**United Nations Seminar of the Expert Mechanism on the Rights of Indigenous Peoples**

**“Right to Land under the UN Declaration on the Rights of Indigenous Peoples: A Human Rights focus”**

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**Sean Brennan, ‘Legal Recognition of the Right of Aboriginal and Torres Strait Islander Peoples to Own and Control their Traditional Land, Territories and Resources in Australia’**

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Thank you Laila and it is an honour to be invited to participate in this seminar. I want to thank the members of the Expert Mechanism, Kate Fox and her colleagues in the secretariat, Kristen and Abigail for their welcome, and Frans and his colleagues at the Centre for Human Rights for hosting us. I also acknowledge Professor Megan Davis, member of the EMRIP, as it has been one of the great privileges of my life, as a non-Indigenous lawyer, to have worked with her on Indigenous legal issues and public law reform in Australia at the University of NSW over many years and to have been a first-hand witness to the tireless and inspiring leadership she has offered her people and our country. I am delighted to be in South Africa for the first time. And I am looking forward to learning an enormous amount from the people who will be contributing to this seminar over the next two days. (161)

**POWERPOINT 1**

I am going to focus on the legal vehicle for recognition of the rights of two Indigenous peoples in relation to traditional land, territories and resources – Aboriginal people and Torres Strait Islanders – that operates across the Australian federation and is known as ‘native title’. I will address at high level some key features: first, how do people in Australia regain legally recognised control of traditional land, the court-based process that is used, the legal thresholds for establishing a successful claim for native title recognition, an overview of outcomes the system has produced and reference to consent-based approaches to recognition. I then turn to the scope of rights if people succeed in regaining ownership or control. The final two features are the access and use of Indigenous land by non-Indigenous third parties, and compensation for past dispossession.

I will not dwell in history due to reasons of time. But it is important to acknowledge its consequences for the contemporary shape of Australian law and practice in this area. From the outset of British colonisation in 1788, public law and property law long denied the legal significance of prior occupation by Torres Strait Islander peoples in the far north back 4000 years and the prior occupation by Aboriginal people of the great mass of Australia back at least 65000 years. Practically it underpinned the development of the Australian state and its economy for 200 years.

From the late 1960s, Indigenous land rights began to receive statutory recognition and protection in different parts of the federation. Since the High Court decision in the *Mabo No 2 case* in 1992, Australian law has also recognised on a national basis the potential survival of pre-existing property rights based in Indigenous law and custom, under the labelof ‘native title’. A federal *Native Title Act* that commenced 25 years ago in 1994 regulates that scheme. I will emphasise native title in the time available, but bring in brief reference to statutory land rights and perhaps can expand on that during discussion time. (244)

**Regaining rights to own and control territory and resources**

***Process:*** Australia has a native title system characterised by a high degree of complexity and legalism, with one former High Court judge referring to the Native Title Act as a ‘jungle’. About 10-20 per cent of cases are resolved ***by litigation*** in the courts, including matters that raise untested legal issues. The remainder, taking their cue from the litigated cases, are resolved ***by agreements*** ratified in court – the chief parties in all cases being the Indigenous group seeking recognition and the relevant State or Territory (that is, sub-national) government and sometimes the federal government too. The period between initial lodgement of a claim and an outcome has often exceeded a decade and many senior traditional owners do not live to see the result of having put their case.

In terms of Article 27, the Federal Court (which has never seen an Indigenous judicial appointment) does function as an open tribunal with sufficient independence from government parties that it can pull them into line during the conduct of such proceedings. Court processes, however, can be technical and alienating for the traditional owners involved and impose narrower imperatives on the handling of claims than the holistic objectives that Indigenous groups may bring to the process of seeking recognition. Though inevitably legalistic, the courts have taken steps to adapt their processes to native title matters, including the hearing of evidence from traditional owners on or near their traditional country.

***Legal requirements of proof:***There are two main legal hurdles confronting groups seeking to prove native title. The first is to show that they are ‘the right people for country’ and have retained the necessary connection to their territory throughout the period since the British asserted sovereignty. From one perspective one could say, in terms of Article 27, that shows Australian law giving ‘due recognition to indigenous peoples’ laws and traditions’. Traditional law plays a significant role in this question, both in terms of establishing the right people and proving continuous connection through observance of Aboriginal or Islander law.

In truth it is more complicated. This law on continuous observance of traditional law has been shaped and applied by a judiciary made up of non-Indigenous judges and reflecting the sovereign power asserted by state institutions. They have brought to that task substantive rules of recognition that reflect non-Indigenous priorities rather than Indigenous legal norms or community aspirations.

