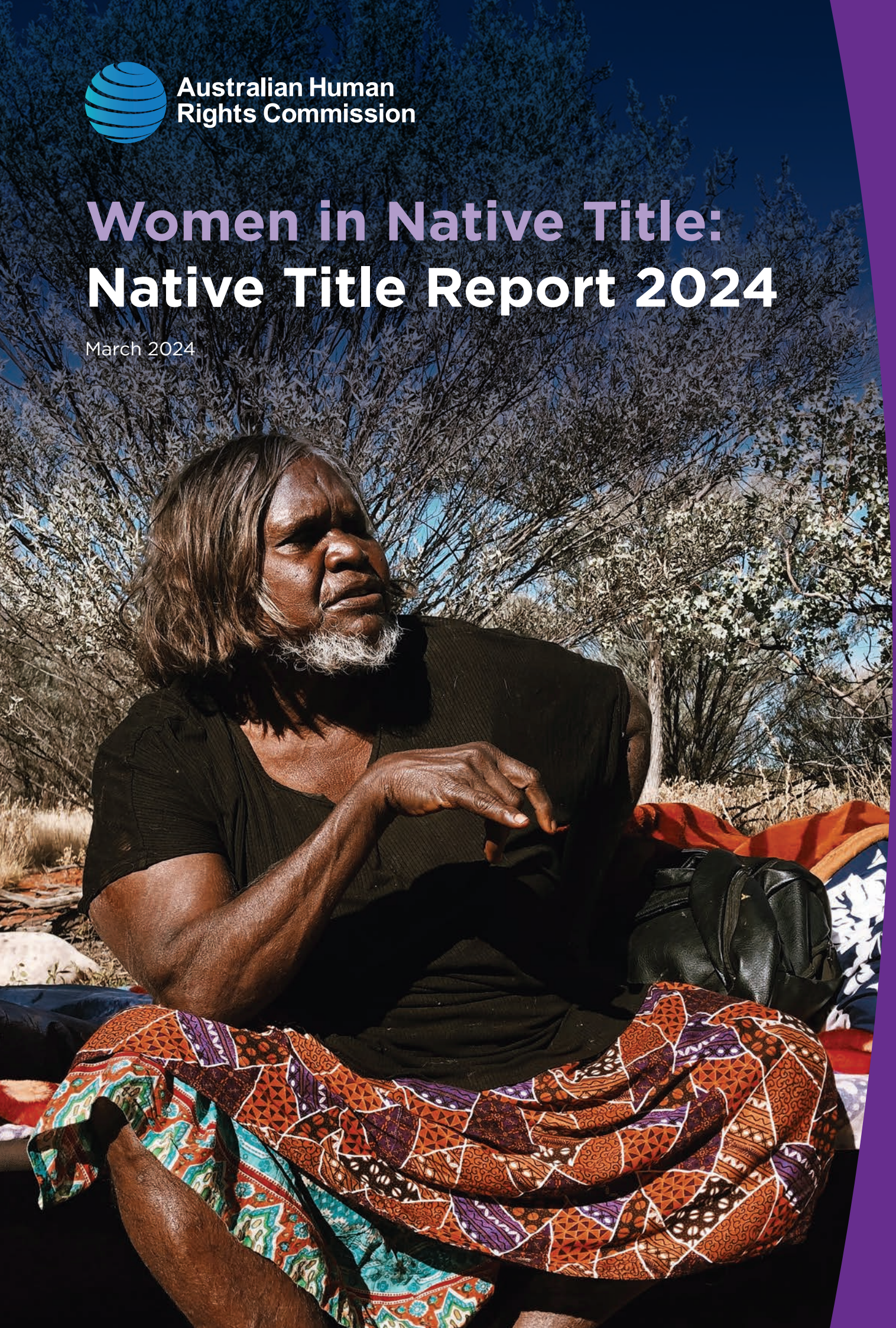
Australian Human Rights Commission

Women in Native Title: Native Title Report 2024

March 2024



Acknowledgements

The *Women in Native Title: Native Title Report 2024* was drafted by Libby Gunn, Josephine McLeod and Nick Devereaux.

The Aboriginal and Torres Strait Islander Social Justice Commissioner thanks the following staff and interns of the Australian Human Rights Commission for their work in producing this Report: Allyson Campbell, Lisa Carroll, Darren Dick, Monique Duggan, Graeme Edgerton, Kate Griffiths, Kimberley Hunter, Maia Ihemeje, Catherine Johnson, Rachel Law, Jane Pedersen, Terri Reid, Emily Rutherford, Sara Saleh (staff), Edward Aitkin, Ellie Baldwin, Liam Carmody, Erin Ronge (interns).

A list of acknowledgements of external parties who assisted in the production of this Report is at Appendix 1.

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Front cover: **Daisy Tjuparntarri Ward**, Ngaanyatjarra woman, in interview with anthropologist Jan Turner, on behalf of the Australian Human Rights Commission, 2021. Image credit: Jan Turner.
Back cover: **Monica Morgan**, Yorta Yorta woman, past CEO of the Yorta Yorta Nation Aboriginal Corporation RNTBC (YYNAC), and activist of over 50 years. Image credit: Justin McManus, The Age.

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Australian Human Rights Commission

Women in Native Title: Native Title Report 2024

March 2024

Transmission letter

26 March 2024

The Hon Mark Dreyfus KC MP
Attorney-General
PO Box 6022
Parliament House
CANBERRA ACT 2600

Dear Attorney

Women in Native Title: Native Title Report 2024

By virtue of my functions under section 46C(2B) of the *Australian Human Rights Commission Act 1986* (Cth), I am pleased to present to you *Women in Native Title: Native Title Report 2024* (Report).

Where I have also included consideration in this Report of the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples in relation to other relevant policy and legislation, this is done so in accordance with my functions under section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth).

This Report follows in the wake of the *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report 2020* and provides a dedicated account of the experiences, perspectives, aspirations and solutions of First Nations women within the native title system.

This Report takes a person-centred approach, highlighting how native title and related systems impact individuals and communities on a day-to-day basis. In doing so, this Report makes clear that significant reform is required if the native title system is to uphold the human rights of First Nations women and their communities.

My hope is that this Report provides a stepping stone that elevates native title reform as a critical issue for attention in the broader context of the need for structural and systemic change, and emphasises the need for the supported participation of First Nations women and their communities in the conversations, decisions, processes and structures that ensue as part of future reform work.

This Report provides 29 recommendations for your consideration.

Yours sincerely

June Oscar
Aboriginal and Torres Strait Islander Social Justice Commissioner

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Contents

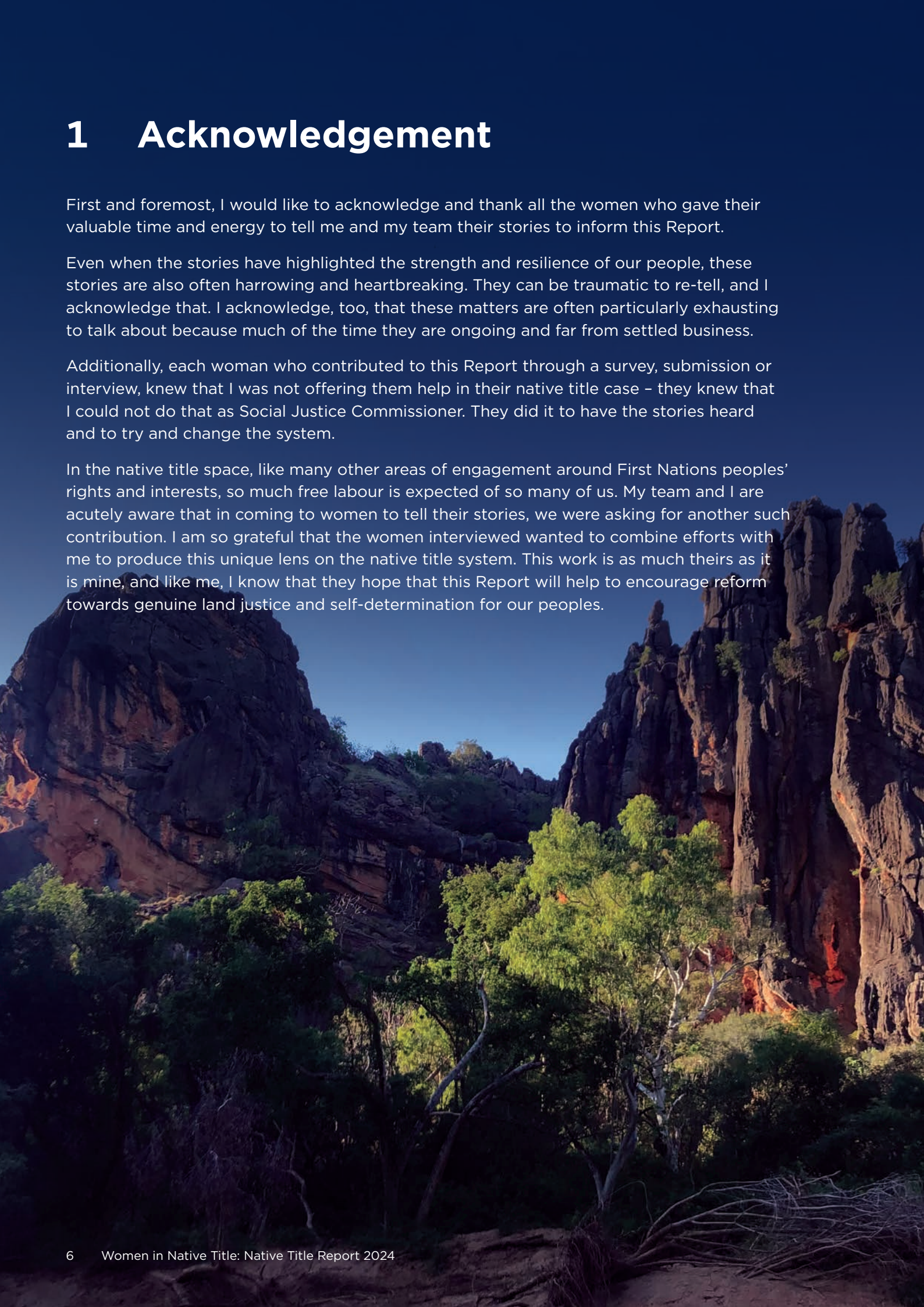
1 Acknowledgement

First and foremost, I would like to acknowledge and thank all the women who gave their valuable time and energy to tell me and my team their stories to inform this Report.

Even when the stories have highlighted the strength and resilience of our people, these stories are also often harrowing and heartbreaking. They can be traumatic to re-tell, and I acknowledge that. I acknowledge, too, that these matters are often particularly exhausting to talk about because much of the time they are ongoing and far from settled business.

Additionally, each woman who contributed to this Report through a survey, submission or interview, knew that I was not offering them help in their native title case – they knew that I could not do that as Social Justice Commissioner. They did it to have the stories heard and to try and change the system.

In the native title space, like many other areas of engagement around First Nations peoples' rights and interests, so much free labour is expected of so many of us. My team and I are acutely aware that in coming to women to tell their stories, we were asking for another such contribution. I am so grateful that the women interviewed wanted to combine efforts with me to produce this unique lens on the native title system. This work is as much theirs as it is mine, and like me, I know that they hope that this Report will help to encourage reform towards genuine land justice and self-determination for our peoples.



2 Social Justice Commissioner's foreword

It is with great pleasure that I present the *Women in Native Title: Native Title Report 2024* (the Report) as the Aboriginal and Torres Strait Islander Social Justice Commissioner.

One of my primary functions as the Aboriginal and Torres Strait Islander Social Justice Commissioner is to report on the impact of the *Native Title Act 1993* (Cth) (Native Title Act) on the exercise and enjoyment of all Aboriginal and Torres Strait Islander peoples' human rights.

As this is the Aboriginal and Torres Strait Islander Social Justice Commissioner's function, I will use the first person throughout this Report.

2.1 Connection to *Wiyi Yani U Thangani*

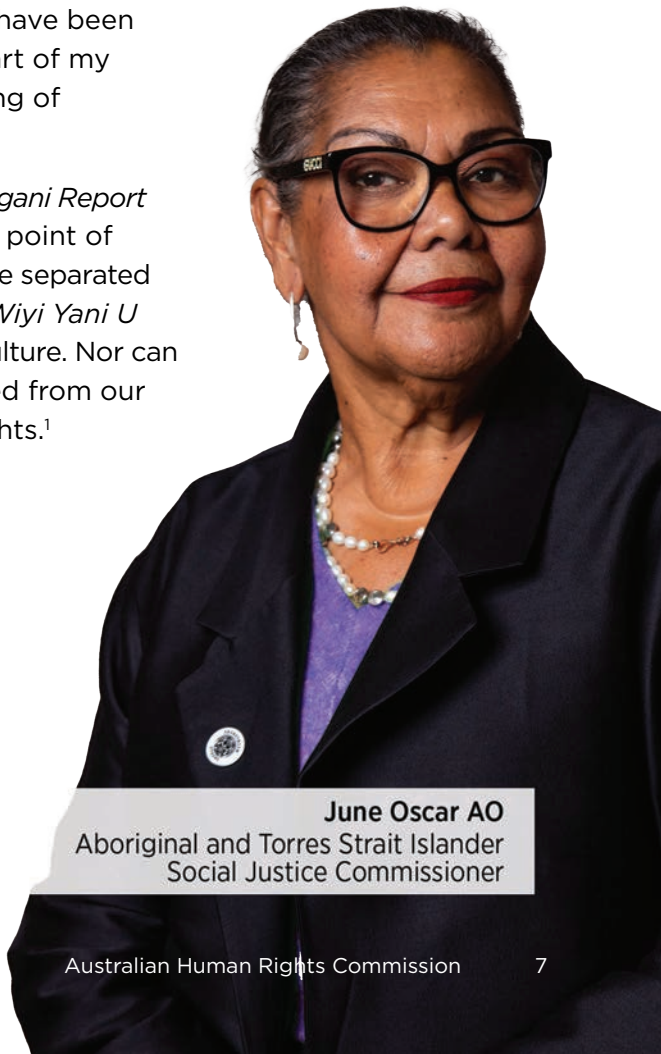
The key contributions I have made as Australia's Aboriginal and Torres Strait Islander Social Justice Commissioner have been through the *Wiyi Yani U Thangani (Women's Voices) Project*, a multi-year systemic change project which has spanned the full length of my seven-year term from 2017 to 2024. This Report, on the experiences of women in the native title system, is in many ways an extension of my *Wiyi Yani U Thangani* work.

The topics of native title and land justice more broadly have been raised with me throughout my term and have been a part of my discussions with First Nations women from the beginning of *Wiyi Yani U Thangani* through to the present.

These subjects feature prominently in the *Wiyi Yani U Thangani Report* 'Land and Country' chapter, but this is far from the only point of intersection. Native title and the related systems cannot be separated from the key human rights discussed so extensively in *Wiyi Yani U Thangani* – such as the rights to self-determination and culture. Nor can our rights to self-determination and culture be separated from our rights to health, education, housing, and other basic rights.[1]

Land justice also features in the *Wiyi Yani U Thangani Implementation Framework* and *Wiyi Yani U Thangani Change Agenda* which was launched on the 19 March 2024, along with the First Nations Gender Justice Institute at the Australian National University.

Analysis of the data from the *Wiyi Yani U Thangani* engagements makes clear that native title is a difficult topic to talk about in any detail in a group environment. One reason for this is that it is technically complex with widely varying levels



June Oscar AO
Aboriginal and Torres Strait Islander
Social Justice Commissioner

of understanding within and between communities. Another reason is that anyone with experience in native title will struggle to speak meaningfully about it in a short space of time, as the determination alone might have taken a decade or two to achieve. That is before the post-determination era is discussed, let alone the compensation stages of any case. A third reason is that native title is a fraught and very raw topic for our families and communities. Existing conflicts have been exacerbated and new ones created by the native title system and claims process and, in some cases, these are proving very difficult to resolve.

For these reasons, I wanted to elevate the voices of women with experience in native title in a separate dedicated report from *Wiyi Yani U Thangani*. This has enabled me and my team to create a picture of native title that starts with lived experience and looks outwards from there. This project has taken a human rights-based approach which centres the people affected within the broader system in which native title operates. To be effective, any consideration of reform should, likewise, take a person-centred and holistic approach. None of the individual problems within the native title system can be considered or effectively reformed in a silo.

2.2 The promise of native title

Like my predecessors who have detailed their recollections of the events that gave rise to the native title system, I too remember when *Mabo (No. 2)* was handed down and the subsequent passing of the Native Title Act. Those were momentous occasions and represented a point in history full of promise and excitement. *Mabo (No. 2)* overthrew the lie that had burdened us for so long – we were re-empowered by the mainstream Australian authorities' acknowledgement that this country was always ours. The Native Title Act reinforced and broadened the public acknowledgement of this fact, and that it was a grave injustice that it was taken from us.

At that time in the early 1990s, I was at the Kimberley Land Council. As a collective we felt suddenly energised and propelled into getting strategic as a nation and a region. We viewed native title as a foundational element of land justice to be used in negotiations and agreements.

Sadly, we came to find that the nation had yet to grapple with the power shift required to make native title, as now framed through the Native Title Act and common law, compliant with Australia's human rights obligations.

The stories told in this Report reinforce warnings by Aboriginal and Torres Strait Islander leaders since the Native Title Act was passed and the first cases were determined, that a just land settlement will not be delivered by native title as we know it – at least not on a wide scale.[2]

Yet despite our awareness of the political realities that restrain native title, the momentum and enthusiasm that we felt has not dissipated. We see that in the ways that First Nations peoples continue to negotiate the use of native title and land rights more broadly to empower our peoples.

So, while native title is not what it could have been – what it *should* have been – from my experience in community and from the stories I have heard through this Report process, native title still matters. The concept of recognition in native title is important to our peoples, as is our irrepressible optimism that a more fulsome realisation of our native title rights might eventually become a reality.

2.3 The disappointments of native title

The stories of the individual women in this Report highlight that many of the best outcomes in recent times are coming from consent determinations and alternative agreement-making; and from highly skilled individuals stepping up to promote the agency of native title holders and Traditional Owners by recentring culture, identity and purpose, and thereby unifying communities. Those individuals are proving to be critically important in the claims period, and the healing and governance aspects of the post-determination period.

The progressive change towards a more collaborative, cooperative approach by governments in recent times[3] has enabled some native title groups to achieve a level of involvement in the management of their own Country which would not have been possible through native title litigation alone. Many native title groups would likely have secured no rights at all if they only had litigation as an option. However, native title has often been the shadow in which agreements have been made and this has had both positive and negative implications.

Whether governments would have agreed to consent determinations or other agreements in the way that they have in the last decade or so without the 'threat' of having to go through the courts will never really be known. The threat of higher levels of compensation via the Native Title Act than was previously thought likely is now having an impact.[4] High Court claims have also 'moved away from finding 'extinguishment' towards 'co-existence' wherever possible'.[5] But it is notable that the shadow of native title in which agreement-making has been taking place has necessarily included the lack of power that native title legislation ultimately provides native title groups, even in the best of circumstances.[6]

While the broad change in approach by governments over the last decade or so – to one of arguably greater goodwill – is welcome, it has not addressed the problems that exist with defining and identifying native title groups and related boundaries over Country. It does not help those groups who went through the courts in the early days of native title and experienced the full force of governmental (and other third party) opposition and the chaos of establishing the regime. It does not help those who, for the sake of certainty for non-Indigenous stakeholders, had their native title defined without rights to control access to their land because at some stage in history that control was not available to them, either in theory or practice. And it does not help those who feel they were coerced into agreeing to the destruction of their land in exchange for what they determined at the time to be the best package of benefits possible within a system that does not adequately uphold their rights.

The reality is that, as predicted 30 years ago, native title is not delivering justice effectively. Certainly, many groups and individuals have done their very best in gruelling circumstances to make the most of the opportunities native title has presented. However, even for those satisfied with the ultimate results, the processes associated with native title have often been experienced as disempowering. Moreover, in far too many circumstances the native title system is producing unjust outcomes; and in many of those circumstances the level of injustice experienced is more extreme and more final than that felt before engagement with the system.

Ultimately, until there is a change in the power imbalance enshrined by the Native Title Act and related legislative regimes, a satisfactory, just land settlement will remain unfinished business for many First Nations peoples across the country.

2.4 The lived reality of native title

All that said, this Report contains many stories of the unparalleled, and at times truly amazing, efforts of so many of our people to make the best of the native title system. Those efforts are made despite the heartache associated with having to prove ourselves and our connection to Country on the coloniser's terms, only to find out that we were never going to truly get our land back under this system. Despite those realisations, individuals, families and communities continue to step up and work out the bespoke solutions needed to heal the harms inflicted by colonisation, including the native title system.

The women who have contributed to this Report all have extensive experience in native title in a variety of different ways, including personal and professional roles. Their stories about their native title experiences, and their opinions on the native title system, provide a holistic picture of the everyday impact of native title on the individuals, families and communities whom native title was supposed to benefit. Their combined lived experiences do not represent everyone's experience of native title, nor do they 'cover the field' geographically or in terms of the type of native title case. That would not be possible. There are so many more women that we would have loved to speak with. But the combined voices in this Report do highlight many common themes.

Some of the common themes are well known and the value of this Report is in highlighting the way those themes play out in real life. Some of the common themes, or the way they are expressed by the women, might be less well known, and need to be elevated in the minds of all those involved in policy reform in the areas of native title, land rights and cultural heritage.

The distress, anger, frustration and exhaustion expressed by so many of the women in their stories is the reality of native title on the ground for so many First Nations people. There is so much work being done, particularly by our women, to heal our families and communities from the cumulative effects of each act of colonisation. For many First Nations people, native title represents another act of colonisation.

The individual harms described in each native title story are illustrative of a systemic lack of capacity in the native title system to ensure that it works to facilitate the enjoyment of First Nations peoples' rights to culture, property, procedural fairness, self-determination and non-discrimination. The result can be described at a very high level as a discriminatory lack of access to justice.

No other group in Australian society is expected to be able to overcome poverty and trauma, and resolve conflict, in the way that First Nations peoples are expected to – on someone else's terms, to someone else's timetable, and with extremely significant consequences for our future generations of any 'failings'.

That is what native title looks like in many of our First Nations – an unparalleled requirement imposed upon us to resolve conflict, negotiate both internally and externally (often at the same time), reconcile cultural norms with Western legal requirements and navigate through multiple foreign legal frameworks in an attempt to achieve the best possible outcome, for now and into the future, in broader circumstances which we cannot control.

It is unsurprising that this is a big ask of many communities. It would be a big ask of any community, and it is notable that no other community in Australia is required to participate in such a system in an attempt to give effect to their rights to culture, property and self-determination.

The success of many of our peoples in making native title work for us, in preserving our cultural unity and focus, and in working through internal conflicts generated by colonial acts of dispossession, is impressive and worthy of note in any legal or social commentary. This Report aims to elevate the voices of women involved in those impressive acts, as well as to highlight injustice and ongoing struggles they face, and to see the nature and impact of the native title system over the time of their involvement, and through their eyes.

The point of this Report is to highlight the way the native title system is experienced. The stories told are the truths of the women who told them.

I urge readers who might think that some aspect of some particular story or stories in this Report is incorrect to focus less on whether or not one woman's interpretation of a particular element of her case is strictly accurate, and more on how, for example, it has come about that a competent, committed, experienced woman can have spent so long in the native title system and still not fully understand what happened. Notably, all of the women who contributed to this Report expressed their strong desire – need even – to tell their stories in order to progress a fairer, more just and more culturally relevant and safe system for determining land justice for their communities and for other Traditional Owning communities across First Nations Australia.

2.5 A call for connectedness

The women's stories in this Report tell the truth of the heartbreak associated with the native title system. The women's stories also tell another important truth that I have noted – the strength of our people.

I have had the privilege of experiencing this strength through my tenure as Aboriginal and Torres Strait Islander Social Justice Commissioner. Engaging with our women and girls across Australia for *Wiyi Yani U Thangani* reaffirmed the harms inflicted by systems and structures. This Report voices those same harms that have been enabled by the native title system and identifies actors and structures within that system which uphold them.

The system demands our people engage in a traumatic process. The work required by native title processes cannot be navigated without the entanglement of the traumas inflicted on our people. The historical trauma, the trauma of losing knowledge-holders, of disconnection and removal, of reconnecting, and of being denied our cultural and linguistic heritage. The influence of this history cannot be overstated as people return to Country and reconnect during native title processes.

People want to know who they are, how they belong, and what their rights are as native title holders. This is important and the native title system has not recognised these needs, nor does it facilitate this community healing work. The native title system does not involve an understanding of the inherent need for inclusive spaces that support communities through this difficult work. This poses the challenge of how we build and nurture spaces to listen and learn; to reconnect and, in turn, mitigate the division that the native title system generates.

My commitment to social justice is both a statutory and personal responsibility and I am proud to approach this responsibility from a position of deep listening. The result is a report which communicates the status of native title by listening to the stories of our women. These stories show their strength and resilience and narrate the need for systems-change.

My experiences with Bunuba native title and our subsequent healing work have bolstered my faith in our strength and informed the approach to this Report. Bunuba women, Patsy, Millie, and Kaylene, each share their experiences with this project throughout the Report, with my team interviewing them on Country during our second Cultural Mapping Camp. These camps have seen people return to Country and hear from the anthropologists, visit locations which served as evidence for knowledge and connection to Country, and have the genealogy report explained and further details provided. The camps have also included the colonial history of the Kimberley – the maps, events, and personalities. This information reinforced and supported stories from families which had not always been accepted. The fact that some of the recorded information was directly from old people that were remembered and respected means that family connections were accepted where they had been questioned.

These camps have enabled people to find their connection to Bunuba, both the Country and the community. They have provided necessary truth-telling. While truth-telling is often confronting, and has been for some Bunuba, it has built the foundation on which people can see Country through a more holistic and layered lens. It also provides them with knowledge that will inform how they wish to have a presence on Country and strengthen connection.

This healing process has been both personal and collective. The focus and unity of Bunuba through this initiative has also reinforced what I have always known – that there is healing in connectedness. That is significant in relation to one of the main failures of the native title system. Neither the system, nor the powerful actors within it, considered the predictable divisions and conflicts that native title would generate and/or exacerbate. I believe the experiences heard throughout this Report would have been very different had the native title process been resourced to work with people's connectedness rather than their separateness. There is a clear need for the system to incorporate provisions and resources for community truth-telling and healing.

The stories from women in this Report describe the various ways in which the native title system demands an individualistic and exclusionary approach. Our young people are often ignored, our women are often not recognised for their knowledges, and our traditions are often excluded from the process. The system has thus created disrespect and distrust for customary governance and decision-making. This focus on division has limited the capacity for truth-telling – a process which demands unity.

This experience mirrors what women and girls have told me throughout my time in this role. That there is a need to prioritise unity and healing as part of the journey to social justice. This includes our journey to a socially just native title system.

The system's lack of focus on unifying our people has resulted in competition when the people with knowledge ask for trust. Customary governance and decision-making are based on thousands of years of transmitted knowledge around how society functioned. Our history of removal and dispossession has limited many of our people's exposure and access to knowledge-holders. This means we must trust those who hold this knowledge and have our collective interest in mind. The role that our past plays in this act of trust is challenging.

This is particularly challenging due to the division between the Western native title system and our traditional ways. The Western system requires 'proof', where customary Law requires people to trust. In the native title system, we are proving connection and rights to land, language and culture. To prove our traditional connections we are required to work within the frameworks and expectations of Western society. We need to provide proof of our cultural ways

which inherently involve a lot of trust and unity of purpose. These two approaches to the world are arguably incompatible and inevitably, the Western system prioritises itself over our ways of being, knowing and doing.

Our people mediate between our cultural obligations and those enforced by Western structures every day. We mediate in community, in the workplace. We mediate in our person-to-person interactions and with governments and their governing systems. We have relied on our whole-of-life approach to mediation to prevent conflict and disputes – learning and growing from each other's expertise. It is a particular strength of First Nations Australians.

Our mediating expertise is grown from principles ingrained in our ways of knowing, being and doing. Inclusivity, reciprocity, connectedness, unity, collective obligation and responsibility, and shared leadership and decision-making. This connects us through the knowledge we learn, protect and share.

The native title system has proved damaging to the spirit of our people and exhausted us. These stories are evidence of that.

Our women and girls know the pathways for action to heal our spirit. They embody the strength we have always held at the core of our people. I proudly present this Report in my capacity as Social Justice Commissioner and as a product of our people's commitment to connectedness and unity in the face of divisive systems. The voices of all the women who contributed to this Report form a united voice demanding genuine change.

3 Visual report guide

Desktop research

- previous reports
- previous AHRC and other organisations' submissions
- academic articles
- media articles
- other relevant reports.

Preliminary conversations

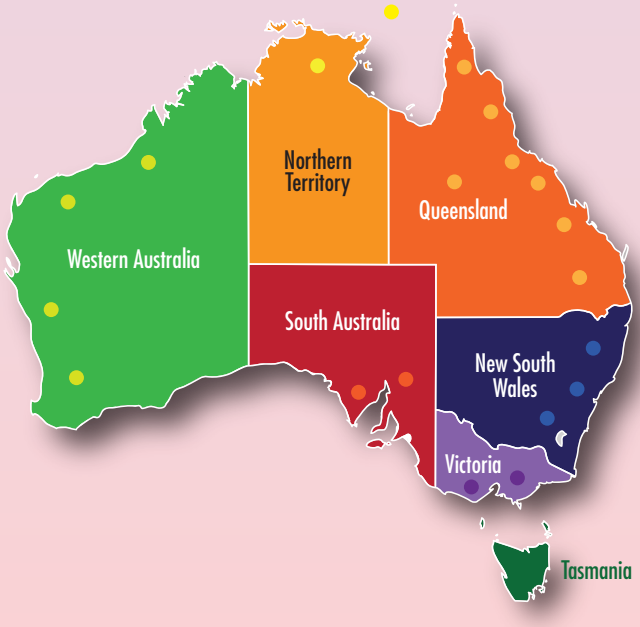
- ad hoc approaches by First Nations communities and organisations
- conversations with lawyers and anthropologists.

Surveys

Submissions

Interviews

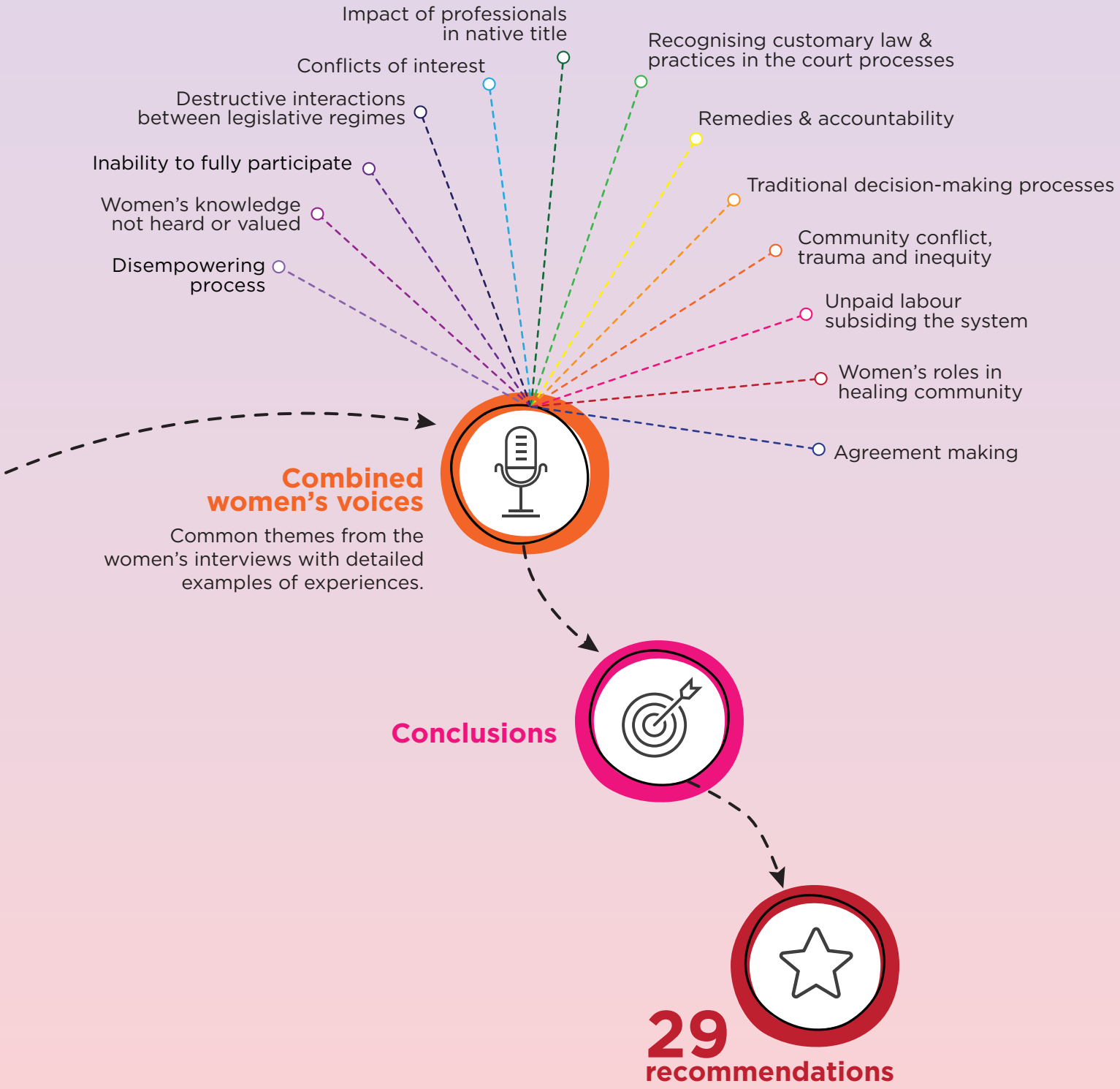
Summaries of individual women's stories



Overarching themes

- self-determination & self-governance
- gender discrimination
- structural racism
- lack of access to justice

AN RIGHTS APPROACH



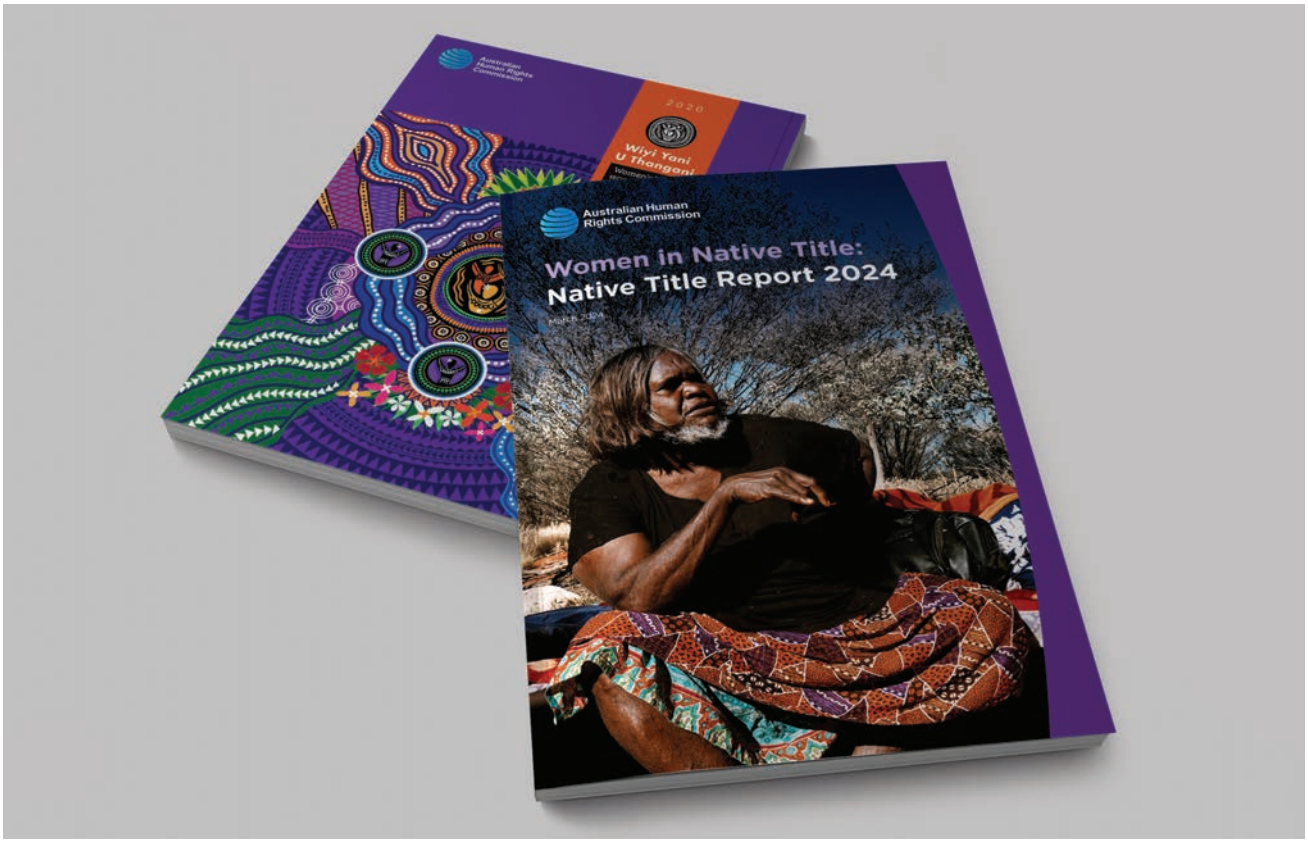
4 The Native Title Report 2024

One of the roles of the Aboriginal and Torres Strait Islander Social Justice Commissioner (the Social Justice Commissioner) is to report 'on the operation of the Native Title Act; and the effect of that Act on the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders.'[7] This is in addition to the Commissioner's more general function of submitting reports to the Minister regarding 'the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders.'[8]

Until 2017, the Native Title Act required the Social Justice Commissioner to prepare a Native Title Report each year for federal Parliament. Until 2013, Native Title Reports were separate from the Social Justice Reports; between 2013 and 2016 they were combined in one annual publication.

Following legislative amendments, the Native Title Report is no longer required to be tabled annually.[9] The last Native Title Report was completed by then Social Justice Commissioner Mick Gooda in 2016.[10]

This is my first separate Native Title Report as Social Justice Commissioner, although native title, land rights, cultural rights and a raft of related rights have been discussed extensively throughout my *Wiyi Yani U Thangani* project and the report of the project in 2020.



5 A human rights-based approach to native title reform

In carrying out our statutory duties, Social Justice Commissioners employ a human rights-based approach, drawing upon the international human rights framework to which Australia is a signatory, and articulating how these rights can be fulfilled and protected within Australia.

5.1 What is a human rights-based approach to native title reform?

A human rights-based approach centres the experiences of individuals and communities.

Taking a person-centred, human rights-based approach to this Report means that the content addresses the way the native title system is experienced *in practice*. The intention is for this Report to emphasise the compelling nature of the call for radical, holistic reform.

The stories told by women for this Report raise significant human rights concerns with the native title system. This is not the first time that such concerns have been raised. However, the holistic perspective provided by the focus on each woman's story – and the common ways in which the women have experienced the native title system told through the 'combined voices' in Chapter 10 – provides a contextualised understanding of the real-life impacts of the native title system.

In particular, this story-based approach highlights the way that different aspects of the system, and players within it, can and do work together to disempower and disenfranchise First Nations women and their communities in their day-to-day lives. It is the impact of the system overall, not merely each provision of the Native Title Act, that has such huge human rights implications. And it is the impact of the native title system on daily life, not merely the determination in favour of or against native title, that translates legislative and regulatory provisions into deep and far-reaching human right violations.

While the *outcomes* of native title claims have had very painful repercussions for many First Nations groups across Australia, the *process* of claiming native title has resulted in intensified disempowerment for many more.

In his *Social Justice and Native Title Report 2015*, then Social Justice Commissioner Mick Gooda articulated the PANEL principles of a human rights-based approach to policy and law reform (Text Box 5.1).

Text Box 5.1: PANEL PRINCIPLES: A human rights-based approach[11]

Participation: everyone has the right to participate in decisions which affect their human rights. Participation must be active, free and meaningful, and give attention to issues of accessibility, including access to information in a form and a language which can be understood.

Accountability: accountability requires effective monitoring of compliance with human rights standards and achievement of human rights goals, as well as effective remedies for human rights breaches. For accountability to be effective, there must be appropriate laws, policies, institutions, administrative procedures and mechanisms of redress in order to secure human rights. This also requires the development and use of appropriate human rights indicators.

Non-discrimination and equality: a human rights-based approach means that all forms of discrimination in the realisation of rights must be prohibited, prevented and eliminated. It also means that priority should be given to people in the most marginalised or vulnerable situations who face the biggest barriers to realising their rights.

Empowerment: everyone is entitled to claim and exercise their rights and freedoms. Individuals and communities need to be able to understand their rights, and to participate fully in the development of policy and practices which affect their lives.

Legality: a human rights-based approach requires that the law recognises human rights and freedoms as legally enforceable entitlements, and the law itself is consistent with human rights principles.

As the *Social Justice and Native Title Report 2015* noted: 'To be consistent with these [human rights] principles, laws and policies should be non-discriminatory and promote the ability of Aboriginal and Torres Strait Islander peoples to exercise choice, participation and control.'[12]

The complicating factor in seeing the extensive and multi-faceted discrimination in the native title system is that native title can only be claimed by Aboriginal and Torres Strait Islander peoples. Negative impacts of the system are felt only by us. The only people who are deprived of control over our 'assets' and our culture through the native title system are First Nations individuals and peoples.

This perhaps makes it hard for 'outsiders', such as policy and law makers, to see how significantly the native title system undermines our enjoyment of the human rights which other Australians take for granted and the barriers that it has created for us, despite the stated intent to benefit us.[13]

Of course, our fight for land rights, protection and promotion of culture, the right to control over our economic future, started over 200 years earlier upon colonisation. But the year 2022 marked 30 years since *Mabo (No. 2)* – the beginning of our native title journey.

These last 30 years have seen a rapidly developing body of law. In 30 years of legal experiments and precedents, we have been the 'guinea pigs'. Our rights to culture, including our rights to Country, have been defined and redefined and redefined again in national law. Usually not by us. Our forced removal and physical disconnection from country has been established via native title law as a reason to describe our pre-sovereignty rights as 'extinguished' – unenforceable – within colonial Australian law.

Looking back over 30 years of native title in that bigger land rights story, we have again demonstrated unparalleled resilience in working within the native title system – a system which imposes a foreign definition of connection to land and foreign legal structures in deciding what traditional rights to Country and culture are to be recognised – to try and secure our rights. In many cases, the dispossession of land, culture and knowledge cannot realistically be reversed. We have accepted that. But we have not accepted that that position should come freely to the Australian Government and state and territory governments. We never agreed to that. We never ceded sovereignty at any point – not a single Aboriginal or Torres Strait Islander nation, and certainly not as a whole First Nations body of some description.

We have worked with the native title system to come to a point where we often do have a seat at the table. Governments across the country *have* changed their attitudes, helped by the imminence of the major compensation cases which have been looming for a decade or more. And there is further to come with the development of an additional potential avenue for compensation for some of our First Nations peoples through the constitutional protection of section 51(xxxi) on the right to 'just terms' in any acquisition of land by the Commonwealth. Slowly, slowly, the human rights protected by the common law system and the Constitution, and critically infused with international human rights protections, have provided us with avenues to achieve some measure of justice on occasion.

We have used and continue to use every avenue available to us to seize control of our future and enforce our basic human rights. Human rights law – ranging from international human rights law to domestic anti-discrimination legislation, to state and territory human rights acts, to the Australian Constitution – will continue to develop. The tides of history are moving us towards some viable avenues to achieve land justice. But there are still huge barriers and a human rights-based approach needs to remain front and centre of our push for reform in all the relevant areas.

5.2 Australia's human rights obligations

Australia has voluntarily entered into commitments to protect the human rights of people in Australia by ratifying seven major international human rights treaties. These include the two core human rights treaties: the International Covenant on Civil and Political Rights (ICCPR)[14] and International Covenant on Economic, Cultural and Social Rights (ICESCR).[15]

Other binding international treaties include: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);[16] the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);[17] the Convention on the Rights of Persons with Disabilities (CRPD);[18] the Convention on the Rights of the Child (CRC);[19] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[20]

The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) provides a comprehensive framework for the recognition and protection of Indigenous rights. Although Australia endorsed the Declaration in 2009, it does not establish new or additional human rights for Indigenous peoples. Instead, it elaborates on how rights contained in human rights treaties such as the ones referred to above apply to the specific circumstances of Indigenous peoples globally.

There are four underlying principles that the Declaration elaborates. Contextualised for First Nations women and girls, these are:

- **Self-determination:** Aboriginal and Torres Strait Islander women and girls have a right to shape their own lives, including their economic, social, cultural and political futures.[21]
- **Participation in decision-making:** Aboriginal and Torres Strait Islander women and girls have the right to participate in decision-making in matters that affect their rights and through representatives they choose. This participation must be consistent with the principles of free, prior and informed consent. Aboriginal and Torres Strait Islander women and girls must be respected and treated as key stakeholders in developing, designing, implementing, monitoring and evaluating all policies and legislation that influences their wellbeing.[22]
- **Respect for and protection of culture:** Aboriginal and Torres Strait Islander women and girls have a right to maintain, protect and practise their cultural traditions and cultural heritage. This includes protecting their integrity as distinct cultural peoples, their cultural values, intellectual property and Indigenous languages.[23]
- **Equality and non-discrimination:** Aboriginal and Torres Strait Islander women and girls should be able to enjoy their human rights without discrimination from individuals, governments and/or external stakeholders.[24]

The following sections aim to talk through how the human rights instruments reflect some key lived experiences of First Nations peoples. That is, that all our rights are intertwined and interdependent. They all ultimately come back to the right to be in control of decisions that impact us, and the right to be treated equally.

(a) The right to self-determination and to free, prior and informed consent

(i) Self-determination

Self-determination is the central right of the Declaration. All other rights ultimately support Indigenous peoples' exercise of self-determination. In turn, the enjoyment of the right to self-determination supports the ability to enjoy other rights such as the right to health and education, and the right to non-discrimination.

The right of self-determination is found in article 3 of the Declaration, drawing on article 1 of both the ICCPR and ICESCR. By virtue of that right, Indigenous peoples have the right to freely determine our political status and to freely pursue our economic, social and cultural development.

Subsequent rights in the UNDRIP clarify what the right of self-determination entails for Indigenous peoples.

Article 18 specifies that Aboriginal and Torres Strait Islander peoples '**have the right to participate in decision-making in matters which would affect their rights**, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'.

In accordance with articles 18, 31 and 32 in the Declaration, rights to self-determination and control, and full participation in decision-making are applied to the rights to culture, traditional knowledge, intellectual property, and land use.

Text Box 5.2: Prof. James Anaya has described the key characteristics of self-determination[25]

Self-determination:

- cannot be viewed in isolation from other human rights but rather must be reconciled with and understood as part of the broader universe of values and prescriptions that constitute the modern human rights regime
- is a regulatory vehicle that broadly establishes rights for the benefit of all peoples, including Indigenous peoples
- is grounded in the precepts of freedom and equality, and opposes both prospectively and retroactively, patterns of empire and conquest
- affirms that human beings, individually and groups, are equally entitled to be in control of their own destinies and to live within governing institutional orders that are devised accordingly
- affirms that peoples are entitled to participate equally in the development of the governing institutional order, including the constitution, under which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis
- includes the dual aspects of autonomous governance and participatory engagement
- is an instrument of reconciliation and conciliation, particularly for peoples who have suffered oppression at the hands of others
- promotes the building of a social and political order based on relations of mutual understanding and respect.

Article 19 of the Declaration articulates a positive duty on states regarding consultation: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.' Articles 31(2) and 32(2) and (3) specifically apply this positive duty on states to areas of cultural rights and land rights.

As part of the right to free prior and informed consent, governments are under a **duty to consult** 'whenever a State decision may affect indigenous peoples in ways not felt by others in society', even if our rights have not been recognised in domestic law.[26]

Significant work has been done on what 'consultation' needs to look like in order for it to meet the requirements of the right to free, prior and informed consent.[27]

Moreover, back in 1997, the *Bringing them Home Report* set out that the right to **self-determination requires more than consultation**.

> Self-determination requires more than consultation because consultation alone does not confer any decision-making authority or control over outcomes. Self-determination also requires more than participation in service delivery because in a participation model the nature of the service and the ways in which the service is provided have not been determined by Indigenous peoples. Inherent in the right of self-determination is Indigenous decision-making carried through into implementation.[28]

Meaningful consultation and co-design

In a 2009 study on the duty to consult, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People considered that the objective of consultations 'should be to obtain the consent or agreement of the indigenous peoples concerned'.[29]

In 2009, then Social Justice Commissioner, Tom Calma, identified principles for effective consultation and engagement, drawing on existing work.[30] In 2010, then Social Justice Commissioner, Mick Gooda, used existing international and domestic work on free, prior and informed consent to develop a set of principles for meaningful and effective consultation.

Commissioner Gooda reviewed the consultation processes regarding two law reform initiatives and found them wanting in a number of respects, including that 'the Government did not appear to approach the consultations … with the objective of obtaining the free, prior and informed consent of the people affected,' and 'had a predetermined outcome in mind in entering into the consultations' (regarding the NTER measures).[31]

In *Wiyi Yani U Thangani* I noted that the term 'consultation' had lost any currency it might have once had in our communities, because despite numerous and extensive consultations by government, women and girls feel that they have not been listened to and have lost faith in 'consultation processes'. They view consultation processes as tokenistic and a waste of their time; participation in consultations does not appear to them to deliver meaningful participation in decision-making.[32]

In *Wiyi Yani U Thangani* I noted that the term 'co-design' is a more appropriate descriptor for what is required to uphold our rights to self-determination and free, prior and informed consent.

Text Box 5.3: Healing Foundation submission to *Wiyi Yani U Thangani* Co-design

The traditional government approach to community engagement involves 'consultation'. This approach is rigid, has proven to fail over decades of continued disadvantage and over-representation … In contrast with 'consultation', co-design involves service providers and communities working together from the outset to develop new approaches that are genuinely informed by clients. By working directly with Aboriginal and Torres Strait Islander men, women and children on every aspect of program design and evaluation, communities will ensure that programs are designed to be safe, accessible and culturally and locally relevant.

However, in *Wiyi Yani U Thangani,* I also noted that women were worried that the term 'co-design' was already being widely misapplied and was in danger of becoming yet another meaningless buzz word. The way that governments engage without listening or responding to the voices of First Nations peoples has created a deep sense of mistrust amongst Indigenous communities.[33]

(b) The right to non-discrimination

One of the key purposes of the Declaration is to highlight that equality recognises difference and does not mean assimilation.

Article 2 of the Declaration articulates the right to equality and freedom from discrimination and is another key human right in the major human rights treaties to which Australia is a signatory.

Importantly, the enjoyment of the right to culture and rights associated with land will look different for different people. This means that seemingly 'equal' requirements in law or policy can impact different groups of people in different ways. The need to accommodate this in law and policy is sometimes expressed as the difference between formal and substantive equality, or the difference between equality and equity.

(c) Social and economic rights

Economic and social rights are often spoken about separately, as relating to the 'practical' aspects of the lives of our peoples, which should be focused on first and foremost. They are easy to see as key rights that many First Nations people do not enjoy to the same degree as other Australians. The Closing the Gap targets highlight these kinds of rights, such as health and education.

It is harder to get policy makers, politicians and the mainstream public to understand that these essential and basic human rights will not – indeed cannot – be enjoyed in a way equal to other Australians when the rights to culture, self-determination, and non-discrimination are not fully enjoyed.

A significant portion of *Wiyi Yani U Thangani* addressed these kinds of practical rights – specifically, I focused on our right to enjoy them equally.

In the context of native title and land justice issues more generally, it is critical that the practical rights involved be conceived of as issues of self-determination and equality. It is also critical that the other rights which First Nations people in Australia struggle to enjoy equally are understood to be reliant on the practical manifestation of self-determination and equality in the significant area of land justice.

(d) The rights to country, culture, and knowledge

Wiyi Yani U Thangani detailed the human rights framework in relation to country, culture and knowledge[34] and it is replicated here for ease of reference.

As mentioned above, the enjoyment of economic, social, and cultural rights for Aboriginal and Torres Strait Islander peoples is intrinsically connected to the rights of Indigenous people to maintain, practise, and teach our culture. These rights are articulated in various international human rights frameworks, including article 27 of the ICCPR and article 30 of the CRC:

> Indigenous people are not to be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Committee on the Elimination of Racial Discrimination has also indicated that the obligations in the ICERD require governments to:

- recognise and respect Indigenous distinct culture, history, language, and way of life as an enrichment of the state's cultural identity and to promote its preservation
- ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent
- ensure that Indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs and to preserve and to practise their languages
- recognise and protect the rights of Indigenous peoples to own, develop, control, and use their communal lands, territories and resources.[35]

UNDRIP sets out how these rights apply in protecting Indigenous peoples' cultural identity, connection to Country, and cultural knowledge. That is, how it looks to apply these universal rights to Indigenous peoples:

- **Article 10:** Indigenous peoples shall not be forcibly removed from their lands or territories.
- **Article 12(1):** Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites.
- **Article 25:** Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
- **Article 26:** Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and the right to own, use, develop and control the lands.
- **Article 27:** States shall establish and implement a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognise and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
- **Article 29:** Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programs for Indigenous peoples for such conservation and protection, without discrimination.

