Constitution Act* 1856 (Imp); *Tasmania Constitution Act* 1855 (Imp); *Victoria Constitution Act* 1855 (Imp); *Western Australian Constitution Act* 1889 (Imp).

⁸ *Mabo (No 2)*, para 61 (per Dean and Gaudron JJ).

⁹ Commonwealth Constitution, s 51(xxxi).

¹⁰ *Western Australia v Commonwealth*, (1995) 183 CLR 372, 433-4. See also *Mabo (No 2)*, para 82 (per Brennan).

¹¹ There are ongoing discussions to amend the Commonwealth Constitution to provide Aboriginal and Torres Strait Islander people a voice to the Commonwealth Parliament (see Referendum Council, 2017).

¹² See: *Koowarta v Bjelke-Petersen*, (1982) 153 CLR 168 and *Gerhardy v Brown*, (1985) 159 CLR 70.

¹³ *R v Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507, para 31.

¹⁴ Commonwealth Constitution, s 109.

¹⁵ This may contravene Australia’s international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, however domestic remedy is available for doing so.

although extinguishing existing Indigenous land rights would likely involve an acquisition of property, with compensation payable on just terms (Government of Australia, 1996). As will be discussed below, in important ways the Commonwealth's *Native Title Act* 1993 (Cth) does depart from the standard of equality before the law.

PART III. RECOGNITION OF INDIGENOUS LAND RIGHTS IN AUSTRALIA

As discussed above, the settlement of Australia proceeded with a complete disregard for Indigenous land rights. Indigenous communities were driven out by force, with traditional land granted by colonial governments to settlers without agreement or payment of compensation (Bartlett, 2020). Early court decisions, addressing issues unrelated to Indigenous land rights, reinforced the presumption that land and resources resided in the Crown.¹⁶ It was not until 1970 that misperception of the law was challenged in Australia. According to Bartlett, the absence of earlier litigation may be explained on the basis that “absolute and exclusive jurisdiction” was vested in “the representatives of the settlers whose interests were most antipathetic to those of the Indigenous peoples”—the states (2020, p 11-12).

3.1 EARLY AUSTRALIAN LAND RIGHTS LITIGATION

In *Milirrpum v Nabalco Pty Ltd*, the Yolngu people challenged the validity of bauxite leases granted over land in the Northern Territory based on their occupation since time immemorial.¹⁷ As the Northern Territory was still under Commonwealth administration, the plaintiffs argued the Commonwealth government had not acquired the property on ‘just terms’ as required by the Commonwealth Constitution s 51(xxxi).

The case failed. Blackburn J, a single judge in the Northern Territory Supreme Court, found that while the Yolngu peoples’ laws and customs were recognisable as a system of law, the doctrine of “communal [native title] does not form, and never had formed, a part of the law of Australia.”¹⁸ In coming to his decision, Blackburn J relied heavily on the British Columbia Court of Appeal’s decision in *Calder v Attorney General of British Columbia*, a decision overturned 18 months later by the Supreme Court of Canada (SCC) to find, for the first time, that Indigenous land rights in Canada had survived annexation and were recognized by the common law.¹⁹ This accident of history caused a significant divergence in Canadian and Australia law until the High Court of Australia revisited the question in its 1992 *Mabo (No 2)* decision.

¹⁶ See for example *Attorney General v Brown* (1847) 1 Legge 312 and *Williams v Attorney General (NSW)* (1913) 16 CLR 404.

¹⁷ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

¹⁸ *Milirrpum*, 245.

¹⁹ *Calder et al.*, 376.

3.2 LAND RIGHTS LEGISLATION

The *Calder* and *Milirrpum* decisions each provoked very different responses. Following *Calder*, Canada returned to the treaty-making practice it had engaged in since the 1700s (CIRNAC 2018), albeit in a modern form, and began the negotiation of individualized and comprehensive “modern treaties” (Isaac 2016, 165) with First Nation, Métis and Inuit communities (for a discussion see Wright, 2020, 22-24). In Australia, the *Milirrpum* findings provided the basis for an Aboriginal Land Rights Commission to inquire into “appropriate means to recognise and establish the traditional rights and interests of Aborigines to and in relation to lands” in the Northern Territory (Aboriginal Land Rights Commission, 1973, iii). The recommendations in Commissioner Woodward’s two reports (Aboriginal Land Rights Commission, 1973 and Aboriginal Land Rights Commission, 1974) formed the basis of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA 1976 (Cth)).

The ALRA 1976 (Cth) “fundamental piece of social reform” (Central Land Council, n.d.), the ALRA 1976 (Cth), establishes land councils; makes provision for the transfer of Aboriginal reserves into a form of inalienable freehold title and puts in place a legislative mechanism to claim title over unalienated Crown land; and accords “traditional Aboriginal owners” substantive and procedural rights in relation to the grant of mining leases and any other interests in land over which title is held.

3.2.1 Land Councils

The ALRA 1976 (Cth) mandated the establishment of representative bodies called ‘Land Councils,’ chosen by Aboriginal people living in the area (ALRA 1976 (Cth), s 21).²⁰ Each Land Council represents several Indigenous communities. The Act assigns Land Councils several functions including ascertaining and expressing the wishes and opinions of Aboriginal people living in the area; assisting with claims; protecting and managing land and sacred sites; and supervising land trusts (ALRA 1976 (Cth), ss 21-21C and 23).

There are currently four Land Councils in the Northern Territory—the Central Land Council, the Northern Land Council, the Anindilyakwa Land Council and the Tiwi Land Council.

3.2.2 Land Grants and Land Claims Process

The ALRA 1976 (Cth) provides for all land held as Aboriginal reserves in the Northern Territory to become “Aboriginal land” and be granted to the land trusts (ALRA 1976 (Cth), s 10).

The ALRA 1976 (Cth) also established a legislative mechanism for claims to be made over “unalienated Crown land”²¹ in the Northern Territory “by or on behalf of Aborigines claiming to have a traditional land claim to an area of land” (ALRA 1976 (Cth), s 50(1)). Unlike in Canada, where Aboriginal title is sourced in exclusive occupation prior to the

²⁰ Two Land Councils, the Central Land Council and the Northern Land Council, were formed on the basis of a recommendation in the Aboriginal Land Rights Commission’s first report (Aboriginal Land Rights Commission, 1973, 41-44). Supplied with independent legal advice, these two Land Councils then made submissions that informed the Aboriginal Land Rights Commission’s second report (Aboriginal Land Rights Commission, 1974, 4). As such, these two councils preceded the ALRA 1976 (Cth).

²¹ The ALRA 1976 (Cth) defines “unalienated Crown land” to exclude land set aside for a public purpose (s 3).

assertion of sovereignty,²² a “traditional land claim” arises out of “traditional ownership” (ALRA 1976 (Cth), s 3). The term “traditional Aboriginal owners” is defined to mean

a local descent group of Aboriginals who:

(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and

(b) are entitled by Aboriginal tradition to forage as of right over that land.

This definition includes two elements: spiritual affiliation to the site on the land *and* entitlement by Aboriginal tradition to forage as of right over the land.²³ In turn, “Aboriginal tradition” is defined to mean:

the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

These provisions reflect Commissioner Woodward’s recommendations that Indigenous land rights should preserve “where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs” (Aboriginal Land Rights Commission, 1974, 2), learnt through consultations with Indigenous peoples that it is “close spiritual associations with particular tracts of land” that gives rise to “rights and responsibilities” over those lands (Aboriginal Land Rights Commission, 1973, 7).

The ALRA 1976 (Cth) provides two pathways for traditional Aboriginal owners to claim land arising out of their traditional ownership. The first pathway allows for an application to be made to the Aboriginal Land Commissioner (a judge of the Supreme Court of the Northern Territory), to determine whether the claimants are the traditional Aboriginal owners of the land (ALRA 1976 (Cth), s 50). This pathway requires the Commissioner to report to the Minister, following an inquiry, whether the claim should be recognized. Alternatively, Parliament has the power recognize Aboriginal land by adding it to Schedule 1 of the ALRA 1976 (Cth).

Once the land is recognized as Aboriginal land, it is transferred in fee simple into a land trust, subject to reservations of mines and minerals and specific exemptions relating to roads, existing right of ways or existing approvals. The Act prohibits Aboriginal land from being alienated and from being resumed, compulsorily acquired or forfeited under any law of the Northern Territory (ALRA 1976 (Cth), s 67).

Despite the appearance of simplicity, these pathways to claim land have “proven lengthy” (Haughton, 2018). A total of 249 traditional land claim applications have been made since the ALRA 1976 (Cth) took effect in 1977, with amendments precluding new application after June 4, 1997 (ALRA 1976 (Cth), 67A(6)(a)). Of these, 84 claims were subject to inquiries and reports, with a further 148 claims either withdrawn or disposed of by some other process

²² *Delgamuukw*, para 143; *Tsilhqot’in Nation*, para 26.

²³ *Risk v Northern Territories*, [2002] HCA 23.

and six subject to settlement negotiations (Aboriginal Land Commissioner, 2020). Decades on, six claims remain the subject of “incomplete inquiries,” and five claims, relating to land comprising the beds and banks of rivers and/or the intertidal zone (ITZ) “are not currently the subject of an inquiry,” and “susceptible to being finally disposed of” by regulation (Aboriginal Land Commissioner, 2020).²⁴ Currently, approximately 50 per cent of land in the Northern Territory, including approximately 85 per cent of the coastline extending to the low water mark,²⁵ is held by 151 Aboriginal land trusts for the benefit of traditional Aboriginal owners (Australian Trade and Investment Commission, n.d.). (See Appendix, Figure 1).

3.2.3 Consent and Section 19 Agreements

A key recommendation of the Aboriginal Land Rights Commission was that Indigenous people should have the right to withhold consent to activities on their land. In the words of Commissioner Woodward, “to deny to Aborigines the right to prevent mining on their land is to deny the reality of their land rights” (Aboriginal Land Rights Commission, 1974, 108). The one “qualification” to this recommendation allowed for a lack of consent to “be overridden if the government of the day were to resolve that the national interest required it” (Aboriginal Land Rights Commission, 1974, 108). Commissioner Woodward made clear, however, that the word “required” was used “deliberately so that such an issue would not be determined on a mere balance of convenience or desirability but only as a matter of necessity” (Aboriginal Land Rights Commission, 1974, 108).

These recommendations are reflected in the ALRA 1976. Subject to special procedures for mining, dealings with Aboriginal land held by land trusts, including dealings for a public purpose, require the consent²⁶ of the traditional Aboriginal owners and consultation with any other affected community. If consent is given for a proposed use to proceed, there must first be agreement as to reasonable terms and conditions—commonly referred to as a section 19 agreement (ALRA 1976 (Cth), s 19). Land Councils determine the application process, with no guarantee as to the time required to conduct consultations, and third parties may be responsible for reasonable costs (Northern Land Council, 2021). If the traditional Aboriginal owners do not consent, the proposed use cannot proceed.

However, in relation to mining (which includes minerals, petroleum and geothermal), the ALRA 1976 (Cth) allows for the grant of an exploration licence to a third party in respect of Aboriginal lands with either the consent of the Land Council, who must first consult with the traditional Aboriginal owners, or a Proclamation by the Governor-General declaring that “the national interest requires that the licence be granted” (ALRA 1976 (Cth), ss 40 and s 43). Unlike other dealings, in relation to exploration licences a detailed negotiation process is prescribed, which includes a specified negotiation period (twenty-two months

²⁴ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 (the *Blue Mud Bay* case).

²⁵ In *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 (30 July 2008), the High Court held that the ALRA 1976 (Cth) confers exclusive rights to tidal waters.

²⁶ Under the Act, consent is considered to be given if (a) under the Aboriginal tradition of the relevant traditional Aboriginal owners or group to which they belong there is a particular process of decision-making that must be complied with in relation to decisions of the kind being made, and the decision is made in accordance with that process; or (b) there is no such process of decision-making, in which case the decision is made in accordance with a process of decision-making agreed to and adopted by the traditional Aboriginal owners in relation to decisions of that kind (ALRA 1976 (Cth), s 77A).

with room for an initial two-year extension and subsequent twelve-month extensions thereafter) (ALRA 1976 (Cth), s 41- 42). If a Proclamation is made to allow the grant of an exploration licence in “the national interest,” a negotiation period is prescribed to allow the Land Council and the third party to agree to the terms and conditions to which the grant of the licence will be subject (ALRA 1976 (Cth), s 43), failing which the matter is referred to an arbitrator (ALRA 1976 (Cth), s 44). To date, a public interest proclamation has never been used to grant an exploration licence, meaning that since the commencement of the ALRA 1976 (Cth), in the Northern Territory exploration licences have only been granted with consent of the traditional Aboriginal owners.