Australian judge-made law requires the continuous observation of traditional law without substantial interruption and without regard to culpability of the state for such interruptions, for example through forced movement of peoples or suppression of culture in government and church institutions. It also draws boundaries around the evolution of traditional law under the pressure of colonisation that many find quite unrealistic and unfair. These reflect a sternly monistic rather than pluralistic conception of sovereignty on the part of the High Court of Australia.

These continuity requirements continue to rule out native title recognition for many groups and have been subjected to much criticism by Indigenous groups and legal commentators.

The second hurdle facing native title claimants is to show that their rights have not been lost due to the operation of the law of extinguishment. The law of extinguishment has been developed from scratch since 1992 by legislators and judges. It addresses the friction between pre-existing Indigenous rights and official action affecting the land taken by Parliament or governments. Extinguishment occurs when official action so impinges upon native title that the continuation of native title is held to be a legal impossibility. This legal subordination can result in the total legal annihilation of Indigenous property rights. Or in the case of partial extinguishment, it permanently compromises decision-making control over large swathes of Indigenous land, an issue relevant to Articles 26(2) and 32. These rules have an over-riding legal effect and therefore disregard entirely the continued observance of traditional law by a land-holding group. The High Court’s choices in developing this law have too readily departed from protections accorded to other property rights and too readily resulted in native title extinguishment rather than the alternative for example of co-existence and/or its temporary suppression. This likely reflects the problem of belated recognition and the retro-fitting of native title into a legal framework premised on a contrary assumption, the non-existence of traditional rights to land. Decisions of the High Court since 2013 have moderated the harshness of extinguishment law, but the earlier test cases remain a deep incursion into the potential of native title.

***Outcomes:*** This map shows that there have been some significant achievements since 1992 with about 375 positive determinations recognising native title covering about a third of the continental land mass. Some of that is held as strong-form, exclusive possession native title similar to ownership under the Western property law system, shown here in dark green. Most of it is a lesser set of non-exclusive rights, without decision-making control, shown here in light green. There is a striking disparity between population and land ownership: 79% of Indigenous people live in urban areas whereas 99% of this land is located in areas classified as ‘remote’. The land is also generally in arid areas where climatic factors and soil fertility meant that much of it was unwanted by non-Indigenous Australians after the first 200 years of colonisation.

***Consent-based recognition:*** The high legal barriers to recognition and the inflexibility of post-recognition management regimes can be alleviated by using agreement-making processes provided under the Native Title Act. The Act does support consent-based processes for achieving recognition of native title. The conduct of negotiations by government parties to resolve native title claims avoids the formality of court proceedings, though that process is usually less participative for traditional owners and there have been frequent complaints about the conduct of government respondents that may have an ultimate interest in maintaining a status quo of non-recognition for as long as possible. It is entirely up to governments whether they will prioritise agreement-making for the recognition of native title.

There are some very significant examples of this occurring. The long history of almost sole occupation by Aboriginal people and the relative absence of any competing interests in large areas of the arid interior of Australia have given State governments the confidence to negotiate recognition of exclusive possession native title over tens of thousands of square kilometres in remote areas, particularly in Western Australia. Sometimes, groups have been able to secure ore comprehensive settlements that include packages to enhance economic empowerment and support land-holding entities that would otherwise be hostage to the annual government budgeting process.

**Scope of legally recognised Indigenous property rights**

In characterising native title and defining its content, the High Court chose specificity over generality when deciding a crucial test case in 2002. Piecemeal specification has weakened the native title held by traditional owners in many situations, by facilitating its atomisation and fragmentation, making it more vulnerable to extinguishment. A more holistic conception of native title as a *right to land* was put to the court based on Canadian case law but rejected. This disparity with the legal treatment of non-Indigenous property ownership was ostensibly justified as being more respectful of the distinctive and dissimilar nature of traditional law rights. Again, the most recent cases have shown a moderating swing back towards framing rights in broad rather than narrow terms.

Native title is an exclusive possession right in about one third of successful cases. But even there, Australian law will not recognise subsurface rights to minerals including where there is evidence of traditional law access to ochres. Nor will it recognise qualified forms of exclusivity under traditional law offshore in sea country. One of the positive developments for Indigenous people in recent years is recognition that trading of resources (such as fish and other marine species) that is consistent with traditional law can result in the recognition of commercial native title rights.