- **Article 31:** Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
- **Article 32:** Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

(e) Previous reports relevant to native title

Over the past three decades, the Commission is on record with respect to the native title system's lack of compliance with Australia's human rights obligations.

Previous Native Title Reports have identified a plethora of flaws in the native title system. They have highlighted the ongoing need to prioritise reform of the Native Title Act to mitigate the impacts of colonial dispossession. They have also identified positive developments in the reform of native title law and practice, most particularly in communities' abilities to work within and around the system to achieve the best possible results for our peoples.

There are consistent themes which previous Social Justice Commissioners have highlighted, followed and reported on. This includes themes such as:

- the racially discriminatory legislative provisions resulting from the 1998 amendments (and arguably present to a lesser degree in the original 1993 legislation)[36]
- the power imbalance between native title claimants and holders, and third parties such as governments and mining companies[37]
- the onerous connection requirements[38]
- lateral violence and intra-community conflict[39]
- the creative ways that local communities have managed problems and led the development and implementation of solutions[40]
- the failure of the current land rights, native title, cultural heritage and environmental protection legislation across the federal and state and territory jurisdictions to protect Indigenous cultural heritage.

The Native Title Reports have also traditionally included a 'year in review' chapter, summarising developments in the previous 12 months and providing summaries and/or analysis of significant cases. This Report is focusing instead on deeply listening to the truths of women who have personally experienced the native title system and elevating their voices. Those voices frequently refer to and reflect contemporaneous legal developments and I have used some of those opportunities to expand on those developments. However, there are other excellent sources for summaries of native title legal developments, most obviously, the *Ashurst Native Title Year in Review*[41] and the resources available on the AIATSIS website, including the Issues Papers, Newsletters and the Native Title Law Database.[42]

There have also been a number of other significant reviews and reports on the native title system over recent years. These reports and reviews have involved hundreds of submissions by individuals and organisations.

Text Box 5.4: Significant inquiries and reports relevant to land justice and cultural heritage since 2016

DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006* (2017): the purpose of the Technical Review was to consider technical amendments to strengthen and improve the CATSI Act and align it with changes in corporate law and regulation.

A number of themes emerged from the consultations with stakeholders, including the following:

- that Indigenous corporations play a unique role in Indigenous communities and in the provision of services to Indigenous peoples
- there is no 'single' form of CATSI corporation, and 'one size does not fit all'
- smaller CATSI corporations require additional support, and it is appropriate to reduce the regulatory burden that is imposed upon small CATSI corporations
- while CATSI corporations look to the Registrar and ORIC for assistance and support, the autonomy of CATSI corporations requires that regulation often be based upon additional disclosure
- the Registrar can play a greater role with respect to certain matters relating to native title regulation.

B Burbridge, M Barber, T M Kong, T Donovan (AIATSIS, NNTC and CSIRO), *Report on the 2019 Survey of Prescribed Bodies Corporate (PBCs)* (January 2021): reported on a survey of 58 PBCs (of a total of 197 PBCs across Australia) to collect data on their activities, challenges and successes, to inform policy and program development. This Report and its findings are discussed further in section 10.3 on the ability to participate properly in native title processes.

NIAA, *CATSI Act Review Final Report* (February 2021): the CATSI Act Review had an expanded scope to include an assessment of the effectiveness of the CATSI Act as a 'special measure' under the *Racial Discrimination Act 1975* (Cth), including whether it can better support economic and community development opportunities for Aboriginal and Torres Strait Islander people.

The review included 72 recommendations outlining changes to the CATSI Act, suggesting further consideration of some aspects of the CATSI Act and identifying additional support that could be provided to corporations incorporated under the CATSI Act.

RMIT University, *First Peoples and Land Justice Issues in Australia: Addressing Deficits in Corporate Accountability* (17 March 2021): describes the multiple barriers that First Peoples face to achieving land justice in Australia. It finds that in some cases, such as the Bravus (formally known as Adani) Carmichael Coal Mine, the Queensland government has gone so far as to extinguish native title.

It points to serious accountability shortfalls in the mining and extractive gas industries and highlights what governments and companies should be doing to protect the rights of First Peoples impacted by major corporate developments in Australia. This Report sets out an agenda of urgent legislative reform.

Text Box 5.4: Significant inquiries and reports relevant to land justice and cultural heritage since 2016 (cont.)

Nous Group, for the National Indigenous Australians Agency (NIAA), *Comparative Performance of fourteen Native Title Representative Bodies* (31 March 2021): Nous Group assessed and reported on the extent to which 14 NTRB-SPs are achieving positive and sustainable outcomes for people who hold or aspire to hold native title. The reviews examined various factors that impact on good performance – including NTRB-SP's efficiency and effectiveness in performing their functions under the Native Title Act, their cost effectiveness, governance arrangements, support for the organisations that hold native title and the future of the NTRB-SPs in a post-determination world. It also reports on systemic issues which arose in the reviews.

Aboriginal Affairs NSW, Department of Premier and Cabinet, *Aboriginal Land Rights Act 1983 Statutory Review 2021 Report* (September 2021). The 2021 ALRA review identified immediate and long-term work to be realised through a three-stage process. These three-stages acknowledge the attention to complaints (including in relation to misconduct), membership, representation, and more. Five themes underpin this work, including: Aboriginal culture and heritage, strategic land use, compensation, compliance and regulation, and social housing. These themes aligned with the review's guiding principles of consistency, efficiency, and empowerment.

Parliament of Australia, Joint Standing Committee on Northern Australia, *A Way Forward: Report on the Inquiry into the Destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, (October 2021): Following Rio Tinto's destruction of the 46,000+ year old Juukan Gorge rock shelters on 24 May 2020, the Senate referred the matter for inquiry. This Report found that there are serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework, in all states and territories and the Commonwealth, not only the *Aboriginal Heritage Act 1972* (WA); and that legislation designed to protect cultural heritage has, in many cases, directly contributed to damage and destruction. The Committee called for legislative frameworks in all Australian jurisdictions to be modernised, based on the UNDRIP principles of free, prior and informed consent, to bring meaningful protections for Aboriginal and Torres Strait Islander cultural heritage.

Text Box 5.4: Significant inquiries and reports relevant to land justice and cultural heritage since 2016 (cont.)

NSW Parliament, Legislative Council, Standing Committee on Social Issues, *Review of the Heritage Act 1977* (October 2021): Chapter 3, 'Aboriginal Cultural Heritage', noted significant stakeholder support for stand-alone Aboriginal heritage legislation, and recognised the separate parallel process underway, whereby the NSW Government had appointed 13 Aboriginal people with expertise in Aboriginal cultural heritage to provide independent advice to the Minister on reforming Aboriginal cultural heritage protections. The Committee report recommended '[t]hat, as a matter of priority, the NSW Government progress the reform of Aboriginal cultural heritage legislation in tandem with the review of the *Heritage Act 1977*'.

In 2010, the NSW Government commenced a process to reform Aboriginal culture and heritage laws, and between 2011–2018 a series of government working groups was involved in consultation, construction of principles and draft legislation. However, as at the time of publication of this Report, there is still no Aboriginal cultural heritage legislation in NSW.

The *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022* (NSW) was a Private Member's Bill brought to the NSW Parliament in June 2022. It was an comprehensive attempt to develop a new framework for the recognition, protection and conservation of Aboriginal cultural heritage in NSW. A key reform proposed was the establishment of an Aboriginal Cultural Heritage Council comprised of Aboriginal people that was to have the 'ultimate say on whether or not a site, object or remains of Aboriginal heritage may be altered, damaged, or destroyed'. The Bill lapsed in February 2023.

C Dalley and D Romano, Women in Native Title Anthropology (WiNTA), Alfred Deakin Institute for Citizenship and Globalisation, Deakin University, *Discrimination and Gender-Based Harm: the Experiences of Women Anthropologists in the Native Title Sector*. Report to the Attorney-General's Department (October 2021): reports findings of a qualitative study of women anthropologists' experiences in the native title sector. The study explores issues relating to discrimination, career progression, recruitment, retention, pay inequity, safety, abuse and threats of violence, sexual harassment and assault. The background was an ongoing concern about the lack of knowledge and expertise among native title anthropologists, often framed as an issue of 'career progression', but largely ignoring the conditions of gender.

Parliament of Australia, Senate Standing Committees on Finance and Public Administration, *Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021, Final Report*, (November 2021): inquired into the proposal (since implemented) to establish the Northern Territory Aboriginal Investment Corporation in the Northern Territory. The Commission made a submission to this Inquiry, noting concerns regarding the potential negative impact on the free, prior and informed consent of Northern Territory Traditional Owners.

Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia*, *Progress Report* (June 2022): The Committee received 92 submissions but the progress report noted that the 2022 federal election resulted in the inquiry not being completed. The Senate subsequently referred the inquiry to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, which reported in November 2023 (see below).

Text Box 5.4: Significant inquiries and reports relevant to land justice and cultural heritage since 2016 (cont.)

Rio Tinto, *Communities and Social Performance Commitments Disclosure* (October 2022): following Rio Tinto's destruction of the Juukan Gorge rock shelters in 2020, this Report shares Rio's progress on the actions taken to improve Rio's cultural heritage approach and Indigenous participation and leadership.

Parliament of Australia, Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, Report* (Nov 2023): this Inquiry was essentially the continuation of the Legal and Constitutional Affairs References Committee Inquiry (mentioned above) which was interrupted by the 2022 federal election. The Joint Standing Committee adopted the terms of reference and all submissions to the Senate Committee Inquiry were made available to the Joint Standing Committee. In addition, the Joint Standing Committee received 50 submissions and 11 supplementary submissions, and conducted seven public hearings.

This Joint Standing Committee report is an important piece of work capturing the history of the fight for human rights by First Nations Australians since colonisation, including the development of UNDRIP – and Australia's 2007 opposition and then 2009 endorsement of it. The Joint Standing Committee report also outlines the extent to which UNDRIP principles or articles are being implemented across Australia.

The Joint Standing Committee report makes important recommendations regarding the implementation of UNDRIP, including by responding to the Uluru Statement from the Heart.

Legislative Assembly of the Northern Territory, Legal and Constitutional Affairs Committee, *Inquiry into a Process to Review Bills for their Impact on First Nations Territorians* is due to report back to the Legislative Assembly by May 2024.

5.3 *Wiyi Yani U Thangani* Project

Given the importance of the *Wiyi Yani U Thangani* Project to this Native Title Report, I have laid out below a brief overview of the Project to give readers a basic notion of its aims, the work it entailed, and the findings and recommendations it made relating to the native title system.

(a) Project overview

Stage One of the *Wiyi Yani U Thangani* project involved national engagements with First Nations women and girls throughout 2018. The *Wiyi Yani U Thangani Report*[43] released at the end of Stage One identified major systems-deficits across the board and made recommendations for broad structural reforms to meet the needs and rights of First Nations women and girls'.[44] The Report goes far beyond siloed issues and delivers a striking message: that we will reach a meaningful point in our journey of political agreement-making in Australia when we seriously begin the shared work of transforming our systems, across all sectors and parts of life, from siloed, punitive, top-down, and short-term to holistic, healing-orientated, culturally and community-grounded and sustainable.

Following publication of the *Wiyi Yani U Thangani Report*, **Stage Two** of the project focused on socialising its findings with communities, peak bodies, First Nations and non-Indigenous organisations, as well as the Commonwealth and state and territory governments.

To aid in conveying the key messages of the *Wiyi Yani U Thangani Report*, the Commission published several tools. This included an animation *From Dreams, Let's Make it a Reality*.[45] Also included was the *Wiyi Yani U Thangani (Women's Voices): Implementation Framework (2021)*,[46] which provides guidance for translating the substantial findings of the Report into meaningful action to make systemic change.

The Implementation Framework was designed as 'a living document' to be used and refined in preparation for dialogues at the national First Nations Women and Girls Summit in 2023 and to form the basis of a Change Agenda that was published in March 2024.

The *Wiyi Yani U Thangani* **First Nations Women's Safety Policy Forum** was held virtually on 12 September 2022, bringing over 150 participants together in a self-determining space, drawing together the diversity of issues, uniting voices and finding common ground for the path ahead. The ultimate intention of the Forum was to re-set the relationship with government, centring First Nations women in the design and development of the policies and systems that impact our lives.

The *First Nations Women's Safety Policy Forum Outcomes Report (November 2022)*[47] is a contribution to setting out the pathway for transformational change, sitting alongside the long journey of advocacy of First Nations women, centuries past and present. The Outcomes Report of the Safety Policy Forum primarily deals with context-setting and the steps required for how to move forward in designing effective plans and policies to end violence.

The *First Nations Women and Girls Summit* – the key engagement event of **Stage Three** of the project – was held in May 2023. The Summit was the first ever national gathering of its kind to focus entirely on the issues that matter to First Nations women from Countries across Australia. There were over 900 participants in attendance. Women called for a national gathering to make themselves visible, to celebrate and share their diverse strengths and all they have achieved, and to create a time and space to determine the way ahead and consider how to translate the substantial body of evidence in *Wiyi Yani U Thangani* into reality. Several significant documents came out of the 2023 Summit including the *Summit Communiqué*, and the *Wiyi Yani U Thangani Youth Statement 2023*.

In order to **continue the implementation work of *Wiyi Yani U Thangani*** after my term as Social Justice Commissioner ends, and to respect the clear message from women and girls that the *Wiyi Yani U Thangani* Project must be more than a consultation period with a report, the *Wiyi Yani U Thangani* First Nations Gender Justice Institute (the Institute) is, at the time of writing, has just been established at the Australian National University (ANU). The Institute was launched alongside the Change Agenda for First Nations Gender Justice in March 2024, around the time of this Report's publication.

The Change Agenda for First Nations Gender Justice is a Blackprint for transformation, setting out the change that First Nations women and girls want to see in the world, for themselves, their children, families, communities, Country and culture. The Change Agenda defines how we make change happen through a systems change measurement, evaluation and learning (MEL) approach, and sets out the work of the Institute in driving this change.

Through strong partnerships and collaborations with First Nations women, governments, the ANU, other universities, the private sector, and philanthropists, the Institute will design and scale-up First Nations gender-informed approaches and initiatives and support the translation of evidence into policy development and design.

(b) *Wiyi Yani U Thangani* and the native title system

As with all elements of *Wiyi Yani U Thangani,* the Institute will model best practice First Nations women-led governance, driven by principles of cultural governance, self-determination and co-design, to ensure the knowledges, skills and lived experience of First Nations women are front and centre.

As I noted in the *Wiyi Yani U Thangani Report*, the enjoyment of rights associated with access to and protection of Country, and control over resources on Country, are integrally related to the enjoyment of many other human rights for Australia's First Peoples. That connection works both ways: recognition of land rights is integral to our ability to enjoy our rights and promote our well-being in other ways, while other rights, such as to services on Country and to equal access to education and justice, are integral to our ability to enjoy our rights to Country and culture.

> Aboriginal and Torres Strait Islander peoples' identity is inextricably linked to Country. For our mob, safety, health, and wellbeing are found at home. Nonetheless, too often, Aboriginal and Torres Strait Islander women and girls who live on Country are not provided with readily accessible and suitable services, including services for women and girls with disability. This lack of adequate support is undermining women and girls' sense of place and belonging and presents an obstacle to the realisation of a range of economic, social, and cultural rights.[48]

In *Wiyi Yani U Thangani* Chapter 11, 'Land and Country', which sits within Part Three of the Report, 'Living and Belonging', I discuss the right to Country, culture and knowledge, and the experiences and views of First Nations women and girls in this regard. That chapter highlights how difficult it is to separate our native title rights, and other rights to Country, from our capacity to enjoy all our other human rights. For that reason, Part Three also includes chapters on service delivery, housing and homelessness, and disability.

I will provide a brief summary of that chapter here as it was the foundation from which this Native Title Report has grown.

It was notable that in *Wiyi Yani U Thangani* consultations, women did not go into very much detail about land justice and associated processes in the way they did for this Report. Several women in their interviews for this Report mentioned that the complexity of the native title system and especially the intra-community conflicts associated with it, mean that group consultations are not conducive to frank, open conversation about native title.

With the benefit of the subsequent Native Title Project interviews and submissions, it is clear that, in many ways, women were only scratching the surface in their discussions about land justice in *Wiyi Yani U Thangani* . Nevertheless, the themes which came from those consultations did present a picture of the way that land justice (or lack thereof) has impacted First Nations women and communities, and their priorities going forward in that respect. That picture has been dramatically built upon by the women who provided their expertise and experience for this Report.

In *Wiyi Yani U Thangani* the interconnectedness of the experience of enjoying (or otherwise) human rights such as the right to culture, the right to adequate housing, the right to education, the right to health, and so on, were identified by First Nations women and girls.[49]

As I noted in the *Wiyi Yani U Thangani Report*:

- Girls and young women in Juvenile Justice settings identified the protective element of – and therefore the need for – learning about culture and including culture in schools.
- Women discussed the need for access to Country in order to maintain and teach culture.
- Women raised the intra-community disputes associated with claiming recognition of rights to Country, and the associated identity issues and disputes.
- Women raised the ongoing problems with appropriate, secure housing of a decent, liveable standard.
- Women recognised the impact that the lack of land justice we experience has on our health outcomes.
- Women raised the dispossession of country and the ongoing removal of children as contributing to the inability to pass down culture and knowledge.

In *Wiyi Yani U Thangani,* I also discussed how a human rights-based approach recognises that First Nations women experience rights and violations of those rights differently from First Nations men.

Within the native title system, the role of women has been discussed over the last few decades with no consensus, but with common themes around participation, discrimination and equality, decision-making and governance rights and responsibilities, and empowerment and self-determination.[50]

These themes all also stand out in the stories women told of their experience in native title for this Report.

5.4 Premise, methodology and project development of this Native Title Project

(a) Methodology

This Report follows the *Wiyi Yani U Thangani* project in elevating the voices of First Nations women in a specific policy and legislative area that is often viewed as male-dominated.[51] This native title project complements and builds upon *Wiyi Yani U Thangani* in one particular, very technical and complex area of our lives that no other Australians experience.

In order to present a holistic picture of the native title system as it plays out in real life for First Nations people – that is, to view it from a person-centred perspective – we designed the project around narrative-based inquiry and storytelling. This Report had similar methodological principles as *Wiyi Yani U Thangani* – valuing storytelling and prioritising a gendered lens. We approached it with the same commitment to deep listening.

The data that informed this Report includes:

- existing publications, media reports, case law
- informal conversations with personal and professional contacts in native title
- a survey of First Nations women with extensive involvement in the native title system
- written submissions by women with extensive involvement in the native title system
- women's views expressed in a group format at the 2021 AIATSIS Summit Indigenous women-only workshop, which I hosted
- in-depth 'interviews' with Aboriginal and Torres Strait Islander women who have had extensive involvement in the native title system.

From my own experience in the native title system and my team's human rights-based research background in the native title system, we were able to interpret initial desk-based research and use that to design an iterative process, with each step informing the next.

1. We conducted desktop research and spoke with existing professional and personal contacts in the native title space.
2. We then invited First Nations women with experience in native title to tell us their experiences and opinions through a survey. This survey collected some limited quantitative data, but also steered the next stage through the development of a guided submission form.
3. We designed a guided submission form and accepted submissions in that form and any other format through which women with experience in the native title system wished to contribute. Submissions were specifically sought from Aboriginal and Torres Strait Islander women, in addition to other individuals and organisations, with expertise and experience in the native title system. These submissions offered an opportunity for respondents to tell their stories in greater detail.
4. The third consultation forum was at the AIATSIS Summit in 2021, at which my team and I facilitated a First Nations women-only workshop on experiences of the native title system. This provided us with the unique opportunity to listen to women's views and experiences, not simply in isolation, but as a collective and collaborative voice.
5. The final phase of this committed listening process was the in-depth, semi-structured and unstructured interviews of First Nations women with extensive experience in native title. Their stories are at the centre of this Report.

(b) The organic development of the evidence base

The engagement phase of this Report was carried out at a time when COVID-19 made in-person consultations difficult. It has been through several iterations in design, but was always intended to be based on in-depth interviews of First Nations women who have had extensive experience in the native title system. However, it became clear that in order to present a useful picture of the native title 'landscape', preliminary work was needed to ensure the interviews were sufficiently representative and targeted. This was a challenge until the end – my team and I would have loved to do many more interviews.

To guide our approach to the Report, we spoke with existing contacts in the native title system who have both broad and technical knowledge of what is going on in different parts of the country. I express my sincere thanks to those professionals – lawyers, anthropologists and board members and staff of various Indigenous organisations – for their generosity in sharing their expertise, professional opinions and contacts with me and my team.

The information gathered was used to approach First Nations women who have had various kinds of experiences in the native title system. Some women referred us to other women whom they knew had important knowledge of the native title system. My team took up as many opportunities to interview women as was logistically possible.

(c) Storytelling as the basis for person-centred policy development

This Native Title Report is an holistic look at the impact of the native title system on the everyday lives of First Nations individuals and communities, from the perspective of First Nations women. Women's stories of their experiences in the native title system paint a picture of the lived reality of that system; they lay bare the impacts on every aspect of the lives of those women, their families and their communities. They personalise the system and make it relatable on a human level.

Much like other aspects of our lives, the native title stories of the women featured in this Report remind us that, despite structural marginalisation and systemic barriers to our equal participation in decision-making, women are present and influential in the native title sphere. We are coming up with creative, strengths-based approaches to address the intra-community conflicts which native title has exacerbated and, in many cases, created. We are uniting our communities. We are stepping up as individuals to use our skills from both worlds to benefit our communities – our strong cultural knowledge and our adeptness and expertise within mainstream law and business.

Like we found in the *Wiyi Yani U Thangani* consultations, through the voices of women we also heard the concerns and needs of communities as a whole.[52]

Somewhat predictably, the women's stories in this Report raise the same themes that recur in the body of case law, and the same developing areas of native title law and practice that are raised in key inquiries and reviews, and discussed in the academic papers. But the stories in this Report provide something invaluable to the discourse surrounding native title reform: the meaning of the system and its processes to, and the way it is experienced by, First Nations peoples, communities and individuals.

The personal stories in this Report highlight the complexities and the interrelatedness of things such as various legislative provisions, regulations, policies, regulatory bodies, judicial bodies, professionals and representative bodies. The stories make it clear that no part of the native title system can be viewed alone, much less reformed effectively in isolation. Any analysis of reforms

to the native title system must be considered alongside state and territory legislation regarding land rights, and all jurisdictions' cultural heritage legislation.

Indeed, the stories in this Report illustrate the very basic but important fact that land justice – and within that, the native title system – is strongly connected to the general wellbeing of our peoples. It is part of our everyday life that the ongoing denial of land justice – and the discriminatory processes that are involved in that denial – result in a deprivation of our basic human rights to identity, culture and self-determination.

Native title and land rights is something that only we, as First Nations peoples in Australia, have to pursue, but it is in fulfillment of human rights that all Australians are entitled to enjoy, and most already do enjoy. As discussed earlier in this chapter, the content of those human rights – were they to be enjoyed – looks different for us because our culture is different and our traditional system of 'land rights' looked different under received British common law. But they are the same rights already enjoyed by everyone else in Australia.

The first Social Justice Report by the first Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, clearly identified the importance of social justice, including land justice, to our everyday life.

> Social Justice must always be grounded in the daily lives of Indigenous Australians. Social Justice is what faces you when you get up in the morning. It is awakening in a house with an adequate water supply, cooking facilities and sanitation. It is the ability to nourish your children and send them to a school where their education not only equips them for employment but reinforces their knowledge and appreciation of their cultural inheritance. It is the prospect of genuine employment and good health: a life of choices and opportunity, free from discrimination. This is not an ideal. It is the commonplace experience of most Australians.[53]

Regarding native title and social justice, specifically, Commissioner Dodson went on to say:

> The recognition of native title has utterly recast the landscape of this country. It has brought Australian common law and morality into a closer relationship. It provides a unique opportunity for developing a closer relationship between Indigenous and non-Indigenous Australians. Reconciliation based on justice presents the prospect of a unity which could uplift the entire community.[54]

This is the basis of approaching native title in this Report – 30 years later – through the stories of individual women and their native title journey. The unfinished business of land justice in Australia – specifically the failure of native title, land rights and cultural heritage protection legislation to facilitate self-determination and community control – is a significant component of the failure of successive governments to see improvements in our well-being and health outcomes. Native title may seem removed from everyday life to many Australians who do not understand the importance of Country to our cultures and our identities, and to those who have not experienced the system. However, it is integral to how we experience our everyday life.

By starting with how the human beings at the centre are impacted, valuable insights can be gained into how those systems and processes must change.

Like Commissioner Dodson's *Native Title Report 1993*, this Report posits native title (and land justice more broadly) as unfinished business which impacts not only whether or not our people can enjoy our social, economic and cultural rights, but also whether all Australians can reconcile our history and forge a relationship of trust, respect and commonality moving forward.

Like *Wiyi Yani U Thangani* in 2020, in listening to women involved in the native title system, this Report also draws attention to the solutions that First Nations women and communities are bringing to the table to deal with the myriad issues presenting through the native title system.

Despite so thoroughly denying many of our peoples control over their Country, the native title system has, nonetheless, precipitated some incredible governance developments for a considerable number of groups across the country. In struggling against the system and constantly having to find work-arounds, native title claimants and groups have found various governance solutions that do support self-determination in varying degrees.

In the *Native Title Report 2012* and *Social Justice Report 2012*, the fifth Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, looked closely at this issue of self-governance and self-determination and their various manifestations.[55] As each of the previous Social Justice Commissioners' reports has done, Commissioner Gooda's 2012 reports highlighted many examples of community-led developments which have had success – because they were designed and implemented by the First Nations peoples whom they were intended to benefit. Where a service was provided by a non-Indigenous provider, it was highlighted because it was an example of true co-design and collaboration, centring culture, respecting and prioritising the knowledge of Elders and other First Nations leaders within community, listening to the needs of community and ultimately centring community in the design and delivery of the services.[56]

The interviews which form the primary evidentiary basis of this Report highlight the ingenuity and resilience of our communities and particularly, in this case, our women, in coming up with various self-empowering solutions to the problems that governments continue to put in our way. In this way, it follows in the footsteps of previous native title and social justice reports.

Daisy Tjuparntarri Ward dancing in the ministers, Mr Wyatt and Mr Dawson, to the signing of the Settlement Agreement at Mina Mina for the Pila Nature Reserve. Image: © Jason Thomas, permission granted for use by Warnpurru AC/RTNB.


The world of native title opened up an experience that I never ever want to endure.
I found this process extremely treacherous and littered with levels of lateral violence that I have never experienced before.
There are a lot of strong Aboriginal women involved in native title however their voices are not always heard because of the patriarchal nature of the broader legal system and the historical anthropological studies often failed to appreciate the role of Aboriginal women.
I have had to place my career on hold to coordinate my family groups, and community to succeed with native title applications from the registration process through to consent determination.
Native title is oppressive and it's not land rights.
Women have to fight for equal say when making decisions. History and conditioning by previous governments have been to approach men and ignore the women. The younger generation of men have this approach that they are the bosses therefore are decision makers. Much of our meeting in the early days was spent talking about how men and women have key roles and are equal.
The native title system is a complete failure for our Country, our Elders and our future generations.
Over the years I have been a witness to the destruction, dismantle, protocols and lore be broken by non-Indigenous professional lead as well as Indigenous people. My community has been divided and conquered. We are fighting amongst each other, native title has caused so much trauma to my community ... Native title has made it hard for myself and siblings as we sit on the fence with anxiety, fear, paranoid of which family is going to be hurt.
I have a good understanding of my culture, but I don't have an understanding of this system. If we get up and say that something is wrong or that what they're saying is wrong, then we're seen as angry black women. And people don't ever want to listen to angry black women, they just ignore us. Stop listening.... At the end of the day, they give us native title, but everything is prepared by white people, everything is decided in this book that only white people say is now the rules for who is from this country and what is important to us. Just white people that don't know anything about real culture. It doesn't recognise heritage, culture, our spiritual being. In the end, native title is just another label for us.
It's a dog tag.
Like we used to have.


Native title is not a culturally safe process, it is based on unequal power relationships.
Western research has misinterpreted and misrepresented Aboriginal cultural traditions and values throughout colonial history in Australia. The layers of historical documents that are relied on by courts are known to be incomplete, inaccurate and in some instances, completed by administrators with little or limited literacy skills ... It does not deliver justice. It results in procedurally produced inequality and promotes further misconceptions about Aboriginal cultural processes of decision-making and custodial duties.
Western perspectives have introduced a patriarchal system where men's business and initiation sites are seen as more important than women's business and birthing sites.
I find the system discriminative against Aboriginal people and our Traditional Land.
This is a complete disgrace and abuse of the system that continues to deny our people land rights. Native title is a farce.
From a young age I have seen grown men fight physically due to 'native title,' their identity has been stripped slowly. Native title isn't healthy ... Native title yet again plays a big part it's killing my Elders. They all should be relaxing and passing on stories to the next generation yet they are fighting a fight set up by white man to kill them off quicker, native title is emotionally, mentally and physically killing my Elders.
As women, as we get older, we learn more about our culture and have more understanding of all the things native title talks about, but that's the same time we become mothers and we have responsibility now for all the children and siblings and parents in our life. The men are all looked after by the women. They can go and talk about all this stuff then and then generation after generation are taught that men have all the knowledge.
Native title just a white man thing that thinks men's business is all we have. And now men act that way too because that's what native title tell them is true.

6 Survey results

A survey was made available to Aboriginal and Torres Strait Islander women with experience in the native title system to inform the development of this Report. The survey was available to complete between 4 March 2020 and 12 May 2021.

The results from this survey provided my team and me with insight into common challenges faced by First Nations women in the native title system, and women's views on what needs to change.

There are clear limitations to an online survey, not least of which is that some people may not have easy access to devices with sufficient capability to easily complete the survey. For this reason, the survey was used only as a guide in the development of this Report, along with, for example, our existing knowledge, desktop research, written submissions, professional contacts, and the women's breakout session at the AIATSIS Summit 2021.

A summary of the survey respondents and noteworthy results is below.

6.1 Break-down of respondents

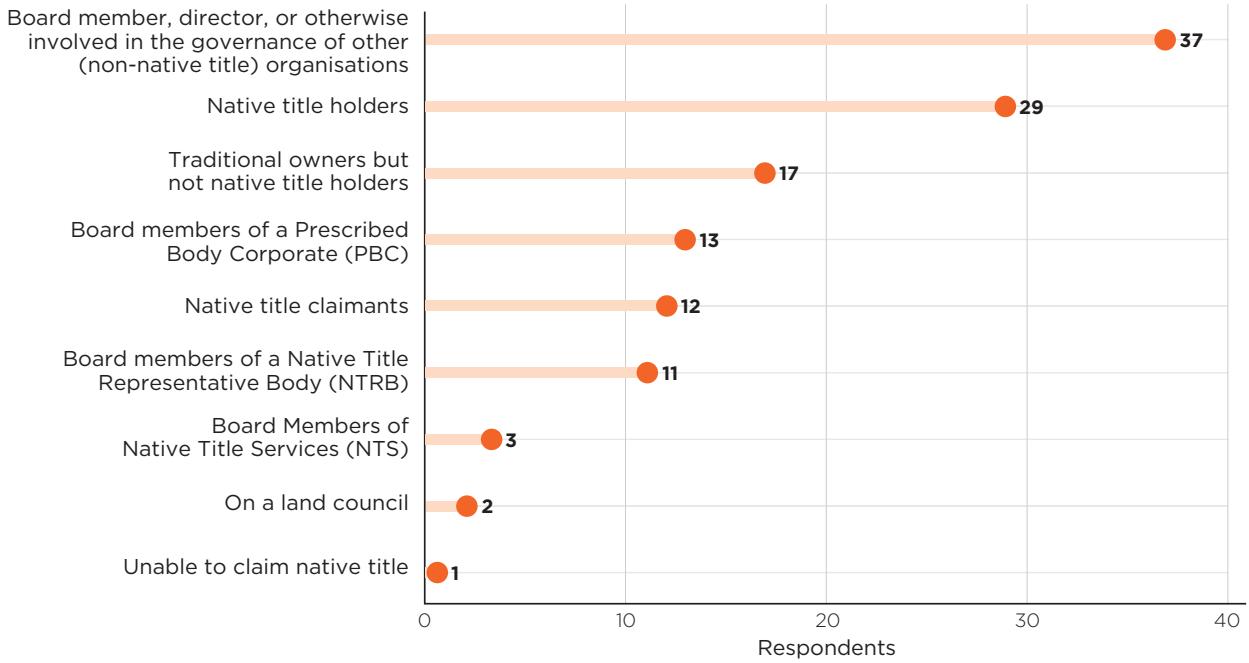
There were 119 respondents to the survey. Out of this 119, 96 identified as female and were therefore able to go on to answer more questions.

Out of 96 female respondents, 73 identified as Aboriginal, 2 as Torres Strait Islander and 1 as both. Of those 76 First Nations respondents, 11 did not continue with the survey after responding that they were not involved in native title. This left 65 relevant respondents. Figure 1.1 represents where 64 of these respondents were from. The remaining respondents did not disclose.

Figure 1.1: Where respondents were from

In total, 13 respondents reported working professionally in the native title space and two respondents responded that their *only* experience in native title was professional experience.

Other characteristics of the 65 relevant respondents included:



6.2 The results

(a) Top issues for women in native title

The survey results describe the most prominent issues for women in native title among the participants and their communities. Analysing the data made clear that the most prevalent issue for these women is that native title holders lack power under the Native Title Act. The table below depicts two different rankings of the issues presented in the survey.

Table 1.1: Top issues for women in native title (ranked)

#	Issue	Ranked overall	Ranked by first preference
A	Native title holders lack power under the *Native Title Act 1993* (Cth)	1	1*
B	It is too hard to prove connection to country	8	4
C	Native title processes force people to choose identities	6	7*
D	Unequal power dynamics with third parties (e.g. mining companies) funding negotiations	4	5
E	Native title rights to offshore areas are limited	12	8*
F	Native title holders cannot choose how to set up PBCs	11	7*
G	It is hard to benefit economically from native title land	7	6
H	Other laws like heritage laws do not protect native title	2	2
I	Insufficient resources for PBCs	5	3
J	No resources to heal from trauma which has surfaced in native title processes	3	1*
K	Onerous compliance requirements for PBCs	10	8*
L	Other, please specify	9	8*

*ranked equally with another issue

The respondents who selected Issue L ('other, please specify') were invited to describe an issue in their own words. The issues women cited in these responses as most important to native title included: nepotism, corruption, lateral violence, lack of time to engage in processes, secrecy, land council exclusivity, informal conflict resolution, incorrect and/or false connection reports, and more. These issues echo those heard in the in-depth interviews that my team and I conducted for this Report. These issues are categorised under 'other, please specify' but are no less significant than the other issues listed in Table 1.1.

My team and I analysed the top issues through a governance lens. As noted above, 21 of the respondents were in governance roles within the native title sphere.

The priority issues between respondents who had said 'yes' to being part of native title governance were largely aligned with those respondents who had said 'no/unsure'.

Respondents who are involved in native title governance prioritised the following issues:

- native title holders lack power under the Native Title Act
- other laws like heritage laws do not protect native title holders
- insufficient resources for PBCs.

Respondents who are not involved in native title governance or unsure of their involvement prioritised the following issues:

- no resources to heal from trauma which has surfaced in native title processes
- native title holders lack power under the Native Title Act
- unequal power dynamics with third parties (e.g. mining companies) funding negotiations.

The primary difference in priorities between these groups is clear in the overall preferencing of Issues C and D (refer to above Table 1.1). Respondents who are not involved in native title governance or unsure of their involvement prioritised these issues in their responses. Respondents who are not involved in native title governance had this noticeably lower in their ranking of priority issues.

(b) Women's views of gendered experiences of native title

The survey results observed significant challenges and barriers for both men and women within the native title landscape. Responses to questions in the survey that sought to understand these issues through a gender lens provided insight into the different ways women can experience challenges and barriers. That is, barriers for all First Nations people in native title are exacerbated by the intersectional experience of being a First Nations woman. Several results described this, including that the respondents felt that:

- women are less supported to provide information for native title claims in a culturally-safe way
- women bear the brunt of unpaid native title work
- women's business, roles and sites are comparatively less respected in native title
- women are less able to participate in native title processes due to other family and community commitments (see Table 3.1)
- young women are less involved in native title than young men, and are less supported to learn about and develop skills in the native title system.

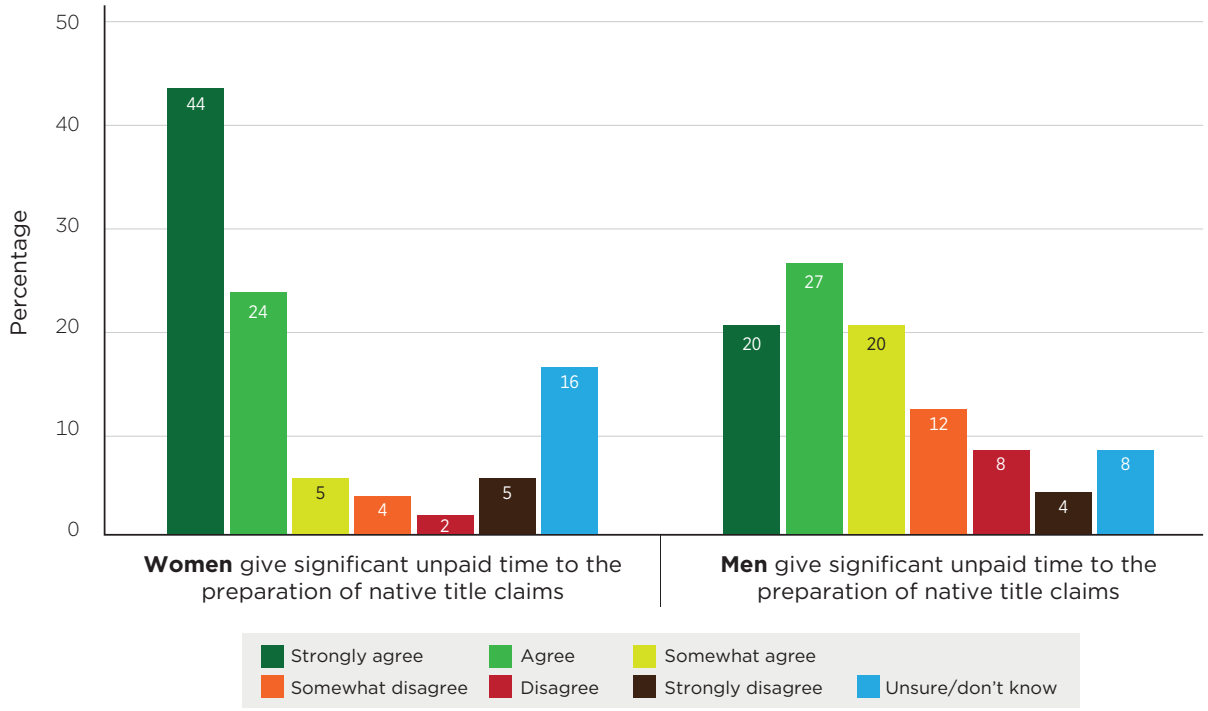
Most survey respondents expressed that the native title system is culturally unsafe for all First Nations peoples. However, they reported that this lack of cultural safety was more significant for First Nations women.

In comments provided within the survey, women described being given a lack of cultural authority compared to their male counterparts in the native title system. Some women reported that this issue is exacerbated by non-Indigenous (often male) lawyers who do not engage with or listen to the women involved in native title processes. Many of the women described being excluded from native title decision-making processes, including because of their gender. These descriptions were accompanied by comments regarding gender discrimination and bias that is felt to be enabled by a 'gender-blind' native title system, which struggles to deliver equitable access.

Several comments referred to the impact of Western patriarchy on cultural Law via the native title system. That is, they spoke of a belief that one impact of native title has been that our own understandings of our First Nations cultures have been impacted by Western patriarchy. One example is that cultural knowledge relevant to native title is often assumed to be men's business when that is not universally the case.

Unpaid time was one of the starkest differences in respondents' views between the impact of barriers on First Nations men compared with women. Figure 1.2 depicts the quantitative results from the survey that echo many of the substantive comments made by respondents referencing the compounding family and community responsibilities of women. These responsibilities present another gendered barrier to participation. They result in reduced capacity to participate in processes that require (significant) unpaid time and learning. Several comments referencing this barrier drew parallels with the financial benefit that motivates some of the men in their communities to engage in the native title system where it involves payment, rather than the volunteer aspects.

Figure 1.2: Giving unpaid time to the preparation of native title claims: men and women



My team and I recognise that this survey's depiction of gendered experiences of women is limited by a survey format. We also acknowledge that this discussion is a binary depiction of the experience of native title which is not the reality for many First Nations peoples today. It instead reflects the 'traditional' understandings and perceptions of connections to country that are required by the native title system. I also note that we did not hear about any experiences of native title with reference to First Nations people identifying as non-binary, but nor did we seek out those experiences.

(c) Resources and trauma

The lack of resources in the native title system and the degree of trauma associated with native title were areas of great importance in the survey results. The results described key issues in this area, including:

- native title holders and PBCs do not have enough information to meet their obligations under the Native Title Act, to exercise their native title rights, or to participate in native title related negotiations and agreements
- native title claim processes are a source of trauma (see Table 4.1)
- the need for additional resources to address such trauma and conflict.

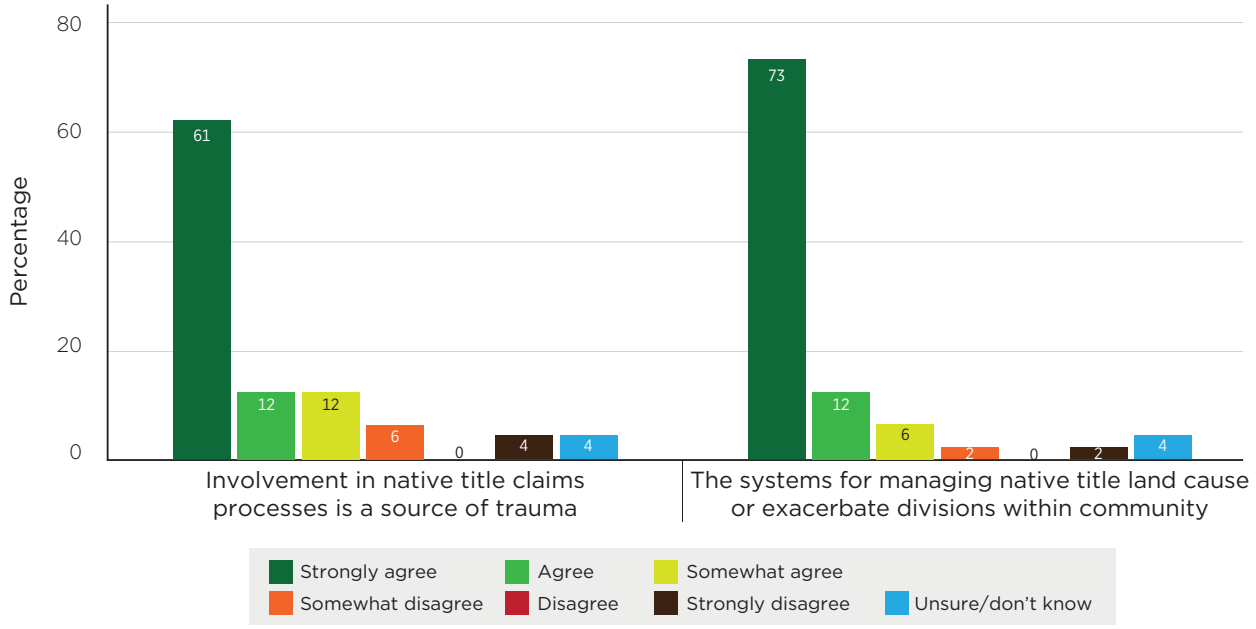
The survey revealed mixed opinions as to whether the reassertion of traditional protocols would serve to prevent or mediate conflict, suggesting the complexity of the landscape.

The comments collected from the survey provided greater insight into the role of resources and trauma in native title processes. The comments from women regarding resources for participation and management of native title land addressed the lack of resources available to community. Some of the women questioned the funding of PBCs and the money politics involved with community governance bodies more broadly. Many of the women commented on governance bodies not representing the community adequately and privileging certain connections. These women also described a lack of engagement between native title governance and community, particularly Traditional Owners and Elders. Several women commented that native title governance arrangements privilege government interests, breaching native title holders' rights and impacting negatively on the right to self-determination.

Comments from women regarding trauma in native title further illuminated the issues. Many women described the native title processes and system as distressing, leaving them without a say and without rights. They described the impact of the system as traumatising and the process as having been responsible for splitting up families. Several women asserted that native title does not deliver justice and instead creates division.

Figure 1.3 highlights the responses to questions about the connection between native title processes and trauma, and the systems for managing native title land and community division.

Figure 1.3: Responses to questions about the relationship between trauma and community conflict and native title



(d) Summary of findings in the context of this Report

Several of the findings from this survey reflect themes that recur in the in-depth interviews discussed in the later chapters of this Report. For example, the top issues identified by Aboriginal and Torres Strait Islander women respondents – particularly those who sat on the board of PBCs – reveal concerns surrounding the way the native title system requires people to '**choose identities which do not reflect their cultural reality**'.

From the perspective of the surveyed women, they are often less able to participate in, provide information toward, or feel respected during native title processes compared to their male counterparts. It is important to note, however, that the experience of First Nations women varies dramatically from community to community and region to region. In the submissions and interviews we heard that women were often central to native title claims and were also frequently stepping up into governance roles. The survey results also varied significantly in this regard.

The survey results highlight that respondents feel the native title system has created or exacerbated **trauma and internal division**, and that they lacked appropriate resources to deal with that and facilitate healing in community. The responses pre-empted the submissions and interviews in this regard, with many women describing involvement with native title as traumatising and distressing.

The survey also touched on the **power imbalances** experienced by Aboriginal and Torres Strait Islander peoples and individuals within the native title system, a theme that also pervades the written submissions and the interviewees' stories. The qualitative components of the survey provided powerful commentary on the perceptions of First Nations women regarding gendered, relational, and systemic forms of power imbalances that surround the native title system and processes.

Respondents to the survey, like those who made submissions and the interviewees, raised issues around the **extensive unpaid labour** that First Nations women give to the native title system, and barriers to participation presented by the degree of unpaid time and energy required to be able to participate fully.

Respondents identified the lack of adequate information and resources provided to First Nations people to participate fully, which goes to the human rights concern of **structural racism in the native title system**: navigating a complex and technical native title system without the necessary knowledge and resources negatively impacts the ability of First Nations peoples to effectively engage in native title processes, present their case in court or in negotiations, and ultimately protect country and practice culture. The more detailed submissions and stories featured in this Report speak to this aspect of the **lack of access to justice** even more clearly.


The native title process has allowed for sacred men's sites and story lines on our country to be desecrated.
The process itself is flawed, unfair and culturally damaging for both men and women. It is also gender blind, and thus gender negative.
PBCs have done nothing but keep everyone in the dark about native title. PBC has played a big role in the Indigenous communities' mental health and has impacted on our community in a negative way.
I have had to place my career on hold to coordinate my family groups, and community to succeed with native title applications from the registration process through to consent determination.
Most of the men I know in native title process are in it for their own greed and financial benefit.
They tell us we have to do things against our culture to get this piece of paper that says white fellas agree you been here. But to get even that we have to tell them all these business things and for us that was all man's things. Us women the ones that know everything anyway. But all that knowledge not going to get us native title.
I don't think our native title determination gave us any rights. It's just made everything harder.
My experience with a Regional Native Title Representative body is they don't fully engage and consult with Traditional Owners regarding the native title process. Claims have involved overlaps with same legal representation, not according to common law; therefore allows modern society laws to misinterpret and adoption rights.
Women's greater obligations to family and community means that we don't have the same time and opportunity to practice our Law on country. There's no recognition in native title that the way we practice women's business on country has had to change because of mainstream laws. The knowledge that we continue to hand down is seen as lesser because we don't practice it the same way.
Even when you get native title after 14 years of fighting and crying over it, there's just another government agency that comes in and controls you. ORIC it's called. And they watch you, question everything you do as a PBC. But they are not there to help, they are there to punish.


The trauma of native title is there every day.
Due to historical policy, native title is no doubt a traumatic process.
When we got native title here they made us put up those rules. In the book. Had to say how we make decisions. But they couldn't understand how we make decisions. We told them, but they just said 'no – that's not how you can do it'. It worked for us for thousands and thousands of years. But just like that – white man says 'no. That doesn't make sense to us so you can't have that.'
Cultural heritage work has been the biggest hurdle in creating conflict closely followed by connection reports.
The only reason conflict arises is when Traditional Owners don't know their connection to country and lore. And want to dominate process.
The native title system needs an overhaul, to be rebuilt alongside First Nations people who have a right to land, and a right to have their governance systems recognized by a western legal system. It should rebuild itself only after gender is appropriately considered, because a patriarchal process means men are usually at the negotiating table, and women lose out.
Native title creates division. It creates haves and have nots.
Native title is seen as somehow legitimising the role that Aboriginal people have in looking after country and making decisions about our own culture. I am a Traditional Owner for land over which I have no decision-making capacity because of native title.
My PBC does not represent the interests of the native title holders. They continually breach their rights and responsibilities, yet ORIC turn a blind eye whenever it is bought to their attention.

7 Submissions

In addition to the survey responses, guided submissions were sought from Aboriginal and Torres Strait Islander women, as well as other individuals and organisations with experience and expertise in the native title system. The submissions provided an opportunity for respondents to provide more detailed information than was possible via the survey.

In total, we received 24 submissions, 18 from individuals and six from organisations. Of the submissions received from individuals:

- nine submissions were from people working in native title in some capacity (two male, one of whom is Aboriginal)
- nine submissions were from First Nations women with personal experience in native title.

Submissions were also received from the following organisations:

- Australians for Native Title and Reconciliation (ANTaR)
- First Nations Legal Research Services (FNLRS)
- Federation of Victorian Traditional Owner Corporations (FVTOC)
- Women in Native Title Anthropology (WiNTA)
- NTSCORP Limited (NTSCORP)
- Kimberley Land Council (KLC).

The themes discussed in the submissions aligned with the themes highlighted by the survey results and pre-empted many of the themes which emerged out of the subsequent interviews. Notably, they talked of the impact of the native title system on the lives of women, families and communities, including intra-community conflict and lateral violence. They spoke of the way the Native Title Act requires us to prove our identity in a 'foreign' system for recognition of what we already know to be ours. They discussed the systemic power imbalance in the Act, particularly when it comes to negotiating 'future acts'. Submissions, particularly those from individuals, also spoke of the struggles many First Nations women face in participating in native title claims and decision-making processes.

Many women spoke about problems with the system which impact all Traditional Owners and native title claimants/holders affecting First Nations women to a heightened extent. For example, when native title meetings are conflict-ridden, women feel particularly unsafe to attend.

Several professionals, organisations and individuals noted the cumulative impact of generational and compounding bias towards elevating men's knowledge over women's knowledge in circumstances where it does not appear to reflect gendered hierarchies extant within the cultures themselves.

The following is a summary of the themes in the submissions and some representative quotes.

7.1 From individual women

(a) Culture and conflict

Many of the individual women's submissions highlighted concerns that the native title system was facilitating the wrong people to speak for country. This led women to feel that native title was undermining traditional culture and creating significant intra-community conflict.

Specifically, the leadership of some PBCs, NTRBs and Service Providers was questioned along with the ability of individuals and groups to hold PBCs, NTRBs and Service Providers to account. Women felt that some individuals in positions of power tasked with speaking for and making decisions on behalf of the group, lack the cultural authority to do so.

Some women specifically felt that the native title system enabled people to benefit from membership of a PBC when they should not be able to, according to tradition. Concerns ranged from the processes associated with proving connection to Country through to the way PBCs are constituted in the post-determination period.

> How can we be reassured that the Native title process is correct if a foreign process is implied onto a cultural process in connection reports … ***Juanita Johnson***

> … some people are making decisions about country that they have no cultural authority for. This disempowers and disrespects our law bosses and cultural authorities … In my experience the PBCs are not made up of … those who have a right to speak for country. Native Title undoes thousands of years of culture that protected and managed country. ***Maria***

Several women submitted that the process of proving connection provided a forum for women's knowledge to be sidelined and for conflicts of interest to play out to the advantage of a more powerful group or individual. Some women felt that anthropological reports prioritising historical written evidence originally compiled by non-Indigenous men were being favoured over information put forward by First Nations women. One submission specifically discussed 'biased connection reports funded by NTRBs' which seemed to have been designed to ensure that certain mob benefitted from native title more than others. These submissions directly raised the conflicts of interest inherent in the native title system.