When an exploration licence is issued, the ALRA 1976 (Cth) requires the terms and conditions to include provision requiring the third party to pay compensation for damages or disturbance to the land and to the traditional Aboriginal owners, which compensation can include compensation for not only the value of minerals removed but deprivation of use of the land and severance of the land from other land with the same traditional Aboriginal owners (ALRA 1976 (Cth), 44A). The ALRA also requires agreement to be reached between the Land Council and the third party in relation to the terms and conditions to which a mining interest will be subject, failing which the minister is required to enter into such an agreement “in the name of, and on behalf of, the Land Council” (ALRA 1976 (Cth), 46).

The emphasis on mining, in both the Aboriginal Land Rights Commission’s recommendations and the ALRA 1976 (Cth), reflects the realities of the time, with conflicts between Indigenous communities and settler society largely centered on mining activities and the consequential impacts of these activities on the land. Indeed, the push to assert land rights in the *Milirrpum* case was motivated by prospective bauxite mining. Had the ALRA 1976 (Cth) been drafted today, the special procedures in the ALRA 1976 (Cth) may well have contemplated renewable energy developments and large infrastructure projects.

3.2.5 Other Land Rights Legislation

Several state parliaments have also passed land rights legislation. This legislation generally only allows for the transfer of land held in reserves to traditional Aboriginal owners.²⁷ While most of this legislation transfers only a small amount of land into Indigenous ownership, two pieces of South Australian legislation, the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act* 1981 (SA) and the *Maralinga Tjarutja Land Rights Act* 1984 (SA), transfer large Aboriginal reserves, totalling approximately 100,000 square kilometres and 50,000 square kilometres respectively, to Aboriginal corporations of which all members of the relevant Aboriginal community are members. Like the ALRA 1976 (Cth), the traditional owners must consent to any proposal relating to the land (*Anangu Pitjantjatjara Yankunytjatjara Land Rights Act* 1981 (SA), s 7), although a failure to consent to a mining application, or the giving of consent on conditions unacceptable to the applicant, may result in arbitration

²⁷ See: *Aboriginal Lands Trust Act* 1966 (SA), now replaced by the *Aboriginal Land Trust Act* 2013 (SA); *Aboriginal Land (Lake Condah and Framlingham Forest) Act* 1987 (Cth) (Vic); *Aboriginal Land Rights Act* 1983 (NSW); *Torres Strait Islander Land Act* 1991 (Qld); *Aboriginal Land Act* 1991 (Qld); and *Aboriginal Lands Act* 1995 (Tas). In Western Australia, the *Noongar (Koorah, Mitja, Boordahwan) (Past, Present and Future) Recognition Act* 2016 (WA), passed as part of a comprehensive settlement, recognizes the Noongar people as traditional owners of land, with cultural responsibilities and rights, but does not create “any right, title or interest” in that land.

(*Anangu Pitjantjatjara Yankunytjatjara Land Rights Act* 1981 (SA), s 20(8) and the *Maralinga Tjarutja Land Rights Act* 1984 (SA), s 21(10)). The land transferred under these two pieces of legislation totals approximately 15 per cent of the total area of South Australia. See Appendix, Figure 1.

3.3 COMMON LAW RECOGNITION OF NATIVE TITLE—THE MABO DECISIONS

Almost two decades after the SCC's *Calder* decision, the High Court in *Mabo (No 2)* overturned Blackburn J's *Milirrpum* decision and affirmed that "native title" is recognized by the common law in Australia. The claim arose in 1982 when three members of the Meriam people, on behalf of themselves and their respective family groups, commenced an action against the state of Queensland. The plaintiffs claimed that the Crown's sovereign rights were subject to the land rights of the Meriam people, which were based upon local custom, original native ownership or traditional native title. The state of Queensland denied any foundation in law for the rights asserted by the plaintiffs and argued, in any event, that any such rights were abrogated by the *Land Act* 1910 (Qld). To bolster its defence, the Queensland Parliament then passed the *Queensland Coast Islands Declaratory Act* 1985 (Qld) (*Queensland Act* 1985), declaring that the islands were vested in the Crown in right Queensland and that no compensation was owed for any right that may have existed prior to annexation.

3.3.1 Mabo (No 1)

In *Mabo v Queensland (Mabo (No 1))*, the majority of the High Court found that, despite its draconian effect, the *Queensland Act* 1985 expressed a "clear and plain legislative intention that all native title is to be extinguished" and that it was within the power of the Queensland Parliament to extinguish native title without compensation.²⁸ However, a majority of four out of seven justices held that the *Queensland Act* 1985 was invalid on the basis that it amounted to a denial of equality before the law on the basis that it "abrogated the immunity of the Meriam people from arbitrary deprivation of their legal rights" and "thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Meriam people."²⁹ The *Queensland Act* 1985 was therefore inconsistent with s 10 of the RDA 1975 (Cth).

Mabo (No 1) confirmed, therefore, that from October 31, 1975, when the RDA 1975 (Cth) took effect, native title was protected from being singled out and treated differently—whether substantively and procedurally—than other types of property interests.³⁰

²⁸ *Mabo v Queensland* [1988] HCA 69, para 10 (hereinafter *Mabo (No 1)*).

²⁹ *Mabo No (1)*, para 20 (per Brennan J).

³⁰ In *Western Australia v Commonwealth* (1995) 183 CLR 373, legislation passed in Western Australia to deny and pre-emptively extinguish Indigenous land rights without compensation was struck down on similar reasoning.

3.3.2 Mabo (No 2)

In *Mabo (No 2)*, the High Court proceeded to consider whether “native title” rights were recognized by the common law of Australia. Relying on jurisprudence from throughout the world, with particular reliance on the SCC’s *Calder* decision, the majority held that the property rights of the Indigenous peoples of Australia should be “fully respected,” such that a “mere change in sovereignty does not extinguish native title to land.” Without interrogating the basis upon which the British Crown acquired title, the majority went on to hold that “native title” is sourced in the traditional occupancy or connection to land by a community or society, “burdening” the Crown’s radical title on the acquisition of sovereignty.³¹ These findings will sound familiar to those acquainted with the Canadian jurisprudence on Aboriginal title. However, there are also some significant differences in the reasoning of the Canadian and Australian courts.

In Canada, Aboriginal title to land arises from “the prior occupation of Canada by Indigenous peoples,”³² proof of which requires occupation that is “sufficient” and “exclusive” and, only if present occupation is relied on to prove prior occupation, “continuous.”³³ In contrast, Brennan J’s leading judgment in *Mabo (No 2)* states that “[n]ative title has its *origin* in and is given its *content* by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory” (emphasis added).³⁴ Brennan J also found that in order for native title to continue to exist, the “clan or group” must have “continued to acknowledge and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained.”³⁵ While “immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty,” to be recognized it remained essential that the “general nature of the connection between the [I]ndigenous people and the land remains.”³⁶ Brennan J recognized the very real consequences of this requirement, stating that “when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared” and “cannot be revived for contemporary recognition.”³⁷

Brennan J also defined the content of native title by reference to traditional laws and customs. This means “[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.”³⁸ The SCC has not adopted this approach in relation to Aboriginal title. Characterized as the “highest form of Aboriginal rights” (Isaac, 2016), once proven, Aboriginal title confers “the right to exclusive use and occupation of the land ... for a variety of purposes” not confined to traditional or “distinctive” uses, subject only to the “important restriction” that the collective title “cannot be alienated except to the Crown or encumbered in ways that would prevent

³¹ *Mabo (No 2)*, paras 61 and 62 (per Brennan J).

³² *Delgamuukw*, para 114.

³³ *Tsilhqot’in Nation*, para 25.

³⁴ *Mabo (No 2)*, para 64 (per Brennan J).

³⁵ *Mabo (No 2)*, para 66 (per Brennan J).

³⁶ *Mabo (No 2)*, para 83(6) (per Brennan J).

³⁷ *Mabo (No 2)*, para 66 (per Brennan J).

³⁸ *Mabo (No 2)*, para 64 (per Brennan J).

future generations of the group from using and enjoying it.”³⁹ For this reason, Wright notes that Aboriginal title “would be of primary relevance in relation to a cross-country infrastructure corridor” (Wright, 2021, 18).

As discussed above in Part I, subject only to the protections afforded by the RDA 1975 (Cth), both Commonwealth and state parliaments had the jurisdiction to extinguish native title. As a result, extinguishment is also an issue of significance in *Mabo (No 2)*. The High Court unanimously agreed that a clear and plain intention is required to the extinguish native title. This requirement, which “flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land”⁴⁰ has also been endorsed by the Canadian courts. In *Mabo (No 2)*, the High Court unanimously held that both legislative and executive acts may manifest such an intention, with consequential extinguishment of native title to the extent of inconsistency (Bartlett, 2020, 32-33). A slim majority also agreed that the unilateral extinguishment of native title by a legislative or executive act did not require compensation.⁴¹

The practical consequences for the survival of native title in Australia, particularly within settled areas of Australia, are sobering. Brennan J states:

As the Governments of the Australian Colonies and, latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last 200 years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands ... Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.⁴²

Mabo (No 2) is, therefore, as much a decision about the “validation of the dispossession of Indigenous people ‘parcel by parcel’ from 1788 to October 31, 1975 [when the RDA 1975 (Cth) took effect] without consent or compensation” as it is a decision about the recognition of native title at common law in Australia (Bartlett, 2020, 33). In the wake of *Mabo (No 2)*, an extensive and evolving jurisprudence⁴³ examines whether a myriad of legislative and executive acts made by state and Commonwealth governments wholly, or partially, extinguish native title. In relation to Crown grants and reservations, subsequent case law has focused particularly on inconsistency of rights, with native title giving way to settler rights and interests to the extent of inconsistency. While too complex to review in detail here, significant academic commentary exists on this aspect of native title law (see for example: Bartlett, 2020, 363-493; Young, 2019; Edgeworth, 2016; Stephenson, 2015; Bartlett, 2002; Bartlett, 2015).

³⁹ *Tsilhqot'in Nation*, paras 67-76.

⁴⁰ *Mabo (No 2)*, para 75 (per Brennan J).

⁴¹ This is subject to the s 51 (xxxi) requirement that the Commonwealth Parliament acquire property “on just terms.”

⁴² *Mabo (No 2)*, para 82 (per Brennan J).

⁴³ See for example: *Fejo v Northern Territory* (1998) 195 CLR 96; *Wik Peoples v Queensland* (1996) 187 CLR 1; *Yanner v Eaton* (1999) 201 CLR 351; *Western Australia v Ward* (2002) 213 CLR 1; *Akimba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2)* (2010) 204 FCR 1; *Western Australia v Brown* [2014] HCA 8; *Queensland v Congoo* [2015] HCA 17.

3.4 NATIVE TITLE ACT 1993 (Cth)

While the *Mabo (No 2)* decision was received as an opportunity to advance reconciliation (Bartlett, 2020, 35), the response was a “flurry of legislative and judicial activity” attempting to settle issues relating to land management “in as short a time as possible” (Wishart, 2005, 794). Notably, however, this excluded larger constitutional issues relating to sovereignty and governance (Wishart, 2005, 794). The decision to adopt a legislative response is perhaps not surprising, given the earlier experience of the Australian states and territories with land rights legislation. Other possible responses were considered, with a discussion paper prepared in the months following the High Court decision raising several options to address native title, including the Canadian approach of negotiating settlements between governments and Indigenous peoples. However, a draft report delivered to Cabinet in March 1993 recommended against the negotiated settlement approach:

[T]o give effect to the concept on a national basis, a very long and difficult negotiation would be inevitable, in which concepts such as self-government over native title lands, constitutional protection of title and the granting of substantial economic and other benefits would come into play as part of the “grand bargain.” It is not therefore a practicable approach for dealing with immediate land management issues (IDC, 1993).