Claimants who succeed in achieving legal recognition of their rights are entitled to practice traditional decision-making processes in managing their land or opt for agreed contemporary decision-making methods. They are required to establish a particular corporate legal vehicle to hold their native title which has been criticised by some as too inflexible. The lack of significant funding support for the many accountability and management obligations of these land-holding entities has been widely criticised. It threatens to undermine the potential for empowerment in native title recognition. For many groups, this sustained lack of policy interest in the period that follows the claims process imperils the realisation of the right to use their land and resources and to develop priorities and strategies for their development (Articles 26(2) and 32(1)). Those able to access an income stream, for example from national park access fees or mining activity on their land, are often better placed in this respect.

**Access and use by third parties**

The federal *Native Title Act* contains a detailed set of rules for access to and use of native title areas by miners and other third parties, known as the future act regime. If I stop for a moment and refer to the other legal mechanism in Australia, statutory land rights, you see that in the Northern Territory for example, Aboriginal people since 1978 have had a veto over mining and other development on their land. The principle of free, prior and informed consent referred to in Article 32(2) applies. Indigenous negotiators sought to have the same consent principle inserted in the federal native title legislation enacted after the *Mabo No 2* decision in 1992. But the Commonwealth government rejected that idea.

Instead the mechanisms designed to offer native title holders some legal safeguards in the face of proposed development on their land consist of procedural rights arranged in a spectrum. In the design of that spectrum, there is some relationship between the seriousness of the impact of the proposed development. But by no means can it be said that there is a precise correspondence between the two. For example, public works may only attract a right to notice and an opportunity to comment.

Mining leases and compulsory acquisitions require observance of the most demanding procedural rights on the spectrum: the so-called ‘right to negotiate’. This is a ‘stop the clock’ mechanism, in that development cannot proceed for between 6 and 12 months on major projects and proponents are required at least for a period of some months to engage in good faith negotiations with native title parties about the proposed development. In reality, given environmental and other approvals for large mining projects can take much longer, these requirements for a native title clearance are often accommodated as a parallel process as all the permissions necessary to proceed are gathered up by the proponent.

It is almost never the case that even high-impact projects will *legally require consent* from the native title holders.

There are elaborate procedures for agreement-making about future development. These can displace the legal rules I have described under the heading of the future act regime. Some very substantial benefit agreements have been concluded by mining companies with Aboriginal groups using the legal mechanisms provided under the Native Title Act.

But the important point to make is that they constitute voluntary alternatives. If proponents of development wish to insist on their legal rights to follow the development rules of the future act regime, then there is generally little that native title holders can do about that. In the area of mining history over the last 25 years shows that project proponents will get native title clearance on the grant of their mining lease. The specialist Tribunal that arbitrates disputes over the grant of mining leases *is* legally required to take account of the impact on native title rights, the way of life, culture and traditions of the people affected, their wishes and proposals, the development of their social and cultural structures, and their sacred sites and weigh them against a variety of other factors including the economic value of the project to its proponents and the nation. The mining approval will likely have various conditions to protect cultural heritage and so on attached. But since 1994 the Tribunal has only refused permission to mine three times in a period when thousands of mining and exploration tenements have been granted.

There was arguably a fundamental miscalculation in the design of the incentive structure for agreement-making in relation to mining projects, that has worked to the structural disadvantage of Indigenous people. The arbitral tribunal cannot attach a royalty or share-of-profits condition to approval for a grant. This, together with the near-certainty that proponents have of obtaining a grant if the matter goes to adjudication, has diminished the bargaining position of native title holders, in seeking to insist on informed consent and to determine strategies for the development or use of their land (Article 32).

**Compensation for dispossession**

In terms of Article 28 of the Declaration, the High Court in 2019 upheld a significant award for the cultural harm suffered by an Aboriginal group as a consequence of past acts of extinguishment inflicted on their native title. But the availability of redress for the extinguishment of native title is highly restrictive and hemmed in by the questionable economics and practical difficulties of recovering such compensation under the Native Title Act.

There is no compensation under the common law of Australia for the extinguishment of native title. That was the finding of a majority four out of seven judges in *Mabo No 2* in 1992. The incorporation of the CERD Convention in Australian law through the Racial Discrimination Act altered the common law by statute as from 1975 – making many acts of extinguishment thereafter into acts of unlawful discrimination against Indigenous property holders. The Native Title Act in 1993 set out procedures for recovering just terms compensation in these circumstances.

It took more than 20 years for the first case about quantifying just terms compensation for native title extinguishment, involving the Ngaliwurru and Nungali peoples, to come in front of a judge and the case then went through two levels of appeal, concluding in March 2019. He determined a sum for economic loss based on market valuation of the land involved and added a substantial amount for interest for the period between the loss and the payment of compensation.