> There has been misinformation put forward to the Court and accepted by the Court as evidence; and the information that I myself and others have put forward has been rejected. ***Coral King***

> In my experience native title claimant groups are fraudulently empowered by deceitful Native Title Rep Bodies who undertake sparse connection reports to justify their own biased reason in putting forward 'yes mob' who have no connection for the sole purpose to continue to receive future funding. ***Juanita Johnson***

> … both representative bodies have falsely and deliberately put forward people who have no connection to the claim area … The NTRBs are knowingly supporting these applicants in an effort to secure lucrative ILUAs with mining and gas companies … The true claimants are being written out by revisionist anthropologists and lawyers who are instructed, and paid, by the Land Councils using Federal Government funds. ***Letter to Attorney-General from Elder Mrs Vanessa Hunter***

Several submissions described the devastating everyday ramifications of native title empowering the 'wrong people' at the expense of traditional culture. For many of the women, they felt that the process of native title undermined their basic human right to culture, divided once harmonious First Nations communities, eroded the prospect of knowledge transfer and succession planning, and re-traumatised those already dispossessed.

> I am fighting a losing battle as no one in my generation of my family will reach the levels of knowledge I have attained. ***Dawn Brown***

> The native title process has undermined my group's culture to the extent that at the moment I feel that we have no chance of getting our native title rights recognised … The native title processes have made the conflict between my group and the groups taking over our Country much worse. ***Coral King***

> Native title allows our culture to be taken away. ***Michelle Francis***

> I believe that the whole process of native title undermines our basic human and cultural rights … the wrongful connections through the lack of independent so called 'experts' is creating unnecessary and increasing mental [ill] health to many Aboriginal people across the nation … ***Juanita Johnson***

(b) Women and barriers to participation

Submissions from individual women spoke of the disproportionate impact that native title processes have on themselves and other women in their communities.

Several submissions noted the wide-spread dominance of men in NTRBs and PBCs, and as anthropologists and lawyers. Women expressed that they felt disrespected and/or not listened to – that the impact of the predominance of men in positions of power worked to silence women's voices and inhibit their full participation in native title processes.

This exclusion of women from native title decision-making has been perpetuated and maintained by the central role that men have played as professionals in anthropology and law before and after the existence of native title. That male perspective brought by various professionals in relevant sectors in the lead up to and during the development of native title has served to skew native title evidence gathered by anthropologists. This has had a marked influence on the perspectives of lawyers and judges and of many within Aboriginal communities.

> I do not feel that as a woman I have been supported to maintain my culture throughout the native title processes. These processes have put up barriers so that I can't maintain my culture on Country – I maintain it away from Country. ***Coral King***

> Some male anthropologists, lawyers and Traditional Owners can have a male-dominant gaze without meaning to. But most see men's business matters as occupying places of primary consideration in 'authentic' representations of Indigenous laws and cultures. ***Adele Millard, non-Indigenous anthropologist***

> In the course of seven years, we experienced six different lawyers as the lead lawyer to prosecute our NT. These were all men. ***Jennifer Darr***

Throughout many of the submissions, women's roles as 'caretakers' and 'nurturers' were highlighted, emphasising how Aboriginal and Torres Strait Islander women are deeply involved in their communities and cultural lives. While some of the women were also immersed in native title, others felt they were excluded from more formal native title decision-making and leadership roles. However, this did not always mean they were uninvolved in native title decision-making altogether.

> I believe women are more involved in NT as their role are the nurtures of families. I can only speak on the experience of Yuwi here. ***Jennifer Darr***

> Women typically attend broader community/authorisation meetings and I expect are quite active participants in the informal community discussions which occur outside meetings. ***Adele Millard, non-Indigenous anthropologist***

Submissions spoke of the ability of women to participate in native title processes more actively and/or perform leadership roles being hindered by the significant unpaid commitment required – on top of the already significant responsibilities to family and community.

> Women have a duty of care and of course this does not allow them to be able to participate in native title as they would like to do so. ***Michelle Francis***

> Some women are so involved with working for clinics and schools, or in other community capacities, that they do not have time to take on governance roles with PBCs. But where they do, my experience has been that they take those roles very seriously. ***Adele Millard, non-Indigenous anthropologist***

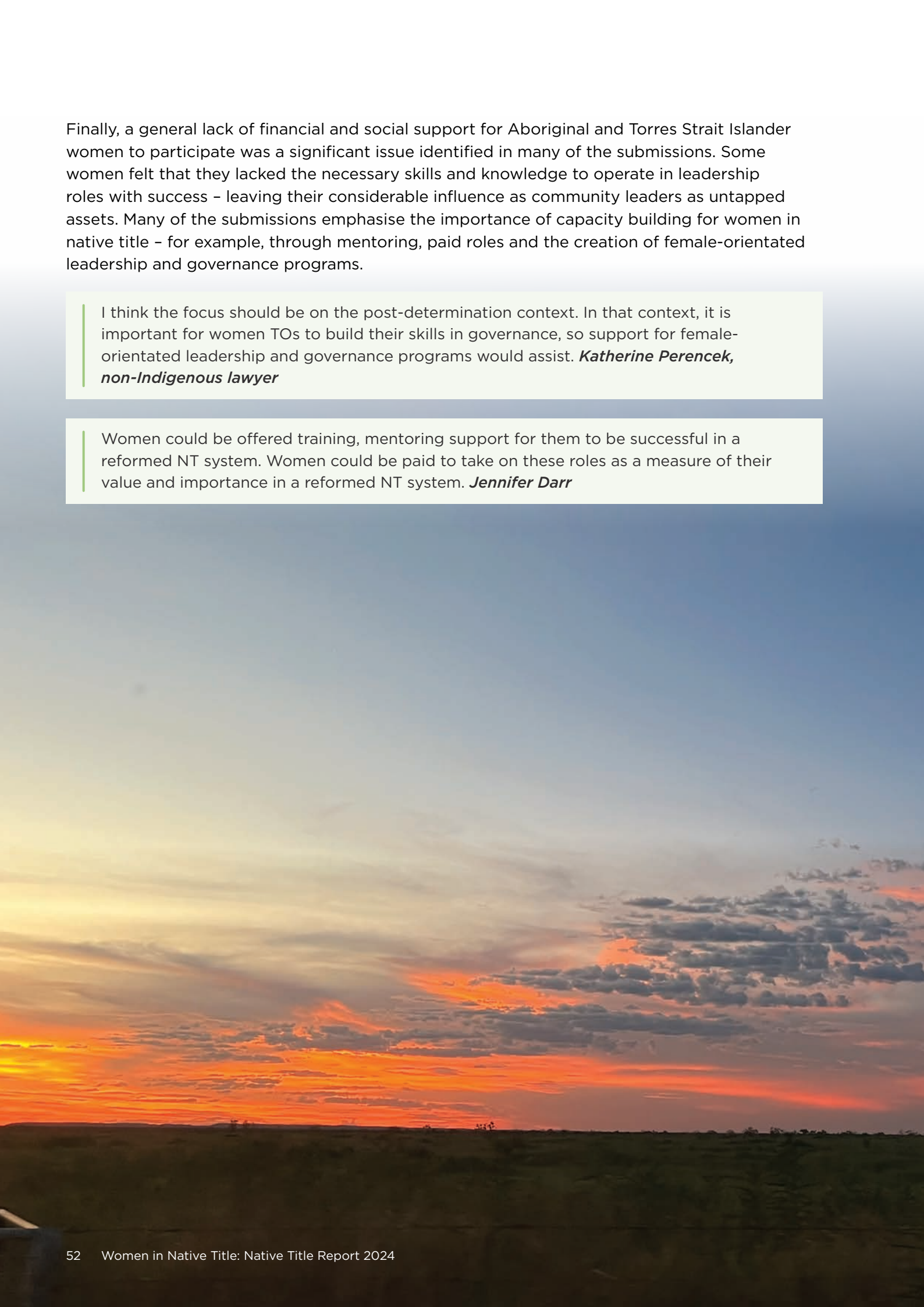
The pervasiveness of men in positions of authority – including those with historical allegations of physical and sexual violence – also deterred women from fully participating in the native title space in some communities.

> … in Kununurra specifically many traditional owning women refuse to sit at the same table as local senior men due to historical allegations of physical and sexual violence. ***Denise Gallo, non-Indigenous woman***

Finally, a general lack of financial and social support for Aboriginal and Torres Strait Islander women to participate was a significant issue identified in many of the submissions. Some women felt that they lacked the necessary skills and knowledge to operate in leadership roles with success – leaving their considerable influence as community leaders as untapped assets. Many of the submissions emphasise the importance of capacity building for women in native title – for example, through mentoring, paid roles and the creation of female-orientated leadership and governance programs.

> I think the focus should be on the post-determination context. In that context, it is important for women TOs to build their skills in governance, so support for female-orientated leadership and governance programs would assist. ***Katherine Perencek, non-Indigenous lawyer***

> Women could be offered training, mentoring support for them to be successful in a reformed NT system. Women could be paid to take on these roles as a measure of their value and importance in a reformed NT system. ***Jennifer Darr***



7.2 From organisations

(a) Dominance of men and the diversity of women's roles

FVTOC and FNLRS both noted the ongoing underrepresentation of women within leadership and governance in Victorian native title spaces, including in their own organisations. FVTOC noted that higher level processes and instruments within native title legislation are likely to be needed in addition to their organisation's commitment to advertise specifically for women to apply for particular governance positions.

Women in Native Title Anthropology (WiNTA) was a three-year project from 2019 to 2022, conducted by two anthropologists, Dr Cameo Dalley and Ms Diana Romano, who made a submission to this project.

WiNTA addressed women anthropologists' experiences including gender-based discrimination, pay inequity, sexual harassment and abuse. WiNTA submitted to this Native Title Report because these issues for women anthropologists have implications for the supply of anthropologists available to undertake native title work, and also for the involvement of Aboriginal and Torres Strait Islander women in native title processes. Both affect the integrity of the native title system.

WiNTA noted the significant attrition of women anthropologists in native title, with very few 'progressing to become "exemplary"'. The supply and demand side of this for women anthropologists in native title is difficult to counter – if lawyers believe judges will give more credibility to men, they will hire men as part of their duty to do the best by their client.

> Paradoxically, limited supply has not resulted in a widening of pool of anthropological expertise and instead has concentrated prestige and gravitas in a small cohort of older, male anthropologists. Women anthropologists that we interviewed reported struggling to be recognised as senior within the field, and routinely being overlooked for work opportunities in favour of men. Our research participants identified lawyers and judges as particularly complicit with this process, noting prejudices against contracting women anthropologists. ***WiNTA***

This is relevant to First Nations women's experiences in the native title system because women anthropologists 'arguably improve the access that Aboriginal and Torres Strait Islander women have to native title processes'.[57]

WiNTA also noted the connection between an overemphasis on gender-restricted knowledge in the native title system and an entrenchment of biases towards the elevation of men's knowledge.

> A major finding from our interviews has been that within the native title system and particularly in connection reports, the inclusion of gender-restricted knowledge (men's knowledge) continues to be overemphasised … these kinds of performed authenticity had the potential to entrench pre-existing biases towards the elevation of men's knowledge. ***WiNTA***

However, WiNTA also noted that a significant number of their research participants had reported that across many settings, 'it is Aboriginal and Torres Strait Islander women who are the most senior holders of knowledge'. WiNTA cautions that the 'diversity of relationships to land and systems of land holding across Australia … should not be underestimated in drawing conclusions about women and native title in Australia'.

WiNTA participants highlighted that they had been contracted specifically to work with Aboriginal and Torres Strait Islander women in collecting evidence, including recording women's only sites. Further, participants reported that First Nations women were actively and critically involved in the preparation of genealogies.

> Our research participants noted many instances where Aboriginal and Torres Strait Islander women had outstanding recall for genealogical information. In a dispute context, especially those involving controversy over who should be included or excluded in a claim group, these genealogies can be of critical importance. ***WiNTA***

Importantly, WiNTA also noted that participants reported that where First Nations women had been employed in community liaison-type roles in NTRBs/SPs, they 'were key to the successful management of the relationship between the NTRB/NTSP and Aboriginal and Torres Strait Islander claimants'.

NTSCORP submitted that the cultural heritage system in NSW does not adequately protect Aboriginal cultural heritage for a number of reasons, including native title holders not being given their exclusive consultation rights. NTSCORP specifically notes that the protection of women's sites suffers from the following:

- Aboriginal Cultural Heritage Reports prepared by non-Aboriginal archaeologists include images and descriptions of Aboriginal objects or sites which are women's sites which men should not see
- proponents often only offer one position for site officer or Aboriginal Cultural Heritage monitor which does not allow for appropriate representation when visiting women's or men's sites
- proponents often only have male archaeologists or staff, creating culturally inappropriate circumstances when visiting or recording women's sites or objects.

(b) Access to participation

i. Conflict and lateral violence

Both WiNTA and FNLRS specifically noted that the high levels of conflict and lateral violence generated by the native title processes is a significant cause of the underrepresentation of women (and young people) in native title.

WiNTA also noted that there are situations in which gendered power dynamics of native title group meetings limited women's capacity to contribute, for fear of retaliation by male claimants, including their own relatives and kin.

The NTSCORP submission identified a list of specific circumstances within the native title processes that create situations of conflict within native title groups, resulting in lateral violence, including:

- the uniform decision-making requirements of s 251A and s 251B of the Native Title Act
- 'foreign' requirements to describe boundaries and claim group membership within the construct of native title law
- requirements that native title groups negotiate with Local Aboriginal Land Councils in order to use s 47A of the Native Title Act (to disregard prior extinguishment) when the extinguishing act was a transfer of Crown Land under an Aboriginal Land Agreement made pursuant to the *Aboriginal Land Rights Act 1983* (NSW)
- proof of connection requirements in the historical context of dispossession
- behaviours of governments and proponents who seek to circumvent the engagement processes agreed amongst a native title claim group

- management and distribution of native title benefits within communities with extensive social and economic needs
- lack of resources of PBCs
- often-limited nature of native title agreements to address the needs of the community as a whole.

FNLRS identified the lack of time allowed for native title groups within the native title system as directly contributing to intra-community conflict:

> Often there is limited time to engage in deep and meaningful engagement with native title groups and blunt winner-takes-all decision-making processes have to be adopted in order for decisions to be made to suit timetables outside of the native title group's control. Not only do these types of approaches make it difficult for people who have experienced trauma to participate effectively, they can inflict further trauma on participants. ***FNLRS***

FNLRS submitted that greater and more flexible funding is required to allow for more opportunities for dispute resolution and trauma informed approaches, leading to greater participation by women and young people. The need for PBCs to receive ongoing support to achieve positive native title outcomes was a key systemic issue identified in the NIAA's 2021 report on the performance of NTRBs.[58]

ii. Male anthropologists

WiNTA noted that in some parts of Australia, where a commissioned anthropologist was male, it has limited the potential for First Nations women to participate in native title processes because of social mores. For example, women wouldn't travel in a car driven by a male anthropologist; or women were simply less comfortable sharing knowledge with male anthropologists.

iii. Family and community responsibilities

WiNTA noted that in their participants' experiences in the anthropological side of native title processes, 'women who have caring responsibilities for children have limited access to native title processes, particularly fieldwork and some claimant group meetings'. They also noted how otherwise benign and unrelated policies can impact the participation of women with caring responsibilities:

> Of course, carers include not only mothers, but a range of women kin, including grandmothers, sisters, and aunties. This issue emerges out of the compounding of a number of factors. Many Aboriginal and Torres Strait Islander people live at a distance to their Country and do not have access to their own suitable transportation (particularly four-wheel drives) to attend fieldwork or meeting locations. Over the last decade and earlier, most NTRBs/NTSPs have instituted 'no children in cars' policies, in response to concerns about safety and the lack of child restraints fitted in NTRB/NTSP or hired vehicles. These conditions impact particularly negatively on women who appear to be disproportionately excluded from opportunities to participate when opportunities are limited. ***WiNTA***

iv. Implications for lack of gender equity

NTSCORP submitted that it has heard concerns from PBC members wanting greater gender equity on their boards, and noted that under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), PBCs can do that by structuring their rule book to require it. NTSCORP went on to discuss the importance of better representation by women on PBC boards in the context of future act negotiations, specifically to ensure women's business and the protection of women's sites is better addressed.

(c) Systemic reform

The KLC submission addressed the inequities and fundamental power imbalance created by the failure to protect the right to free, prior and informed consent in the future act provisions of the Native Title Act:

> 'Consent' to ILUAs and other agreements under the NTA is a fiction in the context of a future acts system where a mining company has a 98% chance that their tenement will be granted even if there is no agreement with the native title holders. ***KLC***

The ANTaR submission also emphasised the need to shift the power imbalance in the future acts regime, specifically noting the need to allow more time for negotiation (Native Title Act, s 35(1)(a)) and to allow Tribunal determinations to include royalty agreements (Native Title Act, s 38(2)).

Further, KLC noted that the inequities created by the future act provisions of the Native Title Act are compounded by the 'chronic lack of resources available to native title holders to participate in negotiations with proponents'. KLC referred to its previous submissions in relation to native title reform, specifically noting that the future act processes 'shift the cost' of a business' application to do business onto native title parties and therefore 'to the extent that native title parties have the resources to participate in future act processes to protect native title rights, onto the public purse. This is an unacceptable cost shifting from private enterprise to public funding which should be addressed through urgent legislative reform.'

KLC also noted that proponents are not required to pay the invoices of representative bodies providing services to PBCs in future act negotiations and that such payment should be required by legislation before their interest is granted.

FNLRS also discussed the need for significant reform of the native title system to facilitate just land settlements – FNLRS recommends reform to allow for comprehensive settlements and compensation more broadly than the Native Title Act currently allows.

NTSCORP identified a need for institutional change in the approaches of state and territory governments to native title matters in order to achieve meaningful empowerment of Traditional Owners.

In relation to the NSW Government, NTSCORP submitted that 'positive outcomes are impeded by the inconsistent application of policy and procedures by the NSW Government, creating significant delays in positive consent determinations.' Further, NTSCORP said that unlike other states and territories, NTSCORP has not been provided with, and is not aware of, a state policy for assessing connection evidence in the course of mediating a native title claim in NSW. The result is that the 'requirement for establishing a credible claim per s 87 can be amorphous and inconsistent'.

NTSCORP submitted that the Commonwealth and state governments should 'redesign their institutional approach to the native title process' to centre their commitments under the National Closing the Gap Agreement entered into in July 2020. That is, their approach to native title as parties should be consistent with their obligations and commitments under the Closing the Gap Agreement. NTSCORP noted several specific relevant clauses and outcomes of that agreement, including:

> ***Clause [19] of the Closing the Gap Agreement:***
> *(c) government agencies and institutions need to address systemic, daily racism, and promote cultural safety and transfer power and resources to communities.*
>
> ***Clause 62:***
> *When Government Parties change, design or deliver policies and programs that impact on the outcomes of this Agreement, they will do so in line with this Agreement.*
>
> ***Outcome 15:***
> *Aboriginal and Torres Strait Islander people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters.*

ANTaR submitted that systemic reform of the Native Title Act is needed, with a focus on the intent to pursue justice and the 'rights and interests' of the First Nations peoples of Australia. It further argued that native title should be viewed as having a role in truth-telling and Treaty processes. ANTaR noted that native title has been the instigator of much of the progress made in negotiating settlements between the First Nations communities and the State, noting the examples:

- South West Native Title Settlement between Noongar Nation and the WA Government
- Yamatji Southern Regional Agreement between Yamatji people and the WA Government
- agreements around fishing and land use flowing from the Buthera Agreement in South Australia between Narungga people and SA Government.

ANTaR considers that the native title space should be recognised as a 'national project of truth-telling', noting that 'at present much of the Native Title Act process is seldom revealed so it is not contributing to truth-telling in the wider community. We must consider how to use the evidence in a respectful way that complements the process of truth-telling across Australia.' Further, ANTaR argues that the Federal Government and the other state and territory governments 'should follow the lead of Victoria, Queensland and the NT and begin Treaty processes that will reinforce and strengthen native title'.

8 Interviewee story summaries

The following are the summarised stories of the women whom my team and I interviewed for this Report. Each woman has a very different story and, even then, despite over 20 interviews, I am conscious that we have many gaps in representation. Those gaps are from the perspective of geographical coverage and the type of native title case, as well as the type of lived experience being spoken of.

Clearly, it is not possible to provide comprehensive coverage of all the types of concerns associated with native title system, and associated systems, in one relatively short report.

It is also obviously not possible for any one woman to fully cover her entire experience of land justice in one interview, no matter that some interviews were hours long! The stories presented here do not purport to provide a comprehensive picture of the entirety of a person or group's native title journey. Some of the stories focus on one or two aspects, some of the stories provide more overarching pictures.

Importantly, none of the stories or the discrete experiences and opinions within those stories have been 'verified'. The importance of the stories contained in this Report and the lived experiences being conveyed is that each one is one woman's truth.

All of the women knew that it was not possible for me, in my role as Social Justice Commissioner, to assist them in any immediate or material way with difficulties they were experiencing in relation to the native title or related systems. But all of the women hoped that the telling of their stories alone would contribute to substantive long-term change.

The reader should focus on the ways that these stories reflect on the native title system and the themes that are discussed in the subsequent chapters using the combined voices of the interviewees. It is not intended that any individual, family, native title group, or organisation be maligned using the accounts of the women here. Rather, care has been taken to ensure the focus is on the structural elements of the native title system and associated systems, within which individuals are acting. I do not wish to scapegoat individuals for the systemic faults ultimately identified – faults which mean that the roles of individuals within the system are not sufficiently supported, scaffolded and held accountable.

The organic nature of the way in which the interviewees were 'chosen' has resulted in a collection of really important stories and some clear illustrations of the way that the native title system does not centre those whom it purports to benefit. The stories and the combined voices of the women in the next chapters highlight the way that the native title system plays out to significantly impact woman and their families and communities in overwhelmingly negative ways.

Many of the stories also illustrate the ways that individual women within communities are stepping up, partnering together, and supporting each other, to seize control of the governance arrangements in their native title groups, particularly in PBCs and other corporations, and unify their communities.

8.1 Daisy Tjuparntarri Ward, WA

Daisy Tjuparntarri Ward is a Ngaanyatjarra woman and a Traditional Owner of the Pila Nature Reserve (formerly known as the Gibson Desert Nature Reserve) in WA. Daisy is a Director of Warnpurru (Aboriginal Corporation) RNTBC (Warnpurru) – the corporation which entered into the Gibson Desert Nature Reserve Compensation and Lurrtjurrlulu Palakitjalu Settlement Agreement (CLPSA) with the WA Government. Daisy was a lead negotiator in the Settlement Agreement. Warnpurru has been the PBC since Daisy and her people finally received a determination of native title on 15 June 2022.

As one of the 'last bush people', Daisy's ancestors have practiced traditional law and culture in the Western Desert for thousands of years. Daisy first saw non-Indigenous people when she was around 5 years old. At this time in the 1960s, she and other members of her family were still living in the area practising their traditional law and culture. Her family still live on their traditional Country today.

Daisy was interviewed on Country by Jan Turner, anthropologist, colleague and friend, in the company of other senior women who have also been part of the same native title journey.

Daisy's story told of the pain and confusion caused by repeated denial of native title and the very long, arduous process of finally securing that determination. Daisy told the story of the old people they had lost along the way; the heartbreak of so many setbacks; and of the struggle to understand what native title even meant.

Daisy's people were originally part of a bigger group of Western Desert claimants in the Ngaanyatjarra Lands native title claim.[59] That negotiated claim resulted in a native title determination in 2005 for all the other groups except for Daisy's. This was due to the 1977 creation of the Gibson Desert Nature Reserve which extinguished native title.

In 2007, the Western Australian Government introduced the Indigenous Conservation Title Bill (ICT Bill). This followed extensive negotiations with Daisy and her people. The aim of the ICT Bill was to provide a new type of title over the Gibson Desert Nature Reserve as an alternative to the extinguished native title and thereby settle the state's compensation liability under the Native Title Act. They had to do this as the Gibson Desert Nature Reserve was created post-*Racial Discrimination Act 1975* (Cth).[60] However, before this could happen the Government called an election and the ICT Bill lapsed. This left litigation as the only option.

In opposing the *Ward* native title claim, the State of Western Australia discovered and relied on a 1921 petroleum tenement over an area of the claim. The decision in *Ward v State of Western Australia (No 3)* [2015] FCA 658 found that the grant of an oil licence extinguished the exclusive possession of native title rights before the Gibson Desert Nature Reserve was even established. It didn't matter that the tenement was never used at all. Negotiations then ensued over the next 5 years.

At a ceremony on Country on 29 October 2020, Daisy was one of the Traditional Owners who signed the CLPSA between the Traditional Owners of the Pila Nature Reserve (previously the Gibson Desert Nature Reserve, renamed as part of the CLPSA) and the Western Australian Government. The CLPSA runs for 10 years with a focus on joint management of the Pila Nature Reserve.

Daisy described how that ceremony was a time of jubilation because it was a 'win', but at the same time she also felt that they still did not really have their Country back under their full control and custodianship.

One feature of the CLPSA was a parallel court process involving the Traditional Owners lodging a compensation application to be determined by consent of the parties. That compensation claim was filed on 18 September 2020.

Two important aspects to the CLPSA from Daisy's perspective were that the State agreed to the Traditional Owners filing a native title application over the Pila Nature Reserve on the basis of the (then proposed) new section 47C of the Native Title Act and that provision was made not just for land management activities but also for the creation of an Education Hub, for the cultural education of students from all eight campuses of the Ngaanyatjarra Lands School. This had always been Daisy's vision for her Country.

The amendments to section 47C were passed by federal Parliament on 3 February 2021.[61] They came into effect on 25 March 2021. They had been first proposed by Justice French in 2008.[62]

At the time of her interview, Daisy was waiting for the imminent lodging of what she hoped and expected to be a successful native title claim, after so many Elders had passed without seeing their land returned to them.

A few weeks after her interview, on 28 July 2021, Daisy and the other Traditional Owners of the Pila Nature Reserve filed their native title claim in the Federal Court (WAD 174/2021). The determination was finally handed down on 15 June 2022 – the first case to use the new section 47C provisions.

Text Box 8.1: Native title update – section 47C Native Title Act amendment[63]

In February 2021, section 47C was inserted into the Native Title Act and allows for prior extinguishment to be disregarded in relation to national parks and other conservation reserves where agreed by the relevant government.

Another case that has been determined using the new section 47C provision is *Drill on behalf of the Purnululu Native Title Claim Group v Western Australia (No 2)* [2022] FCA 1538.

In addition, there are a number of other recent determinations where parties have agreed to defer determining certain areas to reach agreement under section 47C to disregard extinguishment, or have flagged the likelihood of entering into a section 47C agreement.

For example, in *Austin on behalf of the Eastern Maar People v State of Victoria* [2023] FCA 237, it was specifically noted in the determination that section 47C could apply to certain park and reserve areas in the determination, but that no agreement had been reached by the date of the determination. The parties agreed to negotiate in good faith about these areas – and that the State and Commonwealth would not oppose the Eastern Maar people amending their original application to include those areas or bringing a new application for them.

The *Cape York United #1* proceedings,[64] have included similar clauses in their determinations.

It is also possible to reach a section 47C agreement for areas already determined, using the revised native title determination process in the Native Title Act (sections 13(1)(b) and 13(5)).

8.2 Kia Dowell, WA

Kia Dowell is a Gija woman from Warmun Community (Turkey Creek) in the East Kimberley, WA. Kia is the Chair of Gelganyem Limited and shared her story, experiences and observations related to the closure of Rio Tinto's Argyle Diamond Mine.

Gelganyem Limited was established as one of two Trusts to manage and distribute funds for the benefit of Traditional Owners arising from Rio Tinto's Argyle Participation Agreement. The Agreement included an Indigenous Land Use Agreement and Management Plan Agreement guiding the day-to-day relationship between the seven daam/Dawang (estate groups) who asserted some form of connection to the area at the time of the negotiations. Gelganyem is not a PBC but has fulfilled a quasi-PBC role in the absence of native title determination and continues to oversee and manage the funds established to benefit current and future generations of Traditional Owners under the ILUA.

Kia first joined the board of Gelganyem in 2017 and was appointed Chairperson unexpectedly at the same time. But her journey started in 2008 when she was called back from the USA where she had just graduated with her MBA from the University of Texas at El Paso (UTEP) following a successful chapter as a college athlete playing basketball (NCAA Div I).

> … my grandmother had been involved in negotiating the Argyle agreement, amongst a really strong group of Elders and leaders. She had said to me at that time 'You've had your fun, time to come back. And we need mob in our own family. And people who understand [kartiya[1] speak] and the way this company is talking. And bring it back and explain to us in simple way what it means'.

Kia joined Argyle Diamonds as a graduate, insisting on being in the mainstream graduate program and not 'pigeon-holed as a field officer or a community relations officer'. The grad program gave Kia 'a good feel for what the company was trying to achieve' and it became important knowledge as she entered the governance world of her community.

Kia described a fraught introduction to Gelganyem when she was elected to the Board and quickly realised Traditional Owner Directors were not empowered. She observed and experienced firsthand the impact of independent directors at that time who were not building the board's capacity and facilitating self-governance but, rather, controlling the agenda.

Kia described how important the role of Gelganyem has been in ensuring appropriate representation amongst Traditional Owners and families, and establishing community governance procedures *before* they pursued their native title determination. While it seems that native title was supposed to have been pursued immediately after the ILUA was registered, the benefits of no one having actually done this were noteworthy.

1 Kartiya is a common term for non-Aboriginal person.

At the time of her interview, Kia and the then Gelganyem CEO were preparing for family meetings regarding native title. Kia explained how she would need to have very clear questions ready in order to get clear, unanimous agreement from the families to take back to the Kimberley Land Council (KLC). The KLC had been quite absent throughout the life of the mine but with the impending closure of Argyle, Kia wanted to make sure the Board was holding all parties accountable, including the KLC and the company.

Kia noted this would not have been possible without a pre-established representative organisation like Gelganyem which was expected to support Traditional Owners in a variety of ways. Taking time to build the Board's knowledge was hard work but it led to a good place.

> What if Gelganyem wasn't there, who would do that? The answer is no one.

Upholding cultural principles to ensure accountability meant a strong Board was her first priority.

The changes and leadership today, compared to when she started with Gelganyem has enabled Kia to negotiate strong outcomes and provide more certainty for the families that benefit from programs that Gelganyem delivers. Kia also ensured the Board understood and was involved in determining what was needed to navigate the complexities of mine closure and native title. As a result of numerous community, stakeholder and Board meetings, she presented the board's wishes to invest their own funds in additional anthropological services to supplement the (as Kia described it) inadequate scope of work originally commissioned by the NTRB. To complement that, prioritising the need for Gelganyem to prepare the Traditional Owner families for the native title process and for potential changes to the Traditional Owners previously agreed upon in the ILUA was a simmering concern that needed to be dealt with. As agreed by all the families, it was bound to require some active work in ensuring everyone understood the changes, the implications, and the reasons.

She described how significant the investment made with the board to put in place the cultural and more appropriate decision-making processes and governance structures that were absent for so long. Through the establishment of a culturally appropriate governance model, by exercising the rights and interests of Traditional Owners to protect Country and implementing a freeze on a number of key activities to protect Traditional Owners, Kia described the changes underway within Rio Tinto, the WA State Government and the KLC. With the support of the Board, a capable management team and the resilience of Traditional Owners, Gelganyem continues to drive forward the self-determining economic development and related decision-making of the Traditional Owner community.

8.3 Cissy Gore-Birch, WA

Cissy Gore-Birch is a Jaru/Kija woman and the current interim CEO of the Balanggarra Aboriginal Corporation RNTBC (BAC). At the time of her interview she was the Chair of the board of the BAC and also employed by Bush Heritage Australia as a Senior Executive Manager, overseeing Aboriginal partnerships across Australia. Cissy is also the founder and Director of Kimberley Cultural Connections. Cissy has five children, three of whom live at home with her and her husband.

Cissy grew up in Wyndham and Oombulgurri and has been involved in five different native title claims: Balanggarra, Jaru, Malarngowen, Yurriyangem Taam and the Bungles.

Cissy's first term as Chair of BAC came after she had been living in Melbourne for four years. Cissy returned to her community in 2004 and felt that after living away she was able to bring a different perspective, experiences and understanding. Cissy felt compelled to get involved after attending her first meeting in 2008 in Wyndham, after witnessing the dysfunctions of her community, the family disputes, and frustrations from others. Cissy decided to join Balanggarra to try to help her community progress forward and make positive changes for the Balanggarra people. She was elected Chair and was initially in the role for five years.

During her interview, Cissy put her experience working with the land council and others in the native title area in the broader context. She spoke about the additional fight they were facing at that time in the closure of Oombulgurri community.[65] The politics of that closure and the associated community disputes and dysfunction weighed heavily on Cissy. She described it as 'getting uncomfortable and stepping into the deep end' and a 'very steep learning curve' in relation to 'community politics, community and family disputes and community disfunctions, mismanagement of Oombulgurri matters, ongoing discussions and disagreements with the leading organisations in the closure, and the trauma of elders, women and children.'

At that point in time, Cissy was bombarded by the needs of long-term residents of Oombulgurri: families and Elders becoming homeless, victims fearful of consequences for speaking out or against the perpetrators, the lack of support from Government agencies in helping with addressing some of these matters, and no proper support or resources to address the closure. Cissy spoke passionately about how poorly this matter was dealt with by all people and agencies involved, to the detriment of the community.

Cissy told us that there was a small core group of men and women responsible for some of the behaviour that provided the justification for closing Oombulgurri.[66] She told us these were the same people wielding power in a 'bullying' way on the BAC board. Cissy invested significant time and energy – and procedural and legal knowledge from specialised professionals – in working out how to deal with those 'bullies', based on their behaviour and actions.

Cissy and the BAC Board spent 18 months writing to the Office of the Registrar of Indigenous Corporations (ORIC) requesting support. She finally prevailed and an ORIC staff member came out to the community of Wyndham to see for themselves what was happening. Cissy felt that it wasn't until they were on the ground that ORIC were able to understand some of the dynamics and who was actually causing the problems. Until then, they had received what appeared to be 'two sides to the story'.

Cissy and the BAC Board engaged a barrister to work with them to use sections within the Rule Book on 'eligibility of directors'. The rules provided that a person cannot be on the board if:

- they have committed a criminal offence in the previous 15 years that is
  - punishable by imprisonment of a period greater than 12 months, or
  - involves dishonesty or misuse of corporation funds and is punishable by imprisonment for a period of at least 3 months, or
- if the Corporation has reasonable evidence that they have engaged in behaviour in the last 15 years that has led to another Indigenous corporation becoming insolvent or being wound up.

With that professional advice and support, the Board then went about the process of getting the 'bullies' removed based on these rules.

Cissy and the Board also engaged AIATSIS to assist in deciding how best to educate community, including the directors, on the native title-related processes and effective, culturally appropriate governance arrangements. At that time, a number of board members attended the training provided to directors in Broome.

During this first term as Chair, Cissy and the Board worked closely with KLC achieving a number of milestones – BAC Native Title determination celebration, IPA declared, a functioning board, Joint Management/Native Title holders engaged with the Kimberley Marine Parks – Joint Management and other research projects on country.

Cissy left the BAC Board after her first five years as chair and felt that it had been left in a good state. However, Cissy said that 'the bullies started coming back' and harassing the BAC Directors, making it very difficult for any progress to be made once she had left. After five years away, people in the community asked her to come back to assist with dealing with the governance problems again. At the time of her interview, Cissy was in her second term as elected Chair.

At that time, Cissy found that she was able to manage the native title and other processes as well as the community disharmony because she had knowledge of the family and community connections and dynamics, as well as the understanding of the Western systems that BAC operates within. She felt her education, training, and experience, including a conflict resolution and mediation course at Harvard Executive School, sponsored by Aurora Education Foundation – Roberta Sykes Scholarship (2010) were invaluable. However, this would not have been enough had she not had the broader understanding, knowledge and connections, and the support of her family and others.

Cissy has found that trust, open communication, and transparency with the community is key to addressing a lot of the community conflict. Cissy felt this trust, communication and transparency about family kinship, connection, native title, decision-making, and the way benefits are distributed and used empowers people and removes the knowledge gap which enables 'bullies' to step in. Cissy noticed that the 'bullies' did not find themselves with much support once other family and community members understood these issues better. Cissy felt that, ultimately, this openness with community was the only thing stopping the same men being able to garner enough support to take over the operations of BAC. Cissy emphasised that people were still carrying a lot of burden and pain from the closure of Oombulgurri.

Cissy also highlighted the importance of strengthening the voices of the people, and of good governance set-ups from the beginning. This includes the importance of good professional advice from people who understand the legal and regulatory environments, the social context, and the traditional decision-making requirements.

Notably, the role of Chair and Directorship of BAC is unpaid and Cissy originally quit her paid job for her first term to undertake these responsibilities as a Director and Chair. Cissy was clear that the role needed to remain voluntary to ensure that the person has the trust of the community yet she recalled how hard it was for her and her family the first time around without paid work. So Cissy retained her full-time paid employment for her second term as Chair. While this means she is extremely busy, Cissy felt that it is more sustainable than having no income.

Cissy also emphasised the unpaid support of other people working for the PBC Board and the community. For instance, her sister was always assisting with agendas, minutes and compliance matters.

> We would be working long hours on a voluntarily basis and especially at the time of receiving all these letters from these bullies, we had to commit time to responding, seeking legal support and advice, talk to other community members and work through these dispute processes in an efficient way to continue to progress and to protect the interest of all members' needs. We did not want to end up like Oombulggurri.

At the time of the interview, Cissy had just negotiated on behalf of the PBC and been awarded a contract for the management of Home Valley Station through ILSC – a tourism business. They had a plan to negotiate a five-year Management plan overseeing the tourism part of the lease. Cissy spoke with pride about how this was the first of any ILSC properties to be handed a Management Agreement and the huge opportunity this offered for the Balanggarra people.

> Home Valley Station is a large tourism destination, managed by Traditional Owners. And to have our first Balanggarra Aboriginal Women to manage Home Valley Station. This was a great opportunity for Balanggarra People to manage and operate this destination for the betterment of Traditional Owners and others to assist with jobs and training in Tourism and Hospitality in the region. The first season, there was 95% Indigenous employment with some challenges, but nothing that couldn't be worked through. I must say, it wasn't easy during the EOI process with ILSC. It was difficult dealing with ILSC staff who really didn't prioritise the interests of Traditional Owners. There was one ILSC staff member who was not cooperating, and it really felt as though this person was trying to sabotage our opportunity for success. It was just another form of bullying and intimidation by an institution with power.

They also secured two years of funding for a general manager/CEO Role supported by Bush Heritage Australia, relieving some of the tasks that Cissy, Trisha and the Board were doing. Previous to this, KLC was receiving the PBC Support funding, the Ranger Working on Country funding and the IPA funding. This was the first time BAC PBC had a paid position.

At the time of her interview, Cissy was optimistic that the community and the board were in a good position and that when she leaves next time, they will be far more capable of maintaining solid, transparent governance arrangements that benefit everyone.

In recent updates before publication of this Report, Cissy spoke about the years since securing the paid role and Home Valley Station. During those two to three years the CEO at that time worked closely with the PBC Board to 'develop plans of operation and how to best progress to the next stages'. The Board secured funding from ILSC, Lotterywest, NIAA, DBCA 'to support the delivery/works on country and governance'.

Cissy said the Board made a lot of progress during this time, however, directors and the CEO and staff also dealt with constant efforts to undermine and threaten BAC members, community, and board members themselves.

> During this time, we constantly received petition letters from these bullies who continually tried to intimidate and threaten BAC members, community and board members. They made baseless complaints with no substance to ORIC, meaning we had to spend a lot of time dealing with these complaints. We asked ORIC to help and tried to explain what is happening (again) with the bullies.

> During this period BAC was selected to undertake a review. The BAC Board and staff assisted with the 'Review' process, which was very tiresome, dealing with these bullies who consistently distracted us from progressing, dealing with unnecessary complaints with no real substance, all based on personal opinions and personal agendas.

Cissy told us that during this period the CEO received constant abuse and threats from certain individuals and because of the personal toll this took, the CEO resigned.

Cissy explained that the Board decided to assign Cissy as interim CEO because it was a 'vital time' in terms of how much was at stake with so many developments and initiatives in progress at the PBC. This meant Cissy stepped down as Chair to work in the CEO role.

> The board made a decision to assign me to step up to fill in until we get through this ordeal, the review and to follow through to make sure we are compliant. So I stepped in as the interim CEO and stepped down as the Chairperson to assist with the review and the disputes.

Cissy described how the next move of the 'bullies' was to go to the media as another 'tactic' to try and intimidate and discredit her and the Board.

> The local media, a news reporter from ABC … He posted a story 'Regulator says Kimberley native title group Balanggarra breached own rules and CATSI act', with a picture of me and my children on the front page. I was saddened to see how low this reporter went to get a story with no real substance. This seems to be a story they chase after up in the Kimberley region with other Aboriginal organisations and PBCs.

Cissy told us the 'bullies' tried to use minor compliance matters from a 'compliance notice', which was removed from the public register after those minor issues were rectified, as another means of discrediting and intimidating the directors on the Board.

> BAC received a 'compliance notice' on the 19th April 2023, which outlined minor administrative matters. All details with these minor matters were rectified and on review, the decision was that the compliance notice was removed from the public register. BAC had the clear and we were compliant. The bullies not knowing about compliance and regulations didn't really understand the process, jumped on this and used this against the directors and other members to continue to bully and intimidate, with no substance to their dispute or concern.

Cissy described how one of the four land groups who are represented on the Board, and must be separately represented at meetings, was 'uncooperative and less committed to their director duties'. The PBC failed to meet the quorum for the 2021/2022 AGM after that one land group was not properly represented amongst the 45–60 members in attendance.

Cissy told us that after 'several failed attempts' at holding the AGM, she and the Board were asking ORIC for help but 'to no avail'.

> ORIC was consulted regularly about these attempts to hold the AGM. [We asked ORIC] to assist with these 'disputes' and to be present. We sought assistance from an independent facilitator for the AGM's, and I'm sure he can share his views on the actions that came from these meetings.

Cissy explained that eventually, after many requests to assist, ORIC made the decision to run the Special Interim General Meeting (SIGM): 'we asked to assist, they seemed to have it under control.' Unfortunately, ORIC decided on the date of the meeting and Cissy was overseas for other commitments on that date. Cissy heard from members that there was no quorum of directors – the same problem they had been facing and had asked ORIC for help with – and that at the meeting, individuals who were not eligible according to the Rule Book were elected as directors.

Cissy was concerned and annoyed by the way ORIC had managed the situation and considered that ORIC had actually 'made the situation worse' rather than resolve issues.

> I felt that ORIC really had the power to make positive changes and to also make the necessary changes to the rule book. But it wasn't the case.

> After the rigorous review process that we went through with ORIC regarding compliance, it seems as though ORIC has stepped in and not followed any order whatsoever. After allowing ineligible people to be directors of BAC Board. I really don't understand what role ORIC plays in these situations, I guess it depends on who leads the organisation and what experience they have with community dynamics.

This issue is ongoing at the time of publication of the Report and Cissy says she is determined to make ORIC understand what is really going on. After the SIGM, Cissy and other directors wrote to ORIC 'seeking clarity on these decisions [to elect ineligible individuals] and how is this possible to have ineligible people on the Board.'

> There was a community petition of over 10% of BAC members who signed the petition, calling on the new board to hold a 'special general meeting'. There was no response from the new board and no reply to the members' petition. The Board has breached many rules in the Rule Book, these have been outlined to ORIC to follow through and we are still awaiting a true and correct response. The board recently held an AGM, members and directors did not receive the notices and the AGM had no quorum and they still passed resolutions that had not been outlined in the notices. Again this was a 'breach' of the BAC Rule Book and ORIC has been notified. Still awaiting a response.

Cissy was extremely worried about the direction that these 'bullies' were trying to take Balangarra, particularly after she and the previous board and BAC employees had secured so much funding for all the initiatives they were running. She told us how the 'bullying' was increasing in severity.

> In the meantime – there has been terrible things happening in the background from these directors, things I can't explain. So today, we have in the background, talks about certain people coming on the Board to kick me and my sister out and others to get access to the monies for self gain, to stop certain families accessing country. There are so many members concerned about the current affairs of BAC under this new directorship. There are people who sit on this board who were in the leadership of Oombulgurri at the time of it being mismanaged and the time of the abuse of women and children and the closure of the community.

Cissy felt the need for the fully history of the community and these 'bullies' who had taken power again to be fully understood when the current circumstances of BAC are being assessed by outsiders.

> When the closure of Oombulgurri Community happened, there was no accountability, the people who sat on the board of Oombulgurri, the leadership of people, the schools, the police, the clinic. These people were present at that time. The story needs to be told of what really happened in that community. The stories I heard being told from residents who resided there are horrific, unbelievable that these things occurred to the women and children and also the high numbers of 'suicide' that occurred. There needs to be more people talking up. I guess they are still afraid, as the surrounding communities have the perpetrators and victims living in the same place with no real supports. While this is the case, the threats, fear and intimidations will continue to happen.

8.4 Bunuba women (Patsy Bedford, Millie Bedford/Hills, Kaylene Marr), WA

Patsy Bedford, Millie Bedford and Kaylene Marr all spoke with my team about their experiences with the native title system and the Bunuba Cultural Mapping Camp, for the benefit of this Report. In their interviews, they all talked about identity, truth-telling and healing from their different perspectives. They also spoke about refocusing our efforts on our own cultural connection to Country and to each other – on our own terms. Not for the sake of anyone else's system or process, nor on anyone else's timeline.

Native title claims have proven to be divisive for us Bunuba, like so many other First Nations around Australia. Native title has come on top of the initial waves of colonial dispossession, including the Stolen Generations. It has further disenfranchised our families, fuelled lateral violence, and interfered with both our cultural identity and community decision-making.

Native title and the subsequent post-determination processes of identifying for the purposes of PBC membership have proved a process of confusion and re-traumatisation for many Bunuba.

One of the reasons native title has been so destructive for our community is because of Western anthropological methodology and concepts associated with establishing connection via descent. This approach to identity has interfered with the way we traditionally identify ourselves and understand connection. Because of the extent of dispossession over the previous century, many different First Nations people from our region were moved around and many have had to reconstruct their identities. The native title process unsettled that identity reconstruction for many people with its focus on genealogy.

However, native title has also been good in some ways. In particular, it has revitalised connection to culture for many people. For us Bunuba, it has been helpful to clarify connections to Country within our community, including where other peoples had been living on Bunuba land after being dislocated, but are not Traditional Owners of Bunuba country.

A big challenge that we are dealing with now as Bunuba women is to re-focus our connection to Country according to our own culture, on our own terms, and unite and empower our people despite – and utilising – the coloniser's genealogical foundations of identity. Genealogy cannot be put back into a box and forgotten.

Bunuba women have come together to re-possess and make the most of the information that the anthropologists and historians have about our ancestors and the genealogical connections of our community today. We have decided to use that Western style of information in combination with the knowledge we have received orally from generation to generation, to create a foundation of knowledge from which we can start to heal our intra-community conflicts. At the very least, we need to hold all of the genealogical information about us, ourselves.

We are navigating the inevitable changes that colonisation, and then native title, has brought about for our understanding of connection to each other and to Country. We are doing this consciously so that we can mitigate the damage so far as possible and ensure protection and promotion of our cultural ways to the full extent possible.

The Bunuba Cultural Mapping Camps were designed for people to come together and work through our connections with the help of anthropologists who, in some cases, had more information on genealogical connections than our people. The idea of the camps was to help our community heal from the trauma that was exacerbated and, in some cases, caused by the native title process.

This includes the aim of helping members of the Stolen Generations who believe they are Bunuba by descent but who were prevented from growing up on Country with culture and kin.

Each Camp involved Bunuba families meeting on Country. It turned out that the first Camp involved predominantly Bunuba attendees who knew each other and our connections. We were able to learn how we are connected in more detail and clarity, with time to ask questions. We were able to get sufficient historical information to help resolve some issues around land occupation and who has the rights to which areas. Participants felt satisfied with the information that clarified our connections to each other and to different parts of our country. That first Camp had a positive impact on settling some uncertainties and helping settle some simmering disputes.

The second Camp once again involved people from a particular area coming together on Country to learn about their connections, but this one ended up with more members of the Stolen Generations who were looking to find their place and connect as Bunuba. This second Camp was quite different from the first Camp because of the different participants who happened to attend. It was more complicated and highlighted the problems with the anthropological conceptualisation of connection via descent. But it was a powerful experience for those who attended and had their connections affirmed in a 'public' setting, on their traditional Country, which some of the families had not accessed before.

The interviews for this Report took place at the second Cultural Mapping Camp.

(a) Patsy Bedford

Patsy Bedford is a Nyanjili woman of the Bunuba tribe. Patsy was attending the second Cultural Mapping Camp and talked in her interview about the Camp and the healing processes that Bunuba women were leading, as well as her experience with the native title process leading up to this point.

Patsy remembered how excited the Elders were when they were claiming native title and how proud they were of demonstrating their connection to Country. However, Patsy also described how people were confused. At no point did anyone answer the questions of the Elders and others regarding exactly what the Bunuba would get from native title, given they already knew the land was Bunuba land.

Patsy remembered thinking that perhaps the stations that were owned by non-Aboriginal people were going to be given back through native title.

Patsy spoke about how the native title process required a shift in the way Bunuba defined connection to Country and each other – separated according to boundaries instead of defining us all as connected. Patsy emphasised that the native title process did not understand our culture and particularly lamented the lack of appreciation of the importance of language in connection to Country:

> … they did not bring the cultural understanding in there. The language was gone out – it's out. The language is part of the land together, anyway. So, we sort of lost that when language didn't play a big part in the native title. All they wanted to do was go to government, win this native title back. Forgetting about what the land really meant and what it held and what it holds to this day for us as Bunuba people.

Patsy described how she felt the Cultural Mapping Camps needed to be viewed as just the beginning. They had been an important start but they are not a complete process. She identified how hard it is for those Bunuba who have stayed on Country and in connection with their culture to be able to immediately accept people they do not know as Bunuba, in the way that we identify each other culturally. Descent means everything to those who are reconnecting, but it means little to those of us who have retained cultural connection.

Patsy spoke about the need for resources to enable the development of these healing processes – noting that these processes are not insignificant or quick: there needs to be a process of reconnection, a re-ownership of information and a process by which Bunuba come together to work out a way to quantify our loss and find a way of holding government accountable for compensating for that loss.

(b) Millie Bedford/Hills

Millie is connected to the Mongbung group through her Bunuba mother, Maudie Calwyn. Millie was interviewed by my team at the second Cultural Mapping Camp about Mongbung connecting families back on Country. On her father's side, Millie is connected to Gija country.

Millie came to the second Cultural Mapping Camp with her mother's story of connection to Bunuba and the paperwork of their genealogical connections which backed up the knowledge Millie had from her mother.

Millie's family was first approached by the NTRB when they were doing the anthropological research for the native title claim. Her family was one which was linked by descent, but whose connection as Bunuba has been challenged by some individuals because she did not grow up on Bunuba Country. Millie's mother was stolen from her family as a child. However, as an adult, Millie's mother and father brought their children to Fitzroy Crossing to visit family. They did know they were Bunuba – they just didn't know the exact connections. Establishing those clear connections was a powerful experience for Millie and she hoped it would result in those who had questioned her changing their perspectives and embracing her as family.

Millie felt that native title had 'created more problems for us' because of the way it divided us and had us 'arguing about Country'. Millie spoke of dreading the native title meetings because she 'knew there was going to be tension'. Millie felt that benefits and royalties from native title have caused division and fighting and have not been used to benefit the community more generally. She felt strongly that such money should be used as part of the bigger, long-term plan to benefit the community, rather than only to individuals in the immediate term.

Millie felt that native title and the associated processes were rushed and caused us to be rushed, and that this had a detrimental effect on our cultural wellbeing as a group and as individuals. Millie described how the native title claim was rushed through without all the relevant information, to someone else's deadline. Millie felt the process they were going through at the Cultural Mapping Camp should have been done before native title was claimed – taking the time we need.

Millie wanted to reconnect with cultural ways of our previous generations which kept us unified as one people. She spoke of the importance of language, skin names, and ways of welcoming people onto our Country and sharing, without being defensive and exclusionary. Millie also spoke about reviving the everyday ways of connecting, which her parents used to do, like stopping off to visit extended family whenever out driving – casual, informal ways of maintaining connections.

Millie emphasised the importance of reverting to skin groups and language, describing how it highlights our unity as a group and brings our focus back to how we are connected.

> I'm gonna change my way of interacting with people now, and if I know their skin name I'm not gonna call out their real name, I'm gonna call out their skin name, you know. That's what I've learnt from here, so when I go back from here, that's what I'm gonna practice – calling them through their skin name …

> … I'll change my name, I'll actually have it on deed poll, I'm a full Nangala but then if everybody else did that there'd be a lot of Nangalas, you know, that shows that we all got one connection.

One thing that was important to Millie about the anthropological research that was being presented was that the old people from the past spoke to these anthropologists and it is their voices and stories recorded.