After a very fraught political process, the Commonwealth government passed the *Native Title Act 1993 (Cth)* (NTA 1993 (Cth)). The objects of the NTA 1993 (Cth) acknowledge the need to recognize and protect native title, but also affirm that certainty is required for other members of the Australian community affected by a native title determination. The resulting need to “balance a range of considerations, while promoting an effective and efficient system” (Australian Law Reform Commission, 2015) frames the legislative framework.

In very broad overview, the *Native Title Act 1993* does three things: establishes a mechanism for determining (or recognizing) native title claims; provides for the validation of past acts and intermediate period acts which would otherwise be invalidated because of the existence of native title; and provides a mechanism to validate future dealings affecting native title. Each of these is discussed below. However, the discussion necessarily belies the complexity of the legislation, which totals several hundred pages, and the very extensive body of case law developed around it.

3.4.1 Native Title Claims

3.4.1.1 “Native Title”—the Statutory Definition

The “starting point”⁴⁴ for any claim under the NTA 1993 (Cth) is the legislation itself, with common law principles relevant only “for whatever light they cast” on the legislation.⁴⁵ The Act defines native title as follows.

223(1) The expression *native title* or *native title rights and interests* means the communal, group, or individual rights and interests of [Aboriginal peoples](#) or [Torres Strait Islanders](#) in relation to [land](#) or [waters](#), where:

(a) the rights and [interests](#) are possessed under the traditional laws acknowledged, and the traditional customs observed, by the [Aboriginal peoples](#) or Torres Strait Islanders; and

(b) the [Aboriginal peoples](#) or [Torres Strait Islanders](#), by those laws and customs, have a connection with the [land](#) or [waters](#); and

(c) the rights and [interests](#) are recognised by the common law of Australia.

(2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and [interests](#).

As this definition is a statutory translation of Brennan J’s articulation of common law native title in *Mabo (No 2)*, many expected this section would allow for the evolution of the common law within the strictures of the Act (Stealein, 2009), with little to suggest that the High Court intended a “strict tradition-focused approach to content” or to continuity of laws and customs (Young, 2008, 248 and 270). Yet, a series of High Court decisions relating to contested native title determinations did just that.

In *Yorta Yorta Aboriginal Community v Victoria*, the High Court interpreted s 223(1) as requiring native title claimants to prove continuity, from generation to generation, of pre-sovereignty traditional laws and customs through to the present day.⁴⁶ Proof of a continuous community was not sufficient. Unable to discharge this heavy burden of proof, the *Yorta Yorta* people’s native title claim was denied, with the application of this approach leading to several contested determinations in which the Federal Court has “denied any recognition of native title rights and interests in the same breath as acknowledging that the peoples before them are the same peoples that owned that land more than two hundred years ago” (Calma, 2009, 1).

In *Western Australia v Ward*,⁴⁷ the High Court interpreted s 223(1) to mean that the content of native title rights must also derive from traditional laws and customs. While it is possible on this approach for native title rights to include exclusive use and enjoyment, it can also lead to the particularization and fragmentation of native title rights and interests that more

⁴⁴ *Commonwealth v Yarmirr* (2001) 208 CLR 1

⁴⁵ *Western Australia v Ward* (2002) 213 CLR 1.

⁴⁶ *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

⁴⁷ *Western Australia v Ward* (2002) 213 CLR 1 (HCA).

closely resemble, in the Canadian context, Aboriginal rights. The “disaggregation” of native title rights and interests in this way (Edgeworth, 2016, 28) stands in contrast with conceptualisation of Aboriginal title recognized in Canada, where communal title gives rise to the right of possession, of both the surface and the subsurface.

However, since 2005, shifting approaches to the evidentiary requirements to prove exclusive possession, use and enjoyment—from requiring evidence of acknowledgment and observance of traditional laws and customs controlling access, to recognition of spiritual sanctions as a means of control and rejection of the need for actual control or exclusion of non-Indigenous people given practical considerations⁴⁸—have led to the majority of litigated and consent determinations providing for at least some rights of exclusive possession to land (Bartlett, 2020, 288-297). A relatively recent High Court decision,⁴⁹ centred on commercial offshore rights and questions of extinguishment, has offered another turning point in the narrow reductive approach adopted to defining native title rights (Brennan, 2015; Edgeworth, 2016; Young 2019; Bartlett, 2020), challenging the segmentation of rights to support a broader conceptualization of the native title rights and interests that edges closer to the ideas of “ownership” (Young, 2019).

3.4.1.2 Registration and Determination Process

The *NTA* establishes a legislative procedure for the registration and determination of native title claims.⁵⁰ The process begins when a person or persons, authorized by the group claiming native title according to their traditional laws and customs, files an application in the Federal Court seeking a determination recognizing them as native title holders (NTA 1993 (Cth), ss 61 and 62A). Generally speaking, if native title has been extinguished by a legislative or executive act, it cannot be claimed. However, recent amendments to the NTA 1993 (Cth) now allow historical extinguishment over areas of national and state park—which are often very significant areas for Indigenous communities (Tan, 2020)—to be disregarded.

A native title claim must satisfy a “registration test” before it can be registered (NTA 1993 (Cth), ss 190A and 190C). The National Native Title Tribunal (NNTT) summarizes the conditions of the test as follows:

- a sufficient description or a list of the persons in the native title claim group
- reasonable identification of the area claimed through a technical description and map
- a description of the native title rights and interests claimed, so that they can be readily identified;
- certification from a representative body⁵¹ or authorization, with or without conditions, by all the persons in the claim group

⁴⁸ *Banjima People v State of Western Australia* [2015] FCAFC 84.

⁴⁹ *Akiba v Commonwealth* (2013) 250 CLR 209.

⁵⁰ The NTA does not prevent common law actions seeking a declaration of native title or any other remedy.

⁵¹ Native Title Representative Bodies (NTRBs) or representative bodies (rep bodies) are organisations recognised and funded by the Commonwealth Government to perform a variety of functions under the NTA 1993 (Cth) including assisting native title holders apply for determinations, access and exercise their rights, negotiate agreements and bring notices given under the Act to the attention of the relevant people. See Appendix, Figure 4.

- a sufficient factual basis for the rights and interests claimed, including about the group's continued association with the area, their traditional laws and customs, and their continued holding of native title in accordance with those traditional laws and customs
- information about a traditional physical connection of one or more members of the group with the area

Satisfaction of registration, which is aimed at identifying claims with a “reasonable chance of success” (Bartlett, 2020, 254), is significant, as once a claim is registered on the Register of Native Title Claims, the claimants are entitled to exercise a range of rights in relation to the doing of future acts (discussed below).

Notice of an application for determination is given to a range of parties including governments, other registered and unregistered native title claimants and registered representative bodies in the claim area, holders of registered proprietary interests in the claim area and any other persons whose interests may be affected by the determination (NTA 1993 (Cth), ss 66 and 84). Parties who receive notice may become parties to the proceeding. The registered claim is then referred by the Federal Court for mediation⁵² to assist the parties in coming to an agreement as to whether native title exists and, if so, who holds the title, what the nature and extent of the native title right and interests are and how those rights and interests interact with other rights and interests in the claim area (NTA 1993 (Cth), ss 86 and 225). If an agreement is reached in the mediation process, the parties can apply to the Federal Court for a consent determination of native title. If no agreement is reached, the application is determined by the Federal Court at trial.

With the assistance of the Court's Registrars, who actively manage cases to mediate and facilitate the consensual resolution of claims, the goal is to avoid lengthy contested judicial proceedings (Moss, 2018). The overwhelming majority of native title determinations now occur by consent.⁵³ This is particularly so following an amendment to the NTA 1993 (Cth) in 2009 to allow the Federal Court to make an order that “gives effect to terms of the agreement that involve matters other than native title” (NTA 1993 (Cth), ss 87 and 87A). This allows courts to give effect to regional agreements similar to those used in Canada. When determinations occur by consent, the Federal Court retains a supervisory role, as it must “satisfy itself that it has jurisdiction to make an order in the terms sought, that all the statutory and other requirements have been met and that it is appropriate to make the order.”⁵⁴ While the court is not required to make its own inquiry into the merits of the applicant's claim to be satisfied that it is “supportable and in accordance with the law,”⁵⁵ the “scope of compromise” is limited by the court's supervision (Moss, 2018). If no agreement is reached, the application is determined by the Federal Court following a trial.

⁵² Initially, mediation fell within the roll of the NNTT however since 2009 the Federal Court has been assigned complete control of claims management, which includes mediation.

⁵³ To search the hundreds of consent determinations, see National Native Title Tribunal, Search Native Title Applications, Registration Decisions and Determinations: <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx>.

⁵⁴ *Ngalpil v Western Australia (Tjurabalan People)* [2001] FCA 1140 at [12].

⁵⁵ *Cox on behalf of the Yungngora People v Western Australia* [2007] FCA 588, para 3. See also *May v Western Australia* [2012] FCA 1333, para 13.

After a claim is determined, the native title rights and interests are communally held by the native title group, which nominates an organization known as a ‘Registered Native Title Body Corporate’ to manage these rights and interests and represent the group in relation to them (NTA 1993, ss 55-57). As of April 5, 2022, 554 determinations have been made under the NTA 1993 (Cth) by a court or other recognized body, of which 439 have been consent determinations and fifty-five have been litigated (National Native Title Tribunal, 2022b). Of the total determinations, 454 have found that native title exists in all or part of the determination area. There are currently 150 outstanding registered native title applications. (See Appendix, Figure 2).

3.4.2 Validation of “Past Acts” and “Intermediate Period Acts”

Mabo (No 2) confirmed that a myriad of legislative and executive acts undertaken by state/territory and Commonwealth governments since RDA 1975 (Cth) took effect were invalid. Responding to pressure from state governments, farmers and the mining industry to deliver certainty, the NTA 1993 (Cth) provides for the statutory validation of a range of “past acts” that would otherwise be invalid because of the existence of native title. “Past acts” are legislation passed before July 1, 1993 and any other act that took place before January 1, 1994 (NTA 1993 (Cth), s 228). Depending on the category of the past act, validation either extinguishes (fully or partially) or suspends native title rights and interests (NTA 1993 (Cth), s 15).

In 1998, the NTA 1993 (Cth) was amended to also allow the statutory validation of “intermediate period acts.” Intermediate period acts are non-legislative acts occurring between January 1, 1994 and December 23, 1996 (NTA 1993 (Cth), s 232A). These amendments were made after the 1996 *Wik Peoples v Queensland* decision of the High Court, in which the court held that pastoral leases—a type of lease that, despite its name, grants non-exclusive rights over Crown land for the limited purpose of grazing of stock and associated activities—extinguished native title only to the extent of inconsistency.⁵⁶ The amendments to validate intermediate period acts were justified on the basis that an incorrect assumption had been made that pastoral leases fully extinguished native title (Edgerton, 1988). However, the intermediate period act provisions extended well beyond pastoral leases, delivering additional “bucket loads of extinguishment” of native title (Bartlett, 1997).

The NTA 1993 (Cth) explicitly recognizes that the validation of past acts and intermediate period acts is inconsistent with protections afforded native title rights in the RDA 1975 (Cth). While the Act originally declared that “nothing with the Act affects the operation of the *Racial Discrimination Act 1975*” (NTA, s 7(1)), the validation of past acts was specifically noted as an exception. When the NTA 1993 (Cth) was amended to include intermediate period acts, s 7(1) was also amended to provide only that “ambiguous terms” within the NTA 1993 should be construed consistently with the RDA 1975 (Cth), and then only if the construction would remove the ambiguity (NTA 1993, s 7(1)). Compensation is payable, based on the compensation that would be payable if native title was instead “ordinary title” (meaning freehold title held in fee simple). Otherwise, no procedural or substantive rights accompany this validation, and this, in many instances, extinguishes native title.

⁵⁶ *Wik Peoples v The State of Queensland* (1996) 187 CLR 1 (HCA).

3.4.3 The “Future Acts” Process

A crucial part of the NTA 1993 (Cth) is the “future acts” process, as it defines the statutory procedural and substantive protections afforded native title holders in relation to future legislative and executive acts.

For the purposes of the future acts process, a “future act” is legislation made on or after July 1, 1993 and any otherwise valid act relating to a proposed activity or development that takes place on or after January 1, 1994 that “affects” native title (NTA 1993, s 233). An act affects native title “if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise” (NTA 1993, s 277). In the Canadian lexicon, the future acts equivalent comprises those acts that infringe on Indigenous land rights. Importantly, the rights contemplated by the future acts process are available to native title holders and registered native title claimants. Unlike Canadian law, provided a native title claim is registered, the same procedural and substantive protections are available to native title claimants and native title holders.