Coming to the final issue of compensation for cultural harm suffered as a result of dispossession, judges at all levels of the case acknowledged the difficutly of putting a dollar amount on such a thing. The High Court stressed the ‘essentially spiritual’ nature of Aboriginal connection to land and the corresponding gravity of the harms suffered when governments take land, disrespect its significance and damage sites. The connection of the Ngaliwurru and Nungali to their land was described as broad, deep and unique. The pain experienced due to desecration of sites and the failed sense of responsibility to protect traditional country from harm was said to be ongoing. The loss could not be compartmentalised, because the Dreamings – the creation stories that confer significance upon the land – were pervasive: ‘the people, the ancestral spirits, the land and everything on it are “organic parts of one indissoluble whole”’. In terms of Article 29, it appears the Australian courts in this case sought to enumerate just compensation for non-economic loss in a way that respected traditional law and its importance.

However if governments force people to litigate future compensation cases, it may well be uneconomic to seek a compensation order. Each case will involve establishing the rights affected (which involves running a native title claim through to a successful determination), then itemising the acts that affected the group’s native title and finally quantifying the harm that has been suffered. More significantly, many groups will have been dispossessed before the apparently ‘magic date’ for compensation of October 1975, when the Racial Discrimination Act commenced and have no legal entitlement to redress. In other words, compensation under the Native Title Act does not address the overwhelming majority of acts of dispossession in Australia since January 1788.

**CONCLUDING ANALYSIS**

Unquestionably the *Mabo* decision in 1992 was a major turning point in Australia because at a national level it recognised for the first time that the traditional rights to territory of Indigenous people survived the assertion of Crown sovereignty 204 years earlier and, under certain conditions, could be recognised through the mechanism of the common law. Indigenous groups now hold legally recognised rights over substantial parts of the country and they are parties to hundreds of legally binding and potentially beneficial agreements. Native title has been particularly significant in the large State of Western Australia where there was no modern statutory land rights scheme. Indigenous people have a seat at the table as a matter of right far more often than before. These are significant achievements for the Indigenous groups that have fought for them, in terms of Articles 25, 26 and 27 of the Declaration.

But there are fundamental problems with native title. It has proved to be an **arduous and divisive** experience in many communities, which is not surprising when one considers the attention paid to the demands and interests of so many non-Indigenous parties, including governments, in the design and operation of the system. A system of regional agreement-making in the pursuit of comprehensive settlements was advocated by Indigenous groups when the legislative response to Mabo was debated a quarter century ago. But that was rejected in favour of a highly legalistic, technical and drawn-out system that has begun to return, ironically, to consider the merits of such an approach.

The realisation of rights and the benefits of native title recognition have been very **unevenly distributed** across the population of Aboriginal and Torres Strait Islander people. The legal requirements mean that native title recognition skews geographical overwhelmingly towards the remote interior of Australia. These are significant Indigenous populations but they are a minority and native title has not addressed dispossession for many, many groups. The right to just terms compensation has recently been quantified for the first time, for one group. It is similarly hemmed in by technicalities and is likely to reflect the same geographic skew. The conventional legal view is that it will not address the overwhelming majority of situations where dispossession occurred and the economics of recovering compensation in many cases look unsustainable.

Even for those who obtain native title recognition, the prolonged indifference of government to their often **precarious situation as landholders** causes deep concerns. Many groups have spoken of the fear that without adequate funding support and economic opportunities for their landholding bodies, they will have gone through this arduous process to obtain legal rights that they are unable to put into practice.

Occasionally, backward-facing legal technicalities have been set aside and more comprehensive agreements have been negotiated with a view to the longer term economic and political viability of First Nations people. These isolated exceptions, where a State government occasionally breaks out on its own, simply reinforce the point that such approaches are possible and preferable.

In short, the operation of the native title system is fragmented, uneven, dominated by legalism and disaggregated from a wider national policy framework. The potential for a given Indigenous group to benefit equally from the realisation of relevant rights in the UN Declaration is hostage to factors that are arbitrary and unfair.

A different approach and a more holistic framework for resolving the issues involved in native title litigation is needed. Government could be a powerful equalising force for the enjoyment of rights to territory, redress for compensation, recognition of traditional law and authority and the underlying right of peoples to self-determination. There are signs that some in government and the judiciary want to move in this direction of genuinely comprehensive settlements. But it is not where the system is at.

There is a serious proposal on the table from Indigenous people that can provide a uniting framework for this much-needed shift. The Uluru Statement from the Heart emerged in 2017 from an Indigenous-designed and led deliberative process on constitutional recognition and structural reform, that was conducted on a regional then national basis. It was won wide support amongst the community, across business, civil society and individual Australians.