Millie felt it was important that Bunuba come together and deal with our own conflicts now, not rely on the NTRB or anyone else to fix them for us. The Cultural Mapping Camp was important for this. Millie was particularly enthusiastic about the Cultural Mapping Camp for the transparency and the opportunity to discuss concerns openly and work through them.

(c) Kaylene Marr

Kaylene Marr's muwayi is Galamunda and she is connected to Bunuba through her father, and his father. Kaylene was one of the main mentors at Yirimalay School, which was a Bunuba initiative, and teaches Bunuba at the school. She is also an actor. She has played significant roles in community as a Traditional Owner Senior Mentor and Cultural and Community Advisor.

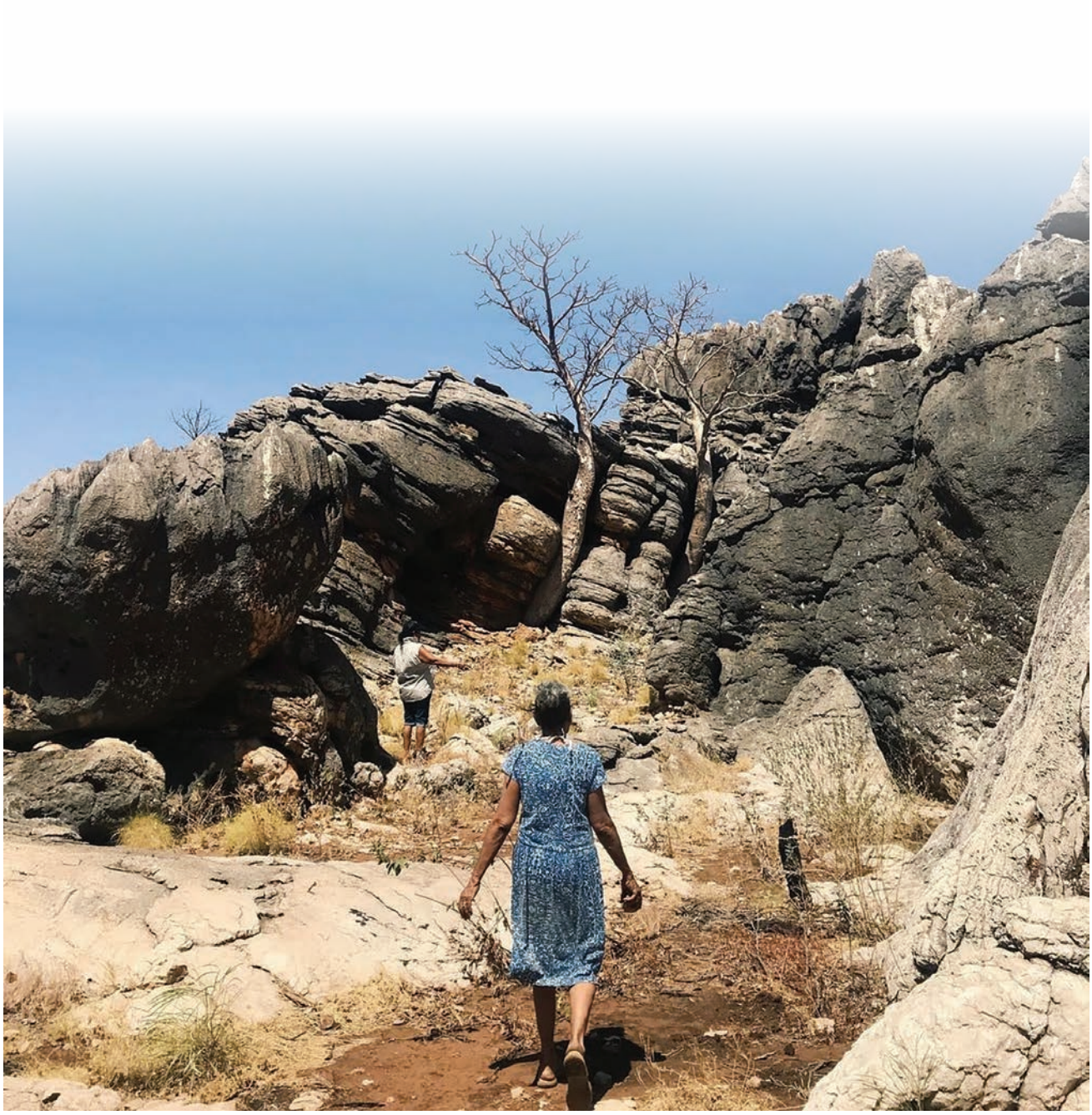
Kaylene is from a well-known Bunuba family and had not, herself, struggled with understanding her connection, or with others understanding her family's connection. However, she spoke about feeling a responsibility for helping unify all Bunuba and specifically helping those who had been stolen understand their connection and build on that knowledge of their bloodline to really understand and be connected to Bunuba. Kaylene described the Camp as 'eye-opening' for many participants who only had basic knowledge of how they fitted into Bunuba society and Country. She was moved by their experience and how important it was to them; she could feel how hard it must have been not to have had the connections that she had to Country and kin.

More recently, however, Kaylene had found another clan was 'on her area' and did not recognise her people's traditional ownership properly. This was causing her great heartache because she felt it was affecting her sense of identity. Kaylene spoke a lot about the importance of truth-telling and healing, as well as explicitly including language and culture in schools, for the sake of the younger generations of Bunuba. Kaylene described her own struggles as a single mother who could not read or write, and how she values education for our children as our first priority. That education must include Bunuba culture and language as well as mainstream education curricula. Despite not finishing her schooling, Kaylene described feeling confident in her traditional knowledge.

> I didn't finish up my schooling, but I know I was strong in my ownership of my knowledge, my spirit, my kinship.

Kaylene specifically talked about how important the Cultural Mapping Camp was for the healing process at both an individual level and at the level of Bunuba society. She spoke of the cultural mapping process as a foundation, connecting everyone through their muwayi, so then the whole community can be strengthened together.

Kaylene noted that the Bunuba native title experience lacked the process they were going through with the cultural mapping at the time of her interview. Kaylene believes that the cultural mapping process should have happened first. She feels that if that had happened, it might have avoided a lot of misunderstanding, conflict and trauma. Kaylene felt that there needed to be another healing camp bringing all Bunuba people together to try and ensure everyone clearly understands their connections to Country and to each other.



8.5 Francine McCarthy, NT

Francine McCarthy is a Warumungu woman from the Northern Territory. She was born in Tennant Creek and grew up in Alice Springs and in the Nauiyu (Daly River) community.

Francine has been employed with the Central Land Council (CLC) since 1994 and at the time of interview she was the Manager Native Title Program at the CLC. She has held CLC positions in both Alice Springs and Tennant Creek. Francine is also Deputy Chair of the National Native Title Council (NNTC) and one of only two women on the nine-person board.

In addition to her professional role in native title, Francine is a native title holder of Phillip Creek and Tennant Creek stations and Tennant Creek town. She has also played an active role in her PBC, Patta Aboriginal Corporation RNTBC, holding various positions including director.

Francine told of her introduction to native title through the Tennant Creek township claim.[67] For Francine, it was both a personal and professional journey. Francine described the Tennant Creek township claim as unusual. It involved a lot of vacant Crown Land that was being used informally by other people, without license of any kind. The CLC strategised that a claim over the entire township area might deliver some benefits to the Traditional Owners in a situation where the *Aboriginal Land Rights Act 1976* (Cth) (ALRA) could not.

The claim over the township area involved negotiations with the Territory Government who had limited experience with negotiations over a township claim. These negotiations ultimately led to mediation through the National Native Title Tribunal (NNTT). The outcome was the settlement of the native title claim and the negotiation of an Indigenous Land Use Agreement (ILUA).

Francine spoke about the different types of rights in the ALRA and the Native Title Act, as well as the CLC's role in relation to each of them. In Francine's experience, the existence of the two different legal systems has created confusion and misunderstanding amongst communities, native title-holding groups, and Traditional Owners regarding the benefits achieved through both systems.

Francine noted that native title in the Northern Territory is, generally speaking, much less beneficial than the ALRA because the latter can deliver freehold title to land. In her experience, Traditional Owners often have expectations of native title that the regime does not deliver. The Tennant Creek township claim involved educating people about what native title really means, how it works and particularly on realistic expectations.

Francine has found that many Traditional Owners and PBC members are unclear on the role of PBCs, the role of the CLC in the native title context, and related decision-making processes. Francine noted that PBCs are new and more complicated structures compared with the land trust system under the ALRA; and that PBC roles are often the compliance-heavy and require a high level of English and legal literacy.

Francine spoke of the priority the CLC gives to educating native title holding groups and communities, and of the challenges associated with engaging native title holders in the post-determination environment, particularly in delivering governance training programs and activities of the PBC.

Francine told us that the confusion about native title and the PBC was impacting on families' understandings of traditional decision-making and causing disharmony. Francine said that confirming decisions had not been a problem yet because everyone knows who is responsible for decisions on particular country. However, the issue of succession planning had arisen in Tennant Creek regarding who would have what role in the future when it comes to traditional decision-making about Country.

Francine herself had identified the need to address this brewing problem. She knew the community and was able to effectively consult with them because she had a personal role in the community as well as her professional role at the CLC. She also knew the right professionals to engage, and how to access grant funds to do so.

Francine described the formal process that she and the CLC facilitated to address this source of disputes by providing knowledge and clarity around people's identities and roles. It involved consultants working closely with the group, the group identifying together the process they would use, an anthropologist with experience in the area, and a long term CLC staff member who had worked with members of the previous generation through the Land Claim process.

The outcome was that the process itself and the resulting chart gave people an understanding of where they fitted in and the ability to reference back to it when misunderstandings arise.

Francine talked about the various initiatives that she is a part of at the CLC to educate native title holders and PBC members and directors as this need became apparent. She also discussed her efforts to try and engage with Government and other organisations, such as ORIC, who play a critical role for native title-holding communities. At the time of her interview, the CLC had just finished their second PBC Regional Forum at Ross River and had been speaking with ORIC about developing a training manual for people in central Australia.

Francine drew particular attention to the fact that most of the work of PBC directors is unpaid, including the bulk of the work associated with the many ongoing projects and negotiations in Tennant Creek. This makes proper participation hard for many people trying to work, fulfill caring responsibilities, and fulfill other community responsibilities and governance roles in other community organisations or advisory bodies.

In Francine's experience, most PBCs have suffered from a severe lack of resources up until relatively recently. Francine saw a huge difference in the capacity of PBCs to get people to meetings and provide people with information when the Commonwealth Government started providing additional funding to PBCs in 2017. In the NT, it has enabled PBCs to access a lot more support from the CLC: 'more legal support; have a PBC officer assigned to them so that they can actually have some regular meetings, not just the four meetings that are required per year under the rule book.'

Text Box 8.2: PBC Regional Forums

The NNTC facilitates PBC Regional Forums around the country, providing PBCs with an opportunity to network, share information and hear about the latest developments and PBC supports available. Speakers and workshops address themes such as governance, native title rights and economic development opportunities. Directors speak about their own experiences, discuss common challenges, shared success stories and local solutions, and learn how to access services and help.

The CLC co-organised central Australia's first prescribed body corporate regional forum in June 2019 and the second in 2021. Around 80 people attended the first and around 100 people attended the second. Representatives from over 20 PBCs participated, gathering at the Ross River Resort, 100 kilometres east of Alice Springs.[68]

The First Forum saw the launch of *Native Title Story*,[69] the CLC's series of plain English posters and an illustrated booklet about the Native Title Act and its processes. These have been updated several times since then. The resources explain the complex legislation around native title, which is frequently confused with land rights, and guide native title holders through the process, from researching claims to managing their representative bodies.

The CLC's publication was subsequently adapted by the Kimberly Land Council for its own constituents in Western Australia.

In July 2022, the NNTC and Yamatji Marlpa Aboriginal Corporation RNTBC (YMAC) hosted a PBC Regional Forum in Carnavon, WA. This Forum specifically provided information on compensation to native title groups and PBCs.[70] The 2022 Kimberley PBC Regional Forum was held in Derby,[71] and the 2022 South Australian PBC Regional Forum in Renmark.[72]

8.6 Geiza Stow, Badu Island, Torres Strait

Geiza Stow is a Torres Strait Islander woman from Badu Island, third largest island in the Torres Strait, with population approximately 750 in the last ABS census. Geiza's totems are Thumpmul (porcupine stingray), Koedal (crocodile) and Umai (dog). Geiza was the first female board member, and has been one of just a few female board members, for the PBC, Mura Badhulgal (Torres Strait Islanders) RNTBC. Geiza is also active in the community in many other ways, including as the Badu Island representative on the Queensland Community Justice Group.

Over her working life, Geiza has worked in the following roles (from most recent): Student Welfare Officer, Tagai Badu Campus for 7 years; Senior Housing Officer, Queensland Government for 4 years; Community Support Officer, Department of Children's Services, Queensland Government for 3 years; Badu Island Council Housing Officer for 10 years; receptionist for MacKay Aboriginal and Torres Strait Island Legal Services for 1 year; Field Officer delivering courses to outer islands for Far North Queensland TAFE on Thursday Island Campus for 8 years; Community Education Counsellor with Aboriginal and Torres Strait Islander secondary students (at least 300 students, grades 8–12) at Trinity Bay High School in Cairns for 5 years. Geiza started her working life as a shop assistant for See Hop & Co, Thursday Island, when she was 13 years old and was living independently as a tenant by 18 years old in the blue flats opposite Thursday Island Primary School.

Geiza started her native title journey with her father, when he was pushing for recognition of Badhulgal Traditional Ownership of Badu Island at the same time as Koiki Mabo was fighting for recognition of Traditional Ownership of Mer Island. The Badhulgal application for native title over Badu Island was made in 1996 and determined by consent in 2004 in *Nona on behalf of the Badulgal v State of Queensland* [2004] FCA 1578.

Despite the group's successful native title determination, Geiza considered there to be a lack of community control in this post-determination stage.

Geiza also felt that processes associated with native title governance contributed to the reinforcement of existing power imbalances within the community – specifically, some men had been able to use native title to bolster their existing positions of power. Badu women had been denied representation on the Elders Committee of the PBC out of respect for tradition.

Geiza felt that women's cultural knowledge, as well as women's experience in administrative and governance roles is often overlooked and the community misses out on the benefits of that expertise. She also noted that the roles women played in the homes and community more generally were overlooked by men and not recognised for their important contributions. Geiza herself had many roles within the community and they often enabled her to understand the community's needs, facilitate processes to secure resources, and facilitate the community coming together.

Geiza discussed how she has found men in native title governance roles do not always have their focus on the benefit of the whole community. One example that Geiza gave was about areas of land regarding which there was a lack of cultural knowledge – it was not clear whose land it was. Geiza felt that there should have been transparency and community consultation about those areas and consistent information and opportunities provided to everyone to claim that land or advise of the Traditional Owners.

It seemed to Geiza that the required process of notifying anybody who has any interest in land, or questions about it, was not followed. Nor were PBC meetings happening on time, or regularly, at the time of her interview. As a result, Geiza believed that the non-director members of the PBC do not really know what is going on and struggle to hold the decision-makers accountable. Geiza found this lack of communication and lack of transparency to be concerning and noted that it generates community tension and misunderstandings.

Throughout her interview, Geiza emphasised the importance of those in leadership roles prioritising the benefit of the whole community. She noted how in her experience, women had this focus and it was important to ensure women were in leadership positions, including in the PBC, so that community interests are not outweighed by individual interests.

In the context of the maintenance and handing-down of traditional laws and customs, Geiza discussed the lifestyle changes on the island, including that many families live on the mainland for a period of time. Such changes have impacted some families' ability to pass down their knowledge of Country as comprehensively as they used to. Geiza felt that this has left a gap which was able to be exploited and care needed to be taken with extra vigilance around transparency and accountability.

8.7 Thelma Parker, QLD

Thelma Parker is a Waluwarra, Wangkayujuru member of the group of native title holders under the 'BWW determination' (*Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland (No 2)* [2014] FCA 528). Thelma is an Associate Professor and Associate Dean for the Faculty of Medicine at the University of Queensland.

Thelma's mother was Betty Elizabeth Parker, a named applicant on the native title claim, before Thelma took over. Thelma's great-grandmother was 'Queen Ida Toby – the Queen for all people around the Georgina River'. 'Granny Queen' was so well-known and the subject of so many stories of the Georgina River people that Thelma felt this enabled a smooth ride to prove her connection to country.

Thelma's native title story focused on ramifications stemming from the many layers of privileging colonial men's knowledge without understanding that, despite best intentions, such professionals have never been – and will never be – privy to matriarchal Law women's knowledge of Country. The cumulative result over the years, from Thelma's perspective, has been the elimination of women's cultural knowledge from the native title sphere.

Thelma also felt that the native title connection evidence and determination 'hasn't provided the full picture from a matriarchal Law woman'. From Thelma's perspective, key to this failing is the silencing of women's voices in evidence concerning connection to Country, and the fact that the native title sphere is largely made up of male anthropologists, lawyers and archaeologists. Thelma told us that despite the importance of matriarchal Aboriginal Law women in her culture, males have been tasked with speaking for her Country. The retelling of cultural evidence through a male lens is a 'big wound' for Thelma and other female members of her community and has created a 'huge gap' between native title rights and the 'actual traditional space'.

This 'gap' has manifested in flow-on effects in the post-determination phase. Thelma reported seeing women in her community being excluded from decision-making processes concerning matters that affect their Country. For example, mining companies only seek out the advice of 'males and male lawyers'. Thelma described the cumulative effect of these layers of exclusion and the ultimate devastating impacts. For the reasons already discussed, women's birthing sites were not itemised in the native title claim, so they were not obvious to the men in charge of managing the post-determination negotiations. None of those men approached the senior women in Thelma's family who do have that knowledge, instead inadvertently approving the destruction of women's birthing sites in an agreement with a mining company.

Thelma also spoke about lateral violence in her community, which she has found is fuelled by the NTRB. In her view, the NTRB is contributing to the intergenerational trauma of dispossession through playing the role of gatekeeper – imposing their own decision-making frameworks in place of traditional decision-making processes, and controlling funds such that the PBC is unable to obtain independent legal advice.

Thelma said that lawyers from the NTRB now make decisions as to who can join the PBC – rather than community itself. Thelma explained how this situation exacerbates in-fighting regarding genealogies and has resulted in the fabrication of Aboriginal histories. In Thelma's experience, this issue is also driven by inaccurate anthropological evidence; and the fact that the native title system forces First Nations people to contort their identity to satisfy a particular definition of connection, regardless of whether that reflects the community's understanding of relatedness and connectedness.

8.8 Leanne Edwards, QLD

Leanne Edwards is a Gkuthaarn woman from the Gulf of Carpentaria, and a member of the Gkuthaarn and Kukatj native title group. Their native title claim (the GK claim) was originally lodged in 2012 and finally determined on 29 September 2020.[73]

Between 2012–2020, Leanne was involved in the GK claim. For much of that time, Leanne and her husband lived on and managed the remote Delta Downs station. In her interview, Leanne described how it was hard to give so much time to the native title claim while also working more hours than a full-time job. But the claim was important to Leanne, and she did her best. Leanne specifically mentioned that her group's lawyer helped her participate by travelling from Normanton out to the station to get information from her, which made her participation easier.

Despite accommodations by their lawyer, Leanne found that the demanding nature of native title processes and the way the anthropologist conducted the research for the case still limited her ability to participate. For example, Leanne said she was unable to attend all claim group meetings due to work, and she felt that the evidence gathered by the anthropologist for her group's claim was lacking and inaccurate.

During the claim process, the NTRB combined three claims, including the Gkuthaarn claim, into one. Leanne described how this meant that the Gkuthaarn claimants were forced to use the same anthropologist as the other claimant groups, despite concerns from Leanne and others that the shared anthropologist knew less about the Gkuthaarn people.

Initially, Leanne explained that she felt broadly positive about their native title outcome: the Gkuthaarn people had achieved native title over some of their land. However, as the interview progressed, it became clear that the southern section of the original claim area, which was removed from the claim in order to secure the rest of the determination, was actually very important to Leanne and her group. Leanne said that they felt sadness, frustration and anger about not having their connection to that part of their country recognised.

Leanne specifically explained that she understood that excising the southern area was considered a necessary compromise to get back on Country and secure the determination over the rest of the land – Leanne understood the difficulty her people faced in proving connection to the southern area was because her people had been dispossessed, and their access to Country had subsequently been restricted. But it was a 'hard pill to swallow'.

Credit: Michael Leunig

One other part of the system which Leanne particularly wanted to talk about was in the post-determination period and was regarding the governance and accountability mechanisms associated with Aboriginal Corporations under ORIC.

Leanne described a situation in which several Aboriginal Corporations were involved in land use agreements with a mining company which were made before the native title determination and therefore before the PBC had been established. Leanne made serious allegations associated with the way the royalties were being administered. She told us that as a result of one person's actions, the members of one organisation have not received years' worth of payments.

Leanne told us that she and others had raised these allegations with ORIC but at the time of her interview, 18 months after that ORIC complaint, ORIC were yet to take any action, despite Leanne following up regularly.

Leanne said she had also tried to involve the Queensland Police, but the Police said they were unable to investigate as ORIC was already involved.

Leanne explained that while the community waited for ORIC to take action, another Aboriginal Corporation had been subsidising costs for those who had not been receiving payments. Leanne described how this included payments for critical expenses like transport to hospital in Cairns. As a result, Leanne said the whole community is suffering financially and the resulting disharmony is significant.

At the time of publication, almost three years after her original interview, Leanne advised that they were still waiting for ORIC to help them in relation to the governance concerns regarding the corporation in issue. Additionally, her people were engaged in 'another battle' for the other part of her Country, regarding which there are disputes with two other peoples. Leanne reflected on the extent of the work involved in establishing connection under native title and how little in terms of traditional rights are actually gained as a result of that energy and effort: 'it's so wrong on every level.'

8.9 Coral King, QLD

Coral King is a Kungardutyi Punthamara woman from the south-west of Queensland. The boundaries that she knows as her Country overlap with multiple other native title claims. Coral's father William (Bill) Booth is the son of an Aboriginal woman named Toney (Tonie, Antonia), who was the first wife of her grandfather, Frank Booth. Frank Booth's mother – Coral's great grandmother – was an Aboriginal woman named Clara.

Coral told her story of attempting to correct the record regarding where her grandmother Toney and her great-grandmother Clara, were from, after other groups secured native title determinations over much of her family's Country, excluding her and her family in the process. Coral was angry that in one determination her grandmother Toney and her great-grandmother Clara were removed from country and were given identities by the court, based on third hand evidence via anthropologists, that contradicted everything she and her family knew of their identities and Country.

Coral King's grandmother and grandfather

Coral explained that her father, her father's brother, Lindsay Booth, and her grandfather, Frank Booth, were initiated men and despite being removed from their Country 'they maintained connection by returning to country and telling their children and grandchildren about it, and visiting it, or places close to it, later in life'. Coral's grandfather Frank Booth, who was removed from country in 1930, returned there in 1963 with his daughter from his second marriage and her children to introduce them ritually to country. Coral's uncle, Clancy Booth, returned regularly to country, taking his wife, children and other relatives with him. Coral King herself went on one of those visits. Since that visit with her Uncle Clancy, Coral 'has returned to Country on at least four occasions, collecting bush medicine, and paying respects to her ancestors buried on Nocatunga' until she 'felt the Court's recognition of other native title claims on her country prevented [her] from accessing her Country'.

Coral described how when the first NTRB-funded researcher doing the connection research for native title claims in southwest Queensland spoke to Coral and her sisters, he appeared completely disinterested in what they had to say. Coral said that this researcher also visited her relatives in Rockhampton, but her relatives had felt that he had 'an agenda in his questioning' and was 'disinterested' in anything else they were saying. He was even disinterested in information from her Aunty Ivy Booth (by marriage) who was considered an 'encyclopedia of knowledge' about her husband's (Coral's Uncle Clancy's) family. From that time, the native title claims in southwest Queensland were progressed by the NTRB without her family.

Coral had never seen the connection reports that were written about them in relation to those original meetings and does not know what evidence from her family is, or is not, included in those reports, or their accuracy. Anthropologist Dr Fiona Powell has been assisting Coral on a pro bono basis. Dr Powell accompanied Coral for some of her interview and said that she herself was given access to some of the relevant native title connection reports, but not given an opportunity to submit a full responsive report in relation to Coral's recent attempt to become a respondent to one of the native title claims on Coral's country.

The chronology of Coral's native title experience is complex, and Coral (and Dr Powell) were at pains to ensure it was understood so that the errors they believe have been made, and the barriers to getting them corrected, are made clear.

Chronology: native title experience

In 2006, the Boonthamurra native title claim was commenced on behalf of the descendants of 24 named apical ancestors, not including the apical ancestors of the Booth/Fisher family or the McCarthy family. Coral King's apical ancestor whom she understands to be Boonthamurra is her grandmother, Toney Booth. Coral applied to the court to join the Boonthamurra claim and an independent anthropologist was appointed by the court, with the consent of all parties, to see whether agreement could be reached as to which families should be a part of the claim. This attempt was unsuccessful and in **2014, Justice Mansfield determined that the Booth family were not Boonthamurra and they were removed as respondents to the claim**.

According to Coral and anthropologist Dr Fiona Powell, Justice Mansfield's 2014 judgment contained significant errors which have affected all the subsequent proceedings. In particular, Justice Mansfield relied on the 'Mutawindji report', which said '*All the evidence places Kungardutyi in the area immediately east and north-east of Tibooburra and around the southern parts of the swampy areas around Lake Bulloo*.' However, Dr Powell described how this was a misquote of the relevant anthropologist, who had actually said in her primary report 'All this evidence places …' [italics added]. Dr Powell knew the anthropologist and knew that she was aware that there was other evidence that had not been examined, making the one word difference significant.

Meanwhile, **in 2008, the Wongkumara people claimed Country to the south west of the Boonthamurra** claim area, extending into northern NSW.

Coral's cousin, **Geoffrey Booth, lodged their native title claim in 2016. In 2017, Justice Jagot struck out that application**[74] after the Wongkumara people (supported by the NTRB) argued that the application was not properly authorised by all group members (as per s 61, Native Title Act). In that 2017 judgment, Justice Jagot relied on the 2014 judgment, and specifically on the finding which relied on the Mutawindji report. Justice Jagot found that the Kungardutyu Punthamara application sought to relitigate an issue already determined in earlier proceedings and was therefore an 'abuse of process'.

In **November 2017, after the Kungardutyi Punthamara claim was rejected, Coral and her family applied to be joined to the Wongkumara claim**. In 2020, the court rejected Coral's application to join as a respondent.[75]

Dr Powell told my team that she is one of the few anthropologists who has conducted fieldwork and also compiled extensive ethnographic and historical records relating to the relevant area. She spoke about how, when she became aware of the 'terrible injustice' done to Coral's family due to the errors in the evidence provided in native title proceedings about Coral's ancestors, she began helping first members of Coral's group and then Coral herself on a pro bono basis. From her professional experience and her research on Coral's case, Dr Powell said she felt that there was an underlying lack of appreciation in the anthropological and legal community of the complexity and differences in naming practices associated with pre- and post-sovereignty groups or tribes as members of these groups dealt with the impacts of dispossession and forced relocation. In Coral's opinion, judges appear to be ill-equipped to properly assess the evidence and make the kinds of decisions that they have to make around connection.

A key theme of Coral's story was her family's inability to secure funding for legal representation, despite the NTRB funding and representing opposing groups. Coral felt this inequitable resource allocation was unfair and that her family 'never stood a chance.' Coral and Dr Powell felt that there is an inherent conflict of interest in the situation where an NTRB is responsible for funding decisions in relation to two opposing groups, yet funds only one of these groups.

Coral and Dr Powell described significant efforts to secure pro bono legal representation which had, at the time of interview, not been successful. They reported being told by several lawyers approached to assist Coral that they had a conflict of interest because they worked with the NTRB on other cases, including some relating to Coral's country, so could not represent her effectively against them.

At one point, Coral secured the services of a lawyer in another state through referrals. However, he was not acting pro bono as Coral had at first believed, and Coral ended up spending her entire stolen wages compensation

amount and had also borrowed some of her family members' compensation to pay a bill of over $20,000. Coral said she had to discontinue with his services because she had no more money to pay for them.

Coral has had two unsuccessful mediations in the native title system. For the first mediation, Coral's family had no legal representation at all, while the other side came 'armed with barristers and QCs and what not.' Coral asked if the other side's lawyers could leave the mediation before it started but after the lawyers and mediators left the room for the parties to discuss the issues, the situation between the parties became heated and Coral said one of her female cousins was threatened by one of the men from the other side.

According to Coral, that mediation was unsuccessful because her family rejected the other's side's offer of giving them 'permission' to access the Country that Coral and her family knew was theirs. Coral said this other group had a native title claim application on that country, and believed that, because of their native title claim application, it was their Country already, that Coral and her family had no right to claim it, and Coral's family needed permission from them to go there.

> … it was never going to work from the get go. They didn't accept that it was our Country.

Coral told us that the second mediation was unsuccessful because when she met with a representative from the other group, that person deliberately spoke about Coral's mother when Coral had specifically told everyone that her mother was not to be referred to in the proceedings at all. Coral had been furious at this mention and felt disrespected, and the mediation fell apart.

Coral questioned how so many parties within the system over the years could fail to see the truth despite the evidence she has presented. She kept expecting the evidence to speak for itself and has been repeatedly disappointed and frustrated.

In 2017, when Coral's family were able to successfully register their own native title claim in southwest Queensland, that allowed them to negotiate for cultural heritage work. They were pleased about this, as it allowed them to get back out on Country. But that situation was short-lived and now, Coral feels she has no access to her Country because, as far as she is concerned, Federal Court decisions have either relocated her ancestors to areas where they have no connection and are claimed by other groups, or allowed other groups to claim her Country. She feels that if she cannot regain access to her own Country, her family will never be able to heal.

Coral King and her great-granddaughter.

8.10 Sarah Addo, QLD

Sarah Addo is a Kunggandji Gurrubuna woman and traditional owner of Yarrabah Country in the Cairns area (Kunggandji Gurrabuna People of Kamoi – traditionally known as 'Geemooiburra People'). She is a Director (Cairns Ward) on the Board of the North Queensland Land Council and a Director and Treasurer of the Wuchopperen Medical Centre. At the time of speaking, Sarah had spent around seven years working on her native title case virtually full-time and had only recently been able to take up paid employment again.

Sarah described how her native title journey began when she was asked by her Elders to help contest native title claims over their Country made by other groups. In 2012, after being asked several times, Sarah says she felt a spiritual calling compelling her to respond – to protect Country and defend her people's rights and responsibilities for Country into the future, for her children and grandchildren.

By the start of 2013, Sarah had left her well-paid, full-time administrative job to be able to give more time to the native title case. She took up studies at TAFE and was able to get Abstudy for the next three to four years, during which time she studied and researched the native title case, and somehow still managed to provide for her children. Over close to a decade, Sarah has conducted extensive research, drafted many affidavits and court documents, applied many times (mostly unsuccessfully) for funding for legal representation from the North Queensland Land Council (NQLC), and is still fighting in the courts for her Country today.

The background to Sarah's story is that in 2012, Justice Dowsett of the Federal Court granted native title rights to the Mandingalbay Yidinji-Gunggandji Peoples in Cairns.[76] According to Sarah, this claim was fraught with evidentiary errors which have had lasting impacts for her people – the Kunggandji.

Sarah explained that the NTRB used a joint connection report for the Mandingalbay Yidinji and Kunggandji tribes for this claim, despite both tribes recognising that the Kunggandji People lived on the land prior to the Mandingalbay Yidinji Peoples. The Kunggandji objected to the way the anthropological report was done without their knowledge: according to Sarah, this has given rise to genealogical inaccuracies and a conflation by the court of 'historical' rights of the Mandingalbay Yidinji tribe with the traditional ownership rights of the Kunggandji tribe.

Sarah further explained that due to that 2012 judgment accepting the inaccurate connection report, she has been locked out of other claims over her Country and denied cultural heritage consultation rights.

Complicating her native title journey, also in 2012, the 'Gimuy' Waluburra Yidinji Peoples and the Yirrigandji Peoples gave notice that they were going to claim native title over land in the Cairns area, which Sarah and her Elders consider to be Kunggandji traditional country. Without legal representation, Sarah lodged a Form 5 in the Federal Court to join the claim as a respondent and attended court hearings and mediations.

From 2013–2018, Sarah conducted research to find written evidence to 'prove' the oral history of her Elders. In that time, Sarah told of putting in numerous funding applications to the NTRB and all were denied. Sarah felt that the NTRB directed funding disproportionately to the Mandingalbay Yidinji tribe. She also told us that there are connections between decision-makers in the NTRB and the Mandingalbay Yidinji tribe suggesting the potential for conflicts of interest.

Sarah was particularly frustrated at the way another tribe has been able to utilise the evidence of the Kunggandji to build their own claim over Kunggandji Country.

In 2018, Sarah's group and the other claimants agreed to negotiate a Protocol Deed which set out a process with a mediator who would provide a final report which the parties would be bound by. Sarah described how the process was initiated by a Registrar, whom she felt was the only official who understood that her group had real grievances. This was the one time in the native title process that Sarah's group received funding – required by the court so that they could properly participate in the negotiations.

However, despite being advised against it by her lawyer in that Protocol Deed negotiation process, Sarah agreed to Justice Dowsett being appointed the 'referee' because she 'thought he would be inclined to correct his prior incorrect findings' from the 2012 determination. Sarah realised after the process that her lawyer was right, and Justice Dowsett had 'doubled down', issuing the Referee's Report with essentially the same incorrect findings of fact as his earlier determination.

According to Sarah, one of the key issues with the way the evidence was interpreted by the court was the acceptance of the proposition that there was a patriclan, and the corollary that women didn't have rights. Sarah was insistent that this is incorrect and that traditionally, women also had rights associated with Country. Sarah feels the legal system, including lawyers and judges, is ill-equipped to appropriately deal with the complexities and nuances of traditional laws and customs and traditional tribal boundaries (which are different to historical colonial government boundaries).

Sarah explained how she had itemised and produced several pieces of written historical evidence supporting the oral history that the Kunggandji people alone are the Traditional Owners of the Cairns area, and that the other groups came to the area later and were permitted to stay but were not given traditional owner rights. Nonetheless, Sarah has been unable to have a native title claim accepted because of the original evidence which she claims to be erroneous.

Sarah described some wins for her efforts – using the written records from her research at the State Library, she was able to show that the Yirrigandji people were not Traditional Owners of the Cairns area and had them removed as native title claimants.

The impact of not being able to register a native title claim has been that Sarah's family have no cultural heritage consultation rights over their Country because of the link between the two pieces of legislation. Sarah described how devastating it has been for her and especially her Elders to see important places destroyed while those purporting to speak for Country do not seem to care.

The personal impact of her native title work over the last 10 years has been significant:

> I suffered everything, me and my children. We had nothing, you know, because my children were used to me making a good salary. To go to nothing … they were even arguing with me – 'go back to work, you need to leave the land'. But you know they're kids … Now they're seeing why this fight is important, because they've grown up with it and learnt a lot from it.

At the time of her original interview, Sarah said she had appealed the latest decision of the NTRB not to fund their claim as a respondent under section 203FB of the Native Title Act and was waiting for a decision from the National Indigenous Australians Agency (NIAA).

In late December 2021, Sarah's most recent application to join the native title claim of other groups over her country was rejected by the Court on technical grounds. She expressed desperation – she feels she is out of her depth and really needs a lawyer. However, at that point, she had still been unable to find one who could provide assistance pro bono.

8.11 Shawnee Gorringe, QLD

Shawnee Gorringe is a Mithaka woman and member of the Mithaka Aboriginal Corporation (QLD). At the time of her interview, Shawnee was also in a paid role at the Mithaka Aboriginal Corporation.

The Mithaka native title determination was handed down in 2015.[77] Mithaka Country is made up of mostly pastoralists, gas exploration and mining, meaning there is a significant amount of negotiating with third parties as part of their management of Country.

The Mithaka native title claim group was comprised of an equal mix of both men and women, and involved Shawnee's grandad, his siblings, and his wider family. Shawnee recalled that it was probably her aunt who was the driving force behind the claim, and that there has always been a strong presence of Boss Ladies in the family and community who fought that long battle.

Shawnee described how the original pastoralist, Duncan-Kemp, and his family, were particularly sympathetic to the local Aboriginal people. The pastoralist's wife was passionate about 'looking after their people' who lived and worked on the station, including Shawnee's great grandad Bill Gorringe, a renowned stockman. The pastoralist's daughter, Alice Duncan-Kemp, spent considerable time with the Mithaka people and recorded a lot about what she observed and researched.

Shawnee noted that Alice's information had assisted them with their native title claim. She also noted, however, that a subsequent book by Alan Pike about Mithaka women's business, which was based on Alice's research, inevitably did not include some of the more significant information which Alice would not have been privy to.

Shawnee emphasised that the positive relationship between the pastoralist's family and the Mithaka people continues with his descendants, even today.

Shawnee spoke of her community's experience collating evidence for the Mithaka native title claim and its impact on the preservation of her community's cultural knowledge. In Shawnee's experience, the anthropological reports preferred written documentation over what 'living Elders had to say', creating challenges for her community who lacked evidence from the outset. Moreover, information was drawn from sources authored by non-Indigenous men and was therefore limited in its capacity to capture women's culture and knowledge.

Shawnee also highlighted how during the pre-determination phase, and now the post-determination phase, the Mithaka people have had a mostly positive experience with companies and property owners with vested interests in the determination area. Nonetheless, misinformation concerning the implications of native title rights has at times created mistrust and uncertainty which they have largely overcome through relationship-building over time.

Shawnee explained that after six years of post-determination negotiations, a lot of work between the PBC and the community to come to an understanding, and a lot of research, the PBC has formed many positive external relationships and is in a good place.

The Mithaka people have partnered with the University of Queensland (UQ) and researchers have come out to Country two to three times a year from UQ and other universities. Shawnee also spoke about how the PBC invites the pastoralists to go out on trips with them.

In Shawnee's experience, although they have managed well with what funds they have been able to secure in addition to the basic PBC funding, a lack of consistent supplementary income has limited the Mithaka Aboriginal Corporation from realising its vision of bringing people 'back on Country'. She described how the PBC has created the equivalent of a 'ranger's program' and provides contract services for the management and maintenance of pastoralist stations. This provides employment opportunities and income to the community. They also provide camps out on Country for at-risk youth.

While Shawnee stressed that the PBC does not want to be a 'multi-million-dollar company', she said additional funding would be beneficial to further expand and sustain the PBC's projects. At the time of her interview, Shawnee described how they had managed to secure the agreement with the universities. The funding for those three positions was due to run out soon, but Shawnee hoped that with the ongoing university partnership, the establishment of the contracting services, and the basic PBC funding, it will be enough to enable the PBC to function sufficiently well. Ideally, Shawnee explained how the community would like to be able to bring people back on Country regularly, which is expensive given how remote the determination area is.

In addition to the services of the NTRB, the PBC can afford the services of a private solicitor to review agreements, which they are able to fund through their own income stream. Shawnee described this as important to mitigate what could be described as inherent conflicts in the funding structures due to the fact that NTRBs benefit financially from agreements, even if they are not in the best interests of the native title group.

Shawnee said while it has been a lot of hard work and continues to be, and nothing has come easily, she loves the work she does at the PBC, and the community and the PBC are in a great place looking into the future, capable of tackling the many and varied challenges that will always arise.

As of early 2024, the membership of the PBC had expanded from 70 to 100 members, had a state-funded ranger program, and has successfully campaigned to prevent exploration in the rivers and flood plains of the channel country.

8.12 Avelina Tarrago, QLD

Avelina Tarrago is a Wangkamahdla woman from central-west Queensland, and a barrister. At the time of her interview, Avelina was the President of the Indigenous Lawyers Association of Queensland and a Legal Member of the Mental Health Review Tribunal, as well as other roles additional to her paid job.

At the time of her first engagement with the native title system, Avelina was still at law school. She understood the system sufficiently and was able to participate, but she found the process disempowering because of the lack of control that First Nations groups have over the process and over their own information in that system.

Avelina described how her family did not want to claim native title, but they were 'forced' to engage in the system by applying to join as a respondent to the 'BWW claim',[78] because it was encroaching on their Country. Avelina explained that the NTRB was unwilling to help and sided with the other families. This left Avelina to try and address the incorrect boundaries of the application on her own.

> So, I filed an application on my own in the Federal Court to join as a respondent on BWW, to try and alert the Court to the fact that there was an overlap and that nothing was being done about it. I didn't know what I was doing at all.
>
> I wasn't even admitted, but I managed to be successful.

Eventually, during the process of contesting the boundaries as a respondent in the BWW claim, Avelina had to hire a solicitor herself, with her own money, and then luckily a barrister agreed to work for them pro bono. The whole thing took a huge toll on Avelina's mental health.

Avelina talked about having to eventually withdraw as a respondent because the anthropologists came to an agreed position which she knew was incorrect, and which she knew would mean they couldn't 'win'. She remains angry about the way those professionals conducted themselves and believes they knew they were doing the wrong thing.

At the time of interview, Avelina had heard through the 'legal grapevine' that the NTRB had sought advice about reopening the determination. Avelina was not surprised at all given the way the case was run and the errors she knew had been made in the connection evidence, though she was surprised that there was open discussion about it.

Avelina also discussed how she was acutely aware of the importance of ensuring governance structures are established carefully and thoroughly from the outset to avoid PBCs being compromised and to minimise the conflict that comes with that. Once the Wangkamahdla had their native title determination, Avelina did her best with the system they have to ensure safeguards for traditional decision-making and to prevent conflicts of interest. For example, Avelina knew from her legal training and years of involvement in the native title system by then, that provisions relating to conflict resolution in PBCs were critical, and that issues of conflicts of interest needed to be addressed explicitly. So, for instance, their PBC Rule Book provides that an individual can only be on the PBC board if they are not already a director of another PBC in Queensland.

Avelina spoke specifically of how it takes lawyers with both the legal and cultural knowledge and confidence to ensure that legal processes are safe spaces for First Nations women to fully participate. Avelina talked about creating a culturally safe space for First Nations women to give evidence and the impact it has, not only on women's capacity to participate and be heard, but on the accuracy and extent of the evidence that is provided.

Avelina recommended that Indigenous lawyers with experience in native title be involved in any reform process from the beginning – people who have both a personal and professional understanding of the system.

8.13 Cassandra Lang, QLD

Cassandra (Cassie) Lang is a Bundjalung woman and Co-founder and Principal Solicitor at Parallax Legal, Brisbane (QLD). She is the Vice President of the Indigenous Lawyers Association of Queensland and has over fifteen years of specialist legal experience in the native title and cultural heritage areas of law.

Cassie has been frustrated and perplexed by what she has seen as a First Nations woman practicing in native title law. Cassie addressed a wide gamut of issues within the native title system during our interview. One such issue was professionals in the system failing to ensure clients are able to participate in the native title process with full understanding.

Cassie acknowledged the system is not perfect and has many limitations but expressed particular concerns based on her understanding of the way anthropologists within the native title space are commissioned, with a narrow scope of work and preconceived ideas of what a claim should look like based on their preliminary research. Cassie has experience having to navigate inaccurate determinations that occur in the wake of incorrect or incomplete anthropologist reports. She described these erroneous determinations as burdensome and challenging to resolve.

Cassie specifically noted how hard it was to hold people and government agencies accountable for failures in consultation and decision-making processes within the native title system, as there is a strong tendency to shift the blame around.

Cassie believes there is a lack of accountability regarding technical experts such as historians, anthropologists and lawyers within the native title system. She discussed how they often don't seem to realise when they have not fulfilled their roles or discharged their duties to a sufficiently high standard. Cassie noted that there doesn't appear to be a way to complain about the services provided by an anthropologist, and there is no practical way of holding lawyers in the native title system accountable. Many of the queries Cassie receives are about the dissatisfaction a person or a group has with the delivery of services or advice provided by the respective NTRB/NTSP.

Cassie recognised the important role NTRBs/NTSPs play in the native title space but emphasised the need for them to work better with both clients and professionals to enable more positive experiences. In Cassie's view, NTRBs may struggle with competing interests between the best interests of the client and retaining the contract for provision of services to the client in order to retain the funding themselves.

Despite the intention of the system to allow for native title groups to get the funding from the NTRB in order to pay for their own choice of professional, this is not how it plays out in most instances.

Cassie has experienced native title groups being forced to use all the services of the NTRB if they want any support for their native title claim. In Cassie's experience putting constraints on how native title claim groups/PBCs can access support from their NTRB/NTSP causes unnecessary tension between the client and the NTRB/NTSP.

Cassie suggested in circumstances where the relationship between the NTRB/NTSP and the client is tense, it would be in the best interests of native title claimants and groups if the model looked more like the NTRBs as community liaison between a native title litigator from the private sector and the local community.

Cassie also talked about her work mapping traditional boundaries in the Torres Strait. She engaged in this work to ensure authorisation processes are clear and easy to follow. Cassie described how the traditional decision-making processes are a 'rolling thing'; and it can require additional accommodations to facilitate those traditional decision-making processes. But Cassie described how the long-term consequences of not taking the time and making the effort to consult the right people are community disharmony and wasted resources. For example, houses that no one can live in because the land belongs to one family, but the houses are allocated by government to other families.

8.14 Marilyn Pickalla Campbell, NSW

Marilyn Pickalla Campbell is a South Coast woman from NSW, who has traditional connections through her Pickalla family in the Aragunuu to the Mystery Bay area. Marilyn's father is a Djiringanj Yuin man from Wallaga Lake, and her mother's family is from the Lake Tyres area in Victoria.

Marilyn had previously been involved in a long-running native title claim and at the time of publication was still involved in a native title claim. In her interview, Marilyn described when she was young, sitting around 'in the background, listening to my Elders' as they fought for their land and told stories.

> … watching our Elders stand up and fight for something that they believed in, I think that's what made me the person that I am today. And watching their struggle, and how they carried themselves, and who was the head speaker.

At the time of her interview, Marilyn was involved in opposing an application by the Local Aboriginal Land Council (LALC) for a declaration that there was no native title over an area known as Isabel Street. The land council had acquired the Isabel Street land under the *Land Rights Act 1983* (NSW) (LRA NSW) and wanted to be able to sell or develop Isabel Street. Under the LRA NSW, for a LALC to divest or develop land they require a declaration that there are no native title interests in the area.

Marilyn lives on Isabel Street and has a traditional connection to that area as a source of traditional food and medicine, and as an area where her family used to camp. Marilyn feels there is a native title interest in the area and opposed its development.

In March 2020, during the COVID-associated restrictions, Marilyn gave evidence to the Federal Court via Zoom regarding the application for a determination that no native title exists over Isabel Street. The transcript was made available to my team as an illustration of how gruelling the process of giving evidence can be for First Nations individuals – made even more difficult using Zoom.

The transcript suggests that the applicant's lawyer attempted to undermine the credibility of Marilyn's evidence that there are native title interests over Isabel Street, using her previous evidence in a native title case from 17 years prior. During Marilyn's cross-examination, it was implied that the lack of mention of Isabel Street in Marilyn's affidavit from that time shows that Marilyn did not actually consider the area to be of significant cultural value, compared to other places that she spoke of in that affidavit.

The applicant's lawyer also used the fact that Marilyn was not asked to give oral evidence in the earlier native title claim – the Djiringanj claim – as an indication that she is not considered by her community to hold particular knowledge.

Marilyn specifically said in the cross-examination that she did not want to answer some questions because she 'does not speak for other families' as to who is and is not a knowledge-holder in their families. In response to this, the applicant's lawyer suggested that Marilyn was not answering because she did not want to admit that traditional knowledge-holders from other families were supporting the plan to develop Isabel Street.

In her interview, Marilyn spoke about her connection to Country and the challenges she has faced fighting for her Country. She provided detailed information on her knowledge of bush medicine and on her family story, and how knowledge was passed down through the generations. She was concerned to ensure that she could pass it down too. In this context, Marilyn talked about her mother and grandfather's particular knowledge of Country, and that it is only some people this knowledge is passed down to. She explained how some of these things are not meant to be spoken about: 'that's how it's handed down. It was specifically handed down to me because I was the sickliest child out of 14 kids.'

Marilyn felt strongly that any explanation of her connection was inadequate if not done physically on Country. She was insistent that her education of others and her knowledge transfer to younger generations was only possible by being on Country and learning through practice. When unable to take people out on Country, Marilyn felt it hindered her ability to show and teach her culture.

At the time of speaking, Marilyn was also frustrated that her family were having to justify their cultural fishing practices to the NSW Government authorities. Marilyn's nephews were being prosecuted by the Department of Primary Industries for taking too much abalone. Marilyn explained that they did not make money from their fishing. She described how they have always fished for the whole family and community, as is traditional practice: 'Those young men fish for many, many people and so it might look like they are taking too much but it is how it's done traditionally – for sharing amongst many.' She was angry and insistent that this was a cultural right, and they were not going to stop.

The ongoing need to justify herself and her family's cultural practices and connection to Country was felt by Marilyn as a never-ending demand, which was both exhausting and angering. She felt it was unfair and unjust to be required to explain herself, her culture, and her rights when she and her family had endured so much already. But Marilyn was also determined to continue fighting for her Country and the ability to fully pass on her cultural knowledge to her grandchildren.

8.15 Sarah, NSW

Sarah is a Dharug woman from Western Sydney. Sarah's native title group's claim was lodged in 1995 and settled in 1999. That native title claim over the area now known as Bidjigal Reserve was ultimately withdrawn, with an agreement reached between the local council and the Dharug people. The parkland was renamed Bidjigal Reserve and the Dharug people were to have a say in how the reserve is managed.

Text Box 8.3 provides the historical legal context for the connection requirements under the Native Title Act and the court's interpretation of how they apply to the heavily colonised southeast of Australia in the Dharug case. It highlights the limitations of native title as a means of redress for dispossession.

Text Box 8.3: Early Dharug native title decision

The 1999 Dharug Native Title claim was determined via an agreement that the Dharug claimants withdraw from further participation in the case in exchange for an undertaking by the Deerubbin Local Aboriginal Land Council and the NSW Government that they would not claim any issue in estoppel in relation to another application that the claimant had filed separately over another parcel of land.[79] In relation to that claim, Justice Madgwick said:

> *it appears that the claimants have viewed their claimed authentic descent from Aboriginal people who were identified in viewing written records very soon after British colonisation, together with the survival of vestigial elements of traditional culture, as more or less sufficient to show both (a) the survival of a people, rather than of descendants of one or more peoples, and (b), in large part, continued connection for the purposes of establishing legal recognition of their claimed native title in respect of the claimed and associated lands. Rather, what those things may well show, along with the facts of uncompensated historical dispossession, is a claim telling in fact and morality for due recognition as the historical descendants of the original owners and occupiers, in a generic sense, of the lands that have become greater Sydney, and for reparation for the effects of that dispossession. However, the fact of Aboriginal descent, either alone or taken with the survival of some remnants of Aboriginal people's pre-1788 culture, falls both wide and short of showing the survival of a people with live traditional laws and customs stemming from any such original people.*[80]

Justice Madgwick went on to say:

> *The decision in Mabo was regarded in various quarters as heralding a new dawn for at least a modest degree of reparation to Aboriginal people generally, by way of according them an ability to reclaim unalienated Crown lands. The decision in Yorta Yorta has confirmed that such was not the effect of Mabo. The ability to obtain a declaration of native title under the Native Title Act is, at least after Yorta Yorta, strictly limited.*
>
> *The reality seems to be that the present idea of a Dharug land-owning polity is an aspiration which arose, after Mabo, out of the process, more generally, of the Dharug Link group's earlier efforts, in rather less of a 'land rights' context, to recover some of their lost history and to have public recognition of and respect for their ethnic and cultural roots and their historic losses and injustices.*[81]

Sarah described a stressful and disempowering Bidjigal Reserve co-management committee process where the Dharug people felt that the committee gave no respect or priority to their knowledge, expertise or values, or to their agreed right to have a say. Sarah's family were involved but left because of how they were treated. Sarah later heard that the committee was disbanded after many ongoing problems with the local council.

Sarah spoke about how her family, and the Dharug people more generally, have been excluded from consultations and cultural heritage work on Dharug country.

Sarah described a complex legislative picture, which in her experience does not work to the benefit of Traditional Owners. Specifically, Sarah explained how the 'registered Aboriginal party' system operates in the context of cultural heritage work in NSW. Leanne's family campaigned for the right to be consulted regarding developments on Aboriginal land for decades, and when it was finally legislated, Sarah said 'within 5 years, it was terrible.'

Sarah discussed how the opportunities for development on the traditional Country of the Dharug people – the Sydney basin – are significant, and there are therefore a lot of people claiming an 'interest' in paid cultural heritage work on Dharug land, including many without any connection to the relevant Country. This has limited the availability of paid cultural heritage work for Dharug organisations, which in turn has reduced the funding that Dharug people have to conduct their education and community work. Sarah also noted that this means that cultural heritage site work is not being done properly and Country is not being properly protected.