Compliance with the RDA 1975 (Cth) requires the future acts process to afford native title holders equality before the law. At a minimum, this means native title holders must have the same procedural and substantive protections as other property interests. In this regard, it is worth recognizing that it is generally only Crown dispositions to third parties relating to mining and petroleum exploitation that override ordinary title, and then only with significant exemptions to protect the ordinary title holders (Bartlett, 2020, 544). Otherwise, dispositions affecting ordinary title generally arise only in relation to public infrastructure or following the compulsory acquisition of the land (Bartlett, 2020, 544).

In relation to acts, a formal equality approach requires native title to have access to the same substantive and procedural rights accorded ordinary title holders in these circumstances. However, the substantive and procedural protections accorded in the future acts process must “correspond to the tenor and nature of native title” (Bartlett, 2020, 543). This extends beyond consideration of the rights accorded “ordinary titles” to recognize the communal nature of native title and its cultural and spiritual significance for present and future generations. As Noel Pearson, the Director of the Cape York Land Council eloquently put it (as quoted by Bartlett, 2020, 37):

... to compare Aboriginal rights to the rights of others not discriminated against in the past 200 years is not appropriate. So much has been lost that Aboriginal people are entitled to expect special protection for what remains. There needs to be a positive acknowledgement of different treatment of Aboriginal title which reflects the fact that Aboriginal culture is inseparable from the land to which Aboriginal title attaches. The loss or impairment of that title is not simply a loss of real estate, it is a loss of culture.

This accords with the approach adopted in the ALRA 1976 (Cth) and the core principles of the UNDRIP. It is also consistent with the Canadian approach and the special protections afforded through historical and modern treaties and s 35 of the *Constitution Act* 1982.

The preamble to the NTA 1993 (Cth) recognizes that native title holders' rights need to be "significantly supplemented," with future acts "only able to be validly done if, typically, they can also be done to freehold land, and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate." As originally enacted, the future acts process was aligned with this preambular aspiration. However, the *Native Title Amendment Act* 1998 (Cth) introduced a range of additional categories of future acts that are now to be validated in accordance with more limited procedural rights, and correspondingly diminished the right to negotiate. Indigenous people rejected these amendments (Tehan, 2003), which were criticized as inconsistent with the right of self-determination and free prior and informed consent by the United Nations Committee for the Elimination of Discrimination (1999, para 13).

3.4.3.1 Validation of Future Acts

To the extent that a future act affects native title, the future acts process validates that future act if it is covered by provisions of Division 3 of the Act, and invalid if not (NTA 1993 s 24AA(2)). First and foremost, a future act will be valid if the parties agree to it being done in accordance with a registered indigenous land use agreement (ILUA). Otherwise, the NTA 1993 (Cth) provides the following bases for validity:

- a. section 24FA (future acts where procedures indicate absence of native title)
- b. section 24GB (acts permitting primary production on non-exclusive agricultural or pastoral leases)
- c. section 24GD (acts permitting off-farm activities directly connected to primary production activities)
- d. section 24GE (granting of rights to third parties, etc. on non-exclusive agricultural or pastoral leases)
- e. section 24HA (management of water and airspace)
- f. section 24IA (acts involving renewals and extensions etc. of acts)
- fa. section 24JAA (public housing, etc.)
- g. section 24JA (acts involving reservations, leases, etc.)
- h. section 24KA (acts involving facilities for services to the public)
- i. section 24LA (low impact future acts)
- j. section 24MD (acts that pass the freehold test—subject to the right to negotiate)
- k. section 24NA (acts affecting offshore places)

The ordering of these subdivisions is important as, in general, the lower in the order the subdivision is found, the greater the “carefully graded” rights⁵⁷ accorded. In broad overview, the “higher listed” (Bartlett, 2020, 549) provisions apply a right of notice, comment and compensation, while those lower on the list provide for deeper consultation or negotiation. If an act fits within more than one of the subdivisions, only the subdivision higher in the hierarchy applies.

The result is a very complex codified array of rights relating to differing types of future acts. For the purposes of this article, the few such acts of potential relevance to the creation of an infrastructure corridor will be examined before turning to discuss the alternative means of validation through voluntary agreement in the form of IULAs.

3.4.3.2 Acts Involving Facilities for Services to the Public

Subdivision K allows for the construction and operation of a variety of onshore facilities “operated for the general public.” These facilities include roads, railways, gas pipelines, electricity transmission or distribution facilities, communications facilities and the like (NTA 1993 s 24KA(2)).

Subdivision K does not allow for compulsory acquisition of native title rights and interests. Rather, it only applies if native title holders are not prevented from having reasonable access to the land on which the facility is built (except when the thing is built or for health and safety) and relevant provisions are in place to preserve and protect areas or sights of traditional significance to Indigenous peoples (NTA 1993 s 24KA). If these conditions are not satisfied, then Subdivision M (discussed below) applies.

When the Subsection K validation provisions apply, native title holders and registered native title claimants whose interests are affected are entitled to the same procedural rights as they would have if they instead held “ordinary title” (meaning a freehold estate in fee simple) over the land concerned (NTA 1993 (Cth), s 24KA). What these procedural rights entail, even if notice is required, depends on the procedural rights available in the relevant jurisdiction to ordinary title holders. If the procedural rights allow matters to be considered, then those must include native title rights and interests (NTA 1993, s 24KA(7A)).

In relation to public infrastructure, the “non-extinguishment principle” applies, meaning that native title rights and interests are suspended to the extent of inconsistency resulting from the validation of the act (NTA 1993, 24KA(4)), and compensation is payable to native title on the assumption that they instead hold ordinary title (NTA 1993, ss 24KA(5) and 17(2)).

3.4.3.3 Acts Passing the Freehold Test

Subdivision M provides for the validation of future acts—whether legislative and non-legislative—that pass the “freehold test.” The freehold test “reflects the notion” (Bartlett, 2020, 581) that only those future acts that could be done over land, if the native title holder instead held “ordinary title” (or done in relation to water if they instead held ordinary title to the land surrounding the water) can be validated (NTA 1993 (Cth), s 24MB). The class of future acts that pass the freehold test is small, with Subdivision M applying only to acts

⁵⁷ *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, para 27.

relating to legislation, mining and petroleum development⁵⁸ and compulsory acquisitions. The procedural rights available under Subdivision M depend on the type of future act.

Legislative Acts

Legislative acts are validated under Subdivision M if the passing of the legislation applies in the same way to native title holders as it would if they instead held ordinary title, or if the effect of the legislative act does not place native title holders in more a disadvantageous position at law than they would be if they instead held ordinary title (NTA 1993 (Cth), s 24MA). So, for example, the passage of legislation that establishes an infrastructure corridor could fit within this provision if it allowed for the creation of a corridor on land in respect of which there is both native title rights and interests and ordinary title.

Compulsory Acquisition

When a compulsory acquisition of the whole or part of native title rights is validated under Subdivision M, the rights so acquired are extinguished if the whole or a part of any non-native title rights and interests are also acquired (NTA, 1993, s 24MD(2(a))). Recognizing the significance of this, extinguishment is conditioned on the requirement that the process of acquiring the interest does not cause native title holders any greater disadvantage than is caused to non-native title holders when their rights and interests are acquired (NTA, 1993, s 24MD(2(ba)) and (3)). It is also possible that native title may be surrendered and extinguished as part of the negotiating process.

The procedural rights that accompany a compulsory acquisition under this subdivision depend on whether the compulsory acquisition is for the benefit of government or for the benefit of persons other than the government. In both cases, registered claimants and native title holders are entitled to the same procedural rights relating to notice, objection and consideration accorded the holder of ordinary title under the relevant legislation (NTA 1993, s 24MD(6A)). If, however, the compulsory acquisition is for the purpose of conferring rights on persons other than government, notice must be given providing any registered claimant or native title holder the opportunity to object within a two-month period (NTA 1993, s24MD(6B)). If there is an objection, the government must consult with the objectors on ways to minimize the act's impact on registered native title rights and interests and, if relevant, on any access to the land or waters or the way anything authorized by the Act might be done (NTA 1993, s24MD(6B)(e)). If the objection is not withdrawn within eight months (extended from a much shorter two months by the *Native Title Legislation Amendment Act 2021*), then the relevant government authority must ensure the objection is heard by an independent person or body. In hearing the objection, the person or body is then empowered to make a determination upholding the objection or allowing the act to be done on specified conditions. The determination must then be complied with "unless" the relevant minister responsible for Indigenous affairs is consulted, the consultation is taken into account, and it is "in the interests" (which includes the social

⁵⁸ Minerals and petroleum resources are vested in the various states by legislation. To the extent it affects native title rights and interests, this state legislation is validated under the past acts process. However, the content of native title, which derives from traditional laws and customs, has not been found to include rights to the resource. See for example: *Banjima People v Western Australia* (No 2) (2013) 305 ALR 1 relating to geothermal legislation Western Australia.

and economic benefits and the interests of the relevant region or locality) of the relevant jurisdiction not to comply (NTA 1993, s24MD(6B)(g)).

These additional rights are substantial in that they allow for an eight-month period of consultations to take place and, failing resolution, provide an opportunity for registered native title claimants and native title holders to have their objections heard and methods of minimizing adverse impacts discussed. However, even after an independent process, a determination may be overridden in the “interests” of others. Perhaps even more surprisingly, in *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)*,⁵⁹ the Full Federal Court made the very surprising decision that non-compliance with the s 24MB(6B) procedure does not invalidate a future act. This finding, of course, significantly undermines the value of these additional procedural provisions (Bartlett, 2019).

Compensation is payable to native title holders, who may request such compensation be made in anything other than money, in which case the person providing the compensation must negotiate in good faith in relation to the request (NTA, 1993, s 24MD(2)(d)). This may include, for example, other land.

Mining Infrastructure

Subdivision M treats the grant of a “right to mine” for the sole purpose of constructing an “infrastructure facility” associated with mining—which includes linear infrastructure such as roads, railways and pipelines (NTA 1993, s 253)—in the same way as a compulsory acquisition for the benefit of persons other than the government discussed above. However, the Federal Court has held that the grant of a licence to carry gas many hundreds of kilometres from the gas well to consumers is not the creation of a “right to mine” within the meaning of the NTA 1993 (Cth).⁶⁰ Although the court was considering the unamended version of the future acts process, this reasoning presumably also applies to major transportation facilities such as railroads or pipelines do not fit within this provision, meaning instead the right to negotiate discussed below applies.

Mining Dispositions and the Right to Negotiate

The validation of a future act that involves the creation of a “right to mine” under Subdivision M attracts the strongest procedural right available in the future act regime—the right to negotiate.⁶¹ The right to negotiate allows registered native title claimants and native title holders the right to negotiate with governments and proponents about the terms on which they will provide consent for a proposed future act to proceed. When the right to negotiate is engaged, all “negotiation parties” must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to either the doing of the act or the doing of the act subject to conditions to be complied with by any of the parties (s 31(1)(b)). A very significant amount of litigation has been directed at what the duty to negotiate in good faith entails, with the Federal Court focusing on the overall conduct of the parties

⁵⁹ [2018] FCAFC 8 (leave to appeal to the High Court denied).

⁶⁰ *Smith v Tenneco Energy Queensland Pty Ltd* (1996) 66 FCR 1.

⁶¹ A future act that does not involve a major disturbance to any land or waters and is unlikely to interfere directly with the community or social activities of the relevant native title holders or with sites of particular traditional significance may instead attract what the NTA 1993 (Cth) calls “the expedited procedure.”

to ascertain whether a subjective intention exists to seek to reach an agreement (Burnside, 2009; Bartlett, 2020, 618-625).⁶² There is no limitation on the type of conditions the negotiations can contemplate. The NTA 1993 does however specifically contemplate the possibility of including a condition that entitles native title parties to payments by reference to profits made, income derived or any substance produced by the grantee party as a result of doing anything in relation to the land or water concerned, irrespective of whether other landowners would be so entitled (NTA, s 33(1)).