It advocates a sequenced set of three reforms. The first is the enshrinement in the Australian Constitution of a representative First Nations Voice. This foundational step towards recognising the legitimate right and, for Australia, the pressing need, for well-structured political participation by First Nations groups would be a turning point, as the *Mabo case* was 27 years ago. After that it would work with government to establish a Makarrata Commission that would over see a nationally coherent process of comprehensive agreement-making between First Nations and Australian governments, and a process of truth-telling about Australian history.

One major party has promised to implement the reforms in the Uluru Statement but they were narrowly defeated at the recent federal election. The governing coalition parties are undecided and Indigenous groups are continuing to build popular support and keep an open door to the government on implementing the Uluru Statement. These reforms offer Australia a path out of the piecemeal nature and shortcomings of the native title system, towards an approach much more likely in practice to secure the rights set out in the UN Declaration on the Rights of Indigenous Peoples.

END

[CONCLUSION – see shortcomings etc below] Comprehensive would also wrap up compo and overcome uneconomic costs of recovery] Govt Far too often native title has been allowed to develop in isolation from stated public policy objectives for Indigenous empowerment, as litigation strategy.

**STRUCTURE (2000)**

**1. Introduction (300)**

**2. Overview of legal protections (500)**

There are three

Statutory land rights summarised in 200 words Ditto nt in 200 words. Purchase 100 words incl quick strength/devs and then dispose of.

**3. Strengths and Recent Developments (400)**

200 words each on nt and SLR, where it has got to.

**4. Shortcomings (450)**

a. uneven

b. disaggregated eg pol/eco empowerment, something about long insistence sovereignty: the High Court in Mabo and subsequent decisions insisted on a strong legal separation between questions of property rights on the one hand and questions of Indigenous sovereignty on the other. The Court said that an honest appraisal of the facts of colonisation necessitated the revision of long-held legal assumptions about British colonisation and its consequences. However it fenced off any possibility of abandoning the orthodox legal view of Australia as a settled colony. And it denied that recognising the contemporary operation of traditional law in the area of property rights could logically extend into other spheres of jurisdiction or reflected the accommodation of some form of retained sovereignty for Indigenous peoples within the parameters of Australian law. Pluralistic sovty most emphatically rejected in YY. [The paramount sovereignty in Coe No 2 hardened even further into the ‘no parallel law-making system after the assertion of sovereignty’ (444) position in YY].

For the most part, negotiation of native title outcomes occurs in a way that is divorced from a wider famework that [might look to accord greater respect to claims of unceded sovereignty]. This does not (cf comprehensive, national fwk ie federalism is reinforcing asymmetry and disaggregation and unevenness, lack of guiding framework and minimum national principles). Jonas quote is great to capture this

‘T]here is a troubling disjuncture in the reasoning of the High Court in Mabo [v Queensland (No  2) (1992) 175 CLR 1]. On the one hand terra nullius was overturned because it failed to recognise the social and political constitution of Indigenous people. Yet the recognition of native title was premised on the supreme power of the state to the exclusion of any other sovereign people. Thus the characteristics of Indigenous sovereignty, the political, social and economic systems that unite and distinguish Indigenous people as a people were erased from the developing law of native title …’

This simply shows no sign of going away. It resurfaced again in the RDs and the USH attempts to tackle it afresh politically through the concept of coexisting sovereignty.

c. drawn out (CoF slowly improve over time.

d. Too much indifference

**5. Conclusion: respect for traditional land tenure and UNDRIP (350)**

1. Yes in some ways eg TOs are primary evidence, basis in recog of TLC (but obv culturally loaded concept). PBCs but also rigidities in requirements.

Legal issues: Degree of adaptation and change (society, laws, rights) that will be recognised is one of sore spots/key controversies. YY v FC (ILI?). Invidious juxtaposition of two requirements albeit later decisions and negotiating postures have knocked sharpest edges off for some.

***Veto in SLR, FAR and compo v relevant***

***Negligible engagement with UNDRIP in courts. But consistent w legalism that is characteristic of HCA, there is also little or no resort to other arguably relevant external sources of perspective and guidance eg decades of SLR and cultural anthropology/TO ev (it’s different in FC trials), int HR law and even basic beneficial presumptions available under the common law.***

Judicial decision-making: risk that judicial elaboration introduces new requirements and erects new barriers to recognition (somewhat of an internal debate within judicary eg ***societal continuity*** and how group chooses to aggregate and identify under changing circumstances in wake of colonisation, generality or specificity in ***characterising*** rights and defining legal content, and threshold for finding inconsistency not coexistence in extinguishment law.

Posture adopted by governments across Australia’s federal system, as litigants, negotiation parties and also as policy-makers.

Internal dynamics (or not really rights vs state, in 2000 words?)