Sarah explained how, at the end of the cultural heritage assessment process, Traditional Owners have an opportunity to review the report in an unpaid capacity. As such, Sarah finds herself still working in the cultural heritage system, but only in an unpaid and uncompensated capacity, meaning she has to use her own funds from the sale of her artworks to fund her organisation's education services.

Sarah felt that in Sydney, native title not only provides very little to Traditional Owners who are given determinations, but can also result in groups being worse off than before if engagement with the native title system fails to deliver a determination.

Sarah spoke about the interpersonal, community, and institutional tensions that the exclusion of Dharug people from the native title system has created. In particular, Sarah expressed her frustration that other Aboriginal people, some of whom occupy positions within land councils, have expressed the view that because the Dharug people do not have native title, they do not deserve any recognition or participation rights at all.[82]

Sarah described the significant clout and legislative primacy of land councils and how this maintains their preeminent position as owners of Aboriginal land in Sydney. She reported her experience of having the historicity and ongoing existence of the Dharug people challenged by Deerubbin Local Aboriginal Land Council, as well as having her request for membership denied because her Dharug identity is considered ineligible.

Despite feeling that another native title claim would create a new forum in which the Dharug people could potentially find themselves in harm's way, at the time of publication, Sarah and her family, along with other Dharug women, had been working with NTSCORP towards a native title claim. She hoped that such a determination, however limited, might improve their recognition as the right people to speak for Dharug Country. In her interview, Sarah was also hopeful that long-awaited legislative reform in the area of Aboriginal cultural heritage would be enacted soon. However, at the time of publication, that legislation had been shelved by the NSW Government.

8.16 Leah, NSW

Leah is an Aboriginal woman from the west of NSW. She is a Custodian with two different native title claims, run by two different NTRBs because her mother's country crosses state borders. Leah is also an academic working across two universities in research.

In her interview, Leah discussed her experiences with professionals involved in the native title system and identified concerns around professionals' impacts on community relations and native title outcomes both within and beyond their roles in the process of getting a determination.

In Leah's experience, the anthropological consultation process in the native title system is 'not always inclusive' and the professionals involved often only hear the loudest voices.

It was Leah's view that some lawyers involved in the native title process do not seem to understand that this process and needs to be a healing process, and that it is not just about getting the determination. Leah felt that a key part of their role, which is neglected, is to communicate respectfully and co-facilitate community meetings in culturally safe ways.

Leah has experience with two NTRBs because their original claim was divided and the two subsequently run separately. She felt that the NTRB has an effect on how the process plays out for a group. In her case, one claim was very much directed by the lawyer and felt less empowering; whereas the other one was far more community directed with facilitators and the lawyers engaging in more effective and regular communication with community.

Leah described personally witnessing the misuse of power by dominant men in leadership positions, some of whom are known perpetrators of violence against women and children. Leah noted that these men are not even qualified to be in the leadership positions and are not benefiting the communities by being there.

Leah has seen women bullied when they have demanded transparency and accountability, and when they stood up to the bullying, they have been ostracised. Leah described how the community has tried to implement changes to ensure everyone has an equal opportunity to take up leadership positions in native title (and other areas), for example, by establishing a rule that anyone with a serious criminal history be ineligible for board membership. But Leah said some men in positions of power resisted by stealth for as long as they could, and when they finally resigned, some moved to more senior positions in native title.

Leah has observed that as long as these men remain in leadership positions in the native title system and across Land Councils, women will always be made to feel unempowered, unsafe and unable to participate.

Leah also described seeing intergenerational conflict now that more young people are coming to meetings, speculating that perhaps some older people feel threatened by the highly educated getting involved. Young people are questioning previous behaviours, actions and decisions, trying to understand how they are made, and by whom. To Leah, it appears that older people might be feeling disempowered. Leah is concerned that younger people are inheriting old intracommunity conflicts and disrespectful behaviour, noting that they are often pressured to 'take sides' in long-running disputes.

These experiences have meant that Leah is particularly concerned about ensuring that native title meetings are safe, 'brave' spaces where the hard conversations can happen, problems are workshopped over time, and disagreements are managed. Leah felt that if native title governance structures and spaces remain unsafe forums for honest discussions, the cycle of disharmony will continue and seep into other facets of life too.

A practical suggestion that Leah had is to commence each meeting with a pictorial timeline and brief presentation summarising the history of the claim in question. This would give community members a base level of knowledge regarding key milestones, decision-makers, and decisions made in the process to date, which would enable more equivalent participation by alleviating some of the misunderstandings, the 'yarn carrying' between meetings and speculation associated with not knowing when, how, and by whom decisions had been made in the past.

8.17 Maria Stewart, SA

Maria Stewart is from Oodnadatta, South Australia, with connections to Arrernte and Wangkangurru, as well as Yankunytjatjara and Walka Wani. Maria is the Chairperson of Dunjiba Community Council, which was previously the Oodnadatta Aboriginal Housing Society, founded in 1973. Dunjiba runs a number of community services such as the general store and café, hotel, railway museum, playground and free camp. Dunjiba also advocates on behalf of residents for improved employment, health education, and community services.

Maria described her family connection to Oodnadatta and the surrounding country through her grandfather, a traditional Law man, and her mother.

> My grandfather was a Law man. He was a big traditional man, went through Law and he lived and worked on a station just out of Oodnadatta where he was born. His grandfather is buried in that Country and my mum and all his children were born on that country on that same station … some people from the land would say it's men's country …

> My grandfather was one of the Law keepers, he looked after the country and the sacred sites around that area up until the 70s … Even us kids we were actually brought up on that country as children, when families were working on cattle stations around that area – Oodnadatta – the pastoral companies around Oodnadatta – and all our families are buried on that country, and our families still live there today.

Maria's story was of her family's exclusion from a native title claim over their Country. Maria told us that her family was not consulted by the anthropologists and lawyers, who instead grounded the claim in inaccurate information recorded by non-Indigenous explorers. Maria described how, due to this, her family has since been unable to join the PBC after the determination over the claim area was handed down, meaning that, at the time of her interview, decision-making was the responsibility of people who 'do not know the Country'.

Maria described how it is particularly hard for her and her family to see people who are not familiar with her people's law and women's business enter into mining agreements that she considers have destroyed sacred sites and cultural heritage.

Maria's experience has been that the benefits from agreements made by PBCs regarding acts on Country are not benefiting the communities who are actually living on Country. Despite the PBC receiving royalties from mining agreements, those who are living in Oodnadatta are living in poverty and 'get nothing'.

Maria believes that PBCs are not acting in the collective interests of the communities that they represent and are not being held accountable in a meaningful way. Maria expressed how she would like to see the emphasis shift from funds being directed primarily to individuals who live all over the country for immediate expenses such as bills and travel, to a strategic investment of funds back into the long-term development of the community.

Maria described how the issue of PBC accountability is exacerbated by community conflict and lateral violence, which prevents community members from attending PBC meetings and staying involved in native title decision-making. In Maria's experience, the conflict is perpetuated by poverty, as well as the loss of traditional structures and culture at the hand of native title, which she described as cyclical and self-perpetuating.

8.18 Anna Strzelecki, SA

Anna is a Kokatha woman and a member of two PBCs, the Kokatha Aboriginal Corporation and the Gawler Ranges Aboriginal Corporation, whose boundaries adjoin each other. Anna also works at a large university and is active at board level in other Aboriginal organisations.

Anna described how her two PBCs don't seem to have a shared definition of a Common Law Holder. One corporation has very tight requirements for membership while the other has a much broader interpretation. Anna described the challenges posed by the terms of determination in their case. Difficulty arose not only through trying to determine who is a Kokatha Common Law Holder, but by determining who gets to decide or recognise a Common Law Holder.[83]

> Under the Rule Book, you just have to have lived or worked in the area, or your parents or grandparents have lived or worked in the area … it allows for a lot of argument.

Anna said she was unimpressed with the legal advice in the early stages of setting up the PBC. She felt that the professional role was important in how the Rule Book came to interpret the determination in the way that it did. She felt it did not need to be interpreted like that.

Anna told us that she has personally witnessed what she considers exploitation of the broad definition of Common Law Holder in the Kokatha PBC. She spoke about how this interpretation has allowed benefits to be distributed to people who have no connection to Kokatha country. Anna also believes that a lack of transparency regarding payments by the PBC means that people speculate wildly, ultimately causing disputes.

Anna spoke of her concerns regarding some of the individual men in positions of power. She felt that legislation and regulations were being used by some on the board of the PBC to confuse members and prevent fairer distribution of the funds to a more limited – and in her view, more legitimate – pool of beneficiaries.

Anna described a long struggle to get ORIC to take any action in relation to alleged misconduct of those in charge of the PBC – after years of asking ORIC to intervene, they went to the Commonwealth Ombudsman and finally ORIC put the PBC into administration.

Anna noted how, while in administration, the PBC's Rule Book could be – and was – changed by the special administrator without needing to adhere to the normal requirements of voting. Anna lamented that this opportunity wasn't taken to create the best and most transparent structure for the group, addressing defects she identified in the existing Rule Book that have caused disputes.

After the PBC came out of administration, its newly appointed board was all women except for one man. Despite the board doing well so far, Anna said there were still outstanding issues which result in ongoing arguments in the community. Anna noted the particular issue of who should be a member and/or Common Law Holder and who should receive benefits. Since Anna's interview, she has advised my team that these issues have made progress.

Text Box 8.4: ORIC's *Model rule book for RNTBCs*

In November 2022, ORIC published a *Model rule book for RNTBCs*[84] which is a 'live document', last updated 9 May 2023. ORIC welcomes feedback on the model at any time to publications@ORIC.gov.au

In relation to eligibility for membership of a PBC, the model rule book has guides for direct and indirect membership models that provide restrictions on who can and cannot be native title holders. If disputes over member eligibility arise, then having dispute resolution provisions in the constitution are key. AIATSIS highlights PBC models that refer membership disputes to regional bodies:

- The Githabul Nation Rule Book includes a process where the PBC goes to NTSCorp, their NTRB, or another independent person to help them arbitrate disputes about membership.
- Top End PBC similarly utilises the Northern Land Council (NLC) to help review their decisions about membership. If the NLC determines that a person is eligible for membership the PBC must approve the membership and in the opposite case the PBC must cancel the membership.
- Gawler Ranges have established a review panel to deal with disputes over membership.
- Ilkewartn Ywel and Mer Gedkem Le PBCs both draw upon traditional decision making processes to deal with membership disputes. Ilkewartn Ywel refers unresolved membership applications to the senior Apmerek-Artwey and Kwertengerl who then put their resolution on the application to the directors to vote.
- Mer Gedkem Le similarly use the Meriam Tribal Council to assist in making decisions about membership application.

Anna wanted to know what other PBCs around the country do and how they deal with these issues. Specifically, Anna was interested 'to know how many other corporations around Australia have this ruling that you don't even have to be of the same Aboriginal group'.

Anna was also interested to know what other PBCs do regarding the conflict between the business side of the PBC and the cultural side. Anna felt that on the one hand, the business side of the PBC and compliance with the regulations is all about white person's law and does not include culturally relevant ways of decision-making and governance. However, she also felt that cultural authority could be wielded to undermine the new board.

Anna also discussed a lack of transparency and communication with regards to the role of Traditional Owners in the state governed heritage processes. She reported that some people had been given roles under the state heritage legislation unbeknownst to others in the group. The basis for these decisions was unclear.

Anna has also witnessed the impact of the role of professionals in the native title sector on Lake Torrens. Anna told us that the way native title claims by four different native title groups from areas surrounding Lake Torrens, including Anna's, were put together and lodged has left it vulnerable to mining companies.[85]

Text Box 8.5: Cultural heritage protection of Lake Torrens, SA

Since 1998 there have been overlapping claims over Lake Torrens and separate determinations over land adjacent to it – the Kokatha people hold native title over land to the west of Lake Torrens; the Adnyamathanha people hold native title over land to the east of Lake Torrens; and the Barngarla people hold native title over land to the south of Lake Torrens.

Many negotiations and mediations were held by the parties to try and resolve the overlapping claims over Lake Torrens itself, with attempts to resolve through an ILUA process, a consent determination or the formulation of a single claim. None of those approaches were successful. The court eventually ordered that the three overlapping claims be heard together.

In 2016, Mansfield J declined to prioritise one set of beliefs over the others and determined that he could not support any one of the competing claims.[86] This left no native title rights for any of the three claimant groups, and left Lake Torrens without the protection afforded to native title-held land under the *Mining Act 1971* (SA), Part 9B.

Lake Torrens is recorded on the SA Government's Register of Aboriginal Sites and Objects; however, section 23 of the *Aboriginal Heritage Act 1998* (SA) allows the minister to approve acts which may 'damage, disturb or interfere' with Aboriginal sites. The South Australian Heritage Committee recommended that the SA Government refuse mining applications in the area due to the cultural significance for local Aboriginal groups. In 2020, the SA Premier approved exploration permits for the Kelaray company (a subsidiary of Argonaut Resources) to drill in Lake Torrens. Despite opposition, drilling commenced at Lake Torrens in March 2021.

The Barngarla Determination Aboriginal Corporation launched a judicial review and in September 2021, the Kokatha Aboriginal Corporation made applications to the Federal Environment Minister to protect Lake Torrens under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHPA).[87]

The number of applications made to the Commonwealth Minister for the Environment to make a declaration for the protection and preservation of a significant Aboriginal area and/or object from injury or desecration has been increasing since 2019.[88]

The Joint Standing Committee on Northern Australia, in its report on the Inquiry into the Destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia, *A Way Forward* found the Commonwealth ATSIHPA offered inadequate protection and recommended a new framework for cultural heritage protection at the national level.[89]

8.19 Donna Wright, VIC

Donna Wright is a proud Gunditjmara woman and sitting member of the First People's Assembly of Victoria. She is also the Chairperson of her people's PBC, Gunditj Mirring Traditional Owners Aboriginal Corporation RNTBC.[90]

During her interview, Donna described her family's deep connection with her Country, including generational stories and cultural knowledge passed on by her Elders, how sacred Lake Condah (Tae Rak) is to her family, and the history of her mother and siblings being stolen from their home on the Lake Condah mission South West Victoria.

Donna Wright with her mother.

Donna recounted how her grandmother had been in hospital with tuberculosis and was not expected to live; her grandfather had been away at work, and the children – her mother and siblings – were being cared for on the mission by family. When her grandfather returned from work the children had been removed and he suffered a breakdown. He spent the rest of his life in a psychiatric hospital, 'he never recovered from having his children taken'. Donna's grandmother came out of hospital to find her whole family gone and her home burnt down. She ended up hiding in a school building.

Donna views native title as part of the overall land justice picture, where Gunditjmara lore, access to Country, and respect for sacred sites are of the highest importance, and she lamented that the governance arrangements were facilitating neither genuine participation of the PBC members nor traditional decision-making.

Donna feels that there is a higher proportion of men in executive positions in native title. She feels that the PBC's traditional decision-making processes and cultural practices have become a 'tick box' process, and that Gunditjmara lore (law), representation in decision-making, and self-determination and free prior informed consent frameworks need to be implemented within the corporation's Governance structures.

Donna talked about when the PBC went into special administration, emphasising that the administrator cannot make decisions on Gunditjmara lore, culture, and practise on behalf of Gunditjmara people.

Donna particularly talked about a tourism development which is close to sacred sites and the Mission. Donna was passionate about ensuring that 'Gunditjmara people have access to those places under Gunditjmara lore, culture and practise for our children'. She said that there was a feasibility study done in 2008 which recommended not to build in that place and provided other recommended sites. Donna was worried that her mother and her family would no longer be able to access the site, which is an important spiritual place for passing on her cultural knowledge and family history, and to her family's healing.

Donna expressed the view that the decision-making process at the PBC was not respectful enough of traditional decision-making processes and that members and Gunditjmara people as Common Law Holders were not provided with sufficient accessible information.

> Our Elders and people would sit for hours at meetings, sometime 8–9 hours listening to Government agencies, academics, lawyers speak on Native Title matters …
>
> They tell us what we're doing, there's no proper cultural governance decision-making process that respects our culture.

Donna feels strongly that it is important to empower the community and has raised with the PBC the need to provide appropriate information and time for her people to digest and understand it.

In addition to the native title side of land justice, Donna also expressed serious concerns that there is no capacity to identify the right people to speak for country in the Cultural Heritage Management Plan scheme. The corporation's cultural heritage management system should provide the opportunity for families and clan groups to be notified and consulted, but Donna says 'we don't have that next process in place to do that … we don't have the systems and we're not enabling that.'

Ultimately, Donna felt that that the group was conflicted in large part because the dispossession throughout history means 'it is so important that everyone in the group upholds Gunditjmara lore, culture, our protocols, and understands what is at stake if things are not done the right way'.

> We are constantly 'fighting' to be heard to have a voice. We feel disempowered in our community.

8.20 Monica Morgan, VIC

Monica Morgan is a Yorta Yorta woman, past CEO of the Yorta Yorta Nation Aboriginal Corporation RNTBC (YYNAC), and activist of over 50 years. Monica has been a key player in the establishment of many Aboriginal organisations and successful negotiations and campaigns such as the creation of the Barmah-Millewa National Park and Murray Valley National Park. Monica credits her mother, Elizabeth Morgan, and other strong and prominent activists whom she grew up watching and listening to, for her own strength, resilience, political understanding and strategic know-how.

In her interview, Monica described the political context of the ongoing land rights struggle, of which native title became a part. She described the experiences of her family members who were heavily involved from both the legal and the political campaigning angles. She emphasised the work that her mother and the Aunties and Uncles achieved in all areas of First Nations rights – from welfare, to housing, to women's and children's rights, to land rights. And then native title entered the fray: 'we were pushing our own claim through the courts when the Murray Island mob won *Mabo (No. 2)* in 1992'.

Monica described the history of the Yorta Yorta land claim in the lead up to the Mabo decision and the big names that were backing them. They were organised, motivated, driven and on their way to their own land rights decision in the courts when it was stalled in the wake of Mabo and the political negotiations for the Native Title Act. Monica explained that the Victorian Aboriginal Legal Service were told that they could not pursue the Yorta Yorta case any further until the Native Title Act was passed.

Monica was there for the native title negotiations and remembered doing a 'walk out' with Lois O'Donogue. She said she was unimpressed and felt the 'A' Team had 'railroaded' the process, but her 'Elders agreed to give it a shot'.

Monica swung between talking about the political context and political work her people were doing, and the native title case. They were never separate – cultural heritage, repatriation of ancestral remains, land rights, native title and truth-telling.

Monica described how important the truth-telling aspect of the native title claim process was to the Yorta Yorta. In their case, everyone was allowed to speak and give evidence. Critically, the Yorta Yorta controlled the process because they controlled the funding for legal representation and directly instructed their lawyers, who were very experienced and committed to empowering the Yorta Yorta as the top priority. The Yorta Yorta group had refused to be funded via the NTRB and lobbied hard to receive funding directly from ATSIC.

Monica spoke of how devastating the *Yorta Yorta* determination[91] was, especially to the Elders who had worked so hard and been through so much. However, Monica also described how their court loss did have some positive outcomes. The old people got a chance to tell their story. The Victorian Government knew that land claims must never happen like that again in Victoria. From the unsuccessful claim came the Yorta Yorta joint management agreement, and from there, a seat at the table in a number of respects.

Monica described how, at the time, the Yorta Yorta loss unified First Nations people across the country. She remembered how they had received support from blackfellas generally. It also galvanised the Yorta Yorta political drive – 'we decided we weren't going to bow down.'

The *Yorta Yorta* outcome spurred in motion the work with the trade unions, Labor party members in both NSW and Victoria who then took the case on, almost on behalf of the Yorta Yorta, and from the unions' advocacy and political sway, came the Yorta Yorta Victorian State Government recognition and then Yorta Yorta co-management agreement.

As Monica talked about the current and emerging set up that the Yorta Yorta have, it became clear that she was describing essentially a small government, with strengthening capacity all the time.

Today, Monica and the YYNAC advocate primarily for sovereignty, over all else. Her self-described 'radical' position is that of the YYNAC – they have decided not to participate in the Victorian Treaty process. The YYNAC have also decided not to be a part of the Federation of Victorian Traditional Owners. Monica described how, as is to be expected of all social governance structures, there is a degree of internal disagreement about significant decisions and structures.

At the time of her interview, Monica was upset about what she described as ongoing threats from non-Indigenous groups who oppose the culling of feral horses as an environmental and biodiversity measure. Monica told us the YYNAC has borne the brunt of opposition in relation to the Barmah National Park culls in the form of threats.[92] Monica made a racial discrimination complaint to the Victorian Equal Opportunity and Human Rights Commission in 2022 in relation to those threats.[93]

Monica remembered the horrendous racism and open threats directed toward her mother, among others, over the 70s and 80s land claims period, by extreme right wing, racist groups like the Australian League of Rights. She also recalled the same kind of racism and threats that carried on throughout the native title process. As one of the early claims, it was a hostile scene. The non-Indigenous people in the area did not like the assertion of ownership or management that the Yorta Yorta were making over the national park and cultural heritage, and native title was happening in that context.

Monica reported that the police have said they cannot do anything about posters and behaviour she has found to be threatening and has brought to their attention. Monica is concerned for the safety of her mob, particularly the 'devastating effect' it was having on her grandchildren, and the Elders.

9 Overarching themes from the combined women's voices

Like the women who contributed to *Wiyi Yani U Thangani,* the women who contributed to this Report were primarily interested in two overarching and tangible things:

- the impact on community, its cohesion and benefits flowing to it
- the protection of Country and culture.

As discussed in section 5.1 on the human rights approach, our connection to Country cannot be separated from our culture, and our rights to culture. Neither can it be separated from our wellbeing more generally, including our other social and economic rights like the rights to health and education. The denial of our right to self-determination underlies the denial of those other critical rights.

The high-level themes addressed in this section are also necessarily interconnected. The lack of access to justice is the main way that First Nations women and communities experience the structural racism of the native title system. Lack of access to justice includes denial of the right to free, prior and informed consent, the right to culture, the right to other social, economic and cultural rights such as to health, and property rights. It also manifests as a lack of transparency and accountability in the sub-systems within the native title system, and this is experienced as a lack of ability to participate properly, and a lack of appeal options, accessible remedies, and due process rights.

As with *Wiyi Yani U Thangani,* overlayed across all the other themes in this Report is the theme of gender discrimination. Through this lens, we can see how women in the native title system are denied access to justice and self-determination, and can experience this denial differently from men. One significant difference is from the perspective of community disputes and the impact of violence and threats of violence. Another significant gender-based difference is in the fact of reliance on historical evidence which emerged through the non-Indigenous male lens and the impact this has had on the value placed on women's knowledge.

No one theme can be meaningfully considered or addressed alone when looking to reform of Australia's system of land justice. But it can be distilled down to one ultimate theme: the need for reform to include a genuine power shift.

9.1 Self-determination and self-governance

The right to self-determination as a foundation is critical to the success of any policy, system, or practice. This is clear in the evidence around 'what works' to address disadvantage in its many forms.[94]

In First Nations communities, we have seen many examples of successful community-designed and run initiatives which respond to the needs of the people they are serving. I set out many examples in *Wiyi Yani U Thangani*, as have previous Social Justice Commissioners in their reports.

We have also seen many examples of unsuccessful interventions which have not reflected a culturally sensitive and responsive approach to the problems they seek to address. These have also been scrutinised by my predecessors. For example, Tom Calma's *Social Justice Report 2007* scrutinised the Northern Territory Intervention.[95]

In 2012, my predecessor, Mick Gooda, wrote about how self-determination can have many different meanings in practice.[96]

> Self-determination can mean different things to different groups of people and there are many elements to self-determination. Importantly, self-determination will not look the same in all circumstances because it is defined by the people seeking to exercise it.
>
> The exercise of self-determination can only be achieved if we have good community governance. This means the existence of 'effective, accountable and legitimate systems and processes' where Aboriginal and Torres Strait Islander peoples can 'articulate their interests, exercise their rights and responsibilities and reconcile their differences'.[97]

Former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya has described the link between self-determination and governance:

> While human beings fundamentally are the beneficiaries of the principles of self-determination, the principle bears upon the institutions of government under which human beings live. Self-determination [expresses] international concern for the essential character of government structures ...[98]

In 1993, Lowitja O'Donoghue argued the basis upon which government should support our self-determination:

> Self-determination as a concept is not something which can be tacked onto program design or introduced through piecemeal consultation. It has to be accepted as a policy objective that pervades the relationship of Indigenous peoples to the wider community.[99]

(a) Self-determination in the area of land justice

The area of land justice highlights the way that many fundamental human rights, such as the right to self-determination, the right to culture, and property rights, will look different for Indigenous compared with non-Indigenous Australians.

This can be easily misrepresented, by those looking to maintain the status quo, as giving some people different (or more) rights than others. But that is indeed a significant misunderstanding of the nature of human rights and the meaning of equality compared with equity, or the difference between formal and substantive equality.

As I said in *Wiyi Yani U Thangani,* the equality we are provided with under Australian law is *formal* – or symbolic – equality, not *substantive*. This has resulted in a singular focus on our equal treatment under the law which ignores our inherent cultural differences and the deprivation we have suffered over the past 232 years. It has resulted in no *real* equality at all – no equity.

For example, if our substantive rights to self-determination and culture were genuinely fulfilled, we would have access to our Country as and when we want and need.

Women talked about native title in the *Wiyi Yani U Thangani* consultations and particularly about the degree to which it did or did not provide control and opportunities for self-determination. I noted in that report that the reality for many native title holders is that non-exclusive native title rights do not allow Traditional Owners to control access to, or the use of, land and waters. This restricts economic development driven by us, and also limits the rights of Traditional Owners to contest development driven by others.

There are a number of factors which women identified as limiting their ability to participate properly in native title, including in the claims stage and the post-determination governance stage.

i. Lack of information and education

In *Wiyi Yani U Thangani,* women told me that they are limited in their capacity to enjoy their native title rights because of a lack of education around what native title means in each circumstance and the processes associated with it.[100]

> This is a really important issue that I have come across with all groups I've worked with. And that is education around native title for our people. That is actual real education, not just bullshit education from the lawyers of the mining companies. But actual education around your rights and what they mean and how you can enforce them … Some people have been involved in native title for 20 years and they don't understand it. They just say they do. Being involved in a process, does not actually mean that you understand what it is.
> ***Karratha women, WYUT consultation***

This was a recurring theme in the direct contributions to that report too. It appears to be a significant source of the dissatisfaction and disempowerment that native title is so poorly understood.

We spoke to lawyers who have constant dealings with communities where community members do not understand their rights and the processes associated with them. We spoke to individuals who are highly competent, educated women who also struggled to understand certain elements of the system and had been unable to get clear answers from the professionals who had advised their native title group over time.

Anthropologists who contributed their experiences of the system told us similar stories of the disempowerment created by the native title process and, in particular, by the lack of accessible information and education provided to Indigenous claimants and native title holders.

> In my experience, if you were to ask people who had a determination where the determination area is, the extent of it, the boundaries of it, what rights they've been accorded under the legal system, who are all the people in their claim group? Many people might be hard pressed to answer those questions.

> There is a real issue regarding information dissemination … In my experience, it is often the case that, for a range of reasons, the native title representative body has not adequately informed claimants about the native title process and about the post-determination realities.
> ***Dr Sandra Pannell, anthropologist***

ii. Lack of information and transparency contributes to community conflict

Many of the women who contributed to this Report noted that the lack of accessible information and education regarding the native title system impacted community cohesion, creating suspicion and, ultimately, disputes.

Several women proposed practical ways of increasing community capacity in relation to native title governance as a critical aspect of reducing conflict in their community.

Many of the women who participated in interviews for this Report were highly skilled in the complex native title system and also had the cultural and community knowledge needed for effectively managing governance issues in their communities. These women are stepping up all over the country to lead their native title groups and their PBCs into a self-determining state. Several women specifically talked about guiding their group to centre cultural identity in their native title claim meetings, and not get lost in the divisive anthropological and legal processes.

Many of the women spoke specifically about focusing on what their community needs and wants out of native title and the importance of approaching it with a medium to long-term view. All of the women who contributed to this Report were trying to ensure that everyone in their communities was able to have a say, that native title and the PBC structures are safe environments for everyone to participate, and that community understood the benefits of a longer-term approach for future generations.

Some women had been trying to purge their corporations of corruption and nepotism, and infuse them with cultural knowledge and respect, combined with knowledge and skills in Western corporate governance. They were working closely with lawyers, ORIC and others to try and secure – so far as is possible – the future of their group's corporate and cultural governance.

iii. Importance of centring the individuals affected

The purpose of this Report is to centre the lived experience of individuals within the native title system in any approach to reform. Without that centring of those of us most affected, it will continue to be a disempowering process which undermines even the best outcomes – by creating mistrust, misunderstanding and community conflict.

First Nations people need to be central to all the aspects of the native title system and fully informed participants in the development and designs of reformed legislation and processes. As it is, First Nations groups 'have been marginalised in the research process as informants or applicants, but they should have a role in framing how the research is done'.[101] Anthropologists identified that claimants

are 'not part of the initial modelling, the initial planning, the initial roll out' and if more resources for anthropological research were available in this regard, and decent time periods available to do the research properly, fewer mistakes would be made.[102] This would lead to fewer conflicts. This was echoed by the First Nations lawyers we interviewed and by other participants in this project.

Ensuring full participation and indeed stewardship of First Nations people in the research processes in the land justice sphere would go a long way to creating an empowering process, which is significant because an overwhelming amount of the trauma experienced by native title groups comes from the process.

(b) Aboriginal and Torres Strait Islander women and self-determination

While the importance of self-determination to First Nations peoples has been the subject of much focus to date, that focus has not generally addressed the specific application of self-determination to Aboriginal and Torres Strait Islander *women*. Until *Wiyi Yani U Thangani,* there had not been much focus on the additional consideration needed to ensure that *everyone* is afforded the right to a say in the priorities and programs which affect us and our children.

Of course, some academics and commentators in the land justice area have discussed women's role in the land rights and native title systems. Some have observed that it has been the domain of men;[103] some others have considered women's roles sometimes less visible but nonetheless very prominent and significant.[104]

The women and girls I spoke to during the *Wiyi Yani U Thangani* consultations were clear that they wanted to see **First Nations women represented proportionally** within both mainstream and Indigenous structures at all levels.[105] Women and girls reported their **level to which they engage in looking after community prevented them from coming together and participating in decision-making** as a group. They also identified **a need for capacity-building to develop the skills** required to represent at the interface with government and other external parties.[106]

Very similar themes emerged from the survey, submissions and interviews for this Report focusing on native title and land justice. Several women and anthropologists noted that in many communities, women had greater levels of skill and experience in Western administration and governance roles, and that their absence from the native title governance sphere represented a significant missed opportunity.

We also heard the corollary of that. Several native title communities have benefited hugely from women stepping up and utilising their education and skills, as well as their traditional knowledge and connections – to improve the governance situation of their PBCs and other relevant First Nations Corporations.

The need for capacity-building stood out as a self-determination sub-theme from the interviews. There were so many stories of the amazing work of women in the sector with very specific capacity in both the native title system and related governance structures, and the requisite cultural knowledge. Those women still battled the structural discrimination, the intra-group fighting and power plays, and the lack of understanding of the native title system amongst community members. What they had in common was the skills and expertise across cultures and systems to be able to redirect native title to have a self-determining role in their community.

The ability to bring community together and unite in purpose and culture is a particular strength of First Nations women that we heard so much about in *Wiyi Yani U Thangani*. Many interviewees talked about this in the native title context too, specifically regarding the ability to heal conflict and move forward as a self-determining group to be able to overcome the barriers that native title law and processes put in the way of that goal.

(c) Women's voices as community voices

Like in *Wiyi Yani U Thangani,* it was apparent from the contributions to this Report that women's voices in the land justice space are voices for the whole community; prioritising women's voices and concerns is a way of prioritising inclusivity and community healing.

Many contributions to this Report described experiences which highlight women's concerns with fairness, community cohesion and dispute resolution.

They also expressed considerable empathy for even those individuals and groups who were actively – and in some cases, knowingly – causing disharmony in community, recognising that in many cases, it is a reflection of societal and/or personal disempowerment, poverty, and desperation to hold or maintain whatever power is available.

However, the women were also concerned that the ongoing disputes need to cease for the sake of the younger generations who otherwise will know nothing else.

We heard about women who had stepped up alone to try and hold individuals and representative bodies accountable for their mismanagement. They were enduring backlash from the individuals they were trying to hold accountable and their families or supporters, and they were doing it for no personal benefit. Those women were doing it entirely because they could see the damage it was doing to the community and the potential for the benefits of the native title agreements to be used in a different, more forward-looking way. As noted above, a recurring theme was that transparency and accessible community education resulted in a reduction in support for 'bullies' within PBCs.

Many women were committed to making the most out of negotiated agreements with a long-term vision for their whole community. Many were struggling to ensure their communities understood the importance of spending royalties and other payments in a way that bolstered community infrastructure and capacity into the future, rather than primarily providing for short term emergency payments, for items such as household appliances. Women were conscious that there is dire need in communities for the most basic forms of assistance such as transport for hospital visits. But there was also a lack of vision about how the money could contribute to lifting the community out of this poverty in the longer term.

As mentioned already in this section, women brought their skills and expertise in other areas of life, including their professional skills, to bear on their native title situations, often with the express aim of unifying and healing community. Using these skills, they persist – sometimes in the face of significant local opposition from those in power, as well as structural barriers – to significantly improve their communities' situations by working to make the **native title and land justice space safer for everyone to contribute**. Many women had only this agenda in their decision to speak to my team and go 'on the record' in this Report.

Finally, I note that many, if not all, the women we spoke to have taken on significant amounts of free labour on behalf of their communities. This has often been at the direct request of their Elders, and has been undertaken to try and ensure their native title claim is successful or an erroneous record is corrected. Many women described circumstances which involved a huge load on them with little support other than from other women in their community, and usually no pay at all.

9.2 Gender discrimination

Contributions to this Report from both First Nations women and anthropologists (there were no First Nations anthropologists interviewed) discussed how the role of women in native title claims has been impacted by the historical recording of First Nations societies and perceived gender roles in the early days of colonisation. Many women noted that assumptions were made about First Nations women's roles on the basis of observations by mostly non-Indigenous, male colonists, historians and anthropologists. It is inevitable that their cultural biases impacted their approach to what they perceived in First Nations societies.

This reflects what has already been comprehensively written about in academic literature regarding the impact of the non-Indigenous male lens on land justice in Australia.[107]

Anthropologists have noted that this has contributed to the way that the anthropological work in native title tends to be divided between women doing the genealogies 'and the men do the real stuff', like go out on Country. This then exacerbates the perceived gender divide and the implications for women being written out of roles regarding knowledge of Country and land management. Several interviewees as well as anthropologists noted that the gender roles actually started to change in accordance with the Western interpretations of traditional First Nations gender roles.

> Phyllis Kaberry's ground-breaking anthropological research in the Kimberley in the 1930s, and that of a number of other female anthropologists, such as Olive Pink, Caroline Tennant Kelly and Ursula McConnel, revealed how little was known about women's lives in Indigenous Australia, and gender relations generally, as reflected in early 20th century ethnographies. ***Dr Sandra Pannell***

Several of the First Nations women also expressed that the concept of men as greater knowledge-holders than women regarding Country does not actually have a basis in their peoples' traditional cultures. We know that the gender roles across the country vary significantly in this regard, but it is true to say that the native title-related anthropological industry appears to have inadvertently exaggerated, and in some cases, cemented gender roles which are more a reflection of the colonial patriarchal perspective than of the pre-colonial societies they were observing.

Many interviewees and anthropologists discussed how First Nations women in native title often do hold a lot of genealogical knowledge about how people are connected and, as such, have often been critical to groups' connection evidence in native title claims. Several also noted that, where women have been excluded, mistakes have been made in connection material. Some women who contributed to the Report felt that in the subsequent post-determination phase of native title, women have not been as prominently involved. However, the contributions from so many other women make it clear that women's participation in the various stages of native title claims and governance varies widely from group to group and cannot be generalised.

(a) Types of gender discrimination experienced in the native title system

Some of the women interviewed spoke specifically about explicit gender discrimination they have experienced and witnessed as First Nations women in the native title system.

Some of the discrimination discussed involved the use of 'culture' to keep women out of decision-making roles. Often this was about simply maintaining existing power structures using implied and explicit threats, including threats contained within the legislative system – basic patriarchal colonialism.[108] This includes creating environments in which women do not feel safe to participate freely.

Geiza Stow spoke about how men in positions of authority in her Torres Strait Island community were explicitly excluding women from governance and decision-making roles using arguments of culture. Geiza had asked to be on the Elders Committee of the PBC and was told that to respect their forefathers, it should only be for men; the men in power said women could have a women's organisation outside of the PBC and that could be their voice.

Geiza felt that the men were using culture as a way of maintaining control and resisting change. She also felt that it was not in the best interests of the community as a whole, given the expertise that many women have to offer.

The same men appeared to Geiza to be using the complexities of native title law, including PBC structures and governance requirements, to make it difficult for Geiza and other members who wanted to participate in decision-making.

It is easy to see how the native title system, with its many facets and sub-systems, can be manipulated. The complexities of the system in combination with the inability of PBC members to directly access their own legal and governance information and advice, other than through those in positions of power in the PBC, can be used to facilitate the maintenance of existing power imbalances. This makes it very difficult for other people to gain the knowledge and skills necessary to 'break in'. Where that existing power structure is gendered, that is the power structure that is strengthened.

Leah shared about how women felt threatened, intimidated and bullied into staying away from the decision-making by some men in power who made the native title space feel 'unsafe' and discouraging for the next generation and families to engage.

Leah said that in her experience, such men simply refused to comply with accountability mechanisms intended to bring checks and balances; for example, they refused to provide their criminal record checks. In Leah's experience, there was no support from the native title process in practice at the time. Women in communities – backed by respectful and inclusive male leaders and families more generally – had called for these checks to be made a requirement. They were successful in getting the checks included in the eligibility criteria to enforce them. However, they found, alone, they were unable to do so. They also called for seats to be allocated to women, to balance gender.

Leah told us how, once broader community pressure intensified, the men involved simply moved to other positions of power in even more senior roles in the native title sector. Leah feels this serves to broaden the scope of the current 'unsafe' environment of the native title system.

There are also publicly available stories in the media of women from native title groups coming together to report governance concerns as a way of mitigating potential bullying in retaliation for speaking out. One of those stories is the Adnyamathanha women's fight.

Text Box 9.1: Adnyamathanha case[109]

The **Adnyamathanha case** in South Australia has been reported on widely.[110] The background to the case involved a media report in which eight women were prepared to put their name to the story as a group. These eight women reportedly 'felt safer speaking as a group … because those who'd complained in the past had been bullied and intimidated'.[111]

Candice Champion, Lilly Wilton, Regina Johnson, Sue Coulthard, Tanya Jackson, Beatrice McKenzie, Leonie Brady and Laverne Johnson all expressed anger and frustration that millions paid to their community by uranium miner Heathgate Resources had been 'squandered'.[112]

The money was being received by a trustee company – Rangelea Holdings Pty Ltd (Rangelea) – for distribution to members.[113] Rangelea refused to provide financial records to Adnyamathanha Traditional Owners who were beneficiaries of Rangelea.[114]

For three years, ORIC appeared unable to respond effectively, in a timely manner, to the governance concerns expressed publicly by the Adnyamathanha women on behalf of their community.[115] This inability arguably provided those who opposed opening those books to all members with a way of obscuring those governance concerns. A key factor appears to be that unlike PBCs, trustee companies are not subject to ORIC's scrutiny. This means that the PBC and/or individual common law holders were required to take action through the courts to get access to records regarding money from mining agreements held on behalf of PBC members and common law holders by the 'Master Trust', Rangelea.[116]

Ultimately, ATLA and, separately, three Adnyamathanha individual applicants requested, and were granted, access to the financial records of Rangelea through the courts.[117] Further detail of the judgment in that case is below in section 10.8 on remedies and accountability.

The 'Master Trust', Rangelea Holdings Pty Ltd, appealed the Chief Justice's decision and the SA Court of Appeal heard arguments on that appeal in October 2023.

All of the above issues discussed in the context of gender discrimination are related to **governance and accountability**, and to the **quality of services provided by professionals** involved in the native title system. As such, they could be included in several sections in Chapter 10, Combined Voices. They are included here because they go to the underlying point that women often feel threatened by the environment and the individuals in power, and find there is no prompt, meaningful assistance offered to them when they call on it. It's not just that there's no accountability, it's that for women, the result is that they feel they cannot even freely advocate to participate in decision-making for fear of their safety.

As noted in *Wiyi Yani U Thangani,* and above, women experience the system's race discrimination and lack of access to justice differently with the extra layer of gender discrimination. This is important to recall when reading this next section on structural racism, because structural sexism as an intersectional point of discrimination is always relevant to First Nations' women's experiences in native title.

9.3 Structural racism

It should come as no surprise that the stories of the women who contributed to this Report highlighted the impacts on individuals and communities of the structural racism inherent in the native title system.[118]

For example, the degree to which the women interviewed for this Report gave of themselves for the benefit of their community more generally, often at great personal sacrifice, did not surprise me. But it is likely to surprise policy-makers in the area of native title who appear yet to understand how taxing the unpaid components of the native title system are on those of us who are meant to benefit. If it is not surprising, then I would ask why the system has been able to go on for so long being subsidised by the labour of First Nations peoples.

So much has now been written on the personal impacts of racism on the physical and mental well-being of First Nations peoples in Australia (and other Indigenous peoples).[119] This structural racism in the systems purportedly designed to provide land justice is so pervasive and so impactful, and so discretely applicable to First Nations peoples alone, that it is arguably a key driver in the health outcomes, including mental health outcomes, of our peoples.

In the context of the link between discrimination and ill-health, it is important to understand that land justice – land rights, native title, other land related agreements, cultural heritage regimes – impact our peoples in ways that simply do not apply to non-Indigenous Australians. It is also important to remember that land justice systems are not a small, discrete issue dealt with by a small number of First Nations people. These issues affect almost all First Nations individuals and communities in some way.

(a) History of the Native Title Act

Given the political history associated with the development of the Native Title Act, and the 1998 amendments, which were directed to ensuring that the Native Title Act was not about delivering a system of land justice but rather about creating certainty and efficiency for non-Indigenous stakeholders,[120] it is unsurprising that the operation of the native title system 'on the ground' reflects the structural racism in the Australian legal system and governance structures more broadly.

The political development of the native title system has shaped it as one in which groups invest in processes and compete with one another for purported benefits which rarely materialise. It sets up a system with apparent promises only to ensure that those promises are mere misunderstandings and can rarely if ever be delivered.[121]

In 2007, Dr Calma quoted a *Wati* man from the Western Desert who was speaking to his lawyer: 'From his perspective, the Native Title Act has not brought justice, and in fact has simply formalised and legalised the dispossession of his people's country'.[122]

In that same 2007 Native Title Report,[123] former Commissioner Tom Calma quoted Israeli philosopher Avishai Margalit, who talks of 'an old fear that justice may lack compassion and might even express vindictiveness'.

Very similar observations were made by **Daisy Ward** in her interview for this Report, and by other interviewees, too.

In the fourth Native Title Report covering the period July 1996–June 1997, the first Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, analysed the draft Native Title Amendment Bill, concluding that the Bill failed to meet non-discrimination standards under international law and was potentially unconstitutional.

In 1998, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, Zita Antonios, said, 'It should not be overlooked that, from the very outset, the concept of native title is based on a principle which is unfair from an Indigenous perspective'.[124] She went on to track how:

- It was held in *Mabo (No. 2)* that the Crown had a power to extinguish traditional Indigenous ownership of land. Before the RDA was introduced in 1975, there was no protection against such discriminatory exercise of sovereign power.
- One of the primary provisions of the Native Title Act enabled the validation of all non-Indigenous interests in land resulting from past acts by the Crown, which may have been invalid because of the existence of native title.
- The right to negotiate was intended as a core procedural protection intended to reflect the traditional right to control access to country, but it never satisfied the Indigenous position that such activity should only proceed with the consent of the native titleholders.
- Post-*Wik* amendments were expressly intended to provide 'bucketloads of extinguishment' and the Government of the day justified it by relying on a definition of equality that reflected formal equality only, enabling it to amend the right to negotiate – which it viewed as a 'special measure' under article 1(4) of the ICERD and section eight of the RDA, not a requirement to achieve substantive equality or real fairness.[125]

In the *Native Title Report 1999*, then Commissioner Dr William Jonas considered the principles upheld by the UN Committee on the Elimination of Racial Discrimination (CERD) – equality and the requirement that the Government negotiate with Indigenous peoples over native title legislation – and supported the CERD Committee's view that the 1998 amendments to the Native Title Act are discriminatory.

In the *Native Title Report 2000*, Commissioner Jonas discussed how both the common law and the native title legislation permit discrimination in the way that the system is designed to ensure that non-Indigenous rights will always prevail over Indigenous interests in the same area.

The *Native Title Report 2002* evaluated the principles of the developing native title case law at that time, which revealed 'fundamental shortcomings in the native title system'. Those shortcomings were specifically in relation to the recognition and extinguishment of native title.

In the *Native Title Report 2007*, Commissioner Calma said that a 'deeper questioning of the Native Title Act underpins this Report'. He went on to say that he fears the 'justice' delivered by the Native Title Act does indeed lack compassion, and 'might even express vindictiveness'.[126] He concluded that:

> **There needs to be a rethink of the native title system, with open mind, and free-spirit … This rethink must focus on increasing recognition of native title and strengthening its protection … it must answer the questions: how may we make it more just? How may we make the Act deliver on Australia's Human Rights obligations?**

In his analysis of the 1998 Amendments, Commissioner Calma specifically noted:

> I am concerned that Indigenous peoples' rights are yet again restricted and curtailed. If not directly then through an increase in the complexity of the system, the bureaucratic hurdles that must be surmounted, and the legal maze that must be wound through. The native title system is too complex. It is too legalistic. And it is too bureaucratic. And it hinders rather than helps Indigenous Australians towards their full realisation of rights.
>
> **It must always be remembered that this system was established by an Act passed as a special measure for the benefit of Indigenous peoples. The most disadvantaged people in Australia face one of the most complex pieces of legislation in the country to gain recognition of their native title. They seek to gain recognition of rights and interests in land and waters that they have held for over 40,000 years; over country they have always known was theirs.**[127]

Commissioner Calma noted that 'Native Title claims are complex and impose demands on the parties that are unprecedented in adversarial litigation'.[128] For example, Commissioner Calma noted that '[i]n the Wongatha case Justice Lindgren faced 30 expert reports, to which 1,426 objections were lodged. In the Jango case, the Yulara compensation case, certain expert anthropologists' reports were the subject of over 1,000 objections by the respondents'.[129]

Dr Sandra Pannell noted in discussions with my team that when it was being negotiated, there was a common view that the Native Title Act would only really apply and be of benefit to Indigenous people in remote Australia. There seemed to be an expectation that the 'more thoroughly colonised' parts of the country would make do with the social justice package and Link-Up services. But very early on it became clear that all Aboriginal people wanted recognition of their traditional rights over their Country 'and rightly so'. And over time it became clear that the social justice package was not going to eventuate, and moreover, the right to negotiate, which had never met Indigenous demands, was watered down without Indigenous agreement. Native title, in addition to state and territory land rights, and cultural heritage rights, were the available options for attempts at having our rights to culture and to self-determination recognised.

The structural racism referred to in all the above Native Title Reports, as well as academic literature and other social and legal commentary, can be broadly and accurately described as inherent and structural power imbalances. The subsequent sections of this chapter will go into detail about the various aspects of the power imbalances in native title and land justice systems in Australia which we found reflected in the lived experiences, as told to us by the women who contributed to this Report.

(b) Legislated power imbalance in NTR and heritage protection laws

In 2021, a major RMIT study found that the existing native title, land rights and cultural heritage legislation exacerbate the power imbalance between Traditional Owners and large mining companies (see Text Box 9.2). It allows those companies to openly flout international human rights obligations of nation states while complying with domestic Australian law.[130]

Text Box 9.2: RMIT First People and Land Justice Issues report

The *First Peoples and Land Justice Issues in Australia: addressing deficits in corporate accountability* report by RMIT investigates the human rights impacts of companies operating on Aboriginal and Torris Strait Islander land. The report is informed by information available through the public domain, including academic journal articles, legal proceedings, judgments, and more. The research methodology further engaged in consultation and fact-checking with First Nations community-based organisations and alliances.

The RMIT report concluded that First Peoples and land rights campaigners face multiple barriers to achieving land justice. This has been enabled by the lack of key international human rights instruments incorporated in domestic law. The report focused on the need for the UNDRIP, ICERD, and ICCPR to be incorporated into Australian law for accountability purposes. In their absence, companies will continue to neglect business and human rights frameworks due to poor federal and state compliance standards. This Report suggests that the accountability shortfalls in the mining and gas industries are clear depictions of where governments and companies should focus their efforts. It uses three case studies to describe the scope of the report.

The RMIT report cites research by the Jumbunna Institute for Indigenous Education and Research to illustrate the relationship between consent and power imbalances within the native title landscape. The report finds that the lack of free, prior and informed consent within the Native Title Act is evidenced by the lack of a right to veto and restrictions on negotiation timeframes.

The RMIT report made recommendations to government and companies, recognising the need for multi-level change. Recommendations to companies focused on the need to adhere to business and human rights norms, to consult and cooperate in good faith, and make due diligence commitments that ensure no further damage to sacred sites. This was in response to the report's findings of concerns about undermining good faith negotiations, inconsistencies between native title law and protected rights, and lack of accountability and transparency, among others.

Recommendations for government were focused on the Northern Territory and Queensland in addition to states and territories more generally. At a federal level, there was a focus on the need for ALRA and Native Title Act reform.

This power imbalance and the lack of any legislated requirement for genuine free, prior and informed consent in the Native Title Act has been discussed in native title reports since they began in 1993.

The *Native Title Report 1995* directly addressed the 'right to negotiate' provisions and mediation processes under the Native Title Act. That report focused on problems caused by power imbalances between Indigenous claimants and other stakeholders. The report discussed the importance of the statutory 'right to negotiate' scheme to the protection of Indigenous human rights, and analysed problems in the practical operation of the scheme. Methods for promoting negotiation and land use agreements were also put forward.

The *Native Title Report 1998* discussed the background to the Native Title Act negotiations, and the necessity for Aboriginal and Torres Strait Islander peoples to accept the power of the Crown to extinguish their title through grants to other people. I have attached at Appendix 1, Chapter 1 of the *Native Title Report 1998*, 'Striking the Balance', as essential reading for anyone who needs a refresher on the critical political developments of that time and the way the 'negotiations' progressed.

The *Native Title Report 1998* clearly describes the original debate around the unfairness of the Native Title Act, but notes that it was negotiated so that things could move forward with the prospect of a social justice package as a consolation.[131] It is important to note that, although they lacked the power to enforce a more equitable outcome, First Nations representatives were involved in negotiating the original Act. In contrast, the re-'negotiated' and amended version of the Native Title Act, after the *Wik* decision and the 10 Point Plan, was never agreed to by any Indigenous negotiators. It was always understood to be unfair and discriminatory.[132]

The **onerous requirements to prove connection**, the **lack of veto** over future acts in both the Native Title Act and heritage protection legislation across states, the **time limits on negotiations and related penalties** for native title groups if those time limits are breached, and the **lack of penalty or enforceability of the 'good faith' requirements** for third parties in negotiations, all demonstrate how the legislative picture was designed to prioritise non-Indigenous interests over native title and cultural heritage interests.

In 2005, the Honourable John Halden 'Hal' Wootten AC QC noted how conservative the *Mabo* decision really was, despite also being innovative.[133] Michael Dillon noted in 2018 that 'serious doubts have emerged in academic and even judicial circles as to the fairness or justice of the outcomes of the judicial process in determining native title'.[134]

(c) Free labour of Indigenous parties

Many aspects of the practical, day-to-day reality of the native title system illustrate the structural discrimination inherent in that system and associated systems and processes.

One key illustration is the degree of free labour that Indigenous parties have had to, and still do have to, contribute to the system to make it 'work'. The disparity between the resources of native title claimants and holders compared to third parties is something which the women we spoke to experienced in an ongoing way and reinforces the inherent power imbalance between native title claimants/holders and non-Indigenous players in the native title space. The degree of unpaid labour expended by women and communities more broadly is clearly visible in many of the stories in this Report.

From early on in the history of native title, those who were involved in the system commented publicly on the extent of free labour required of the First Nations parties claiming native title. For example, in 1996, former Social Justice Commissioner Mick Dodson said:

> Many representatives of claimants have complained that the Tribunal organises too many meetings. In the Broome native title mediation the claimants' working group had 198 meetings in 212 working days.
>
> This staggering figure shows the pressure the claims process places on claimants. Although the Tribunal has acknowledged this, they haven't adjusted the mediation schedule accordingly.
>
> Perhaps the Tribunal is responding to the demands of non-Indigenous parties in setting meeting schedules. But their schedules must build in an acknowledgement of all the other things claimants have to do to mount a claim and the limits of the claimants' stamina.
>
> The Tribunal, government and industry representatives are usually paid to participate in negotiations. They have transport, administrative support and access to advice. The claimant representatives are often pensioners or unemployed, have no transport, no spare money and limitations on their access to advice.
>
> Given the number of meetings people are required to attend, it is vital they are arranged in a way that allows the claimants to participate in the process.[135]

It is clear that in most respects, participating in the native title system has been assumed to be something that First Nations people just do 'on the side', like a member of non-Indigenous Australia might challenge a parking fine and take a day or two off work. The reality of what is being asked of our communities in the native title system is that it has been a full-time job for many within our communities, often for many years at a time.