The right to negotiate is not a veto. If an agreement cannot be reached, an arbitral body makes a determination whether or not an act may be done, and if so on what conditions (NTA 1993, s35(1)). In making such a determination, several specified factors must be taken into account that serve to protect native title rights and interests while also “recognizing the public interest in the grant of mining leases and the ongoing development of the mining industry”⁶³ (NTA 1993, s 39(1)). In making a determination, the Tribunal cannot set conditions that allow for profit sharing, meaning that such a condition can only be acquired through negotiations (NTA 1993, s 38(2)). The responsible minister may still override an arbitral body determination when it is in the national, state or territorial interest (NTA 1993, s 42).

Since the NTA 1993 took effect, many determinations allowing future acts to be done, on specified conditions, have been made.⁶⁴ It took fifteen years for the first determination to be made that an act must not be done, and three decades later there are only three such examples.⁶⁵ Nevertheless, rather than resorting to arbitration, the Australian Minerals Councils recently indicated that negotiated agreements are “widely used across exploration and minerals activities to establish terms of land access, including cultural heritage management and environmental commitments, as well as financial and non-financial benefits between minerals proponents and Traditional Owners” (Senate Legal and Constitutional Affairs Legislation Committee, 2020, 40 quoting Australian Minerals Council Submission). However, the threat of determination by the arbitral body, which hangs over the right to negotiate process, means that it is wrong to assume s 31 agreements lead to beneficial outcomes for Indigenous interests (Langton and Palmer, 2003, 8). So too does the statutory constraint on the arbitral body, including setting a condition relating to profit sharing.

As is the case with mining infrastructure, discussed above, a future act granting approval for a major transportation facility, such as a pipeline transporting oil or gas long distances, would not be considered a “right to mine” to come within the right to negotiate provisions.

⁶² *Strickland v Minister for Lands (WA)* (1998) 88 FCR 303; *Risk v Williamson* (1998) 155 ALR 393.

⁶³ *Re Koara People* (1996) 132 FLR 73, 99-100

⁶⁴ A searchable register of applications and determinations is available here: <http://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx>.

⁶⁵ See: *Weld Range Metals Limited/The State of Western Australia/Ike Simpson and Others on behalf of Wajarri Yamat* [2011] NNRR 172 (September 2011), *Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Others on behalf of Wiluna*, [2011] National Native Title Tribunal (24 March 2011); *Holocene Pty Ltd/The State of Western Australia/Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)* [2009] National Native Title Tribunal Australia 49 (27 May 2009).

3.4.4 Indigenous Land Use Agreements—ILUAs

As is evident from the discussion above, the bulk of the provisions relating to future acts in the NTA 1993 (Cth) focus on the codification of procedural rights to facilitate validation. However, at the behest of Aboriginal negotiators interested in the Canadian experience, the Act made general reference to the making of agreements on a regional or local basis (Langton and Palmer, 2003). The 1998 amendments to the future acts process expanded on the general provision to introduce Indigenous Land Use Agreements (ILUAs) into the Act and “facilitate the negotiation of voluntary but binding agreements as an alternative to the more formal native title machinery” (Howard, 1997). At the time, the complexity of the NTA 1993 (Cth) had already led to growing interest in finding ways to achieve “mutually beneficial, negotiated agreements” without “contentious litigation” (Smith, 1998, 1).

Any future act done in accordance with an ILUA is valid (NTA 1993 (Cth), s 24EB). ILUAs may be negotiated between a native title group, government parties and “others” to allow for, and condition, the doing of one or more future acts and the use and management of land and waters. Who may, and must, be a party to the agreement and what type of matters may be covered depends on whether the ILUA is a body corporate agreement (NTA 1993, ss 24BA-24BI), an area agreement (NTA 1993, ss 24CA-24CL) or an alternative procedure agreement (NTA 1993, ss 24DA-24DM).

Body corporate agreements may be negotiated only when the entire area covered by the ILUA is subject to one or more native title determinations and all the registered native title bodies corporate, representing native title holders, must be parties to the ILUA. (NTA 1993, ss 24BC and 24BD). If the agreement makes provision for the extinguishment of native title rights and interests by surrendering them to the Commonwealth, a state or a territory, the Commonwealth, state or territory must be a party to the agreement; otherwise, it may be a party to the agreement but need not be. Any other person or persons may be parties to the body corporate agreements.

Area and alternative area agreements, meanwhile, allow for ILUAs to be agreed to over areas where a native title determination or determinations have not yet been made over the entire area (i.e.: when a body corporate agreement cannot be made) (NTA 1993, ss 24CC and 24DD). This allows registered native title claimants to enter into these agreements. However, as such agreements bind all members of the native title group, “all persons in the native title group ... must be parties to the agreement” (NTA 1993, s 24CD(1)). Recent amendments responding to litigation relating to this requirement⁶⁶ now allow it to be satisfied if a majority of the persons who comprise the registered native title claimant are parties to the agreement” (NTA 1993, s 24CD(2A)). This helps address potential concerns around “negotiating with the wrong, or not all appropriate, native title holders” and the proper authorization of ILUAs (Howard-Wagner and Maguire, 2010, 74). Critics argue, however, that resort to majority consensus undermines traditional decision-making processes in the name of efficiencies and, to the extent that ILUAs contemplate extinguishment, perpetuates the continuation of colonial dispossession (Young, 2017). As with body corporate agreements, if an area agreement contemplates the surrender of native title rights and interests, the relevant government must be a party to the agreement. Otherwise, any other person or persons may be parties to the agreement.

⁶⁶ *McGlade v Native Title Registrar* [2017] FCAFC 10.

The scope of ILUAs is potentially very wide. A body corporate agreement may be given for any consideration and may be subject to any conditions agreed by the parties (NTA 1993 (Cth), s 24BE). An area agreement, meanwhile, must be about one or more of the following matters in relation to the relevant area (NTA 1993 (Cth), s 24CB):

- the doing, or the doing subject to conditions (which may be about procedural matters), of particular future acts
- particular future acts (other than intermediate period acts) that have already been done;
- withdrawing, amending, varying or doing any other thing in relation to an application for determination of native title or compensation for native title
- the relationship between native title rights and interests and other rights and interests in the area, and the manner of exercise of any native title rights and interests or other rights and interests in relation to the area
- extinguishing native title rights and interests by surrender of those rights and interests to the Commonwealth, a state or a territory
- providing a framework for the making of other agreements about matters relating to native title rights and interests
- compensation for any past act, intermediate period act or future act
- any other matter concerning native title rights and interests in relation to the area

Alternative area agreements can include the same matters as an area agreement except for extinguishing native title rights and interests (NTA 1993, s 24DB).

All ILUAs must be registered on the Register of Indigenous Land Use Agreements. While registered, an ILUA takes effect according to its terms as if “it were a contract among the parties to the agreement” (s 24E(1)). More than this, once registered an ILUA is also binding “on all persons” holding native title in relation to the area covered by the agreement (s 24E(1)). This special binding nature of ILUAs distinguish them from traditional contracts regulated by the common law, such as benefit-sharing agreements in the Canadian context. While this allows for ILUAs to deliver security of title to non-native title parties, that potential native title claimants are bound by such agreements does raise concerns. These concerns are purportedly addressed through notice and objection procedures established for area agreements and alternative procedures agreements prior to registration, at least to the extent that any party with a native title interest is not bound “in the absence of notice and an opportunity to challenge registration” (NTA 1993, ss 24CI, 202(8), 24CL(3)-(4)). Also, the notice and objections process does not address significant concerns relating to intergenerational equity, given that ILUAs are enforceable against successors in title and may have no fixed term (Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Fund Second Interim Report into Indigenous Land Use Agreements, 2001, 17; Howard-Wagner and Maguire, 2010, 81).

Notably, the ‘bindingness’ of an ILUA is not extended in the same way to other non-native title-holding persons in the area who are not parties to the agreement person (NTA 1993, s 24CL(2)). With the normal common law rules of contract applying, this means that indemnities and guarantees must be included to ensure that subcontractors, joint venturers

and successors in title are bound by the contract (Sheehan and Mascher, 1998, 310). For this reason, Indigenous groups did propose ILUAs be given the force of statutory effect, although the proposal was rejected by government (Sheehan and Mascher, 1998, 310). Instead, the NTA 1993 (Cth) provides that if the Commonwealth, a state or a territory is a party to a registered ILUA, “this Act does not prevent the Commonwealth, the state or the territory [from] doing any legislative or other act to give effect to any of its obligations under the agreement” (NTA 1993, 24EA(3)).

As of January 1, 2022, there are 1,400 registered ILUAs covering a total area on land of 2,679,502 sq km (National Native Title Tribunal, 2022). In the resource rich states of Queensland alone, 871 registered ILUAs cover a total of 876,540 square kilometres of land, representing 50.7 per cent of the state. In Western Australia, 199 registered ILUAs cover a total of 929,963 square kilometres, totalling 36.8 per cent of land in the state and 34,044 square kilometres of sea (see Appendix, Figure 3 for a map of registered ILUAs).

PART IV: LINEAR INFRASTRUCTURE PROJECT/CORRIDOR CASE STUDIES

In Australia, when a linear infrastructure project and/or infrastructure corridor for infrastructure is proposed, it is first necessary to consider whether Indigenous land rights and interests may be affected by the authorization of the project. This requires consideration of whether there is any applicable land rights legislation in the jurisdiction and whether any land rights recognized under that legislation will be affected. If a linear infrastructure project or infrastructure corridor passes through the Northern Territories, for example, it is necessary to consider whether it will affect any Aboriginal land held by a land trust under the ALRA 1976 (Cth). If so, consent must be sought from the traditional Aboriginal owners for the project to proceed through that land. Otherwise, it is necessary to determine whether native title rights and interests or registered native title claims might be affected by the doing of an otherwise valid act under this NTA 1993 (Cth). It is also necessary to determine whether native title rights and interests have been wholly or partially extinguished by an act that occurred prior to the RDA (Cth) 1976 taking effect or through the validation of “past acts” or “intermediate period acts” under the NTA 1993 (Cth). If a “future act” will affect a registered native title claim or determined native title, it must be validated in accordance with the procedures in the NTA 1993 (Cth) to proceed. Under the NTA 1993 (Cth), it is always possible to validate a future act if it is undertaken in accordance with an ILUA.

The four case studies below provide examples of the different processes and emphasize the important role that voluntary ILUAs now play in Australia.

4.1 DARWIN TO ALICE RAIL LINK: ALRA 1976 (CTH) AND NTA 1993 (CTH)

The Darwin to Alice Rail Link is a 1,1420 railway in Australia’s Northern Territory. First envisaged in 1911 when the Northern Territory was created, but not completed until 2003, this railway connects the centre of Australia to a deep-water port in Darwin, creating a freight gateway to Asia, and completes the connection of the south-to-north

transcontinental railway in Australia. The Darwin to Alice Rail Link crosses through the regions of two land councils, and eleven Aboriginal land trust areas held under the provisions of the ALRA 1976 (Cth). It also crossed twenty-seven pastoral leases (which cover approximately 80 per cent of the land) and several stock routes and areas of vacant Crown land, with much of this land at the time subject to registered native title claims under the NTA 1993 (Cth) (Agreements, Treaties and Negotiated Settlements, 2003). To be built, the railway required a 100-metre-wide corridor of land and access to a 400-metre-wide construction corridor (Agreements, Treaties and Negotiated Settlements, 2003). The Northern Territory intended to grant ownership of the railway land to a consortium to build and run the railway.

As both the ALRA 1976 (Cth) and the NTA 1993 (Cth) had to be complied with, extensive negotiations preceded construction. As almost 20 per cent of the land required for the railway was held by Aboriginal land trusts under the ALRA 1976 (Cth), the Northern Territory Government had to enter into agreement with these trusts before it could acquire any land for the railway corridor. Other than with respect to mining dispositions, traditional Aboriginal owners have an absolute veto over the doing of anything on their land. The ALRA 1976 (Cth) prohibits a government from compulsorily acquiring their land and it also prohibits the land from being alienated. In order for the Darwin to Alice Rail Link to proceed, therefore, the Northern Territory Government negotiated long-term leases over the land on terms and conditions determined by the Land Councils at the direction of the traditional Aboriginal owners of the land pursuant to the eleven land trusts. In relation to the registered native title claims under the NTA 1993 (Cth), this project proceeded in accordance with the procedures in place prior to the 1988 amendments. This required the Northern Territory government to issue notices of “proposed acquisition,” which triggered the six-month right to negotiate process in accordance with the future act process in place at the time. Negotiations then commenced between the land councils and the Northern Territory Government and their agent the AustralAsia Railway Corporation (a company owned by the Northern Territory and South Australia governments). The negotiations resulted in a framework agreement, upon which to build a final agreement in accordance with the precursor to the ILUA provisions, inserted by amendment the following year. The framework agreement required an assessment to be undertaken of the proposed impact of the railway “upon Aboriginal communities and their way of life” (Agreements, Treaties and Negotiated Settlements, 2003).