The result of this is a diminution or convenient whitewashing of the monetary value of our contribution to 'ensuring certainty for non-Indigenous interests' – keeping the economy going at the cost of our individual earning capacity and economic potential as a group. It has limited the ability of many of us to participate properly because many of us are trying to work in paid jobs at the same time. It has ground many of us down through exhaustion. And it has provided significant opportunity to divide us by offering personal financial incentives to some within our communities to accept compromises that others within our community are not willing to make for personal gain.

We also spoke to several women who were in professional roles which expressly involve assisting communities to try and consolidate and plan for their native title benefits so that the community benefits into the future. The difference when these individuals have the cultural and community knowledge needed as well as the technical knowledge about the system, *and are paid to work in the system*, is significant.

(d) Exploitation of power imbalance by third parties

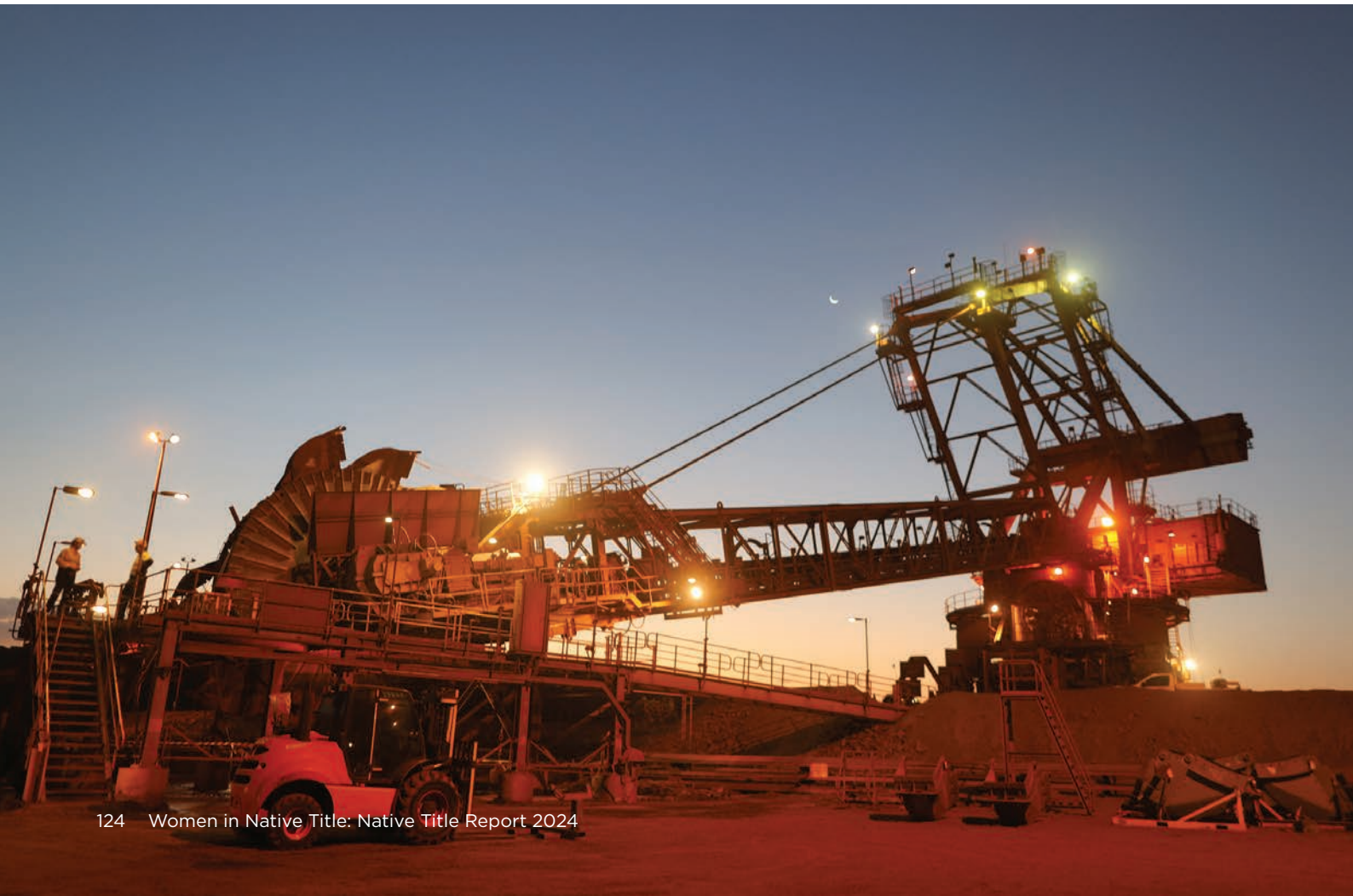
i. Yindjibarndi case study

Between 2001 to 2017, the Yindjibarndi People fought for native title over their traditional land in the Pilbara, WA. Until 2020, the Yindjibarndi defended appeals against their native title determination, and they are currently still fighting for compensation.

In 2005, after discovering iron ore deposits in the Hamersley Ranges, Fortescue Metals Group (FMG) approached the Yindjibarndi People in the town of Roebourne with plans to construct the Solomon Mine Hub. Negotiations with the Yindjibarndi Aboriginal Corporation (YAC) regarding mining royalty payments commenced in 2008. However, they subsequently dissolved amidst conflict concerning the size of the proposed compensation package, as well as claims that FMG disregarded requests from the Yindjibarndi to not use a certain route while accessing a drilling site.[136]

After the parties were unable to reach an agreement within the six-month negotiation period designated by the Native Title Act,[137] FMG was successful in obtaining a mining lease from the Western Australian Government and began mining operations in 2013.[138]

In 2017, Justice Rares of the Federal Court of Australia found in favour of the Yindjibarndi's native title application, concluding that the Yindjibarndi were entitled to exclusive native title rights and interests over the claim area, including 'unallocated crown land occupied by FMG's Solomon Hub Mine' (the 'Warrie determination').[139] FMG's appeal against the Warrie determination was dismissed by the Full Court of the Federal Court of Australia in 2019.[140] In 2020, the High Court of Australia also dismissed FMG's special leave application, upholding the Yindjibarndi People's exclusive native title rights over the claim area.[141]



Divide and conquer tactics[142]

The 17-year legal battle between FMG and the Yindjibarndi People was characterised by a huge power imbalance. Early in the construction of the Solomon Hub Mine, the Yindjibarndi People were fractured into two opposing camps. Certain members of the YAC disagreed with the PBC's opposition to FMG's mining lease, and formed a break-away group (the Wirlu-murra Yindjibarndi Aboriginal Corporation) which proceeded to negotiate with FMG independently, purporting to represent Yindjibarndi interests.[143] Allery Sandy, a Yindjibarndi Elder and member of the Wirlu-murra YAC, said 'there was always argument arising within the meetings [of YAC]'.[144] Members of the YAC contend that the Wirlu-murra YAC was funded by FMG as a strategy to divide the town of Roebourne and oust YAC claimants to gain access to their land.[145] Out of the seven claimants to the Yindjibarndi native title claim, four belonged to the YAC and three to Wirlu-murra YAC. Kerry Savas, a former Wirlu-murra YAC lawyer, alleges that the 'Wirlu-murra was set up by FMG in order for FMG to have a party to deal with'.[146] This has been echoed by YAC CEO, Michael Woodley, who has maintained that FMG's dealings with the Wirlu-murra YAC were indicative of 'dirty tactics' to circumvent an impasse in negotiations.[147]

Division within the Yindjibarndi community intensified in 2011, when FMG organised a meeting with Yindjibarndi Traditional Owners about mining operations and royalties. Footage uploaded online shows misconduct by FMG, as well as divide in the small community.[148] Communication between the YAC and FMG quickly broke down due to concerns regarding the lawfulness of the meeting and the cultural legitimacy of the people (brought in by FMG) present. YAC members state that the majority of those in attendance were not Yindjibarndi People and did not have the right to speak for Yindjibarndi Country.[149]

Prior to the 2017 Federal Court decision, the Yindjibarndi People were barred by FMG from accessing their traditional land.[150] Despite successfully achieving their native title determination in 2017, the Yindjibarndi People said that the internal division they experienced at the hands of FMG was devastating. Yindjibarndi families were 'torn against each other' and the community was rendered 'powerless … in trying to find a solution, because nobody would want to give in'.[151]

Compensation claim

In February 2022, the Yindjibarndi Ngurra Aboriginal Corporation (formerly YAC) filed a $500 million native title compensation claim against FMG for economic and cultural losses caused by the Solomon Hub mine site. They claim two types of destruction: of Country and of community. The Yindjibarndi are arguing that traditional laws that maintained the social fabric have been deliberately disrupted by what they see as divide and conquer tactics by FMG.

While FMG and the Government of Western Australia agree compensation is payable, they claim that compensation is to be paid under the *Mining Act 1978* (WA) which would result in a lower level of compensation than if it were paid under the Native Title Act.[152] In August 2023, the Federal Court heard evidence on-Country from Yindjibarndi Traditional Owners at the Solomon Hub before setting up a hearing at the nearby Bangkangarra campsite. The Court heard from Yindjibarndi Elders and was shown evidence of damage to 250 significant Aboriginal sites, a tailings dam that flooded a cultural site and a rock shelter used for occupation for 35,000 years sitting beneath a haulage road.[153] This was the first time since the Solomon Hub opened in 2013 that Yindjibarndi Elders were allowed on Country.

The next round of expert evidence is expected to be held in early 2024.

ii. Adani Coal Mine

Adani's Carmichael Coal Mine – one of the world's largest and most controversial fossil fuel projects – is constructed on the traditional lands of the Wangan and Jagalingou (W&J) Peoples in central Queensland.

In 2012 and 2014, Adani approached the W&J people to sign an Indigenous Land Use Agreement (ILUA). Both times the group voted against the ILUA. Public reporting documents a 2015 attempt by Adani to pay and bus in 150 people to a W&J group meeting in Carseldine, but which ultimately failed to garner sufficient support for the ILUA.[154]

In 2015, in the absence of consent from the W&J People, the Native Title Tribunal permitted the Queensland Government to issue Adani a mining lease – concluding that the mine was in the public interest due to the employment opportunities it promised.[155]

Divide and conquer tactics

In 2016, the proposed ILUA gained the formal support of the majority (seven) of the 12-person W&J native title named applicants. It has been reported that the seven named applicants who supported the Adani ILUA were paid collectively at least $10,500 on top of travel and accommodation costs, to attend meetings with the company.[156] Despite the support of seven of 12 named applicants, Adani still required wider community endorsement for the proposed ILUA – support which had previously been refused in 2012 and 2014.

In 2016, approximately 500 people were reportedly 'bankrolled' by Adani to attend a meeting in Maryborough in a bid to overcome W&J resistance to the Carmichael Mine. This included people who allegedly had no familial ties to or connection with W&J Country.[157] Further, prominent W&J families said they were refused entry.[158] The meeting delivered a 294:1 vote in favour of the ILUA, but the legitimacy of this outcome is still disputed by many W&J people; it has been the subject of three separate court challenges launched by the Wangan and Jagalingou Family Council.[159] W&J Traditional Owner, Adrian Burragubba, said it was 'a sham meeting which engineered a sham outcome'.[160]

In 2019, the validity of the ILUA was ultimately upheld by the Full Court of the Federal Court of Australia. The Queensland Government subsequently extinguished 1385 hectares of W&J Country to make way for the Carmichael coal mine.[161]

Explaining the Court of Appeal decision, Adrian Burragubba is quoted as saying:

> The decision [hinged] only on the question of whether the certification and registration of the Adani ILUA were administered according to the legal requirements of the Native Title Act.
>
> It will not pull back the veil on the … process leading up to and after the authorisation meeting. Nor will it confirm whether in fact the people in attendance at the Adani meeting were entitled under the laws and customs of Wangan and Jagalingou people to make that decision to sign away W&J rights in land for monetary compensation.[162]

From 2015, members of the W&J Family Council have travelled the world, meeting with major financial institutions to dissuade them from funding a project that did not have the approval of Traditional Owners. That campaign was very successful and Adani has had to self-fund a smaller version of its proposal.

From September 2019, Adrian Burragubba's son, Codie McAvoy, has set up camp on Adani's mine lease, at times blocking the road to the camp for Adani's workers with ceremonial fires.[163] The W&J are recording their re-occupation of their Country on social media, including a Facebook Group Wangan and Jagalingou – Standing Our Ground which has counted over 800 days back occupying Country.

In 2021, Adrian Burragubba brought a complaint to the Queensland Human Rights Commission after police broke up a W&J ceremonial campsite in August 2020. After mediation of the complaint, Queensland Police recognised the cultural rights of the W&J to conduct ceremony under section 28 of the *Human Rights Act 2019* (Qld),[164] refusing to action a complaint by Adani to remove W&J people camping on their traditional lands adjacent to the Adani coal pit. The Queensland Police also issued a 'statement of regret' for removing the group several months earlier.[165]

According to Codie McAvoy, the internal division experienced by the W&J community due to the Carmichael Coal Mine is an intended by-product of the native title process. McAvoy said: 'The native title system has done what it's supposed to do – it's designed to divide and conquer, to take out the people that oppose mining, isolate them, and prop up subservient Traditional Owners'.[166] The W&J identified this strategy early, accusing the Adani Group of 'skulduggery tactics', with the aim of spreading a myth of disharmony within the W&J community.[167] Specifically, Adani is said to have spread disinformation that the W&J community is 'terminally divided'. The W&J community responded publicly saying that the myth of disharmony is contrary to the W&J People's opposition to the Adani Mine since 2012, and was a 'divide and conquer tactic that mining companies have used against Indigenous people standing up for their rights'.[168]

(e) Power imbalances in mediation and negotiation processes

Whilst it was obvious to many early in the native title journey that mediated agreements were likely to be where the majority of beneficial outcomes for native title groups would come from, it was also obvious that the power imbalances implicit in the native title legislation were also present in mediation and negotiation processes.

The change in the broader political climate and the approach by the Commonwealth and state and territory governments over the course of native title development has been significant. Over time, governments have increasingly adopted a 'good-will' approach to negotiations and this has allowed for more just outcomes than would be possible under the Native Title Act, with its many ways of extinguishing and minimising the rights recognised.

This also has the advantage for government of avoiding the costs associated with litigating every native title claim and was not, of course, only out of the goodness of their hearts. Litigating every native title case would be extremely costly for all governments, regardless of the outcomes.

Further, it is clear to anyone who has knowledge of the historical fight by First Nations peoples for land justice, that if the outcomes of land rights, or native title, or negotiations are not sustainable and fair, then it will remain 'unfinished business'.

In 1996, Commissioner Mick Dodson gave a keynote address on 'power and cultural differences in native title mediation'. It paints a picture of differences and miscommunications in inter-cultural mediations and formal proceedings which we would all do well to read again today.[169]

Additionally, he also addressed the mutual need – not just for the sake of Indigenous peoples – to commit to mediate land justice outcomes. Commissioner Dodson said:

> Governments need to get behind the process of mediating over native title. There is no point in governments believing that their best alternative to a mediated agreement is to ignore Indigenous peoples or to beat us with a legal stick. Arid court decisions about extinguishment will simply not be the end of it for governments.

> **... Even if governments can defeat some native title claims in the courts, they are still going to have to deal with Indigenous demands for land justice. We are not going to go away and we are not going to allow our connection to Country to be ignored.**

However, even the foundation and context of negotiated and mediated agreements is marred by power imbalance and structural discrimination.

The 'central problem' in mediating native title claims, he said, 'is power imbalance' between Indigenous and non-Indigenous parties in the native title system. He emphasised that if the power imbalance is not addressed, 'no decent bargains will be produced'.[170]

> **[W]here there is gross disproportion in the power of parties to a dispute, a mediated settlement is likely to enshrine that inequality.**

> The only way compromise of native title claims will produce fair deals is for the **Aboriginal side to have sufficient time and resources to participate**. The non-Indigenous side must also show a will to achieve reconciliation, not simply continue to profit from the historical and economic oppression of Aboriginal people.

Commissioner Dodson listed the ways that dispossession has impacted native title mediations by virtue of the power disparity created:

> Indigenous people have to prove that they have a connection to land. Other parties don't have to justify their expropriation of Aboriginal land.
>
> Mediators might object at this point that, in mediation, nobody has to prove anything. This may be true but it is not the experience of claimants who have been through mediation to date.
>
> According to the structure of the system and the perceptions of the non-Indigenous participants, the claimants come to the table without recognised rights. Whereas all the other parties have rights that are already sanctioned by law.
>
> The claimants are told they should provide evidence of the plausibility of their claim to be taken seriously by the other parties to the mediation.
>
> Claimants feel the injustice of this situation very keenly. Contrary to the perception of the non-Indigenous parties, the claimants will often believe that they are the only people at the table justified to speak about or for the land. A Yorta Yorta Elder expressed her disgust with the claims process with these words: *'These photographs on the wall and all this history, that's just a sample of our culture here. So why do we have to prove ourselves to some drunk down the road? Why aren't the other people made to prove by what authority they are on our land? It is an insult to our people.'*
>
> This gulf is the context in which all negotiations over native title will occur.

Commissioner Dodson also identified an issue that has been borne out in the subsequent decades: the **simplicity of the desired outcomes of mediation for developers and miners is in stark contrast to the complexity and significance of a native title claim to the First Nations parties: '[a]s a result, the claimants will be unlikely to be able to produce a neat lists of wants and wishes to present to the parties at mediation.'**

> Unless structures exist to ensure that the claimants can meet and respond to the agenda set by developers, mediation will not produce fair or enduring agreements.
>
> The structures I envisage include the creation of a research facility to provide assistance to Indigenous communities and organisations and the implementation of bottom-line conditions for negotiation based on international human rights standards.
>
> Without these necessary structures we are reduced to saying yes or no to proposed developments. Negotiations will revolve around how the claim can be made to fit within existing patterns of land use and development. The best outcome for the Indigenous side would then be the imposition of a few conditions on the development.

Commissioner Dodson went on to say that, given adequate resources and time, First Nations people will design alternative agendas other than simply those within the existing patterns of land use and development. He (and others) foresaw that it would be alternative negotiations and agreements – which 'operate to an agenda that emphasises, for example, cultural issues, community development and the preservation of ecologies' – that could shift native title mediation 'into a truly cross-cultural negotiation instead of a coercive and predetermined story in which Aboriginal people have their limited role already scripted for them'.

> It is going to take time for people to work out what they want from the process and to imagine the kind of relationships they could develop with their neighbours and the government. Clearly, claimants need resources to investigate the possibilities for agreement. They need to research, posit ideas and then get authorisation for their negotiating positions.

> The history of denial of Aboriginal rights creates consequences for the mediator. The Tribunal's motivation is to produce agreements. This might seem to be a neutral agenda but because of the context of power imbalance it creates a problem for claimants. The claimants are likely to be the group, in any mediation, whose interests are the hardest to define and describe.

At the time of commenting, in 1996, Commissioner Dodson did not see movement towards the kinds of structural conditions needed to promote, let alone achieve, equality of bargaining positions between Indigenous claimants and third parties. Those conditions included time-frames, resources and supports, and a position of equality outside of the mediation meetings.

> In Canada, comprehensive regional settlements have been achieved after decades of negotiation and work. Indigenous people took time to imagine, formulate and debate options. Community decision-making processes were developed which allowed for participation adapted to Indigenous needs.

> Other essential ingredients for regional settlements are community good will and government determination to go past rhetoric and achieve reconciliation.

> On this comparison, it is clear we have a long way to go before we have what it takes to make lasting settlements of native title claims. It would be heartening to report that we are at least on the right road but, at present, I cannot.

> Claimants lack the resources and assistance they need to negotiate as equals. By fine-tuning the mediation process the Tribunal can improve claimant's experience of it, but such change will not affect the power imbalance that exists outside mediation meetings. The Tribunal probably cannot redress historical or resource inequality but it must not conceal it. If, in any particular mediation, this inequality seems likely to lead to an unfair bargain, then mediation is inappropriate and the Tribunal should acknowledge this.

Joanna Kalowski was a member of the NNTT between 1996 and 1999. Kalowski described mediation in the native title setting as requiring a very different approach to the 'first wave' of mediations involving 'convergent problems' with a number of solutions which are apparent and easily identifiable.[171] Native title involves the opposite – 'divergent problems' which are unbounded, have no correct answers, get more complex the more they are studied and reflect the value positions of diverse participants. Kalowski said in 2009: 'As yet, there are few good roadmaps for these divergent, values-led problems'.

Notably, by the time Kalowski made those comments in 2009, many native title determinations and agreements had been reached already, using the inadequate existing mediation and negotiation 'roadmaps'.

Kalowski recalled some of the basic, practical advice given to mediators at the NNTT when she was there, by then Social Justice Commissioner Mick Dodson:

- Seating – it's their decision. You can't know who should sit where. Just think of the impact of avoidance relationships imperceptible to non-Indigenous eyes.
- You need some knowledge of the groups involved, e.g. kin connections, other relationships.
- Co-mediation – male-female is a really good way of making it easier for Indigenous groups to talk to you.
- Goal orientation is inappropriate: relationships and process matter more than the outcome or the deal.
- Be prepared for 'settling of old scores', the ventilation of issues long in the past but never before able to be broached.
- Renewal of mandate will be necessary – create time for people to go away and do this. Mediation will not roll along without significant breaks in the process, and given the distances in Australia, sometimes weeks or months will be needed for this 'business' to be done in the proper manner.
- Ensure people understand the nature and purpose of the mediation and their role in it.
- Ensure people get access to quality information.
- Assume there is no pre-existing decision-making process: people haven't had to decide issues like these before, so they need time to develop decision-making mechanisms as part of the process.
- There may be little focus on outcome on the part of the Indigenous parties, so the mediator must manage the frustration of the non-Indigenous parties, typically more task-oriented.
- Do lots of groundwork: 'pre-pre-pre-mediation'.
- Disputes will inevitably be complex and multi-layered.
- Pain and unresolved issues will intrude, and can't be wished away.
- Some of these issues will be inter-generational pain concerning parents' and grandparents' experiences of being mistreated, removed etc.
- Dysfunction is common, and will impact on relationships within the group.
- Read widely.[172]

These points may seem basic but they highlight the complexity of the one side in any native title negotiation, in stark contrast to the simplicity of purpose on the other side.

i. Alternative agreements

In 1996, Commissioner Dodson described the 'intransigence' of the NSW Government to sign an agreement negotiated by the Wiradjuri People and the Wellington Town Council and the Trustees of the Wellington Town Common. The Wellington Town Common native title application was the first native title application over the mainland and the Traditional Owner claimants were all women.

Text Box 9.3: Wellington Agreement

The Wellington Agreement arose out of a native title claim to the Wellington Town Common lodged in January 1994. An agreement was produced after mediation and was signed by all the parties to the claim except the NSW Government.

The present Government's position is that to become a party to the agreement would involve acknowledging native title. The Government will not make this acknowledgement unless the claimants provide credible evidence to support their claim to be the native title holders for the area.

The Wellington Town Council and the Trustees of the Common are satisfied that the Wiradjuri People are credible enough. They are also satisfied the agreement sets terms of a relationship that is workable. Why does the Government need any more evidence than the bona fides of the claimants?

The Wellington Agreement is an opportunity for the Government to demonstrate its own bona fides by signing it and allowing it to become the first determination under the *Native Title Act 1993* (Cth).

Reading the agreement, it is hard to imagine why the Government does not take this opportunity. It is hardly the kind of document that will shake the foundations of the state or even the administration of the Wellington Common and all the other parties to the claim agree to its terms.

Thus, despite the time, energy and goodwill put in by all those directly affected by the claim, the matter will not end in agreement. The intransigence of the NSW Government has caused the claim to be referred to the Federal Court where it now awaits arguments.[173]

In November 2007, the 13-year-old application of the Wiradjuri was finally resolved by agreement, and the Wiradjuri Wellington Town Common Aboriginal Corporation was granted freehold title of the Town Common in exchange for surrendering any native title rights.

In the *Native Title Report 1998*, acting Social Justice Commissioner Zita Antonios quoted Noel Pearson, Executive Director of the Cape York Land Council:

> The spirit of the High Court's Mabo decision will never be achieved simply by court actions or divisive political debate. The essential truth is the unbreakable connection of Aboriginal people to the land. It never will be possible to recognise that adequately in law. It can be achieved at the local level and only by reconciliation founded on agreement.

This quote was spoken on the signing of the historic Cape York Heads of Agreement regarding future land use on Cape York at Cairns, on 5 February 1996. The seeds of the agreement were sown in August 1994 when, against the background of the *Wik* litigation, the Peninsular Branch of the Cattlemen's Union decided that issues and conflict with Aboriginal people should be resolved by negotiations wherever possible. Subsequent to the High Court's decision in

Wik Peoples v Queensland (1996) 187 CLR 1, all parties determined they would stand by the agreement.

We now see that negotiations of agreements at a local level are a key way that native title groups have achieved outcomes that they consider beneficial enough to live with.

The alternative agreements being negotiated and agreed to around the country are beginning to look like something more equitable, or at least something that might begin settling the unfinished business of land injustice in Australia.

In 2018, Michael Dillon wrote of how, despite the promise of alternative agreements for Indigenous interests, the success of such agreements hinges on governments being prepared to truly share power and decision-making with Indigenous groups.[174] This commitment to shared decision-making has been evident in few agreements until very recently. Dillon identified two Kimberley agreements, the Ord Stage Two agreement in the East Kimberley, and the Yawuru agreement in Broome, both of which are native title agreements, and the Noongar Settlement in southwest Western Australia, as examples.[175]

The **Noongar Settlement with the WA Government is discussed in Section 10.13 of this Report**.

We heard about successful outcomes for community in **Kia Dowell's** story about the Argyle Participation Agreement and her role in navigating the mine closure and ongoing native title preparation through culturally appropriate governance models with Rio Tinto (see section 8.2). Importantly, Kia explained how the Argyle Agreement was well known in the early years for including a 'no means no' principle, requiring genuine consent by the Traditional Owners, and therefore genuine engagement and collaboration by Rio Tinto as the 'owners' of the mine.

The **Victorian *Traditional Owner Settlement Act 2010* (Vic) (TOSA)** was established as an alternative legislative regime to the Native Title Act in recognition that native title law was unlikely to benefit many, if any, Aboriginal groups in the Victorian region. The TOSA addresses the aspirations of Traditional Owners who would (and did) struggle with the strict and onerous connection criteria in the Native Title Act, and/or whose native title has mostly been extinguished according to the Native Title Act.[176]

Additionally, **Victoria now has a First Nations Parliament – First Peoples' Assembly of Victoria – and a Treaty process underway** – huge developments relevant to land justice and every other aspect of decision-making relating to Victorian Aboriginal peoples' lives. The very first First Peoples' Assembly of Victoria sat from 2019 to 2023 with elected representative from communities and Traditional Owner groups across the five regions covering Victoria.[177]

The First Peoples' Assembly of Victoria is working towards a state-wide Treaty, as well as working to empower Traditional Owner groups in Victoria to negotiate Treaties that reflect their specific aspirations and priorities. One key aspect of the negotiations is for an Independent Treaty Authority that sits outside of the government bureaucracy. It would be 'grounded in our culture, lore and law, and will facilitate negotiations and help resolve any disputes that arise'.[178] The Assembly describes how Treaty negotiations have involved the 'Government [agreeing] to give up some of its power by agreeing to establish and independent Treaty Authority'.[179]

In her interview, **Monica Morgan** identified how important native title has been for bringing the Yorta Yorta people and Victorian Aboriginal people more generally to this point, but that it is not the game-changer people thought it would be. The devastating decision in the Yorta Yorta case was widely understood as an illustration of the injustice of the native title system requirements.

Monica was clear that the Yorta Yorta have a seat at the table in the same way as any other First Nation in Victoria have native title over their land regardless of native title, and these more recent processes have reinforced what she has always said, that native title is not the only determiner of land rights. At the time of her interview, Monica was opposed to the state level Treaty process and believed in keeping all such agreements directly with First Nations at the local/regional level.

ii. Negotiations

Among the women interviewed for this Report are two First Nations lawyers. Cassie Lang and Avelina Tarrago both spoke about the power imbalances they witness constantly in their work in native title. They described how the power imbalances are evident in negotiations, where claimants or native title holders have one lawyer present across the table from a posse of extremely well-paid senior solicitors and barristers.

The power imbalances referred to by these professionals were particularly regarding post-determination stage negotiations in the context of future acts, which are informed by the knowledge that, under the Native Title Act, native title holders have no veto, and if they don't come to an agreement regarding an act on Country within a short timeframe of six months,[180] then the third party can apply to the NNTT for arbitration. The statistics from the NNTT show that almost all cases which go to arbitration result in a ruling by the Tribunal that the act can proceed: the last time a Native Title Report reported on this the figure, 97% of acts had been allowed to proceed.[181] Using the figures provided by the NNTT in August 2023, the latest statistics reveal that around 98% are allowed by the NNTT at arbitration.[182] Further, at arbitration, the native title group loses the ability to negotiate for royalties as part of the agreement. This means that native title holders are essentially coerced by the legislation into having to accept a proposal within six months, regardless of whether they consider it just or not.

When you add the low threshold for showing that negotiations are 'in good faith', the power imbalance is made stark.

> There has been growing concern nationally about the extent to which industry has sought to negotiate 'in good faith' through the RTN [right to negotiate] to reach a negotiated outcome when it is highly likely that an arbitrated outcome would rule in their favour.[183]

The RMIT report referenced above in section 5.2 highlights the fact that the current Native Title Act provisions with regards to negotiations for future acts do not result in free, prior and informed consent of Traditional Owners and should be amended to include a right of veto.

As noted in then Commissioner Mick Gooda's *Declaration Dialogue Series Paper No. 3*,[184] free, prior and informed consent does not necessarily amount to a right of veto. However, international institutions have suggested that in some circumstances, a 'veto' right, or right to withhold consent, exists under international law. For example, in the *Saramaka* case, the Inter American Court of Human Rights held that in circumstances where 'large-scale development or investment projects … have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior and informed consent, according to their customs and traditions'.[185]

Relevant to the capacity to agree upon and adhere to decision-making processes that respect culture and traditional processes, many of the women we interviewed discussed the complexities of group dynamics and decision-making, and the difficulties involved in:

- bringing people together
- educating everyone with enough information on the native title system and the specifics of the claim or agreement being proposed
- allowing enough time to workshop disagreements and misunderstandings and coming to agreements as a group that everyone can accept
- articulating agreed positions formally to legal representatives, who in turn hold that line in negotiations with third parties
- doing all the above within timeframes like six months.

In addition to the discriminatory legislative framework for negotiations, both professional and non-professional interviewees commented on their experiences of being unable to get the legal representation needed from NTRBs to properly participate in post-determination negotiations on equal footing with third parties. Through their 2021 report on the performance of NTRBs, the NIAA reported several issues in the post-determination environment that require urgent attention. The NIAA identified the need for a nationally coordinated and strategic approach to these issues.[186]

(f) Compensation developments

Since the last Native Title Report in 2016, continuing developments in native title **compensation litigation** are very likely to have had an impact on the willingness of third parties to come to the negotiating table. Notably, governments and private third parties are 'on notice' that they may be liable for significant compensation for unauthorised acts on native title land after the *Racial Discrimination Act 1975* (Cth) came into force.

Text Box 9.4: Timber Creek case

The Griffiths case in Timber Creek had its final appeal determined on 13 March 2019, with the High Court holding that $1.3million compensation for cultural loss is payable, but reducing the assessment of economic loss to 50% of the freehold value of the land.[187] *Griffiths* held that the Native Title Act limits the amount of compensation for extinguishment of exclusive possession native title to the value payable for the compulsory acquisition of a freehold estate in the land. However, in that particular case, the native title which was extinguished after 1975 was non-exclusive possession which the High Court determined was a lesser right, applying a 50% discount from the freehold value of the land. Given that each extinguishment and related compensation will be assessed on its own case-by-case basis, there is considerable uncertainty around the liability of governments and third parties who have extinguished native title since 1975.

The part of the judgment that received the most attention was the award of $1.3 million for cultural loss – rejecting the Northern Territory and Commonwealth Governments' arguments that awards for cultural loss should be nominal.

There is also the potential for the Commonwealth's liability for extinguishment of native title to extend back to 1901, on the basis of the Constitution's prohibition on acquisition of property by the Commonwealth other than on 'just terms' (section 51(xxxi)).[188] This has recently been litigated in the case of *Yunupingu on behalf of the Gumatji Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75.

Text Box 9.5: *Yunupingu* compensation case

In May 2023, shortly after he passed away, Gumatj leader Dr Yunupingu AM won his case in the Federal Court, with the Court finding that the Commonwealth had acquired land for a mine without the consent of landowners.

First brought in 2019, Dr Yunipingu's case sought up to $700 million in compensation from the Commonwealth on behalf of the Gumatji clan, on the basis that the acquisition of land on the Gove Peninsula in north-east Arnhem Land in 1969 was not done 'on just terms'. The Commonwealth leased the land to Swiss mining company Nabalco in the early 1960s and the lease was taken over by Rio Tinto in 2007.

This was the first time the Federal Court had been asked to determine the question of whether a Commonwealth act of acquisition of land in the Northern Territory without recognising native title was invalid.

The action contended that, in the period from 1911 to 1978 (after the Northern Territory became a territory and before it commenced self-government), a number of grants or legislative acts took place in the Territory which, if valid, would have been inconsistent with the continued existence of the claimants' non-exclusive native title rights, and would have extinguished those rights at common law. Dr Yunupingu argued that the grants or acts purported to effect an acquisition of property within the meaning of s 51(xxxi) of the Constitution, and were invalid because they did not provide compensation on just terms within the meaning of that provision.

The Full Court of the Federal Court accepted Dr Yunupingu's arguments and held that native title rights and interests constitute 'property' for the purposes of s 51(xxxi) of the Constitution and that the just terms requirement contained in s 51(xxxi) applies to laws enacted by the Commonwealth for the government of the Northern Territory pursuant to s 122 of the Constitution.

The Commonwealth has been granted special leave to appeal to the High Court.[189]

Until these cases there had been very few compensation cases on which to base predictions of the impact of compensation orders.[190] Most earlier settlements were not made public. For example, the 2017 agreement between the South Australian Government and the Tjayiwara Unmuru Peoples for the extinguishment of native tile over a small area of land around the Stuart Highway in the far north of South Australia.[191]

No doubt my successor in the role of Social Justice Commissioner will monitor the impact of the compensation cases starting to come through on the overall power imbalance in the native title system.

9.4 Lack of access to justice

As discussed in Chapter 7, and above in this chapter's sections on systemic gender discrimination and race discrimination, the clearest manifestation of systemic discrimination with regards to all the relevant intersections is the lack of access to justice. That is, the failure of the native title system to provide for equitable enjoyment of the right to self-determination, to property, and to the raft of other relevant rights discussed in Chapter 5. Drilling down on the lack of access to justice, the lack of accountability and accessible remedies highlights the degree to which the native title system has failed in this regard.

The above sections already detail the way that the design of the Native Title Act fails to provide self-determination and equitable property rights to First Nations Australians. This following subsection (a), briefly contextualises the lack of access to justice in the bigger picture of systemic discrimination against Indigenous peoples in Australia more generally.

The second subsection (b), then addresses the general themes coming from the stories of the women interviewed, which highlight how hard native title claimants, holders and Traditional Owners find it to hold anyone accountable within the native title system.

(a) Systemic discrimination against First Nations peoples in Australia

In the 2023 Winggarra Djuraliyin (Growth in Thinking) public lecture at Sydney Law School, Dr Eddie Cubillo said:

> In 2015, Wiradjuri man Stan Grant challenged Australians to consider that 'The Australian Dream is rooted in racism … the very foundation of the dream'. Recently, as Australia tracks towards a referendum on a First Nations Voice to Parliament that 80% of Indigenous people support, non-Indigenous author Richard Flanagan challenges us to 'confront th[e] most terrible truth … [that] racism experienced by Aboriginal and Torres Strait Islander people … is of a completely different order … far more extreme … [and] so pervasive as to often be invisible to non-Indigenous Australians'.
>
> … As a country, we need to acknowledge that the places settlers/non-Indigenous Australians have built for themselves were established by, and are sustained by, racial violence.

Relevant to the substantive content of this Report, is the identification of legislation and interpretation of the law as a barrier to accessing justice for First Nations Australians.[192] Specifically, how difficult it is to use the law addressing race-based discrimination to effectively address such discrimination against Indigenous people.

> Sometimes legislative provisions underpin process-related issues referred to in the preceding section (where a complaint is required at law to be lodged in writing, for instance). There are also perhaps more substantive issues arising within the law likely to inhibit Indigenous access, including those resulting from the way in which legislative provisions have defined race-based discrimination, how these provisions have been interpreted by courts or tribunals (and also by complaint handling agencies when dealing with complaints), and what is required from the complainant in order to prove their case.
>
> … Establishing a causal connection between race and the incident which is the subject of a complaint (direct discrimination), or that a condition, requirement or practice has an unreasonable and disproportionate impact on a particular group (indirect discrimination), is notoriously difficult.[193]

In a generic sense, anti-discrimination law has proven relatively unsuccessful at challenging racism against First Nations individuals and peoples in Australia, as indicated by the low numbers of First Nations complainants.

> The degree to which Aboriginal and Torres Strait Islanders are challenging racism through anti-discrimination law is thus one important measure of the law's efficacy for Indigenous people.
>
> … complaint statistics … indicate that relatively small numbers of Indigenous people are taking formal action in response to racial discrimination – perhaps surprising given the frequency with which it is reportedly experienced within Indigenous communities …
>
> These figures, therefore, tell us little about the true nature and extent of the actual encounters Indigenous people have with racial discrimination. They are probably more indicative of problems of Indigenous access to relevant legal mechanisms.[194]

The impact of having a system that does not effectively provide redress as it purports to is that inequities are actually bolstered and legitimised.[195]

Extra barriers to Indigenous access to justice have been identified as including exhaustion, resignation, disillusionment, lack of knowledge regarding rights and remedies, inaccessibility of complaints handling processes, and a lack of advocacy and support such as legal services.[196] Another concern is retaliation:

> A very fine example of this at a broader societal level is the public backlash that followed close upon the heels of the racial vilification litigation initiated in response to journalist Andrew Bolt's derogatory comments concerning political and other opportunism and 'fair skinned' Aboriginals. The Abbott Government's now abandoned push in 2014 for legislative amendments, designed to water down the racial vilification provisions in section 18C of the RDA and referred to by some as 'the Bolt laws', was a clear and direct consequence of the success of this litigation in the Federal Court.[197]

Professor Beth Gaze notes that the symbolic value of the *Racial Discrimination Act 1975* (Cth) (RDA) is undermined 'unless it is also effective as an instrument against discrimination'.[198] In particular, in relation to the Native Title Act, Gaze states:

> The compromised nature of the RDA as a symbol against racial discrimination is evident in several areas. The Government itself was responsible for explicitly rolling back the RDA by its amendments restricting claims and proceedings for native title under the *Native Title Amendment Act 1998* (Cth): see *Native Title Act 1993* (Cth), s 7.[199]

For many years, 'successful' claims under the RDA resulted in declarations and costs orders but no damages.

> In ***McGlade v Lightfoot***, a complaint made in 1997 had been successful before HREOC in 1999 but was set aside on review by the Federal Court in 2000, and then re-heard and finally upheld in the Federal Court in 2002 (as the jurisdiction of HREOC was then obsolete). Again, the orders made were only a declaration that the Act had been breached and costs against the respondent. **In the interests of good race relations, Carr J did not believe an award of damages was appropriate**. A reading of the procedural history of each of these successful claims leaves no doubt about the level of commitment and persistence required over years to successfully pursue a racial vilification claim.[200] [bold added]

Further, around the same time, the courts were awarding costs against section 18C complainants in unsuccessful cases such as *Creek v Cairns Post, Hagan v Trustees of the Toowoomba Sports Ground Trust* (the 'Nigger' Brown grandstand case) and *Sharma v Legal Aid Queensland*.[201]

In the period that Gaze examined, 2000–2004, only one successful case involved a discrimination claim under section 15 of the RDA, dealing with discrimination in employment – *Carr*. That case was brought by a non-Indigenous complainant against an Indigenous organisation for overt discrimination, and the damages were well above any other damages that had been awarded.[202]

Over the last decade, the RDA has been described as having 'found its place as a remedial avenue for First Nations persons and communities seeking justice against unlawful racial discrimination.'[203] Although it is still the case that First Nations peoples in Australia are 'using processes of dispute resolution in this area to a limited degree, relative to the extent to which they encounter race-based discrimination',[204] there have been some significant awards in RDA matters. This includes the Palm Island Class Action of *Wotton v Queensland (No 5)* [2016] FCA 1457 in which $30 million was awarded to class members. *Wotton* was described as a rare court decision that delivered 'justice'[205] and joined *Baird v Queensland* [2006] FCAFC 162 – a stolen wages case in which complainants were awarded damages (on appeal) of between $17,000 and $85,000 as well as an apology.[206]

Additionally, a seismic shift in the amount of damages awarded for discrimination cases may have been heralded by the 2014 *Sex Discrimination Act 1984* (Cth) (SDA) case *Richardson v Oracle*,[207] in which the Full Federal Court increased damages for sexual harassment from the $18,000 awarded in the initial judgment, to $130,000. Last year, in an *Age Discrimination Act 2004* (Cth) (ADA) case *Gutierrez v Mur Shipping Australia Pty Ltd*,[208] Justice Burley on appeal increased the general damages awarded from $20,000 to $90,000, and awarded damages for economic loss which were to be determined (but which Mr Gutierrez claimed was approximately $142,000).

Recently, there has been a 'surge in RDA class actions and associated settlements'.[209] Though the trend towards increased damages is yet to be seen.

In 2022, Alan Zheng on the *Australian Public Law Blog* also noted that the RDA is now being 'used in novel ways'. Zheng notes the RDA complaint in respect of policy conduct preceding a death in custody in Constable Zachary Rolfe's fatal shooting of Warlpiri man Kumunjayi Walker in Yuendumu in November 2019.

> Following Rolfe's recent acquittal, it is necessary to consider alternative remedial avenues to ensure police accountability. Significantly, an RDA claim enables a claimant to frame the precise 'acts' which are said to constitute discrimination. These 'acts', in turn, are not viewed in isolation but inclusive of all consequences and surrounding circumstances 'involved' in the act on an objective assessment (Wotton at [559]-[560]). This makes s 9(1) a particularly flexible vehicle for exploring a broader array of conduct including matters otherwise unsuitable for criminal trial such as alternative policing approaches in the lead up to the shooting. Moreover, the RDA's well-established interface with the denial of human rights would allow the court to properly consider key issues in the case including the fact that Walker was attending sorry business before the fatal shooting. It would also enable scrutiny of whether there was an arbitrary deprivation of life, which is inconsistent with the right to life under article 6 of the International Covenant on Civil and Political Rights. Although an RDA complaint may not provide the expression of societal opprobrium which a criminal conviction secures, it may be that it can do something to vindicate the family and community's experience of harm as that of a racist institution.[210]

Zheng discusses one of the three causes of action in the case of Marley Campbell, a Kngwarraye and Aranda man who took action regarding conduct which occurred when he was in custody at the Alice Springs Youth Detention Centre and Don Dale Youth Detention Centre. In addition to causes of action regarding false imprisonment, battery, assault or negligence, and breaches of the relevant youth justice legislation, the relevant third cause of action was that certain conduct constituted discrimination in contravention of s9(1) of the RDA. Zheng summarises:

> The pleaded conduct included the Territory's decision to transfer Campbell to Don Dale and the refusal to transfer him back to the ASYDC. In turn, it was argued these acts constituted differential treatment because they 'failed to promote or protect his interests in maintaining connection with his family, community and country' and accordingly denied his enjoyment of rights like the right to equal participation in cultural activities under art 5(e)(vi) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD).[211]

In this case, Justice White considered that there was not differential treatment in the refusal to re-transfer the application back to Alice Springs Youth Detention Centre *in comparison with other detainees*. Justice White ruled that the applicant had failed to establish that he was treated differently 'based on' his race.[212]

Significantly from the perspective of native title law which applies *only* to First Nations Australians, the applicant's arguments that no non-Indigenous detainees were transferred was rejected because there were no non-Indigenous detainees at Alice Springs Youth Detention Centre at the time.

Just this year, Wakka Wakka man Uncle Dennis ultimately failed in his attempt to use the RDA to address structural discrimination in the pension eligibility age criteria, given the systemic issues resulting in the lower average life expectancy of First Nations Australians.[213]

(b) Lack of access to justice in native title and cultural heritage is systemic discrimination

The reality of discrimination for First Nations peoples is that it is more pervasive than non-Indigenous Australia seems capable of recognising, much less dealing with in law or in society. Attempts to right inequities by using the legal system continue to largely fail. Native title law in the broader context of British Australian law can be seen to represent a site of institutional racism like so many others (for example the health system, the education system) particularly when it only offers 'formal equality'.[214]

Systemic discrimination can be seen in the native title system in many ways in which First Nations peoples are denied access to justice. This includes substantively, in the way that the native title system **fails to produce outcomes** which satisfy the right to culture and self-determination as detailed earlier in this chapter. It is also seen in the **persistent barriers to full participation in the processes** associated with native title; and in the **recurrent theme of a lack of accessible and/or effective remedies** for errors made by the system or by players within the system. **Lack of accountability** is a key feature of the native title system in the experience of many of the women interviewed.

In practice, experiences with ORIC, with anthropologists, with lawyers, with mediators, and with Representative Bodies, all left women we spoke to feeling disempowered and at a loss for where to turn to get help making things right and fair.

Many of the women spoke about the mismatched expectations associated with native title and the devastation and disappointment when the outcomes of a determination did not actually constitute the return of Country. No one responsible for the system or working within the system appears to be held accountable for the professional practices that often contribute to the resulting disempowerment.

NTRBs, anthropologists and lawyers who made errors in their professional capacities in the native title system are not held accountable, in the experience of the women interviewed.

One other very consistent theme related to lack of accountability was regarding the funding structures of the native title system which see NTRBs as gatekeepers of funding for native title groups' professional services. The NIAA echoes this sentiment as funding issues were among seven of the key systemic issues discussed they discussed in a 2021 report on the performance of NTRBs.[215] Many women identified the inherent conflicts of interest associated with this structure, whereby the same organisation is responsible for making funding decisions for conflicting Indigenous groups or families. Many women had not been able to find satisfactory appeal mechanisms. Those women affected by these perceived or real conflicts of interest felt there was nowhere to go for fair, independent adjudication.

We heard accounts of women and communities who had attempted to come together to hold those in power to account but too often we heard that women making those efforts were not backed up by timely assistance when they requested it.

The recent case decided in *Adnyamathanha Traditional Lands Association & Ors v Rangelea Holdings Pty Ltd* [2023] SASC 51, discussed in section 9.2 on gender discrimination and section 9.1 highlights a known problem with the governance arrangements in native title – particularly the use of trusts to receive and distribute native title monies. Trusts are not sufficiently transparent for this purpose, and communities have struggled to get access to records of their native title monies and distributions when they have asked. This has caused significant disputes within community and resulted in lengthy and expensive litigation.

The *CATSI Act Review: Final Report* (2021)[216] recommended that the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to require reporting to common law holders on the management and use of native title monies and non-monetary benefits held on trust.

Many of the women who contributed to this Report have had experiences involving the interaction between native title and state or territory legislation on land rights and/or cultural heritage. In particular, interviewees discussed experiences in NSW and NT land rights regimes, and QLD and SA cultural heritage regimes, interacting with native title in ways which left some Traditional Owner groups and families excluded from decision-making roles regarding acts on Country.

Another concern raised regarding equitable access to the native title legal system was the way that the court processes and the legal culture disadvantage and exclude First Nations people, specifically women, in the native title system. Anthropologist Dr Sandra Pannell said:

> Often time there is little reflexivity on the part of practitioners of the culturally-determined assumptions, roles, rules, and procedures associated with the court process – that the law itself constitutes a cultural system, which both enables but also limits Indigenous claims for social justice and recognition.

One example Dr Pannell gave was about the 'incredible disadvantage to Indigenous lay witnesses' who had to give evidence via Teams or Zoom over the COVID period.

> To me, it was quite apparent that a number of the claimants, particularly older people, were not familiar with the technology, indeed, some people were unable to use it at all. It was also the case that if the rest of the claim group wanted to participate in the process, for example, be part of the general audience, they too had to have access to the technology and the internet connectivity to be able to do that. The decision to resort to this kind of technology, which at that time, because of COVID, was readily used by the Court and was familiar to the legal practitioners, resulted in the claimants either being marginalised or excluded from the court process – an outcome which obviously defeated the intentions of the Court.

This concern for the disadvantage experienced by Indigenous claimants trying to give evidence online is something that at least some members of the legal profession and judiciary are aware of in the context of connection evidence. In 2022, the Queensland Land Court handed down a decision on the need for evidence of First Nations witnesses to be taken on Country in order to uphold the witnesses' human rights under the *Human Rights Act 2019* (Qld). In *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4, the relevant evidence involved the parties and the Court going to sites of cultural significance to hear the evidence of First Nations witnesses with Elders present. The arguments for the admission of on Country evidence despite significant costs were:

- oral evidence on Country will allow the Court greater insight into the cultural and environmental impacts the proposed mining could have on the community
- on-Country evidence is needed to uphold the human rights of the witnesses pursuant to s 28(2)(a) of the *Human Rights Act 2019* (Qld), which provides for the protection, control and development of cultural heritage and knowledge. The witnesses would be providing sensitive cultural information, that, based on cultural practices, needs to be given on Country and in the presence of Elders.

The President of the Land Court noted that, although the mining company did not wish to contest the evidence, the evidence was being given for evaluative reasoning and not fact-finding. The basis of the evidence was to better understand and analyse how climate change would affect cultural rights. It is likely to involve assessments of degrees of impact on cultural rights and as such, the evidence was highly relevant and needed to be considered carefully.

> In my experience as a lawyer and judicial officer, written evidence from a First Nations witness is a poor substitute for oral evidence given on Country and in the company of those with cultural authority.[217]

Of course, there has always been on-Country evidence given in native title cases. However, this case provided some specific reasons that go to the importance of culturally appropriate evidence procedures which may be applicable in other cases relevant to land justice and cultural heritage issues.

Marilyn Campbell was one of the women whom we interviewed during the COVID pandemic. Marilyn had to give court evidence online in a native title case and the transcript of her evidence highlights how difficult this was. This is discussed in more detail in section 8.14. In her interview, Marilyn said that it was not possible for her to convey any meaningful information about her culture and her connection to Country, other than by taking people out on Country.

Marilyn's experience is one particular example of the way that First Nations people involved in the native title system find they have to 'prove' their culture and connection within a foreign system with foreign terms of reference. This leaves us materially disadvantaged in that system.

(c) The Wunna Nyiyaparli case

The Wunna Nyiyaparli people of the Pilbara region of Western Australia lodged a native title claim in the Federal Court of Australia in January 2012. The claim passed the registration test under sections 190B and 190C of the Native Title Act, which includes a prima facie assessment of the merits of a claim. The land sits within the region of the wider 1998 Nyiyaparli native title claim. Individuals from the Nyiyaparli disputed the new claim by the Wunna Nyiyaparli.

The Federal Court determined in October 2015 that a separate question would be decided as a preliminary issue, which involved the question of whether the Wunna Nyiyaparli claimants were Nyiyaparli people.[218] In March 2016, the Wunna Nyiyaparli dismissed their lawyers. They then self-represented due to living on Country and having insufficient funds to engage new lawyers.

The Wunna Nyiyaparli said that they did not understand and therefore did not prepare for or follow Court directions. The hearing of the separate question was listed for July 2016. Three of the Wunna Nyiyaparli applicants attended Court in July 2016 and wanted to lead evidence. This was objected to by the Nyiyaparli applicant. The Court decided not to permit the Wunna Nyiyaparli to lead evidence, and only to permit them to make submissions, because the Court formed the view that the Wunna Nyiyaparli had made a deliberate decision not to comply with the orders made by the Court.[219] It appears that the Court decided not to adjourn the hearing to provide another opportunity for the procedural orders to be complied with because of the expense involved in conducting a hearing.[220] At the conclusion of the hearing, the Court held that the Wunna Nyiyaparli claimants were not descendants of the Nyiyaparli people.

The Wunna Nyiyaparli attempted an appeal the decision in relation to the separate question but were again without suitable legal representation and were unsuccessful. Justice McKerracher, sitting as the Full Court of the Federal Court, dismissed the appeal.[221]

The Wunna Nyiyaparli then made a complaint to the United Nations Human Rights Committee (the Committee) in April 2019. The decision of the Committee was focused on whether Australia had failed to provide them with an adequate procedure for the determination of their native title rights. The Committee held that there had been a breach of cultural rights under article 27 of the ICCPR, because the Wunna Nyiyaparli were not ensured '*effective* participation in proceedings for the determination of their fundamental right to traditional territory'.[222] The Committee also held that there had been a number of breaches of due process rights under article 14 of the ICCPR in: failing to provide them with legal aid; not permitting them to adduce evidence at the hearing of the special question; and not adjourning the hearing of the special question.[223]

The Committee communicated its decision on a native title issue in Australia on 10 July 2023. The Committee found that Australia should:

- reconsider the Wunna Nyiyaparli's native title claim and ensure that the Wunna Nyiyaparli have effective participation in those reconsideration proceedings. Until then Australia should refrain from activities which might adversely impact the interests of the Wunna Nyiyaparli in their traditional lands
- review any mining concessions granted over the claimed traditional territory without consulting the Wunna Nyiyaparli
- pay the Wunna Nyiyaparli adequate compensation for the harm they have suffered as well as reviewing legal aid funding in overlapping native title matters.[224]

Dr Scott Calnan represented the Wunna Nyiyaparli in their case to the Committee and remarked on the decision.

> My clients say that they speak for that Country, they say that their ancestors are buried on that Country, that their Elders know the songlines and they have a duty to protect the sacred sites. They're actually really upset that mining operations on the land are destroying sacred sites, including marshes.
>
> There are lots of Indigenous people who want to know their claims to native title are being dealt with fairly by a fair procedure. That's all the UN decision, basically, is about: that, if you go to an Australian court claiming native title, you should have a fair procedure, you should be able to get enough legal aid so you can put your case.[225]

The Federal Government must respond to this decision within 180 days. This response should detail how Australia will provide an 'effective and enforceable remedy'.[226]

10 Combined voices: centring lived experience

This chapter provides a non-exhaustive illustration of ways in which the native title system has been experienced by Aboriginal and Torres Strait Islander women, as told through their combined voices.

As discussed above in section 5.4 on methodology, the purpose of this Report is not to accuse any individual or organisation. There will always be human error in any system; and it is inevitable that developing law and systems like those in native title will require time to settle. But drawing on the history of analysis and commentary made by previous Social Justice Commissioners and other First Nations leaders over more than 30 years, it is clear that many of the problems causing such pain and disempowerment were predicted.

This chapter addresses common ways in which the native title system has been experienced by individual women and their communities. It uses the voices of women who participated in in-depth interviews to contribute their knowledge and experience to our collective knowledge.

I have attempted to provide an holistic picture of the native title system by centring these perspectives and lived experiences of the individuals, and through them their communities, who are supposed to benefit from this system.[227]

The division of the women's combined voices into the themes below is in order to focus attention on the commonalities of experience. Of course, most of these women's stories reflect many themes and I have tried not to repeat quotes, so there is sometimes no good reason an experience is included in one section and not another.

10.1 Disempowering process

Many of the women interviewed spoke about how disempowering the native title process was for them and their families and communities. This was often the case even when they had finally secured a 'successful determination'.

Many women commented on how angering it was to have to constantly justify our connection to Country on the terms of the coloniser, in a system which does not understand or accommodate the cultural knowledge and law that is relevant to that connection.

Others looked back on the process and realised how much they had lost in the 'compromises' required to have any native title recognised at all.

There were many instances described by the women interviewed where the effort put into demonstrating the connection to Country was so significant and, for them, so convincing, that it induced shock, confusion and despair when the result was not the return of control of their Country.

Many women were angry that British Australian laws were still being used to control the way they were able to practise culture, and felt a huge disconnect between the native title, heritage protection and land rights regimes on the one hand, and the reality of how culture and Country should be protected.

Many of the women's stories go to the point that has been considered in legal and other commentaries on the native title process – that oral histories and oral testimony of cultural knowledge and connection to Country are not given the same weight as written records by Europeans who observed First Nations peoples in the early years of colonial contact.

For First Nations women, the practical implications of prioritising the written record are cumulative because of the layers of Western patriarchy that have been at play over the years. Non-indigenous men made the first records; First Nations women would not have spoken to them and were assumed to be less important and their knowledge less relevant, coming from a colonial culture in which that was the case. From then on, as those original records are used to do follow-up research focusing only on the knowledge gained from the first records, First Nations women became increasingly written out of the history of their society from the perspective of cultural knowledge and knowledge of country. In turn, there is less perceived need to send female anthropologists because women's knowledge is not considered as relevant, and on the cycle continues.

Anthropologists we spoke to commented that despite rhetoric pronouncing otherwise, it is undoubtedly true that written sources from Europeans are given priority over oral evidence passed down through the generations in the court system.

Additionally, anthropologists commented that the way that the collection and use of evidence of connection has developed has also meant that an unnecessary focus has sometimes been given to drilling down into the details of sacred secret practices that may not necessarily be required to show connectedness to country. This corresponds to the questioning we heard from some women interviewed regarding the degree to which they needed to provide such extensive and often private information for their claims.

Several women who were interviewed described the impact that having given such private and sacred knowledge over during their native title claims has had on them, in addition to the sheer amount of time and energy spent providing it. Firstly, the expectations that correlate to the sharing of such significant cultural knowledge and knowledge of Country were often not met and the disappointment and confusion this caused, and the sense of exploitation and loss, was deep and widespread.

Secondly, several women expressed how disempowering it was to have discovered that the very private and important information shared in the native title process is not secure and can be (and has been) used by other groups trying to make claims. Many women found that they had no control over who the information was shared with and have been told that the NTRB which technically commissioned the anthropologist report 'owns' the report. Several women had not even been provided with the report, or the section of the report containing their information, or even the conclusions drawn about their ancestry.

This is one way in which NTRBs, lawyers and anthropologists have failed to centre Traditional Owners and native title claimants in the native title process. It appears that in many cases, if not across the board, there has been no thought given at all to ensuring that individuals and families contributing to anthropological research understood what would be done with the information and how it would be used and stored. Nor has there been much, if any, consideration given to the impact of the lack of accountability to individual contributors to connection research regarding their information and how it is used.

In short, there appear to be many cases in which the individuals who contributed to research for native title cases have been subsequently excluded completely and the impact on them has been significant. At the 2021 NSW Native Title Forum, solicitor Aaron Ross discussed this

issue around access to documents, noting that '[w]hilst the basic principles in relation to [legal professional privilege and 'without prejudice' or 'settlement' privilege] are well-understood … the application of these principles can give rise to some novel problems in native title proceedings.' Some of Ross's conclusions are quoted here and are also relevant to section 10.6 below on the impact of professionals in native title.

> It is incredibly important for those commissioning expert reports to be very clear of the purpose for which the report is commissioned, and the potential uses to which they envision the report might be put. Ideally, these matters ought to be explicitly recorded in the retainer agreement, and noted in various internal records.
>
> Anthropologists, lawyers and all those involved in seeking evidence from Indigenous persons or other witnesses must appreciate and clearly explain the potential for disclosure of that evidence including the risk that the information may be used for purposes beyond the instant litigation.
>
> Where parties are concerned about the risk of material being used for adverse or collateral purposes, it will be prudent for express agreements to be put in place about the terms on which any disclosure occurs, prior to that disclosure occurring.
>
> If suitable terms cannot be agreed, alternative arrangements – such as separate reports – may need to be commissioned. Although I acknowledge the cost of doing so is likely to be high, it is almost certainly going to be less than the cost of a protracted privilege fight down the track.
>
> Create and invest in protocols for document management and controls upon access, use and distribution. It is important that any decisions to share material are made with full appreciation of the potential consequences of doing so and on instructions of the relevant owners.
>
> Where evidence is filed in proceedings which may be especially sensitive, seek confidentiality or suppression orders early. It will also be prudent to ensure that you have good records of those affidavits which have been read or otherwise relied upon in court.

(a) Daisy Tjuparntarri Ward

The injustice of Daisy Tjuparntarri Ward's case has been widely recognised. It 'highlights the incredible injustice that can be perpetrated by the common law on extinguishment'.[228] Justice Barker notes this injustice in the *Ward* judgment itself where he identifies that the Traditional Owners' application was essentially undermined by a single piece of historical tenure which, on all accounts, was never accessed or used.[229]

Daisy spoke in her interview about how disempowering and distressing the native title process was for her community and particularly the Elders. She spoke of how much they gave to the claim, believing that if they just demonstrated their connection to Country it would be returned to them, because that would so clearly be the just outcome.

The operation of the native title system makes no sense to Daisy and bears no resemblance to the reality of their ongoing connection to, ownership over, and responsibilities towards their Country. It has only served to provide a way to repeatedly disempower and dispossess her people. The sadness in her voice through her interview is palpable. As is her determination to get her land back.

Daisy described in detail the amount of effort to which she and other Elders went to show the courts their culture and ongoing connection to their land. They performed things that should not have been performed. They were proud to show these intimate, sacred parts of their culture because they thought it would make it indisputable that this was their land. The degree of sharing made the 2015 determination so much more painful for Daisy.

> … then the news came: thought it was good news. That lady came and a man came and they said, 'you can't get the land back because it's an oil exploration'. All the other places, they got their land back. But for us, they put that in for us and we don't even know what that means. People were walking on that land and that thing was mapped and we still don't understand. Sad. We were crying. Thinking we gave everything that no other places can. Anyway, we cried. Holding on for nothing. Holding the land for nothing, when our spiritual … is out there. Our families that died, buried, their bodies are out, but their spirit, we still hang onto it.

> When they're saying that 'it's not your land', I was thinking, like the oil exploration – why didn't they give that land back?

> **Because we gave so much, so much that no other place can get. It's only us bush people, my people, don't speak much English … didn't understand. Anyways they left us, the old people. They're going, one by one, without their native title …**

A change in the WA government after the Ward No. 3 determination in 2017 led to the Minister for Aboriginal Affairs and Minister for the Environment travelling to see Daisy and other Elders on Country. The purpose of this visit was to discuss negotiations for a joint management agreement of the (then) Gibson Desert Nature Reserve.

> [To try and help the Ministers understand, we did] storytelling, singing, brought them in and telling them all the stories about what happened. The history of the struggle, all the way, happy then sadness, crying. What is happening to us? Why are they doing this to us? Old people finish. Kept going … said 'we'll come back next year or two years' time'. That was a long wait. Long wait.

Daisy was part of the negotiating team for the joint management agreement. Daisy's interviewer said to her: 'this time, there was a negotiating team, not just lawyers doing it for you'. Daisy spoke to that point, about how they tried to exercise their agency in the process.

> You know, trying to get in there to straighten things out. To talk about why we are fighting. To say that we want that land back. Because we need to hunt on our own land, visit our Country, see our old people, get the stories, the Country where grandmother, grandfather, father walked.

> And I really, really talked so hard. It was written on piece of paper then taken back to the people that own the land. They own the land so it has to go back to them … We drew something to help … kept saying 'why you all holding that? It's supposed to be our land that's been passed down'. But it's the government's land. Just by a little penpoint, it's their land. They don't even know. They never lived out there with the flies, the mosquitos, everything. They don't know the plants and all that. They just claimed it and didn't want to give it back to us. It kept going. This Wangka was ongoing. Wangka wangka.

Daisy spoke of how it wasn't clear to her people what changed. To them, it was just at the whim of the government that they decided to finally give the land back.

> And then they said 'oh we're giving the land back'. But before that, we were planning things, what would make better for people and our children. Coming back home to the land. We talked about education and cultural education. And we talked about so many good things that they can do and fix this community up because it's nearly falling apart.

> Education hub. Because we wanted to try and find a way how we can educate our children in culture way. How our ancestors walked, hunt, how they survived. How they were rich in their own land, their own Country. That was our plan. Wangka.

> Seeing all that planning, the government came out and I showed them the building. It's only a small one, one little room, education hub, for ranger mob working, coming in, older people coming in and being a teacher for our children, secondary kids …

> When they flew in, we brought them in, showed them. Showed Ben Wyatt, and Steve Dawson. This is what our plan is.

Even after the 2020 ceremony for the signing of the Gibson Desert Nature Reserve Compensation and Lurrtjurrlulu Palakitjalu Settlement Agreement (CLPSA), Daisy did not feel that they had really been given their land back. She recognised that it was positive, but it was not justice.

> **But at same time I was thinking 'what does this mean?' Nyaapa … what does it mean? In my mind it's still government's. 'Hand in hand working together', it's still not our land. We're still struggling because it's not our land.**

On 11 March 2020, Daisy and other Traditional Owners from the Warnpurru AC had given evidence to the Senate Constitutional Affairs Committee asking that the Native Title Act be amended as proposed so that historical extinguishment of native title can be disregarded in a native title claim (section 47C).

When Daisy appeared before the Committee, she spoke of how her land – her home – was stolen from her people, with the stroke of a pen. She spoke of the Gibson Desert Nature Reserve's continuing impact on their lives as a form of dispossession; that still they do not have ownership and ultimate control over their Country. Rather, the state of Western Australia controls it.

In that Committee hearing, Mr Reger, a Central Desert Native Title Services lawyer acting for the Traditional Owners, summarised the very real impact of the nature reserve on their lives: 'the reserve denies and damages their responsibility to care for and protect the Tjukurrpa, which is the Dreaming for their Country. It denies and damages their right to make decisions for that country, to speak for it and to be consulted about it, and their right to use their country according to their traditional law and custom.'[230] Regarding the proposed amendments to disregard historical extinguishment, Mr Reger said:

> These amendments will have a real and direct impact on people's lives. The proposed amendments will go a long way in healing that hurt and shame and restoring a sense of pride for this group and allowing them to move forward towards a future where they can hold their heads up high and proud, along with other groups in the desert who have held their native title for decades.[231]

As detailed above in section 8.1, the native title determination on 15 June 2022 was the first case to use the new section 47C provisions.

(b) Thelma Parker

Thelma Parker identified the 'huge gap' between what is granted in a native title determination and the areas that they actually have traditional custodianship over and cultural connection to. Thelma spoke about this particularly in relation to the disconnect between those who have been through Law and can understand and share that knowledge, and non-Aboriginal people who are working in the system and cannot fully understand. Thelma's point, which was made by many other women and many before this Report, is that native title does not fully represent our connection to Country.

> … it's in that middle, that grey area, what I call 'the space between' from having native title rights, to what is the actual traditional space of that.

Thelma described how the barriers to gathering evidence from Law women played out in practice – that women's knowledge is ultimately written out:

> I remember distinctly one day we were taking the anthropologists out. My mother was there, my aunties were there, cause at that time my grandmother had passed on. It was a non-Indigenous man and I remember distinctly where we went for women's business, we couldn't take him down there. We said 'we can show you where the area was but we can't take you down and show you this area. Nor can we tell you how we done ceremonies.'

Even though there have been implications for the women in her family not being given the appropriate respect as Elders and knowledge-holders, Thelma specifically said she was glad that her mother and aunties did not take the anthropologist out onto the women's sites when they had the opportunity. She now knows that all the information provided in the records and affidavits have been made available for others to use as evidence for their own stories.

> People now pick that to pieces and they change those stories around to suit them and say 'this is what my grandmother has said to me', and in the meantime here is Granny Queen who had said this all the way through and is the only written documentation for that Country.

> So that's what I can't understand. People have gone through and done their own versions of this but they still can't speak for Country because they don't know that woman's business. So in one way that's been a blessing in disguise in that 'space between' that we didn't share.

If given her time again, Thelma would have disclosed even less information but she didn't know then how it would play out:

> I tell you what, if I would have known 10 years ago or 20 years ago what went on, I would have done affidavits differently and I would've made sure that my mother and my grandmother's information wouldn't have been out there for full public display.

Thelma specifically noted that the result of the development of the case law – which has provided clarity on exactly how much information is required for connection reports in a native title claim – has been the correlative development of a 'really white fella way of thinking' about connection to Country.

Thelma also spoke about the trauma that the native title system alone has inflicted upon her and her family through the way it has treated women's evidence, and through participation in such a culturally unsafe way.

(c) Coral King

Coral King feels that the native title process has undermined her group's culture and their rights and responsibilities to Country. She also feels that the process and systems have facilitated other native title groups to further dispossess her and her family of their Country.

Coral described her experience of the native title system as conflict-ridden and disempowering: from mediation, to the evidence processes, to judges' decisions regarding her great-grandmother's and grandmother's identities and Country.

> I have had to attend mediation where I have been verbally abused and felt physically threatened; I have had to put up with misinformation being spread by other Traditional Owners about my family; I have been forced to hand over my personal papers to the experts who work for people taking over my Country; the native title processes have made the conflict between my group and groups taking over our Country much worse …
>
> The conflicts have not been resolved at all. I have had two mediations – they were both complete failures. The evidence I gave and my relations gave just wasn't accepted by the other side, who did not have to show their evidence.
>
> My grandmother Toney has been removed from her Country by the Federal Court and put in northwest NSW – a place where she never was, and which is not our traditional Country and where I and other members of my group have no connection.

Coral explained that her father was clear that they had always known that her great-grandmother Clara, and her grandfather Frank, were Punthamara (another way of saying Boonthamurra). Frank Booth and his family also described themselves as Kungardutyi. However, it seems to Coral that on the basis of Tindale and his researchers' records, Clara was attributed two different identities – Yandruwandha and Yawarrawarrka – and in native title decisions, joined with the South Australian Yandruwandha/Yawarrawarrka group. Dr Powell and Coral explained that Coral's grandmother Toney, while being recognised by the Court as Kungardutyi, has been relocated from the Mount Howitt Cooper Creek Wilson River region in southwest Queensland to an area mostly in north-west NSW. They further told us that this finding has resulted in members of Coral's group being dismissed as respondents to the Boonthamurra claim and, later, in the rejection of Coral's application to be a respondent in the Wongkamurra proceedings. In her interview, Coral told us that her great-grandmother Clara has been included as one of the apical ancestors for the Yandruwandha/Yawarrawarrka claim, notwithstanding that those of her descendants, including Coral, who do not identify as Yandruwandha or Yawarrawarrka, are excluded from participation in those native title proceedings.

Coral said she felt that a lack of control for people in her position is built into the system. Coral told us her family had no control over which professionals collected or presented their evidence, or what evidence they included or didn't include in their connection reports. Coral felt that the first researcher who interviewed them for the original Boonthamurra connection report wasn't interested in anything they said and had predetermined where they fit.

> I don't know why he even bothered with this because it seems like he was going to put us where he wanted to put us regardless of whatever we told him …

> That was the biggest hurdle for us. False people coming in and giving false evidence and what not. They didn't take any notice of our evidence which was handed down from word of mouth. They're talking crap, that's how we felt, our ancestors were just not believed.

Coral felt that the system ensured she and her family had no chance:

> I feel that we have no chance of getting our native title rights recognised. This is because there has been misinformation put forward to the Court and accepted as evidence and the information that I, myself, and others, have put forward has been rejected. The misinformation has come about by mistakes made in expert reports.

> We have had to fund our lawyer and barrister ourselves, and we had only the money we could collect from our pensions and redress monies, so we had no hope, and we had no funds to appeal any of the adverse judgements.

Coral had never seen the report that the first researcher for the Boonthamurra claim wrote, let alone checked for any inaccuracies regarding what information he took from her family. Coral's pro bono anthropologist, Dr Fiona Powell, commented that she had seen the report and 'was astonished to see that he'd written down in his report that Coral's grandmother came from New South Wales … and that he had misrepresented a 1919 record about Coral's great-grandmother Clara.'

The process has seen the NTRB represent other parties against Coral and her family and this has fuelled a huge sense of injustice and disbelief that the system could allow and even facilitate such unfairness, and to Coral's mind, be so easily misled.

To Coral, the native title process has facilitated certain groups and families to elevate themselves to positions of power and control at the expense of genuine Traditional Owners. When asked why people who know they are not Traditional Owners of her country are trying to claim it, Coral identified the gas and oil found on the country:

> [Others] are trying to claim our Country as well. It's just a big mess. I don't know why these people are claiming our Country – it's only because, from our point of view anyway, there's gas and oil. We said [Santos should just] pack up and leave and see how many takers they'll get then for the Country. Guarantee the only ones standing will be us. Because it's our sacred area. You know, our people walked there, are buried there …

Coral said that currently, several other groups are negotiating with the mining companies over her family's Country, using one apical ancestor of Coral's family, but refusing to accept Coral's family on the claim.

> … they claimed granny Clara, and just two of her children – our grandfather Frank and his sister Alice. They've got those three on their claim but they refused to recognise us, even though we're not from their tribe and we never wanted to be from their tribe, but they won't let our ancestors go. It's because it's convenient for them to have them there and that way they're claiming our country. They can more easily prove connection.

> When we had to register with the Native Title Tribunal, we had to prove a connection to the Country we claimed and put our apical ancestors on that. How these other people are getting away with that, I don't know. We had to provide all that [to have our claim registered in the NNTT] and we did.
>
> **Dr Powell:** I did a big report for that. When you were dismissed by Justice Jagot, they basically said 'you have no connections' and you tried to become a respondent then to Wongkumara. You had to provide all your evidence to Wongkumara. It had already been provided, they have all your evidence and they know everything about you.

Coral and Dr Powell said that despite having to provide all her evidence, Coral did not see the other claim group's evidence in return. Dr Powell noted that, as the anthropologist, she did get to see all their expert reports but too late to write a detailed response:

> **Dr Powell**: I made a bit of a response and [the lawyer] took you to the mediation … and a trial?
>
> **Coral**: a mediation to become a respondent, but it failed because of the first judgement made about my grandmother Toney.
>
> **Dr Powell**: but [the lawyer] did not rely at all on any expert for that. I was available, I didn't even know anything about it until Coral told me.
>
> **Coral**: and this is what happens when you got no money.

From Coral's perspective, being locked out of her Country is of huge consequence to her people and culture particularly because it restricts her ability to fully pass her knowledge of Country down to her grandchildren.

> The grandchildren, they're city people. We had to do some cultural heritage work and [one grandchild] she came with me. And now I can't even do that. This group are claiming a part of that area and that group are claiming the other part. So we are people without a place.

The cumulative impact of the various parts of the Native Title system discussed in Coral's interview is very painful for Coral and her family.

> **Dr Powell**: … and who is going to compensate for that? She's got no recognition of her native title rights and interests. Native title has completely removed [her] from Country. Not intended to; intended to give [her] rights in [her] country. But it has, and it does that for many people, but not for everyone.

(d) Leanne Edwards

Like many other women, Leanne Edwards described how upsetting she still found it to think about having to work within the native title system and justify connection to her Country on someone else's terms. This is despite having successfully achieved a native title determination.

The requirement to prove our connection to Country to non-Indigenous people, in the Western legal system, and to have that made virtually impossible by Western law, in combination with the colonial acts of dispossession, emphasised for Leanne that engaging in the native title system is not on our terms and can feel very disempowering.

> I could talk about that issue forever. Why we have to explain ourselves to non-Indigenous people that we belong and we've got connection.
>
> … You can play the game or you're not in the game, you know … you get nothing. It's not on our terms at all.
>
> These are very sore issues for me to talk about. I could talk about them forever but they're upsetting.

(e) Avelina Tarrago

At the time of her first engagement with the native title system, Avelina Tarrago was still at law school. She understood the system, was able to participate from the perspective of having sufficient education and knowledge, but she found the process disempowering. The reasons for this included the lack of control that First Nations groups have over the process generally, and specifically over their own information.

Avelina Tarrago spoke about how her native title group did not want to claim native title. Her family did not see benefits in having a determination and could see how it would involve conflict within community because of a divide between those who do not have traditional knowledge and those who do, like Avelina's family.

> At least for my family, we've always had a very good relationship with the land owners. So you know when my grandmother died in '88, Mum was able to take her ashes home and we did ceremony there. And when I was born, they took me out when I was about 18 months and did ceremony. Whenever we have needed to go back home, it's never been a problem.

> There's also other people who don't know who they are because they grew up white, according to my mother, and they were exempt under the Act. They were very fair. They didn't identify when they were growing up. They don't have traditional knowledge like our family does and they don't hold ceremony like we do.

> We never really filed anything because [we knew] it's going to be a nightmare … so what's the point.

However, Avelina's family were essentially 'forced' to engage in the system by applying to join as a respondent to the BWW claim because that claim included land they had always believed to be their Country.

> I got wind of a consent determination that was going to happen for a neighbouring tribe and when I looked at the boundaries, they were encroaching on our country. Actually, there were two tribes – Pitta Pitta land claim and Bularnu Waluwarra Wangkayujuru land claim. BWW was to the north of us and Pitta Pitta was to the east and they were coming up for determination soon and I wasn't going to stand for it encroaching over our area.

Subsequently, around eight or nine years after the withdrawal of that initial application to be a respondent (for reasons discussed in her summarised story in Chapter 8), Avelina's family were again 'forced' to file an application because one of the leaseholders on Country wanted freehold: '[w]e had no choice otherwise we would have lost it'.

In addition to being forced to participate in the native title process against her family's will, Avelina described how cultural information obtained from native title claimants as part of the process is essentially stolen under duress, and then not returned.

Avelina noted that we as First Nations people engaging in the native title system hand over our knowledge, our stories, but then have no opportunity to ensure that our stories have been received and recorded accurately, and used in evidence in an appropriate and accurate way.

Avelina's experience with anthropologists is that they 'just think they know better', and she has found the exploitation of traditional and family knowledge via anthropologists to be a particularly disempowering part of the native title process.

> [It's the] way that they handle the personal information. They get all the anthropological reports and they say, 'well this is the terms of reference and it belongs to us even though you're the client'.

> You can't [check that they haven't made a mistake]. I don't know what the ultimate submissions were from the anthropologist because they don't like to be questioned.

> It's really bad because they hold it over you and you can never get access to your information. I understand that those reports contain a lot of information from a lot of different people, but after these reports are commissioned, they never allow you to have a copy of your own portions of those reports. I understand while cases are on foot because it might be an issue as to credibility of witnesses to independently recall their evidence. I get that. But once a determination has taken place, that information, if it's been requested by the client, should be provided.

Avelina places the issue of stolen knowledge in the native title system in the broader context of stolen Aboriginal knowledge and intellectual property. Avelina has found that anthropologists often do not appropriately credit the Indigenous people upon whose knowledge they rely for their livelihood.

Avelina made the point that none of the Aboriginal people whose knowledge has been garnered for determinations, and who have given so much time and energy to providing that knowledge, have been paid for that work. She added that this was especially unfair given that such work was often undertaken not only, and sometimes not even, for the benefit of those people.

> I've worked with experts personally and professionally. There are very few of them that actually have genuine acknowledgements to the Aboriginal people who they garnered all the information off.

> And it's so funny, we talk about the fake art landscape but we never discuss about the stolen intellectual property and the fact that we are not paid for that.

> If I stole the Colonel's 11 herbs and spices, or whatever it is, I would have an injunction on me immediately. But when it comes to black knowledge it's sort of an open playing field where, 'let's go get PhDs, and let's go be world renowned as experts about other people who we don't belong to their culture or ethnic group.'

Avelina believes the anthropological reports should be held in a different way, by an independent body, for example.

> They hold these anthropological reports [which should], in my opinion, be in the custody of the Court. There should be some independent body that holds this information in a confidential and respectful manner and not the legal services that have commissioned the reports.

Avelina described how the lack of respect for, and valuing of, black knowledge can look in the legal system in her experience – it plays out in ways which require free labour of Indigenous people in fields where everyone else is getting paid handsomely.

> I challenge this even when I'm in legal meetings. There is a native title forum and one lawyer was complaining about the rate of having to pay for Aboriginal people to do cultural clearances. I said, 'isn't it more an issue that you didn't do your budget properly to account for what you had to pay the people who make or break your project?' They just don't think.

Avelina also discussed at length the role that two senior male anthropologists played in the outcome – which she considers unjust – of the native title claim over her Country by another group, in which her family tried to intervene. This is discussed further in section 10.6.

Avelina commented with some anger about the way that some non-Indigenous professionals 'have created a career off black knowledge'.

(f) Cassie Lang

Cassie Lang also had concerns about the process by which an NTRB commissions a connection report which results in the NTRB retaining the IP to very detailed personal disclosures without the full understanding of those people who are making the disclosures. Cassie acknowledges the need for this information to be provided to support the claim process, however, in her experience many people did not realise exactly how the information they provided would be used.

> Another tricky thing that rep bodies and service providers do when they do a connection report – they use one of the sections under the Act that says that they're going to undertake research to identify Aboriginal or Torres Strait Islanders that may hold native title to a particular area. They're doing it under their rep body function, so they forever own the IP in that report and it is never returned to the group.

This is becoming a prevalent issue in post determination space where many PBCs would like to access their connection report to help with Caring for Country Plans or protection of language programs. Cassie felt that no other area of law would allow an organisation to encourage people to share intimate personal stories, for which the organisation would then hold the IP, without requiring informed, written consent first. Cassie noted that this injustice exclusively affects First Nations people.

Moreover, Cassie has witnessed situations where the NTRBs use their funding and position of power to pressure group members into providing information under conditions they are not comfortable with.

> … you have groups saying 'Well no we don't agree to that, we want this' and they go (big threat): 'Well if you don't agree to this then we're not doing the research for you'.

Cassie feels the information should be held by the PBC after a determination is made:

> [The information] could be put on a server or portal that only the PBC can access. If they're worried about information getting out that the PBC gets access to, it can be managed – people could come in … you could set up a process of its management so you are not forever holding it.

> But at the moment, there are no constraints on the use of that information by the rep bodies because they've commissioned the research under that section of the Native Title Act.

(g) Maria Stewart

In the claim that Maria was involved in at the time of her interview, she was finding a similar problem to the other women in this section. Maria felt that others were using the information that she and her family had disclosed to construct their own more legitimate-sounding native title claims.

> We had to go to trial and give evidence. So it's still in with the court. We gave evidence last year … we're telling the truth and the other party is not. They've learned all from book. Learned it from the book and gone by the book because everything they was taught was straight from the book. Where we had to think about it and get it out of our brains, what we've learnt, when we were younger and stuff like that. It's let a lot of people down the way the native title [system] handled everything.

Maria told us that her Country has been the subject of a native title determination which excluded her family. She said that her family had been completely left out due to the original scope of anthropological work being inaccurate. Maria described the significant hurt that this has caused.

> You know it's damaging a lot of people's lives. We're not people with rock-hard hearts. We've got a heart that's soft and that can be hurt. We've got feelings and as Aboriginal people we've got feelings for our Country, to our families. But it's like all that's been sort of taken. Someone has taken your land. It's like just your heart being ripped out.

> I'd hate if my grandfather was still alive. He used to fight for Country. But it's heartbreaking. It's done a lot of damage to me and my family. I've got old aunties that are getting old now and they still talk about it. They still hurt by it. Why is the system allowing this and putting people through this? It's wrong.

(h) Donna Wright

Donna Wright described the way that the land justice and cultural heritage protection systems are corporate systems that are disempowering and not about promoting self-determination. Donna feels it is 'offensive to be asked to 'prove' our connection to our own Country to the colonisers':

> Our people bore the brunt of Colonisation in Victoria: the devastation from our land being stolen, our people massacred, the first massacre in Victoria was on Gunditjmara Country. Native title laws and corporate systems and processes continue to harm and hurt our people and community, having to prove your identity and connection to the colonisers and academics for formal recognition and to establish a RAP. We have been here since time immemorial, our land has been stolen, and so has our children's birthrights. We are still recovering from colonisation.

Donna talked about how the lack of a right to veto any mining or development on Country means they are ultimately powerless under the existing system. She emphasised that native title and cultural heritage regimes are really designed to benefit the wider community, not First Nations peoples:

> … we don't have any right to veto any mining or that on our Country, that's the biggest issue.

> Even our decision-making, others are telling us how to do it There is a clear How do we, as family groups, navigate that with Elders and our young people?

Donna described the overwhelming difficulty faced by the PBC members in being able to genuinely have a say in decisions of the PBC – she has found that important changes to the legislation around decision-making have not been communicated as well as they should be to members who need information and time to digest it.

> We are at the mercy of the Government and the native title system …

> There's no proper free prior informed consent process. It's a complex process and really sad. When we are making decisions, a paper is put forward, a paper that says this will be the decision-making process on the day when we'll move a motion … we're not even across the recent changes of the Native Title Act and the certification of decisions yet. I'm trying to find out when we're going to have that discussion with the community and I've raised it at the board's level.

> What's the board, what's it look like there? So, there's no transparency, and communities are at risk if they're not structured to protect their interests, whether it's their business, whether it's around the native title decisions.

> We need to restructure the governance of our PBC, be more transparent and accountable to our people, allow time to unpack and talk about the risks and what is at stake when we make native title decisions.

Like the other women in this section, Donna has found 'the situation regarding the ICIP (Indigenous Cultural and Intellectual Property) associated with connection reports' to be unacceptable.

> We've got academics, anthropologists talking about our genaeologies, written studies after the massacres and dispossession of our people … these people are telling our Elders, an Aunty, 'you don't actually come from here'. How dare you?

> We pulled out [of the NTRB] because they've got that connection report and we said, 'you don't own that. You need to give that back to us.' They came back and said it was part of a court transcript and tried to withhold that information. But no one gave permission – that was given as our testimony for the native title rights.

> **This is not what Eddie Mabo set out to do. These government structures that monitor corporations and have procedures and checks in place to get the decision-making, but it's the poor community doesn't have a proper say.**

> **I'm tired of being a slave to the native title system.**

Donna described how some people in positions of power in the PBC were more driven to ensure that tourism developments were able to go ahead in the short term, than to ensure the whole community was able to participate in decision-making according to traditional processes, and in protecting Country and culture for future generations.

> … navigating complex native title legal processes, we are at the mercy of the native title system and corporate structures as a Gunditjmara Woman who really doesn't have a say over her own Country. The corporation must have a cultural governance and decision-making structure … that upholds our cultural lore, and our cultural obligations and responsibilities as Gunditjmara people.

> PBCs must enable equity in decision-making. I have raised concerns on behalf of my mother but we have been not listened to and at times ignored.

Donna also talked about how a lack of capacity impacts the ability to ultilise the checks built into the cultural heritage system. Donna noted that there simply are not the supports provided for Gunditjmara families and clan groups to administer the requirements to ensure the right people are speaking for country.

> With Cultural Heritage Management Plans, there's a section on the cultural values, this might be [someone's] Country, and we know that family, and that family's home group, we need to let them know that this is going on.' But we don't have that next process in place to do that. So we need to keep the whole community informed about what's happening, but we don't have the systems and we're not enabling that.

Donna spoke about how the free labour required in native title means that they are constantly under pressure and unable to find capacity to properly participate in and contest the bigger cultural governance issues at stake.

> We've got 30 days to respond to a CHMP [Cultural Heritage Management Plan] to organise Walkovers, to get the Cultural Heritage Management Plan to the network and then have a say and have input into it. We're constantly under pressure.

Donna was concerned about the legacy they are leaving the younger generations moving into the leadership spaces:

> [T]his is all our kids are gonna inherit and they just really have to be across all the risks. They need to be able to assert their self-determination and they should be talking about their aspirations, not dragged into the [corporate governance] stuff that we're trying to work out.

> It has been exhausting if communities do not have those supports in place, we're at the mercy of native title systems, corporate structures, the registrar has the power over us. We need to empower our young people and their right to achieve their aspirations.

(i) Sarah Addo

Sarah Addo's experience with the native title system had been disillusioning and highly stressful. Sarah told us that the native title system had effectively removed her group's traditional ownership and shared it with a group which everyone agreed had arrived on their Country later. In particular, like so many of the other woman already quoted, Sarah discussed her experience of having other groups use her people's knowledge, provided as evidence already, to try and bolster their own claim. Sarah was frustrated that the system had facilitated this 'theft' of her people's knowledge and allowed it to be used to Sarah's people's disadvantage.

> … that last Court – I felt really stressed and I even said to the Judge, 'it's a whole history that yous are failing to capture here … who's got the evidence of that from their mouths, what's coming out of our mouth?' And see the thing is, when we spoke about Alligator Creek, they started to speak about Alligator Creek. And when we use traditional languages, then they go and use it. They're just putting lies upon lies upon lies.

> That's why we put an interlocutory application in to say, 'your Honour this is our language word list', we gave them the Kunggandji register from our 2012 determination that recorded all the languages as being Kunggandji. We said 'look these are the languages here that they're using. These are the stories that they're using. Now Justice Dowsett, you already gave a determination acknowledging that this is Kunggandji languages and names but they still are letting them use those languages.'

(j) Kia Dowell

Kia Dowell's story was predominantly one of progress towards empowerment, self-determination and economic independence. However, she also told of how hard it was to overcome attempts by non-Indigenous professionals in the cultural and community governance space to maintain control.

As discussed in Kia's story in section 8.2, Kia's primary focus has been on empowering the Traditional Owner Directors on the board while being honest about the challenges the community would face. But it wasn't an easy process. Kia told us she experienced first-hand being undermined by non-Indigenous Independent Directors early in her tenure as Chair.

Without disclosing details, the extent of these behaviours resulted in an incredibly difficult decision for Kia to seek personal legal advice which resolved the issue.

Kia emphasised the need for Independent Directors, service providers and non-Aboriginal staff to understand culture before they can assess the adequacy of governance features in a community-controlled organisation, whether a Trust, PBC or Community Council. Kia noted that there are 'many examples about the tension and inadequacies of Western perceptions of 'conflicts of interest'' which often result in a denial of the right to culture under the guise of 'good governance'. Or, Kia noted, it can be 'used to try and suppress culturally competent and empowering initiatives.'

(k) Monica Morgan

Some of the details Monica shared in her interview about the Yorta Yorta case in the early days of native title highlight some of the ways in which the process needs to change in order to be empowering.

At the time of *Mabo (No. 2)* in 1992, the Yorta Yorta were also mobilised and taking forward their own similar land claim. They were instructed to wait until negotiations for the Native Title Act had been finalised and take their claim through the courts under the new legislation.

However, Monica told us how, at that time, they were being pressured to accept funding via the intermediary – the representative body. Monica lobbied intensely to have the money come directly to them and to pay their lawyers Arnold Bloch Leibler to represent the Yorta Yorta in their native title claim. Even at that early stage of the native title process, Monica was aware of the need for Yorta Yorta to retain direct control of the claim and minimise the potential for intermediaries to whittle away at that control.

With the Yorta Yorta retaining control of funding and directly choosing and instructing their lawyers, one feature of the case was that everyone who wanted to give evidence was able to give evidence. Monica emphasised that it was important that the process allowed everyone to be heard.

10.2 Women's knowledge not heard or valued

Several of the women interviewed for this Report raised the issue of women's knowledge being effectively wiped out by the many layers of colonial patriarchy that have built up in the development of the native title system and beyond. It has built up over the course of multiple generations within the professions and epistemologies that the native title system relies on for historical documentary evidence and contemporary evidence processes. This was discussed above in section 9.2 and section one above also included reference to several relevant experiences. This section goes into more detail on the gendered nature of how voices (or evidence) is valued in the native title system.

Some of the women interviewed said they were unsure how it came about in their cases that men were responsible for speaking about Country more than women during the native title claims process; that there were senior women with important cultural knowledge around at the time; and that it was just left to the men to speak about it for the native title process.

Of course, if male anthropologists and lawyers already assumed men were the most important knowledge-holders regarding Country, and approached their research and evidence that way, it is unsurprising that First Nations women felt that, in order to stand the best chance of success in the imposed legal system, they should adhere to those Western traditions and protocols and allow their men to do the talking.

(a) Thelma Parker

Wangkayujuru Waluwarra woman, Thelma Parker, is the great granddaughter of Queen Ida Toby of the Georgina River Peoples. She was a key member of the native title group who achieved a successful native title determination in 2014. However, Thelma described how the processes involved in the collection and presentation of evidence of connection to Country through the native title system prevented the full participation of senior Law women.

Thelma noted that the research on 'Granny Queen' was most likely to have been done by non-Indigenous men; that even a very fondly-remembered linguist who worked with Granny Queen for many years, Gavan Breen, is also male; and that this is a trend across the native title area. Thelma questioned how the knowledge recorded by those non-Indigenous men can possibly comprehend and incorporate a matriarchal society.

> But there seems to be a pattern and a trend occurring here, right across when you have Aboriginal Law women that are matriarchal to that Country. And how can we have these males making definitions for our Country, for our peoples, knowing full fact that they don't understand what is required in terms of relatedness and connectedness to our Country, if they are males?

Thelma said that in her experience, almost all lawyers, anthropologists and archaeologists involved in the native title sector were male and that her grandmother and mother were not able to take them out on Country to give the full picture.

> ... my grandmother, my mother, they weren't able to take these white males on Country and to express what Country means to them as a First Nations person speaking for Country and with Country, and they never ever got that. So, in terms of a native title right, it hasn't provided the full picture or the full scope from a matriarchal Law woman.

Additionally, Thelma described how the staff at the NTRB are also mostly male and do not understand, respect or accept that it is these Law women's stories that need to be recorded; that these women 'are the Elders you need.'

> They always seem to look 'well who else is out there' in terms of Elders, and I said, 'we are the Elders, these are the stories to be taken down'.

Thelma described the result, in practice, as a cumulative and intersectional impact on First Nations women's knowledge being properly included and reflected in native title rights.

> This is a really big, open wound for us. This wound will never go away because at the end of the day the processes that we went through from the beginning of it to the end of it – we had it with Susan Phillips [barrister] because she understood Mum. She went out on Country and listened – but in terms of negotiations and conversations and learning, it becomes from a really white perspective. And therefore when it comes to a context of putting it through from a male perspective, it just doesn't flow on.

Thelma explained that even when it was a non-Indigenous woman who understood, and who had built the relationships with her mother, and whom her mother trusted, it is still not going to be explained in exactly the right way; it has to be explained in a way that non-Aboriginal people will understand.

> If we were to talk in language and if I was talking with my mother and my grandmother, the language would be completely different. The meaning, but not only that, the information would flow more in a way that it is understood for Country. Because we were brought up that we don't own Country but Country owns us, and we are in this space to provide a safe space for Country. And [to provide a safe space for] the living systems so that we're able to still have meaning for our Dreamings and our stories to continue from our ancestors. And it's really difficult because our ancestors have given us a matriarchal [perspective], but we can't put that on because it's this Western structure that is keeping that at bay.

Thelma described how the colonial frameworks operating in native title – the historians, anthropologists, archaeologists, lawyers and administrators – have resulted in even Aboriginal men from her own group misunderstanding the cultural processes that relate to women's sites.

> One of them was with my uncle, and he says, 'well, tell me where's the women's business.' And I said, 'well who was Granny Queen? Did you go to those Songlines, were you a part of those Dreaming stories? What was her language name? Do you know where the women's site in terms of the birthing rights?' [He said] 'No I don't.' The lawyers then, because they're all male, go to him [to get information] thinking that he's the Elder male here. But he doesn't know that information, and then that splits the community and splits our family.

Thelma discussed the fact that in translating the cultural knowledge to the requirements for connection in the native title system, there is a balance that they have to strike – to satisfy the connection requirements, but not give more information than is needed, or information that may not be shared. The result is that knowledge of men has been elevated by the native title system beyond what was culturally appropriate, because it was culturally acceptable to disclose it at each step of the way.

In practice, Thema told us that this has meant that at least one women's birthing site has not been identified within the native title processes, and women in her family have not been viewed as knowledge-holders who need to be consulted in negotiations post-determination. The flow-on effect has been the destruction of the birthing site and a loss of access to country for Thelma to practice and pass on culture.

(b) Shawnee Gorringe

Shawnee Gorringe noticed that a lot of the information collated in the long (approximately 15 years) preparation for their native title claim was from the 'male lens', and/or through non-Indigenous people's perspectives.

Shawnee spoke about how Alice Duncan-Kemp, the pastoralist's daughter, researched their ancestors and spent significant time with their family in the mid-1900s. On the one hand, Shawnee said she and her family were grateful for the recorded information as it assisted them in their claim. However, she also noted that it was incomplete and somewhat inaccurate because it was from the perspective of a non-Indigenous woman's interpretation of Mithaka culture, and it then was again interpreted and translated to the reader through the non-Indigenous male lens of the author Alan Pike.

Alan Pike authored a book specifically on Mithaka women's business, using Alice Duncan-Kemp's research. Inevitably, Shawnee noted that there is information on women's business that is missing from the book because 'it's the lens or that traditional knowledge that he probably missed out on or misinterpreted because it's coming from somebody else,' and that person themselves (Alice Duncan-Kemp) 'wasn't living that life … so there's always that disconnect.'

(c) Bunuba

The Bunuba women interviewed spoke about the role that women played in their native title claim and were now playing in the post-determination period.

Patsy Bedford described how the men were the most visibly active during the native title claims process. The role of the women was to listen and take on board all the information to then pass it on to future generations. The women have been doing this from that time onwards.

Patsy considered why the men were more actively involved in the claims process but wasn't really sure.

> We didn't have many old women there. We had mum there, we had Lay Lay there, she had a lot to say, which was good. But you always had an Elder man there with them. I don't know why. I can't understand that part of it. I suppose because they had more knowledge of the Country than we did at that time.

> Mum Amo was there with them. Mum Amo had the role of passing on the language. She was the language teacher and then you have the jalebi of the word. They had portfolios. Each Bunuba people had a portfolio. They were a government. We were a government in our own right.

Patsy later expressed sadness that language had not been really incorporated into connection to Country in the way language and Country are intertwined.

However, Bunuba women certainly had a central role in the post-determination period. That role was in bringing people together and it has become a role in breaking down the boundaries that the men had to establish as part of the native title process. In their interviews, the other Bunuba

women considered that perhaps this Bunuba way of seeing everyone as connected had to be sidelined by Bunuba men to more effectively pursue the native title claim under Western law.

> The men have done their job. They're really sad they had to really define boundaries and everything to everybody in the group, whoever, but as women we don't look at it that way. We look at our culture. We don't care where their boundary is. It's all about Bunuba. We have language running. Every Bunuba … we're just not going to pick one … So that's where women come in now …

> Now the women, this is where we come. The women are the driving force of putting that back together. We're bringing our connections back. We're bringing the trust in the language back which is the most important thing. The core of who we are. We understand better because when you talk language there's no definition. If I'm talking about Country, I can't find the English word to explain what I'm saying. I would rather explain it in my language to make it more understandable. It's not for the Western world, it's for the future generation that's coming up of Bunuba kids.

In the contemporary scene, this has manifested in the way the women have designed and implemented the Bunuba Cultural Mapping Camps and the way the women 'are the drivers for the language centre'. As Patsy described, central to the approach to that work is that 'us women don't have boundaries in who we teach, what we teach, because that ties in with the land that we've got'.

Reclaiming anthropological knowledge through the Bunuba Cultural Mapping Camps and redefining the agenda of governance structures has given the Bunuba a sense of control. This control that the Bunuba now have more generally has had an empowering effect. Patsy, Millie and Kaylene all said in their interviews that they felt the impact of the Cultural Mapping Camps and prioritisation of women's knowledge and women's ways of healing has been personally empowering and also healing for the community generally.

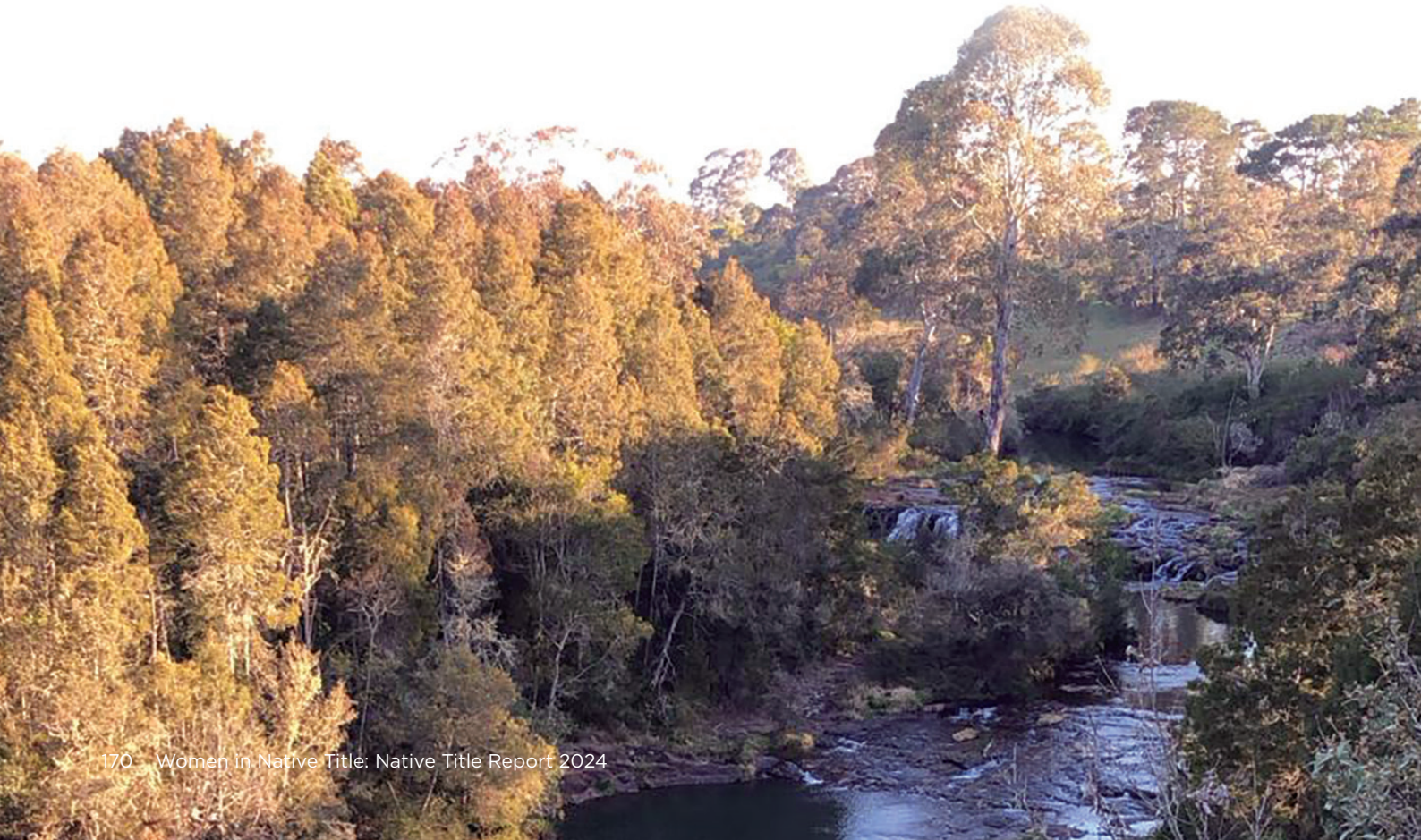
10.3 Inability to fully participate

One very common message we heard from the women who contributed to this Report was how hard it is for Traditional Owners and other native title claimants and holders to fully participate in the native title system – during claims processes, and in the post-determination period.

The barriers to fully participating come in many forms and are not discrete but intersectional. Some of the relevant barriers include:

- the complexity of the system, including its interactions with other legislative regimes (which is also discussed in section 10.4)
- the lack of accessible information on the system, processes, connections to other processes and potential implications, etc.
- the fact that native title law has been constantly evolving for its relatively short lifetime and it was arguably difficult to predict in advance where it would go
- groups' lack of control over which professionals advise and represent them
- the lack of understanding regarding what can be expected of professionals in the native title system and/or confidence to push for that
- conflicts of interest in NTRBs and associated funding arrangements
- colonial and patriarchal foundations of anthropology
- exclusionary court systems and processes.

Barriers to full participation in native title processes and decision-making identified by the women who contributed to this Report included concerns related to the governance of PBCs. In addition (and often related) to a lack of funding for the full range of functions which PBCs now take on, these concerns included a lack of accountability to community, and a lack of member understanding of PBC roles, rights and responsibilities. This issue applies to many of the themes in this chapter but I have included a summary of the important 2021 report on PBCs (Text Box 10.1).



Text Box 10.1: Report on the 2019 Survey of PBCs (2021)[232]

In January 2021, AIATSIS, NNTC and CSIRO published the results of their 2019 survey of 58 PBCs (of a total of 197 PBCs across Australia). That survey was to collect data on PBCs' activities, challenges and successes, to inform policy and program development.

Some of the report's key findings from the survey data are below.

- PBC directors are more likely to be male (58%) than female (42%) and older than the wider First Nations population.
- Almost half (47%) own or control a separate entity such as those managing land and rangers.
- The three most popular responses chosen as purposes of a PBC were:
  - Fulfil statutory responsibilities under the Native Title Act (83%)
  - Look after and manage country (81%)
  - Strengthen culture (62%).
- The most common chosen kinds of work done by PBCs were:
  - Cultural services (76%)
  - Environmental services (64%)
  - Social services (26%).

31% of PBCs indicated that they are providing services under the Native Title Act without charging for them.

60% or more of PBCs reported having access to five categories of skills: office administration, accounting/ bookkeeping, dealing with government, completing funding and grant applications, and corporate governance. The lowest levels of access (less than 40%) were chosen by PBCs for two crucial skill categories: facilities maintenance and information and communications technology.

In relation to 'future aspirations', the most frequently selected categories were:

- cultural services (including cultural heritage, cultural programs and art production) (84%) and
- environmental services (land and sea management, carbon and biodiversity) (78%).