The key outcomes of the Final Agreement included: (Agreements, Treaties and Negotiated Settlements, 2003):

- long-term leases for railway purposes, rather than the compulsory acquisition and extinguishment of native title rights and interests to the land
- agreement that the works would be carried out in a manner that minimized or ameliorated impacts identified by the railway impact assessment
- input of the Indigenous communities into the design of the project to minimize impacts
- appropriate cross-cultural training
- employment of Indigenous liaison officers during the construction phase
- ongoing consultation with Indigenous communities and the land councils

- agreement that the chosen consortium to own, build and run the railway would address economic and social issues, including employment and training of Aboriginal people and opportunities for Aboriginal people to provide goods and services to the project
- compensation for leasehold acquisition, including land value and cultural and spiritual values
- funding for community development
- non-monetary compensation, including control of certain sacred sites for the Kungarakan and Warai people and joint management of the Umbrawarra Gorge for the Wagaman people

The agreements negotiated under the ALRA 1976 (Cth) and the NTA 1993 (Cth) meant that the Darwin to Alice Spring Rail Link proceeded with the consent of Indigenous communities holding land rights affected by the project. It is notable that the terms of this agreement go beyond the benefit-sharing arrangements commonly negotiated between proponents and Indigenous communities in Canada, with an active role for Indigenous communities into design and operation to minimize environmental impacts and control lands relating to significant sacred sites.

4.2 CALLIDE INFRASTRUCTURE CORRIDOR: NTA 1993 (CTH)

The Callide Infrastructure Corridor is a 44 kilometer long, 200 metre wide infrastructure corridor designed to provide for the “co-location of underground pipelines” to transport coal seam gas from Callide to liquefied natural gas (LNG) processing plants at the Port of Gladstone on the Queensland coast (Coordinator-General, 2012).

To facilitate the building of the corridor, a Callide Infrastructure Corridor State Development Area (CICSDA) was declared under Queensland’s *State Development and Public Works Organisation Act 1971* (Qld) (SDPWO Act 1971 (Qld)). This act is the governing legislation for the Office of the Coordinator-General (OCG), which oversees and coordinates all government approvals on large infrastructure projects in Queensland.⁶⁷ The SDPWO Act 1971 (Qld) empowers the OCG to declare certain areas “State Development Areas” (SDAs), to allow for the fast-tracking and coordination of approvals in areas where large-scale development is planned. The declaration of an SDA does not change the land tenure in the area, although the act does empower the OCG to compulsorily acquire land, with compensation payable under the *Acquisition of Land Act 1967* (Qld). For each SDA, a development scheme is prepared to define land use approval processes and assessment procedures along with other functions (Queensland Government, n.d).

The development scheme for the CICSDA (Coordinator-General, 2012) coordinates the negotiation of easements through privately owned land, but it does not provide for the compulsory acquisition of these rights. The development scheme also does not address any native title issues. As a result, the declaration of the CICSDA is not a future act within the meaning of the NTA 1993 (Cth), as it does not, on its own, allow for any future act to proceed. It does, however, establish an approval process to allow the construction and

⁶⁷ For example, an Environmental Impact Statement prepared under the SDPWO Act 1971 (Qld) is sufficient for the requirements of the *Environmental Protection Act 1994* (Qld) (SDPWO Act 1971 (Qld), s 50).

operation of pipelines within the corridor. Each of these approvals is a future act that will affect any native title rights and interests that fall within the corridor area. As the pipelines will not be facilities for a public purpose, the land is not being compulsorily acquired, and the courts have suggested a pipeline of this nature is not infrastructure associated with the right to mine, it is not clear whether any process within the NTA 1993 (Cth) provides for the validation of this type of a future act. In any event, in keeping with the trend towards the voluntary and consent-based process, the major gas pipelines that converge in the CICSDA are negotiating ILUAs with Indigenous communities to proceed.

One pipeline in the CICSDA is the Australia Pacific LNG Pipeline. This pipeline passes through areas that, at the time approval was sought, were “subject to registered claims, were previously subject to registered claims and areas that have never been subject to any claims” but where native title may exist (Australia Pacific LNG, 2010). To proceed, Australia Pacific LNG negotiated and registered ILUA for each of the areas where native title rights and interests may exist (Australia Pacific LNG, 2010). The National Native Title Tribunal ILUA Register records three area agreement ILUAs registered in relation to this pipeline.⁶⁸ Several other ILUAs related to natural gas pipelines converging in the CICSDA are similarly recorded on the ILUA register. Details of the terms and conditions are not provided in the abstracts recorded in the register.

4.3 THE ORD RIVER IRRIGATION EXPANSION: NTA 1993 (CTH)

The Ord River irrigation scheme (Ord Stage 1) was implemented in the 1960s and 1970s and resulted in the damming of the Ord River to form Lake Kununurra and Lake Argyle and development of 14,000 hectares of farmland. In the 1990s, the Western Australian Government committed to expanding the scheme (Ord Stage 2) to cover an additional 65,000 hectares of land. The Miriwung Gajerrong hold native title over the area, with Western Australia having contested the original native title application, resulting in a long and contested process involving litigation up to the High Court⁶⁹ (Mascher, 2003) and the registration of two consent determinations, in 2003 and 2006. The Miriwung Gajerrong had experienced prior acts of dispossession because of the Ord Stage 1 development, with the High Court finding that their native title rights and interests were extinguished in relation to the Ord River dam, outlet structures, hydro-electric power station and access roads (Mascher, 2003, fn 3).

As the Western Australian government wished to secure a comprehensive agreement over the area to allow flexibility as to land uses into the future, it entered initiated negotiations with the Miriwung Gajerrong Aboriginal Corporation in 2003.⁷⁰ The Ord Final Agreement ILUA was registered on the NNTT Register in August 2006. One of the largest and most complex ILUAs negotiated in Australia, the Agreement validates and provides compensation for the original Ord River Scheme and the development of Ord Stage 2. It does this by allowing for the extinguishment or suspension of native title over the

⁶⁸ QI2011/040 Australia Pacific LNG Pty Limited Wulli Djaku-nde and Jangerie Jangerie ILUA; QI2011/025 - Australia Pacific LNG and Iman People ILUA; QI2010/042 - Port Curtis Coral Coast and Australia Pacific LNG Pty Limited ILUA.

⁶⁹ Ward

⁷⁰ Several private parties, including pastoral leases are also parties to the ILUA but the Miriwung Gajerrong peoples and the State of Western Australia are the main parties to the agreement (Quicke, Dockery and Hoath, 2017, 51)

65,000 hectares of land, in exchange for the transfer of freehold land and funding. Bartlett summarizes the key provisions as follows (2020, 703):

- operating funds of \$1 million per annum for ten years for the Miriuwung and Gajerrong Aboriginal Corporations
- payment to an investment trust of \$5 million initially, then \$1 million per annum over nine years, with 50 per cent of the surplus to be retained and 50 per cent for community ventures
- the Ord Enhancement Scheme provided with \$11.195 million over four years to develop partnerships to address Aboriginal social and economic issues
- five per cent of irrigated farmland and town land released for housing and industrial development
- freehold title to 50,000 hectares, including community living areas
- freehold title to 150,000 hectares of conservation parks with leaseback to the Department of Conservation and Land Management with provision for joint management
- provision for employment and business opportunities in the development of the Ord River Scheme, with one-half of park jobs to be reserved for Miriuwung and Gajerrong peoples.

As with the Darwin to Alice Spring Rail Link ILUA, this agreement goes beyond a more traditional benefit sharing agreement, allowing for the transfer of land and creation of significant conservation areas, in which the Miriuwung and Gajerrong peoples play a joint management role. The significant area of native title land surrendered in return of course represents a very major compromise from the Miriuwung and Gajerrong peoples in return. And gaps and challenges in the implementation of the ILUA have emerged in the succeeding years (Quicke, Dockery and Hoath, 2017).

4.4 THE NARRABRI GAS PROJECT

The Narrabri Gas Project involves the production of coal seam gas from up to 850 wells connected into processing facilities. Located in the Pilliga in New South Wales, the project area covers 95,000 hectares, of which operations will be undertaken on around 1,000 hectares of the 95,000-hectare Project area (Santos, n.d.). The Narrabri Gas Project would be authorized by a petroleum production lease issued by the New South Wales government.

The Project is located wholly within the area claimed by the Gomeroi People. The Gomeroi People's native title claim was registered on the Native Title Claims registered in 2012 (NNTT, 2022). The Gomeroi People and Santos have been formally negotiating since 2014 seeking to enter an ILUA in relation to this project. Absent an ILUA, as the Project involves the doing of a future act relating to a mining disposition, the right to negotiate process applies before it can be validated under the NTA 1993 (Cth). In May 2021, Santos filed future act determinations under the Act, at which point the parties had the obligation to negotiate in good faith for a minimum six-month period. In March 2022, Santos made an offer to the Gomeroi People seeking their consent, which was rejected on the basis that there was no satisfactory provision to protect the land, and particularly the waterways (Gomeroi People,

n.d.). The arbitral body—the NNTT—is now hearing the application from Santos to allow the future act to proceed. The Gomeroi People are arguing that Santos has not fulfilled its duty to consult in good faith, or to offer reasonable compensation but the Federal Court will also consider evidence of the spiritual and cultural significance of the surrounding forest and concerns relating to greenhouse gas emissions associated with the project (Gomeroi People, u.d.). The decision of the NNTT can be appealed to the Federal Court and, ultimately, the state minister may overrule a determination that the Project cannot proceed if it is in the national interest to do so.

4.5 OTHER RELEVANT LEGISLATION

There are several other pieces of state and commonwealth legislation that may be relevant to the approval of a large infrastructure project or an infrastructure corridor. Two types of relevant legislation warrant mention. First, both state and commonwealth have environmental impact assessment (EIA) legislation that may require the preparation of an environmental impact statement (EIS) and a formal impact assessment process. State and territory impact assessment processes are generally triggered when an act is likely to have a significant effect on the environment. The Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act 1999 (Cth)), meanwhile, regulates acts which are likely to significantly effect matters of ‘national environmental significance’. Whether or not these pieces of legislation are triggered depend not only on the scale of the project but the sensitivity of the receiving environment, consideration of which occurs at the specific project approval level. These processes, which may take several years, do not address Indigenous land rights specifically.

All Australian states and territories each have laws in place to that protect various of Indigenous heritage.⁷¹ Indigenous land rights and Indigenous heritage issues are very closely interrelated, meaning if agreements have been negotiated for the doing of a future act, the agreement will often make explicit protection for sites of particular cultural significance (O’Faircheallaigh, 2008). However, even if native title rights and interests has been legally extinguished, these sites remain protected by Indigenous heritage legislation. While the level of protection afforded by these pieces of legislation vary, in general terms, these Act establish registers, create site clearance and approval procedures for any person undertaking a development activity, and include offence provisions for unlawful interference. The Commonwealth government assumes responsibility for protecting Indigenous heritage places that are nationally or internationally significant or are situated on land owned or managed by the Commonwealth, through the EPBC Act 1999 (Cth) and the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth).

⁷¹ *Heritage Act* 2004 (ACT), *Heritage Act* 1977 (NSW), *Aboriginal Cultural Heritage Act* 2003 (Qld), *Torres Strait Islander Aboriginal Cultural Heritage Act* 2003 (Qld), *Aboriginal Heritage Act* 1988 (SA), *Aboriginal Relics Act* 1975 (Tas), *Aboriginal Heritage Act* 2006 (NSW), *Aboriginal Cultural Heritage Act* 2021 (WA), *Northern Territory Aboriginal Sacred Sites Act* 1989.

PART V: LESSONS FROM THE AUSTRALIAN EXPERIENCE FOR THE CANADIAN NORTHERN CORRIDOR PROPOSAL

The question that remains is whether the Australian experience offers any lessons for Canada, particularly in relation to moving the CNC proposal forward. Tentatively, the answer is yes.

Some might expect the lesson from the legislative approach adopted in Australia would be efficiency and certainty. Many decades on, however, claims remain to be resolved under the ALRA 1976 (Cth), and a significant number of registered native title claims await determination under the NTA 1993 (Cth). After a very litigious period, the shifting focus on mediation and agreement has increasingly produced consent determinations that is now allowing for consent determinations to become the norm.

In relation to the validation of past acts, and compromises on procedural rights afforded native title equality is compromised to subordinate native title rights and interests to those created by the settler state, the NTA 1993 (Cth) has been at time “quite cruel” and failed to come close to realizing the human rights of Indigenous peoples in Australia (Calma, 2009, 1). These are not lessons to take from the Australian experience. However, as the Australian system has “matured” (Attorney General’s Department, n.d), it is noteworthy that there is now a “renewed focus on settlement by agreement” (Bartlett, 2020, 42).

The standard of consent, except with respect to mining dispositions, has been in place for almost half a century under the ALRA 1976 (Cth). This does not mean nation nation-building linear infrastructure project cannot proceed, it means they may only proceed with the consent of the traditional Aboriginal owners. The NTA 1993 (Cth) does not come close to the standard of consent. Even the strongest procedural right in the Act—the right to negotiate—is not a veto. In this respect it may seem comparable to the duty to negotiate in Canadian law. However, the focus is negotiating in good faith to reach agreement, which offers a nuanced difference from the duty of consultation and accommodation. Perhaps more notably, however, is that even when less fulsome procedural rights are available, the introduction of ILUAs into the NTA 1993 (Cth) has shifted the focus away from resort to settler state imposed procedural rules to offer a “pathway to consent” which allows Indigenous communities to determine the terms and conditions upon which a future act may proceed. This takes a step towards allowing Indigenous communities to influence the outcome of decision-making processes affecting them, rather than merely being involved or having their views heard, in keeping with the principle of free prior informed consent in the UNDRIP.

There is, of course, significant reason to challenge the presumption that ILUAs are, indeed, “the holy grail of agreement-making” (Howard-Wagner and Maguire, 2010, 71). Commentators rightly point out that “the mere fact that an increasing number of agreements are being negotiated does not of itself guarantee equitable outcomes for Indigenous parties” (Langton and Palmer, 2003, 1). Several studies comparing ILUAs suggest that some deliver much stronger outcomes than others. Not surprisingly, a range of factors influences the outcome, (O’Neill, 2014/2015; O’Faircheallaigh, 2008; Howard-Wagner and Maguire, 2010; Howard-Wagner, 2010; Ritter, 2009). Key amongst these

factors is political power, with the availability of the future acts validation process consequentially impacting the freedom with which native title holders enter agreements (Craig, 2000, 444). And here, of course, the ALRA 1976 (Cth) offers an example of how that political power has completely shifted, operating from the standpoint of consent.

Of course, negotiated agreements—in the form of Indigenous Benefit Agreements (IBAs)—are also very familiar in the Canadian landscape. As Wright (2019) discusses in detail, the primary jurisprudential tool available to Indigenous nations when the Crown contemplates approving the doing of a future act that may affect Indigenous land rights and interests is the duty to consult and accommodate. The obligation to discharge this duty rest with the Crown, with the rules of the setter courts requiring consultation occurring on a spectrum at a depth dependant on the strength of the right and the severity of the potential effect. Even at the highest end of that spectrum, where proven Aboriginal title and rights allow for consent, those rights remain subject to the Crown’s “justifiable infringement” (Mascher, 2014; Wright, 2019). While not assigned a formal role within the duty to consult procedural processes—so in this respect not “‘process’ agreements” (Isaac and Hoestra, 2020, 249)—commentators suggest that IBAs already help fill governance gaps (McLean, 2020) and potentially support self-governance goals (Isaacs and Hoestra, 2020, 253). Scott strongly criticizes what she calls the “consent by contract” mode of governance “that attempts to define the social, political, ecological, and economic relations regarding the use of Indigenous lands solely through confidential bargaining and agreement-making between private extraction companies and First Nations, but in fact affords the state a key role in setting the terms” (2020, 272-273). As Issac and Hoestra point out, the existence of an IBA is often relevant to determining whether the procedural aspect of the Crown’s duty to consult has been satisfied and, generally “provide[s] a basis through which project support is granted by the Indigenous community” (2020, 249-250, 252). Beyond the duty to consult, several modern treaties do establish requirements for both consultation and the negotiation of benefits, which Issac and Hoestra say amounts to requiring an IBA (2020, 250).⁷²

The Australian experience with agreement-making does offer some response to this critique of IBAs. While governments are not always parties to an agreement, the Australian legislation recognizes a role for governments in the agreement-making process. Whether substantively different outcomes are in fact realized depends on several factors, but the legislation does contemplate conditions and compensation with a public rather than merely private dimension, and the potential for Indigenous nations to negotiate framework agreements to guide future decision-making within the area.

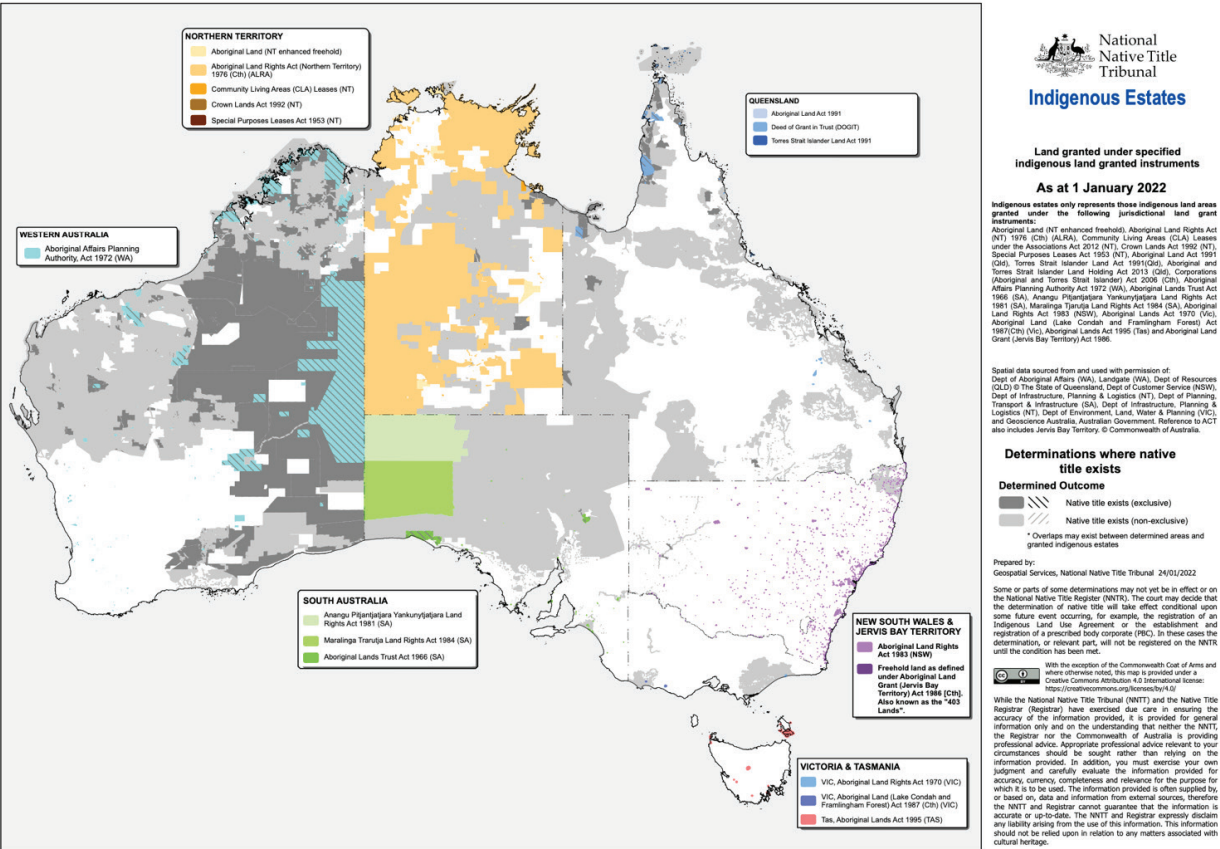
Further research, preferably led by Indigenous researchers, could usefully be undertaken to examine developing best practices in agreement-making, drawing on lessons learned through the negotiation of IBAs and ILUAs in Canada and Australia (O’Faircheallaigh, 2020) as well as agreements made under the ALRA 1976 (Cth) premised on the standard of consent. Research exploring the use of legal mechanisms to facilitate one or more

⁷² For example: Article 26 of the Nunavut Land Claims Agreement (Canada, 1993) requires an IBA to be finalized in most cases before a major development project may commence on Inuit-owned lands, with provisions for arbitration if agreement cannot be reached. Section 10 of the Inuvialuit Comprehensive Land Claim Agreement (Department of Indian Affairs and Northern Development, 1984) requires a proponent given approval to access resources underneath Inuvialuit land to enter into a participation agreement or again refer the matter to an Arbitration Board. For a discussion of similar provisions in other land claim agreements see (Issac and Hoestra, 2020, 250-251).

framework agreements with Indigenous communities along the corridor could also be usefully explored; for example, through an Indigenous-led regional impact assessment under the *Impact Assessment Act* 2019 (Wright, 2019; Noble, 2020). In the context of a major nation-building project such as the CNC, a framework agreement could guide development within the corridor going forward. There is, however, no way around the complexity involved with doing so, given the expanse of the project and the number of Indigenous communities whose title and rights may potentially be affected.

APPENDIX

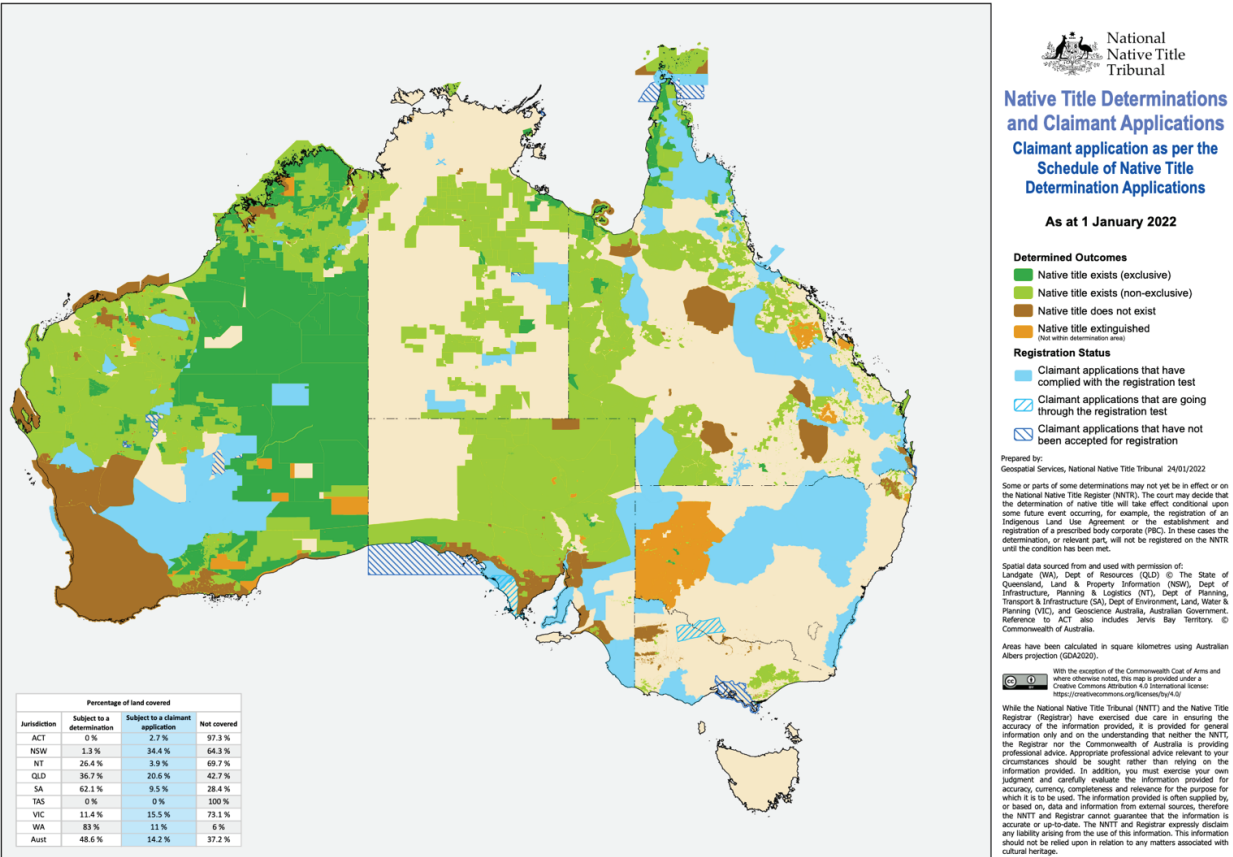
Figure 1—Indigenous Land Estates⁷³



Source: National Native Title Tribunal (2022)

⁷³ Image from National Native Title Tribunal, “Maps, National Maps, Indigenous Estates and Determinations,” accessed March 30, 2022 at http://www.nntt.gov.au/Maps/Indigenous_Estates_and_Determinations_All.pdf.

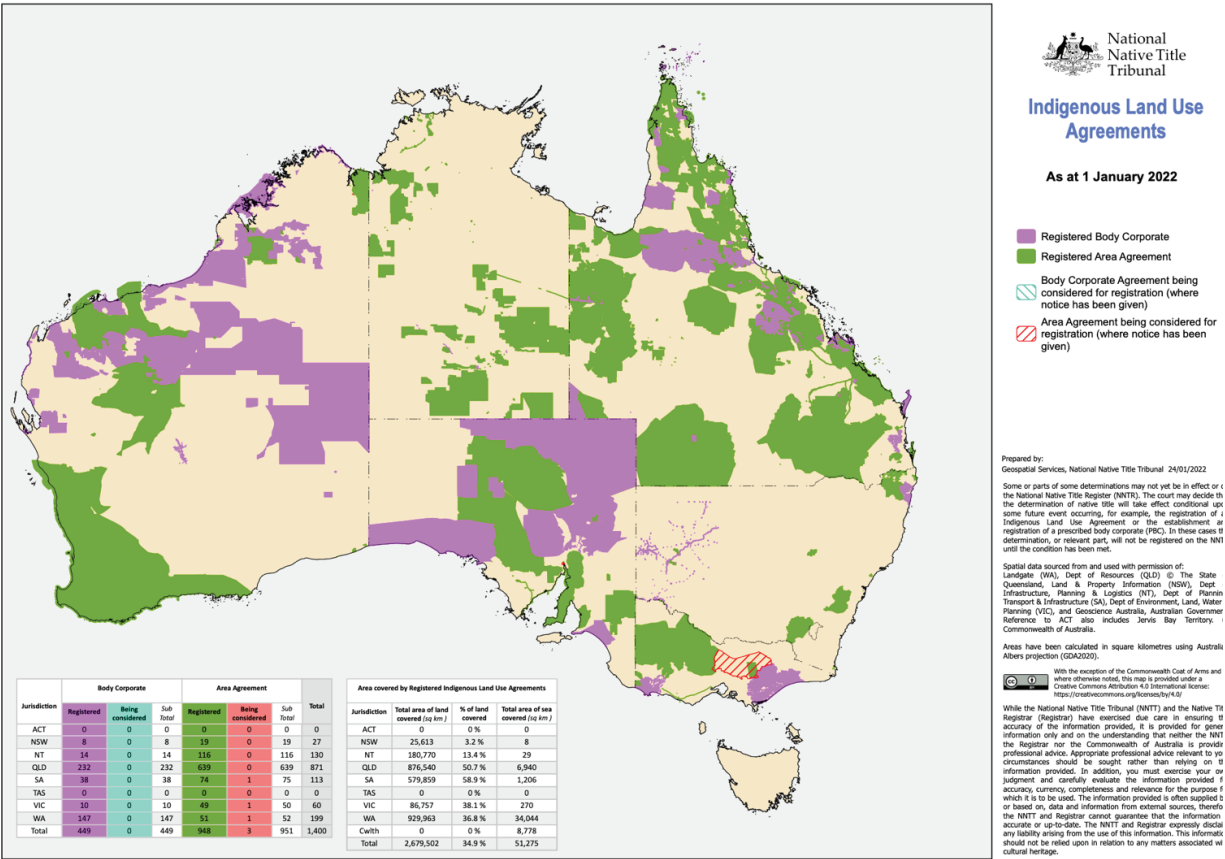
Figure 2—Native Title Determinations and Claimant Applications⁷⁴



Source: National Native Title Tribunal (2022)

⁷⁴ Image from National Native Title Tribunal, “Maps, National Maps, Native Title Determinations and Claimant Applications,” accessed March 30, 2022 at http://www.nntt.gov.au/Maps/Schedule_and_Determinations_map.pdf.

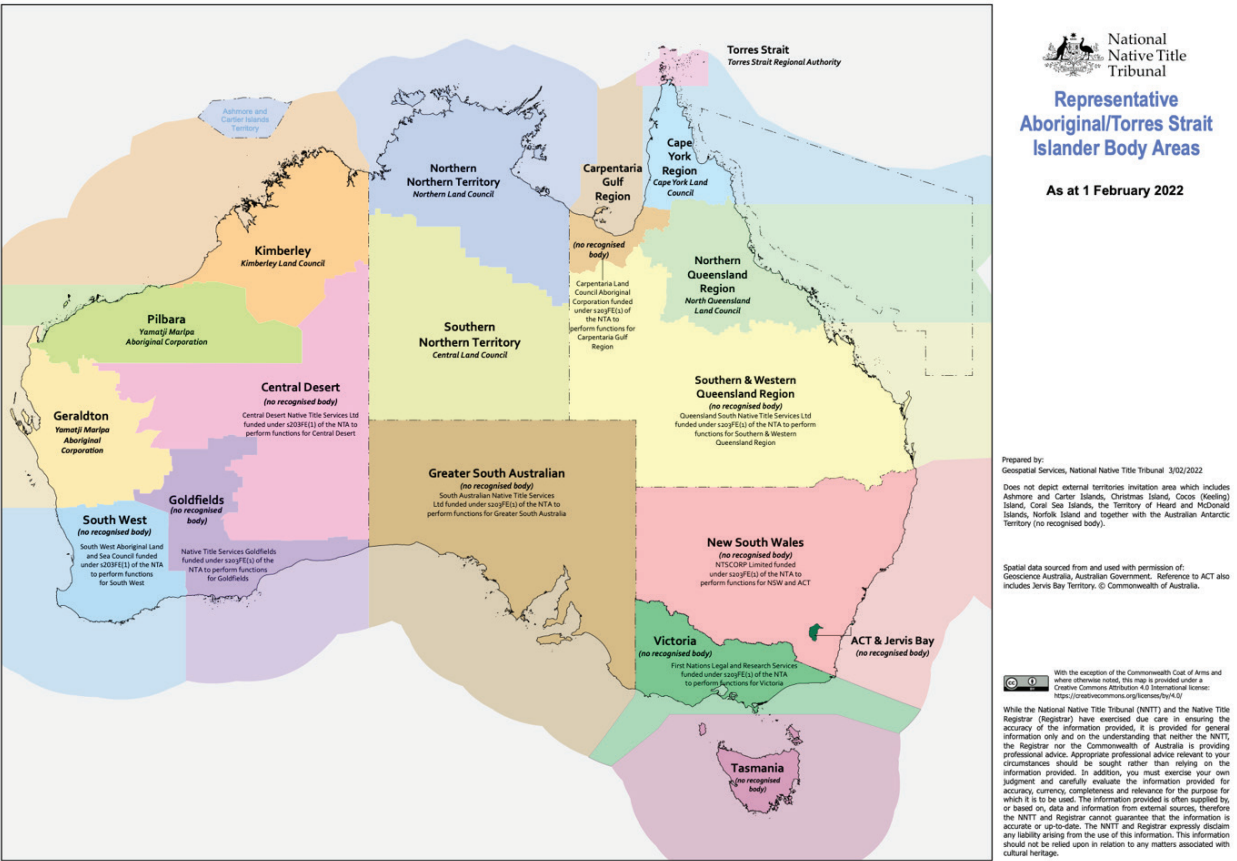
Figure 3—Indigenous Land Use Agreements⁷⁵



Source: National Native Title Tribunal (2022)

⁷⁵ Image from National Native Title Tribunal, “Maps, National Maps, ILUAs,” accessed March 30, 2022 at http://www.nntt.gov.au/Maps/ILUAs_map.pdf.

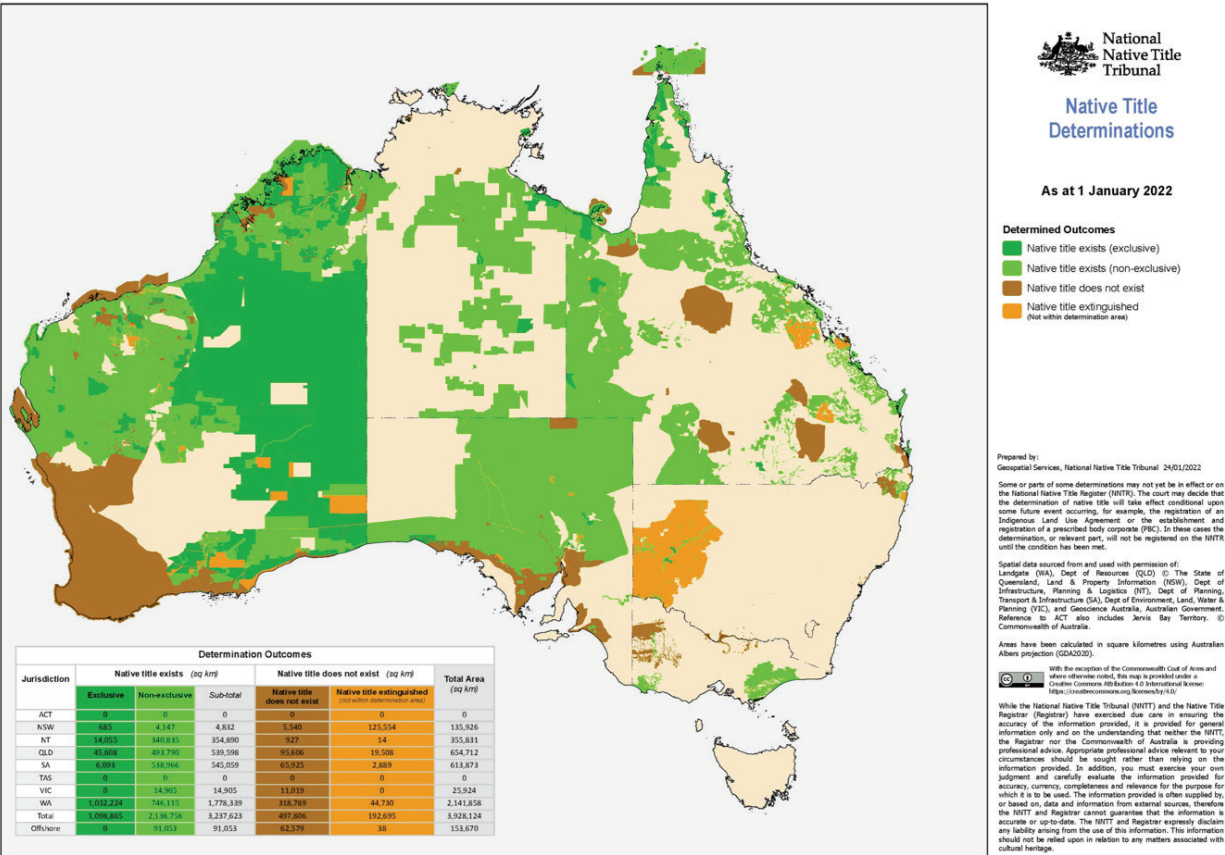
Figure 4—Representative Aboriginal/Torres Strait Islander Body Areas⁷⁶



Source: National Native Title Tribunal (2022)

⁷⁶ Image from National Native Title Tribunal, “Maps, National Maps, Representative Aboriginal and Torres Strait Islander Body areas,” accessed March 30, 2022 at <http://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx>.

Figure 5—Native Title Determinations⁷⁷



Source: National Native Title Tribunal (2022)

⁷⁷ Image from National Native Title Tribunal, “Maps, National Maps, Native Title Determinations and Claimant Applications,” accessed March 30, 2022 at http://www.nntt.gov.au/Maps/Schedule_and_Determinations_map.pdf.

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