However, reflecting the diversity of PBC aspirations, all seven categories were chosen by at least 30% of PBCs. 71% of PBCs have future planning or visioning documents. 54% of PBCs are undertaking governance training. Other forms of succession planning, such as youth leadership training and mentoring, are less commonly reported.

Regarding support needs, the most common responses were consistent with the responses regarding key challenges – 83% chose more funding and 62% chose training in specific skills. Strategic and business planning (57%) was a further priority for future support.

The two highest priority PBC information needs were for Indigenous knowledge (74%) and on-country business and enterprise options (71%). However, nine of eleven categories were nominated by at least 40% of respondents, highlighting the breadth and significance of information needs.

Figure 2.1 illustrates the main challenges identified by PBCs in achieving their goals. The survey found that the main two most urgent issues were the absence of or not enough funds (67%) and a lack of skills, expertise, and knowledge (52%). All other types of challenges were chosen by less than 35% of respondents, but more than 10% of PBCs. This indicated that additional challenges are context-specific and diverse.

Figure 2.1: Key challenges faced by PBCs in achieving their goals.

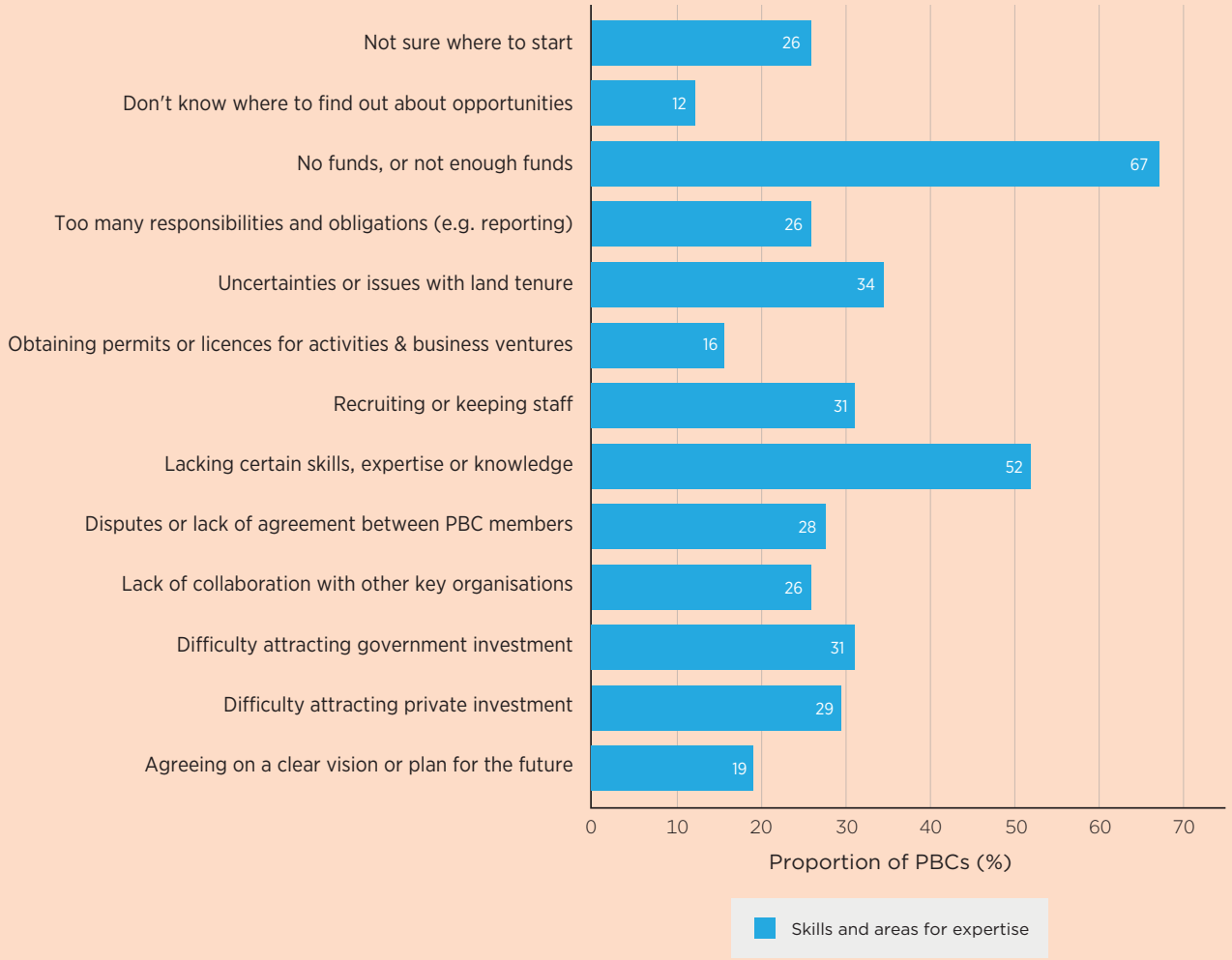


Figure 2.2 describes the forms of support that PBCs identified as most needed to overcome the above challenges. The overwhelming response from the survey respondents was that they need more funding (83%). Training in specific skills (62%) was the second most needed form of support according to the survey, closely followed by help with strategic and business planning (57%). These responses align with those identified throughout the stories in this Report, particularly the need for more funding.

Figure 2.2: Support that would help PBCs to overcome the challenges identified.

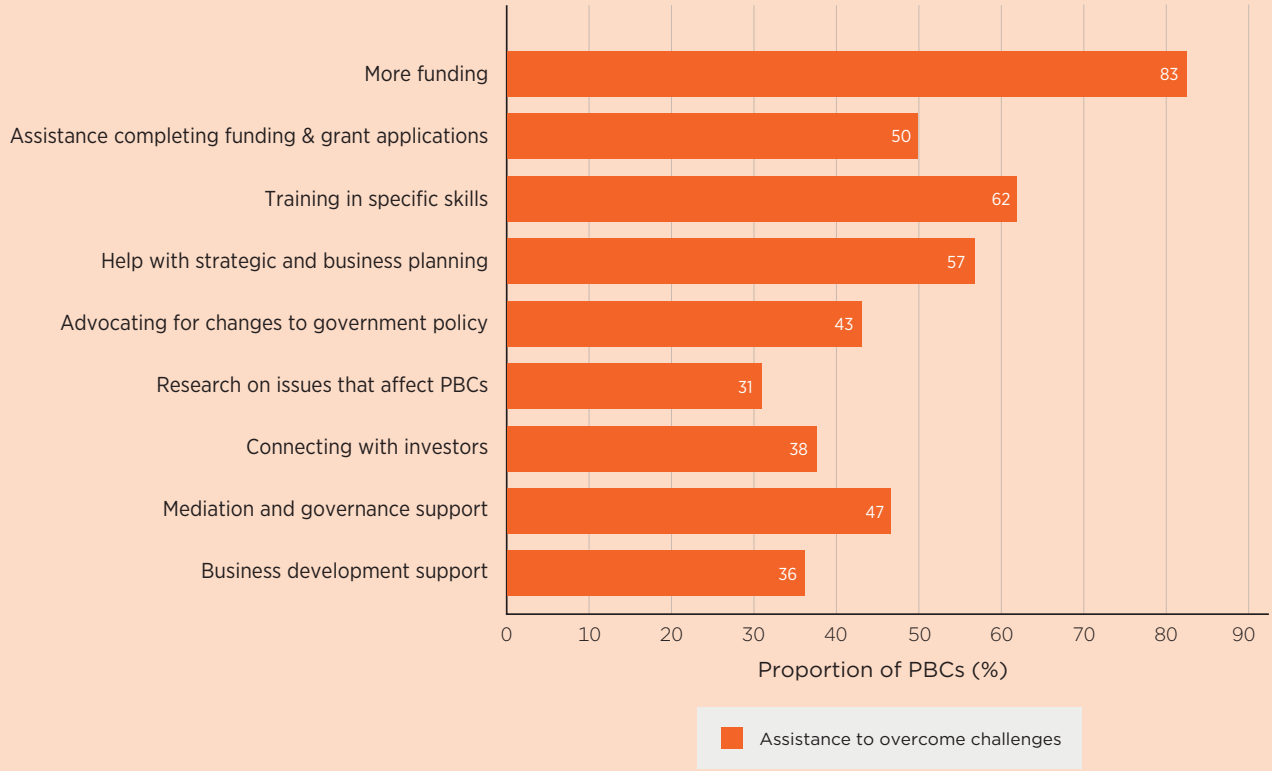
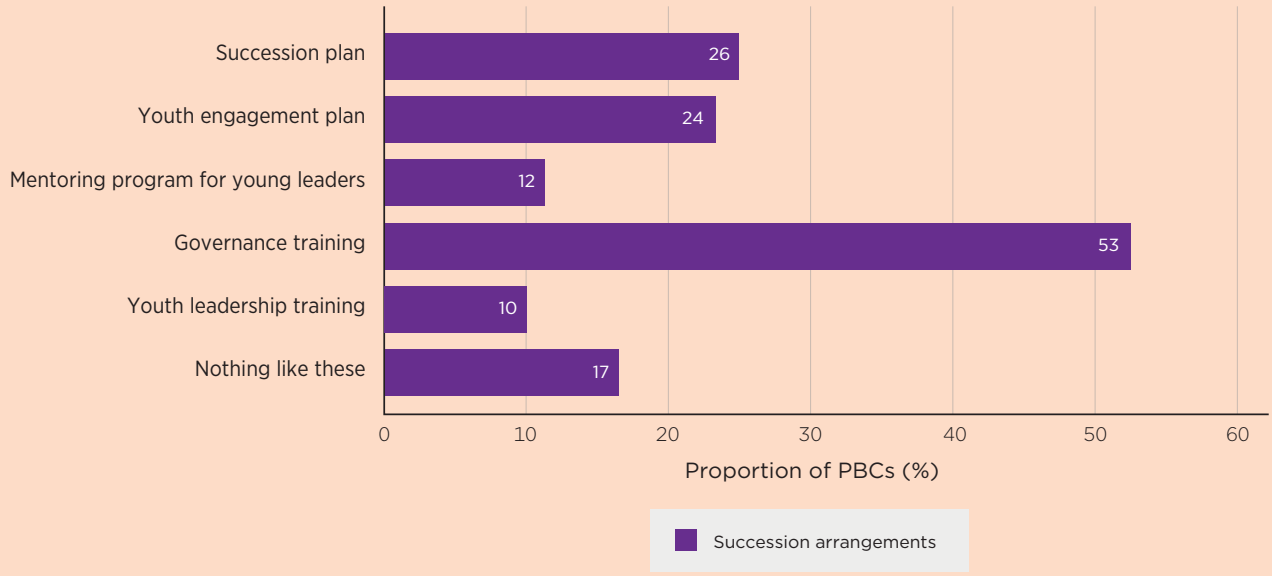


Figure 2.3 illustrates PBCs succession arrangements. The largest response was governance training (53%) and later followed by a succession plan (26%). The minimal level of response for mentoring program for young leaders (12%) and youth leadership training (10%) is reflective of the age issues in PBCs. Age was identified in many of the women's stories in this Report as a means of exclusion.

Figure 2.3: PBCs succession arrangements



These responses describe a phenomenon wherein community members on opposite ends of the age spectrum – young people and Elders – are not adequately represented by the PBCs and absent from PBC boards. This is further felt by women and girls at the intersections of age and gender issues. This is explained further in the survey report discussion:

The data for the age profile of directors highlights that age seniority is a crucial factor and that the proportion of young people has not shifted greatly over time. PBC boards are both more male and substantially older in composition than the overall Indigenous population. Yet the cultural authority that accrues with increasing age does not result in the oldest members of the population sitting on PBC boards. It may be that the demands of the positions mean those over 65 are not heavily represented in the data.

(a) Cassie Lang

As noted in the summary of her story in section 8.13, Bundjalung solicitor Cassie Lang has seen first-hand how confusing and disempowering native title can be for individuals out in community. When people found out she was a lawyer on a trip to a small regional area, so many wanted to talk to her about how 'they don't understand what the NTRB does, how it makes decisions.'

> They wanted me to come back 'cause they wanted to take me on this road trip so I could go and talk to all of these different communities … even at our accommodation people were ringing trying to book times to come and sit with me just so they could be heard.

Cassie got the impression that the individuals affected seemed to know next to nothing about the structures, and their rights as PBC members.

> I was trying to ask questions so I could understand … I spoke to probably five or six different groups, not even next to each other, all within and around the area and they all basically said the same thing – that they did not feel seen or heard from the NTRB …

> It would be really interesting to understand that whole framework because none of the groups seemed to remember or understand themselves. What is the relationship of agency, or lawyer, or client? They get different people all the time so no one seems to spend the time building relationships, building their trust so they can share their information. It was breaking my heart, this sense of such disempowerment.

Cassie discussed the issue of decision-making processes within the native title system in other contexts too. Her experience led her to the conclusion that native title legislation does not accommodate traditional law in a way which adequately protects it. To Cassie, it seemed like the legislation did not adequately understand the social and cultural contexts in which it would operate, particularly in the post-determination period.

> I think that the legislation made so many assumptions of what they thought was going to happen and how the determinations were going to be rolled out.

Cassie has done a lot of work mapping traditional landholdings so that authorisation processes are clear, easy to follow, and well-understood by everyone.

> In every part [of the area], there is a person who is responsible for every part of the land. So there are individual people who, if you need to do anything to do with land, under their law and custom, you have to go and speak to that person. I don't even need to ask if I need a majority, it's just accepted. It's known.
>
> We are actually in the process of mapping those traditional landholding estates, so then the PBC will get the area, look at their map, click on a link, and it will tell them: this is the person you need to talk to. But if we do a community info session saying 'this is what the project's about; one of the things we need to do is work out who we're consulting with', they'll say, 'oh that's such and such's land'.
>
> There might be some issues where we have an infrastructure footprint that is over multiple land-owners so then you've got to have a conversation and that becomes a little bit more difficult 'cause you've got to get, say, all three to agree.

As mentioned in Chapter 8, Cassie has witnessed the long-term consequences of decisions being made without consulting the appropriate people. Cassie specifically talked about the situation where government agencies have gone into communities without understanding the significance of the responsibilities for different areas of Country and, for example, built social housing on someone's land without any consultation with the Traditional Owners.

> … social housing has been built on someone else's land and there's been no consultation with the Traditional Owners … they just put a completely different family from a completely different tribe there. That family grows up thinking that's their land 'cause they've been there for two generations. And then we're having a conversation about knocking the house down and putting a new one there so we're talking to who the community has identified as the right Traditional Owner and you've got people saying 'but hang on, my family's lived there for 40 years'. We're like, 'but that doesn't make you the TO'.

Cassie also described a different angle to the same failure to consult with the community properly about the implementation of a service or policy:

> We now have this situation [in the area] where councils just allocated land and said 'you can build houses here', but there is actually nobody on the social housing list who is affiliated or culturally associated with that land, so those houses are standing empty because there's no one who can go and live in them.

On this particular issue, Cassie found the councils to be unhelpful when they were trying to resolve the issue by offering to review the social housing list to ensure houses were built on land owned by people who could actually use them. Cassie acknowledged obvious issues of privacy which needed addressing, but emphasised that there needed to be consideration given to who needed housing and how to ensure they were able to access the housing built:

> I said to them 'if you want this to be a harmonious thing you need to be a little bit more transparent and work collaboratively with the PBC.'

Based on conversations she was having with people in communities in different states and territories, Cassie felt that there appear to be similarities with regards to absent or inadequate consultation regarding use of land in several jurisdictions. Cassie added that, in her experience, holding people accountable for these failures in consultation and appropriate decision-making processes regarding traditional Country (native title or not) was tricky.

> The hardest part is trying to get everybody in the same room so we can all hear the same message 'cause they are very good at doing the – 'oh but this is what the Department says, this is the department's role'. Then the Department hit me with 'that's actually council's role'. You need to get them all in the one room, but it's best to get them out in community so they gotta have to face the music to the community. They've got to answer the questions in front of everybody.

Cassie described the need for better guidelines around genuine, informed consent in the native title system. From her experience, some professionals have failed to communicate effectively with native title holders.

> **I think when you're supposed to be providing your consent and authorising something, that's supposed to be on the basis you understand. But so often there is no focus, at a practical level, on ensuring the affected Traditional Owners and native title holders understand what they're agreeing to.**

Cassie also noted that some professionals can interfere with community structures and cohesion. She referred to the way that some technical experts and consultants often speak to the groups in complex, academic [English] language which creates more barriers to participation. Once people don't understand and feel inferior they disengage. Cassie stressed the importance when communicating of 'taking the time to take everyone on a journey so that everyone ends up at the destination together.'

Cassie described how she takes her time building relationships to ensure genuine consent. She is particularly conscious of ensuring everyone understands, can ask questions, and has access to all the information they need to genuinely instruct her as their lawyer. Cassie listed some of the things she is careful to remember in ensuring she makes all the relevant information accessible. Some of those things include:

- using translators
- taking time building relationships with people in the community who can guide her
- making the most of individuals within the community who are particularly skilled at 'walking in both worlds'
- using stories and analogies to create clear pictures for people who will otherwise not understand the implications of the technical and legal language and concepts
- building in plenty of time for her clients to sit with the information and process it
- being creative with how you present information, using visuals because the cultures are often visual cultures, to ensure it is understood.

Cassie explicitly said that she took responsibility for ensuring that her clients fully understood what they were being asked to consider and authorise and emphasised many times during her interview how important that part of her professional role was.

> **I think maybe I'm a bit naïve; I think when you're supposed to be providing your consent and authorising something – that's supposed to be on the basis you understand.**

(b) Leah

Leah, felt that there needs to be a way to ensure that the native title process and structure enables rising young leaders, women, and families in culturally safe ways to exercise their collective power. Leah has found that this ultimately requires agreed principles for conversations, that everyone be listened to and have equivalent opportunities to take up leadership positions. Leah believes that leadership positions and the processes of election and appointment need to be transparent and should not be open to people with significant criminal histories, for example histories of violence against women, children and other men.

> So I get really quite frustrated when I see the misuse of power in our communities, particularly our men, and some women. It's disheartening and I get frustrated when I see people that are put on national boards that don't necessarily have the skills to be on those boards and I see men being put on those boards that have committed domestic violence against our women.

Specifically, we need to find a way to enforce what community wants and decides, for example, who can be on a board. But what Leah sees is the same powerful men refusing to be accountable and at this point no one seems able to do anything about it.

> For probably the last couple of years – and I know COVID has had an impact – communities have requested that all members of the PBC Board have their national working with children checks to provide peace of mind and to keep our children safe. But at our last meeting there were several men that still hadn't done that yet and there was a push against having it done (unfortunately supported by a few women), which communities were in uproar about. And then one member, he resigned from that PBC as a board member (due to conflicts of interest), and then next thing we know he's a Director [of another native title organisation] that represents communities. That member, on the one hand he's highly admired by a lot of people who don't know his past and what he's done. And on the other hand, community knows that he's done a lot of damage.

At times, Leah said she feels angry that abusive men continue to obtain positions of power all across society, and particularly noted the effect this has on Aboriginal and Torres Strait Islander communities when those men are in leadership positions.

> As black women, we see it all the time. We see the patriarchy – men get into positions of power and they've not done the work on themselves …

Leah expressed that native title has 'provided an avenue for the patriarchy to demonstrate its power, by stopping young educated men, women, families, and potential leaders from fully participating. She also considers that the situation in our communities reflect, nationally, regionally and locally, and more generally in our communities who are feeling the impacts of patriarchal, structures, eroding the systems we live, work and survive in.

> It's almost like this competition, you know, between men and women, when that's not been our culture – we're supposed to walk beside each other, we're supposed to complement each other, we're supposed to put family first.

> I just want to see the right people with the right skills that are there for everybody and not just feathering their own nests. It's sad because over the years you admire Elders that you've grown up with and then when you've become an adult, gained university degrees, many Elders worked hard to provide these opportunities), when you put your hand up to take a position on a committee, it's like 'do as I say, not as I do'. It's this unspoken rule … when you start to ask the questions and you start to dig a bit deeper into things that are happening, you get ostracised, bullied or roused. There's people that will stand up to bullying – I'm one of them. But there's a lot of women that just don't have the strength or capacity to.

Leah noted, women in communities already operate at full capacity, often challenging the authority of men. They are aware that it could result in backlash and danger, and that it could be a long hard fight to hold these men accountable.

> Women are busy raising families, teaching in schools, volunteering their time. I'm not saying that there's not men that are doing that too, but the caring roles – like nursing, teaching, cleaning, volunteering – roles they do well, because they are nurturers.

Leah described how the community has recently taken action to ensure gender balance on the Board.

> Initially, when the Board was established, it was men and one woman. Recently we had a meeting and two other women were elected to the Board. The community pointed out that there was not a gender balance and there were no youth voices. There were two positions that needed to be filled and so community agreed that those positions needed to be filled by women. Members are aware of the need to have gender balance.

While there is significant progress in gender balance on the Board, Leah feels there is still quite a way to go to improve the governance structures and practices of the Board in areas, such as:

- fair representation of families
- respectful mechanisms for open and regular communication with communities
- the need to begin each meeting with principles for conversations, followed by a presentation on the history of the claim and the PBC, so everyone can understand and participate.
- lawyers need to fully relate to members and explain the legal system and requirements.

> There needs to be improvement in governance and communication of the circle work back to community on a regular basis. At each meeting, provide a 5-minute PowerPoint presentation that summerises where we started. These are the meetings we've had to date and the decisions made. This is where we are today and these are decisions now that we need to make.' So, as you're running those meetings you're actually building capacity and understanding. You're not assuming that everyone knows what's going on.

> Lawyers who attend meetings, do they understand that English could be a person's second or third language? In community meetings, you need translators. Lawyers need to be responsible for the language they use. If they're going to explain the language of law, they need to explain it in terms that people understand.

> You would think [effectively communicating legal concepts to community] would be a key part of their roles. There are some lawyers that do it really well and you think 'oh yes you need to be training other lawyers'.

> And also, you shouldn't just stick young lawyers out there to facilitate these sorts of workshops without being trained. Cultural safety training or something at least!

> Skill is involved in speaking to different groups of people and communicating in everyday community language.

Leah stated the need to focus on capacity building and effective, culturally competent communication as a way of enabling and facilitating community to work through disagreements respectfully. Leah also identified the need to have these brave spaces and conversations within our communities before we are able to have them effectively with others in society.

> You really need a bit more time spent on creating those brave spaces and bringing in the right people to facilitate these difficult, layered and complex conversations that we all have to have amongst ourselves first as Aboriginal families and people across this country; and secondly, to get a voice to parliament!

(c) Cissy Gore-Birch

Cissy spoke about the challenges she faced being heard in different forums as a young woman, and the confidence it required to insist on your right to speak.

> … as a young woman coming in, the men and others were undermining me and saying 'oh you don't know anything about this and about that'. And I was like, 'well, actually I do.'

Cissy felt that it took a lot of confidence and assertiveness to be able to stand up to those attempts to shut her down.

> … having the ability to step up and not be threatened away from those hard conversations … I think for women it's extra hard because it's not only that we're not taken seriously by the men and others in our communities, but even from our older women who are culturally ingrained around cultural practices and ways, you know, 'you've got no right talking in this place'. I've come up against both of those challenges on a regular basis.

> Like being told at a women's forum – I was speaking up and against things that I felt I needed to speak up about as a young women at that time coming into this space, I felt that we as young women had no voice and were not encouraged to step up into leadership roles and positions in some situations. And [we were not allowed to] challenge the decisions and the systems. Some of these older women said 'well hang on my girl, you can't talk, you're young.' Respectfully I answered, as I knew I was not being heard or respected in that space at that time and had to make a stance. I said 'well hang on, no, I am able to talk because I have been endorsed by my old people to be present at this meeting and to share their views.'

> So, you know, it's about having that overall respect for our elderly and the importance of understanding our roles and to have the internal confidence and support of others to be able to challenge systems to make change for the better.

Cissy referred to the huge amount going on for the community at the same time as their native title claim was happening. In this context, she highlighted the importance of giving people enough information and the time to properly process it and make informed decisions.

Specifically, at the time of their native title claim, Cissy's community were also fighting the closure of the Oombulgurri community. It was during this period that Cissy was first elected Chairperson.

Cissy noted that her capacity to deal with all of this as well as the native title claim was due to her knowledge, understanding, awareness and education in combination with her community and cultural knowledge. She particularly focused on trying to enable the community to participate fully and in an informed and safe way. Cissy described a significant amount of work that went into getting the governance structures into a transparent and inclusive state to enable better community participation.

Cissy felt that the community was rushed to do too much at the time of their native title claim and reflected on how she would do some things differently with the benefit of hindsight and subsequent further support:

> It seemed to be a bit of a rushed process. We were going out on Country and doing all this stuff, talking and collecting stories and information and really connecting. But I think because it was a really new system, moving from the roles of an Aboriginal Corporation to now becoming a RNTBC PBC, we had other responsibilities that most of the members couldn't comprehend, it was a lot to take in at that time. Everything sort of came at once. The closure of Oombulgurri, the Coroner's Report of these recorded events that occurred in Oombulgurri, we got our native title, then we got our IPA area declared, then we got our Healthy Country planning to undertake Healthy Country management. So, it was all happening at once. We had no CEO or staff, we were reliant on KLC and their resources and time. It just was not sustainable, it was hard for the victims, BAC members, and the board to take on. People couldn't really digest the information. It was really reactive. So, it wasn't really a resourced or planned process.

In this context, Cissy reflected that the community was not given enough information, time, or necessary professional assistance to digest everything that was happening and make truly informed decisions.

> People are still really confused today around the process of Native Title and the steps taken in collecting evidence and the apical family members … and really understanding like, yes, okay, your Grandfather was nominated to share their story to the courts on behalf of Balanggarra people but … So we've got a family within this group saying 'well my grandmother did that, so that means that's all our Country'. So they just misunderstand the whole process. Like, 'no, your grandmother was nominated from Balanggarra people because she spoke well, to share these stories to the court, to communicate in a way that was articulate'.

Cissy also told us about the impact of 'bullies' on the board of the PBC whom she described as being interested in securing benefits only for themselves, not the whole membership. Cissy and the board did not want the same thing happening with Balanggarra Aboriginal Corporation that happened in Oombulgurri and the closure. She described how the threatening behaviour of the 'bullies' created an environment where many members did not feel safe to meaningfully participate in the decision-making processes or question anything: 'They seemed so fearful and controlled by these people and were threatened if they stepped out of line.'

> There was constant unnecessary interruption from these bullies and walk out of meetings to sabotage our meetings so that we wouldn't – couldn't – make a decision. There was constant threats behind the scenes. People were frightened to come along to these meetings. You should've seen it, it was disgusting that these people had so much control over them and they felt they had nowhere to go …

Cissy said she knew immediately that she had to have these men removed. She outlined the types of criminal convictions these men held which she felt should disqualify them from eligibility for Board positions and which she worked to ensure would indeed disqualify them.

> We need to be clear in regards to what those criminal activities are. We're talking about child sexual abuse, we're talking about violent assaults against people. And you can just see it when we're having meetings, they're just saying 'sit the fuck down', excuse the language, but this is what these guys are saying in the meeting. 'Sit the fuck down otherwise you're gonna get a hiding after this meeting.' You know, in the open! You can't come in here and threaten people like that. So, I told the security, 'if this guy continues, you need to remove him.' And then he walked out. He's like, 'you fucking better come with me,' to the others! He's swearing, he's threatening, he's pointing fingers, he's putting the fist up. And I was so thankful that ORIC was present at that time to witness what we constantly have to deal with. Like, he didn't give a damn!

It took Cissy returning and working closely with the other members of the board to remove these directors and ensure that the PBC was being run for the benefit of all members in a transparent and non-threatening way.

> And then we were successful enough to keep the strength in the board. Keeping in mind that this could all change the year after. They gave me the endorsement to write up these letters and to go and see a barrister to get the official letters to get them removed. And we ended up getting those people removed and we haven't had any problems for the last, say, nearly twelve months now.

Cissy was also on the Kimberley Land Council (KLC) board for two years. At that time, Cissy felt the balance was not right 'between the two types of decision making processes, the cultural and western processes.' She felt there was a need for an executive board, to work closely with the business of the pre- and post-native title decisions and other environmental and economic opportunities.

> I feel that sometimes there is a lot of information that is being presented and to take in and not everyone is on the same level of experience and understanding. We need strong skills sets of people involved with these decisions and processes to get the best outcome and results.

(d) Francine McCarthy

In her professional roles at the Central Land Council (CLC), Francine McCarthy has found that many Traditional Owners and PBC members are unclear on the role of PBCs, the role of the CLC in the native title context, and decision-making processes associated with those entities.

In Francine's experience, Traditional Owners often have expectations of native title that the regime does not deliver. She described how the Tennant Creek Township claim involved educating people about what native title really means, how it works, and on developing realistic expectations:

> In the Tennant Creek Township claim it was educating Aboriginal people … That was really hard because they had the mindset already that 'oh you know we're going to get our land back'. And you try and say 'no, no your interests are just being recognised. Traditional laws and customs are being recognised'.

Francine particularly noted the difference in potential outcomes from native title compared with the freehold title offered through the Aboriginal Land Rights Act. She noted the fact that Traditional Owners have struggled to understand how native title fits in.

> In the Northern Territory, you know Aboriginal people have had a long history working with the Aboriginal Land Rights Act where you do actually get a substantial benefit from a legal process. Under the Native Title Act, it's just a recognition and serves no real benefits here in the Northern Territory. You can't really feel that there's a real benefit because your traditional rights and interests are just being recognised, so you really have to then work through the other rights and interests that are already existing. And then there are other Aboriginal people that have got historical and residential associations with areas because of, you know, the history of people being relocated and moved around, not only in the Northern Territory, but across borders.

Francine spoke of the priority that the CLC gives to educating native title-holding groups and communities, and of the challenges associated with engaging native title holders in the governance and activities of the PBC. The roles of PBCs are compliance-heavy and require a high level of English and legal literacy, which Francine feels deters people.

> … getting people engaged in the process, that's what is really hard. They were all engaged in the process when we were going through the native title claim, but coming and engaging in the PBC process is really hard. It's just people's interests are not there anymore, or they've got other demands on their time or … I don't know what it is.

> **After the determination, that's when the hard job starts, I tell you!**

> Managing a PBC – it takes a lot of energy, it takes a lot of resources and it takes a few dedicated people to really get on top of it, in terms of what your requirements are under the Native Title Act, PBC Regulations, and the CATSI Act. That is just so complicated.

> And it's a very new structure when it comes to managing rights and interests in terms of land. Under the Land Rights Act it's just a grant of title to a land trust and then the land council manages it. And in the native title case, it's setting up a corporation, it's being compliant with three major bits of legislation, and then having to manage it by yourself.

Francine has found communities feel disempowered by the compounding effect of lack of understanding of native title, its possible 'benefits', and the governance structures and processes associated with the PBCs and land councils.

Francine noted that it has only been very recently that PBCs have been given any resources to meet statutory obligations, let alone provide education to community on their roles. That funding has enabled the CLC to be able to offer Traditional Owners more opportunities to understand native title structures and processes but that kind of support and education is something the CLC is still working on delivering effectively.

> Traditional Owners know so little about the native title process. It's so foreign.
>
> It wasn't until 2017, I think, that the Commonwealth Government started providing some additional support to PBCs … [before] that, it was even hard to get people together to attend an AGM.
>
> You try and put on a good feed just so that people would actually come in and benefit from the meeting, even though they weren't understanding quite what was going on. And there are other strategies – I developed a strategy with the directors of the PATTA Aboriginal Corporation to say, hang on, let's have a look at running information meetings two days before the AGM so at least people would have some idea about what we're going to be talking about.
>
> And it was great. [But] we'd have the information meeting and then only half the people would turn up to the AGM because they were just looking at it all and going 'this is just way too hard!'

Since the extra funding for PBCs, Francine told us that the PBC in Tennant Creek is supported to have a meeting at least once a month. She explained that it is necessary 'because they have a lot of things going on in the town.' Previously they had only had the four meetings a year as required by the Rule Book.

Francine emphasised the damage done by not funding PBCs appropriately from the beginning. She noted that there have been so many years where PBCs have been unable to properly service their members with information and education on how native title governance works and how they can participate in decisions, etc.

> And a lot of the existing structure has been funded since day 1, but a lot of PBCs they've only just recently been provided with the opportunity to have some funding, to actually be able to not just operate and fulfil their obligations under those key bits of legislation, but also get out and inform native title holders and members and enable them to understand how it all fits in.

Chapter 8 described the PBC Regional Forums which the CLC has co-hosted. Additional initiatives that Francine discussed include:

- Talking with ORIC about developing a training manual that would be more suitable to people in central Australia.
- Resources such as the Native Title Story on the CLC website, which is 'translated into six central Australian languages so that the information would be better received by the language speakers.'

- Using CLC resources to 'inform members, directors and native title holders about the processes, 'cause to the people, these processes are very foreign. Not only PBC business but also the research side of things.'
- The PBC support unit has staff 'that are identified to support a group of PBCs within a region or a couple of regions' and they 'are the contact for PBC directors and members on the ground'.
- Planning 'Country trips' to deliver information out on Country to enable native title holders', members' and directors' understanding of the name and area of their determinations, and where they fit within the determination areas.

Francine described how important this community education work is to dispel fears that PBC directors can make whatever decisions about Country that they want. Francine emphasised that Traditional Owners need to know how they have a real say in decisions about agreements regarding their native title country.

> A lot of our PBCs – and a lot of our determination areas – are over pastoral properties, so people don't really have an opportunity to engage on the land other than for traditional purposes.

> You can negotiate an agreement with the mining companies but there's a lot of work that needs to be done with people on the ground so they really understand that the role of the PBC isn't to make a decision about your Country, you make that decision. But it's the PBC that signs the agreement. People still are quite unsure about that process, 'cause under the land claim process it's the land trust members that sign the agreement.

Francine made several references to the many governance layers and structures in the land rights context, particularly in the Northern Territory, which make it easy for people to misunderstand.

> It's a lot. Aboriginal people have to try and get their heads around all this and even just someone with my educational level and understanding of government process, I even struggle. And I work in it.

> And the fear of the unknown or fear of not knowing. It's exhausting. And there is a degree of mistrust of government processes, of course. And it's managed by lawyers, I mean God!

> Probably something that surprised me when I first started in the role that I'm currently doing is that there so much infrastructure, or so much structure, around the native title system. So you've got the Act and you've got the NIAA or the government, and then you've got the Attorney General, but then you've also got the Federal Court, you've got the NNTT, you know the Tribunal, and then you've got the rep bodies. And the PBC is just another layer in that structure.

(e) Avelina Tarrago

Avelina Tarrago was still studying law at the time she was leading her family's participation in their application to join as respondent to another native title claim. She found that she had to go to extreme lengths to enable her family to be heard, and to participate fairly and fully in the process, with independent legal advice and representation. Avelina felt she was only able to do that because of her legal training.

One example she gave was in relation to the conflicts of interest which the NTRB had in trying to require disputing families to be represented by the same anthropologist.

> They commissioned a report about the overlap … So, ultimately, I joined as a respondent with my mother, we made a joint application, and then the rep body also filed a separate application for the family that I was disputing with. They initially said 'well you all have to be represented together' and I put my foot down and I said 'no'. So they did a separate application. That's the point when I had to get the solicitor, and thankfully we had a barrister who did it pro bono as well. But that's the extent that I had to go to, to actually be heard.

One thing that Avelina recommended was that First Nations lawyers with experience in native title be involved in any reform process from the beginning – people who have both a personal and professional understanding of the system.

> I think, as far as redrafting things, they need to start consulting with the black lawyers in this space. And I don't mean academics. I mean practitioners that work in the space. I naturally have a lot of respect for academics but there's a different line that you walk when you're dealing on the ground with these issues.

> So, the people they need to be talking to is people like Tony McAvoy SC. Cassie Lang who is a solicitor with a lot of experience. Some of my colleagues up here like Joshua Creamer, who is another Aboriginal barrister. But Cassie works day in day out, whereas at the Bar it comes and goes. Cassie, she lives and breathes this.

> And there's a few up and coming ones. Kristen Hodge who is also fantastic. She's a Wiradjuri woman. One of the people I've been mentoring for many years. You know that's who they need to start consulting with.

> I know that Tony [McAvoy] gets consulted on many things, but he also doesn't on many things. Even if it's just giving him the autonomy to say 'I don't have time', but he should be approached every time. And if he can't, then he should be given a platform to recommend who he thinks.

> You've got to get that kind of expertise. It really does need to be a deliberate and funded approach to garner that expertise [noting that academics are paid to do things like submissions … but private lawyers are not].

Avelina also spoke specifically about how it takes lawyers with both the legal and cultural knowledge and confidence to ensure that legal processes are safe spaces in which women can fully participate. Avelina talked about creating a culturally safe space for women to give evidence and the impact it has on women's capacity to participate and be heard, as well as the accuracy of the evidence.

> So, one example, the hearing we had in February, there was an old lady from Titjikala, one of the homeland communities outside of Alice Springs. We were talking about some sensitive things, and I just said 'no men in the room', and the male Commissioners shouldn't be asking the questions. If they've got a question they can go through the female Commissioners. And we did that … All of that fear that Aunty had about giving evidence sort of lifted. And she gave evidence in language and it was so good to see that safe space.

(f) Donna Wright

Donna Wright spoke about the degree of disempowerment she and others in her community felt at the way the governance structures and decision-making processes were not accessible to them. She felt they were not getting a say in decisions about Country and that the result was not in the best interests of the group as a whole, and future generations in particular.

I quoted Donna in section one of this chapter where she expressed feeling that the members of her group are not really in control of the decision-making. She felt that 'other people are telling us how to do it.' Donna referred to the use of processes such as ORIC's administration process to further disempower community members.

> … the administrator come in, wrote a new rule book, business plan that can't be shared with any third party, and the organisation now only has to have a general meeting with us once a year, and an AGM.
>
> We're so disempowered.

Donna described the situation at the time of her interview, which was that members can get involved in the Cultural Heritage Network in an online capacity, and can come to community engagements 'and we'll tell you what we're doing'. But Donna said there was no genuine member involvement in decision-making.

Donna told us that the extent of the unpaid labour expected of Indigenous people in the native title and cultural heritage space means they simply don't have the capacity to ensure they fully understand the processes and can make themselves heard. This means there is 'no free prior and informed consent', as far as she can see.

> **The free labour to enable the systems to get consent is exhausting.**

Donna described the efforts that she and others have made, and continue to make, to try and empower group members to stand up against those with vested interests. But Donna feels unsupported, and that the PBC is under-resourced to facilitate education and empower the community.

> You know, we've been fighting corruption down home for a while now and trying to say to our community 'this is not how it should be'. You know, you have every right to agree or disagree.

> I'm on the board, and a lot of us who have been fighting to have a say are now on the board, trying our best. But we don't have the proper resources. So if you don't have a business advisor, financial advisor, in place for this organisation … there's a risk there. The corporation must meet its objectives and be accountable to Gunditjmara people. I can't see any benefits mapping, we're not doing that.

The professionals who are supposed to be facilitating and enabling traditional group decision-making and self-determination are not doing that effectively, in Donna's experience.

> … the way the information's presented is not in plain English, we're talking to lawyers, we're talking to anthropologists, we're talking to whoever it is and the way the information's presented to us is not supporting us to make informed decisions.

As noted in section one of this chapter, Donna also told us that that proper participation in decision-making is limited by the lack of systems in place which are needed to fulfill the 'checks' that are theoretically in place to ensure the right people speak for country.

(g) Bunuba

Patsy Bedford described how the old people felt very proud when they were claiming native title, even though 'we already knew it was our land'. However, she felt that if the professionals involved in the process had listened more closely to the questions that the Bunuba old people were asking, it would have helped them play a more informed role in the process and it would have helped the community understand better what was going to result from native title.

> 'What are we going to [get] when we get our Country back, when it's our Country [already]?' I don't think anyone really took that question seriously. If they really listened to what they were saying … I think because we were so rushed and so happy that the government was finally listening to us, everybody really went on board with it. But if only they'd listened to them … [and answered] this question, 'is there another way of really getting what they really want?'

Patsy felt that no one described the native title process properly and people were very confused about it.

> There was this big question about why. Why? When we know our Country and we know that Country belonged to us. Who were we going to fight? There was this other section in there where we knew that stations were owned by non-Aboriginal people. Our stations, where our land was on. Okay. Well maybe that's the area we got to fight for native title is to get that land back off.

Additionally, the requirement to define our Bunuba connections to Country and to each other for the sake of the Native Title Act had the effect of creating a different way of us seeing our connections, with boundaries that weren't part of our culture. Patsy talked about how this different conception of connection has delivered knowledge that we didn't have, such as through the anthropologists, but it was knowledge we didn't have because we didn't necessarily need it before – it wasn't how we defined our connection to Country or to each other.

> You know it really confused people. It shifted us over to the unknown space of the Western world where we had people in these areas for their Country, had to have a boundary line on it, had to have all these things that were foreign to us before native title came out. Because as a tribe we were all together. We knew the connection …

10.4 Destructive interactions between legislative regimes

(a) Sarah

Sarah talked about her experience as a Dharug person in NSW and what she has found to be the disempowering impact of the NSW *Aboriginal Land Rights Act 1983* and the network of Local Aboriginal Land Councils on Dharug people and organisations.

Sarah described a complex picture of different legislative regimes interacting in ways which do not work to the benefit of Traditional Owners. Sarah told us that the impact on the Dharug people has been hugely damaging.

The relevant pieces of legislation in this case are the Native Title Act, the *Aboriginal Land Rights Act 1983* (NSW) (ALRA), the *Heritage Act 1977* (NSW) and the *Environmental Protection and Assessment Act 1979* (NSW).

Compounding the complexity of the legislative regime is the degree of interest in the traditional country of the Dharug people. The opportunities for development on Dharug country– in the Sydney and Western Sydney region – are significant and come with potential to make a lot of money. There are therefore a lot of people interested in the paid consultancy work available regarding developments.

Sarah felt that despite a lot of effort on the part of Dharug organisations and individuals, it is impossible for Dharug people to get anything positive out of the current legislative set up. She felt that some people in the Western Sydney Aboriginal community, and the Aboriginal community more broadly, benefited from the status quo and are strongly resisting a more just distribution of the paid work from development on Country.

Ultimately, the impact on the Dharug people has been so disempowering that this legislative arrangement was a way of keeping Aboriginal people down 'by dividing us and making sure we only have crumbs to fight for'.

> We have our land councils and they are atrocious, to us they're just like the new Aborigine Protection Boards – they tell us that they own all of our land … They very recently tried to kick us out of the Reserve at Sackville – one of the men was there from the land council and said that they own the land and there were no Dharug people.

> I've always thought that this whole native title situation and the land council situation has been done intentionally. I just think it's a way to keep us down … I know native title is completely separate to land councils, but that's what they're using to keep us down.

Intersecting with the Native Title Act and the ALRA is the cultural heritage regime that is also being used in a way which Sarah described as disempowering for Dharug people as Traditional Owners. Sarah described how the NSW cultural heritage legislation sets out requirements to consult with Registered Aboriginal Parties (RAPs), but there is no mechanism for determining whose registered interest is legitimate.

> There's no proper system where a recognised group is the one they have to use for heritage, like the people from that Country. It's whoever registered an interest. So, Registered Aboriginal Parties – RAPs – if any development's going through it goes through a process where they send out for people to register an interest. And people from all over just register an interest in Dharug land, because there's lots of development in Sydney, so lots of opportunities for this paid heritage work.
>
> They just register. And then are given work out on site. Paid work to go out on excavations, like even the Aerotropolis, the airport, there's groups from all over New South Wales out there and then we're lucky to get like two days out there …

In Sarah's experience, while the system allows for individual Aboriginal people to benefit from paid heritage work, it is working to diminish the capacity of representative community organisations with legitimate ties to the relevant land to provide cultural and educational services to community. She explained how it plays out:

> We do a lot of educational stuff but the branch of our organisation that was doing the paid cultural heritage work out on site is what brings in money for our organisation to support the educational and all the rest of what we do. We've got 60 to 100 RAP groups in western Sydney at the moment so we're not getting any work at all. All of these people from off-country are getting that.
>
> There's people from the south coast, people from north. You've got some families that pop up and they're just 10 of them but they don't come in as an organisation, they come in as single people and then they register as separate groups. So then, by the time they do the rosters and the Dharug people get one day and all these other people are getting like months of work.
>
> The consultants organise that roster – the archaeologists or developers … They choose.
>
> We still do all the reports – that's all voluntary. We read through all the reports. We don't get paid to do that … A lot of the meetings, like focus group meetings, they're voluntary as well. The field work, you get paid a daily rate for that but the Dharug people aren't getting a look in because there's mobs from everywhere putting their hand up and … Because, if they're not put on site, they get very loud and very bullying. So, they're the ones that are out on site.
>
> But they're not caring for our Country, they're not caring for our sites, they're not sharing, they're not doing education, they're not doing anything. They're just pocketing money. Whereas, there used to be four of our reps a day on site, that used to fund all our educational programs and all of the community work that we were doing.

For Sarah, the system facilitates exploitation of cultural heritage requirements and offers no protection for Country.

> I went out at Riverstone, this is going back a little while ago, and there was a couple of sisters out there that had both registered. I said 'oh so how come yous are out here?' and they went 'we just want fuckin money', and that was it. And I thought 'oh my God!'.

Sarah has found that there is no effective remedy for the Dharug people to ensure that appropriate organisations or individuals are given the cultural heritage work and can look after Country properly.

> So, now it's like there's just no kind of, 'regulation' is the wrong word, but no kind of credibility check or like, they don't have to be associated with a Dharug organisation. That's what I thought should happen. If you want to go out and do site work like that, you have to join one of the organisations. There's two Dharug organisations. And we've said that for years to all of the consultants. The way to work it out is that you only employ the organisations, the ORIC organisations and then they can employ the people and put them out to work. They get paid good wages. They're not ripped off at all.

Sarah felt there needs to be a more structured way of recognising appropriate Aboriginal organisations for the cultural heritage work and ensuring that funding is directed to them so that the community and education work can be done.

> So, there's two organisations in Sydney that are registered with ORIC. Two Dharug organisations that you can see we work really hard, it's all there to be seen …

> If you're going to use someone else for your Registered Aboriginal Parties to do that work, then you have to factor in a fee associated with the review. There should be an obligatory fee for you to review it.

> And in all fairness, the consultants would be dumbfounded. They would not know what to do because it's just such a shit fight trying to deal with those 60 groups, or more than 60 … So, us whinging to them and saying, 'well we need to be paid to read these reports,' for them it's just another one whinging. They don't see any difference.

> They think we're just one of them and 'oh this is our Country' and then when you start on like that … It is too hard for them to deal with. And if they say to these other people, 'well you're not from here, you're not doing it', the abuse they cop … it's easier for them just to say 'okay, have a day each'.

Sarah felt she had to continue to participate in order to know anything about what is going on, but that essentially, in participating, 'we are just there to destroy that land.'

The overall picture of unpaid cultural heritage work with no potential impact on actually protecting Country or culture is getting Sarah down.

> … we are basically just there to tick boxes. I'll just be blatantly honest. We get called to these meetings, because they have to consult, and then they tick their boxes and we hear nothing else. … We're very lucky if we get public art or you know some kind of educational tool or language resource, but every time you want to put language somewhere, oh there's some reason that we can't. It's like crumbs again.

Even when out on site doing the paid cultural heritage work, Sarah found she and other Aboriginal heritage workers were treated poorly.

> A lot of us studied archaeology and a lot of us were really good at it and we all knew what we were doing. A lot of the archaeologists just treated us like labourers … 'I'll fill out the paperwork', 'oh no you can't' … So those kind of issues, as well. The whole set up is just crap.

> And land council, they go out on all of the jobs separately. They don't work with any Traditional Owners or community members, they insist on it's just them. They have separate meetings. They have their set amount of work and then we just get the crumbs left over from them, really, and it's divided up between us and 60 other people.

Sarah felt that native title and heritage consultations are like other 'Aboriginal stuff' – they do what they have to do to 'tick the box' but it's not genuine and we never benefit from it. When there are requests for assistance that would actually be important to Aboriginal people, they are given short shrift.

> Aboriginal stuff is never a priority, it's a tick the box, get it out of the way … it's to destroy Aboriginal property or whatever, it's never anything that's worthy of being protected [in their eyes]. Our creator story out here is Gurrangatch … there was a massive big Gurrangatch engraving on a river and the block of land that it was on was for sale, so we asked National Parks if they would purchase it. Nah. Not important enough. Our stuff is never important enough for anything.

Sarah explained that sometimes private owners are sympathetic and facilitate access to Country. But even then, Sarah felt that the community disputes, particularly with members of land councils, were ruining those chances the Dharug people had at getting regular access.

> We got access to [the big Gurrangatch engraving], so we got to go and have a look and the people who own it now they're not going to touch that. The owner came out and had a look and he saw how special it was and he said, 'if you ever need access, just let us know.' We still have to contact them and get access, it's a pain in the arse, but at least we can get in and they won't destroy that.

> So, then we tried to put an Aboriginal Place Nomination on it and straight away they notified land council and it's like, if land council or anyone goes there, that meant that they're going to block our access so I had to withdraw it.

Sarah had tried to get support for education centres and programs on Country, but found it was never smooth or easy and nothing has eventuated.

> There's a lot of places out here, like we do talk to National Parks quite a bit. There's a lot of education centres and that that are just sitting here … there's a vacant house sitting there and we've said 'oh why don't we try and get that to do like a workshop hub or you know something' … but never goes anywhere. They won't give us anything. 'It's very hard' they all say … I think they're a bit scared of land council too. Anyway, it all is very exhausting.

Sarah expressed extreme frustration at how hard it is for Dharug people to get any access to country.

> I live out here in the Hawkesbury and for us to get in and see any of our sites it's such a hassle. You can't go in there, most of the property owners think 'oh if we've got Aboriginal stuff on our property, they're going to take it off us.' Like none of us have anything. We don't have any access to sites. None of us have any Country that we can go and have ceremony or do anything on … we walk around out here and there's all these people living on all these amazing Aboriginal sites and we don't have access to any of it. Land council does but they won't let us in any of their Country.

As it stands, Sarah wasn't sure that native title would help the Dharug people in the cultural heritage context in NSW, as they had tried to use their previous standing as claimants to no avail.

> I don't think having native title would necessarily even help, not with the current legislation and processes in place, leaving it to consultants to decide. Because one of the fellas, [he] was on the native title claim and that's what he used to say – 'I was one of the native title claimants.' And I remember back when [he] was saying he was a native title claimant, and I said 'our organisation also has native title and we got the Co-Management Agreement with Baulkham Hills Council', so same thing, and we were really the only ones that had that standing. But it didn't make any difference.

> But it still didn't give him or us any precedence. They don't understand. Like they still get these other people out and they just don't get it. They don't have to get it or want to get it, they just want the work done.

Sarah had spoken with other Dharug community members about pursuing another native title claim, but at the time of her interview, they felt that they just could not face the amount of unpaid time and energy it would require. But Sarah oscillated between hope that it might be able to deliver something, and despair that anything would ever change.

> We need native title just for recognition – we won't get anything except recognition, but that's important for us. It would be to hopefully stop the land council treating us so badly. Like, we're pretty much booted out constantly.

> … we all end up discussing it and then going: it's just too hard.

> **We have no power whatsoever. We still do push and fight and work really hard but it would be good if something was ever easy.**

At the time of her interview, Sarah was looking forward to the legislative reforms of the *Cultural Heritage Act 1977* (NSW), which promised to remedy this situation somewhat, and was hopeful that things would change. Unfortunately, the NSW cultural heritage law reforms were shelved in 2022 and the situation continues as Sarah has been experiencing it for years.

(b) Marilyn Pickalla Campbell

Marilyn Campbell's interview involved another NSW case which has seen the interactions between the *Land Rights Act 1983* (NSW) (ALRA) and the Native Title Act provide a forum for community disputes and cementing existing power disparities within communities.

Marilyn's story involved the native title process pitting the Local Aboriginal Land Council (LALC) (which is not required to be comprised of people with traditional responsibility or ownership of the land) against Traditional Owners/members of a native title claim group or potential claim group.

At the time of her interview, Marilyn was opposing an application by the Local Aboriginal Land Council for a declaration that there was no native title over an area known as Isabel Street. The land council had acquired the Isabel Street land under the ALRA and wanted to be able to sell or develop Isabel Street. Under the ALRA, for a LALC to divest or develop land they require a declaration that there are no native title interests in the area.

Marilyn was living on Isabel Street and says she has a traditional connection to that area as a source of traditional food and medicine, and as an area where her family used to camp. Marilyn feels there is a native title interest in the area and opposed its sale and/or development.

There were community members who sided with the LALC and argued that there are no native title interests in Isabel Street. The court proceedings are discussed further in section seven of this chapter, on customary law and practices in the court processes.

(c) Coral King

Coral King explained how she and her family had been locked out of their country once they no longer had a registered native title claim. This is because the Queensland cultural heritage legislation directly refers to the native title legislation, providing that those with registered claims have cultural heritage consultation rights.

The result for Coral has been that the injustices experienced at the hands of the native title system have been compounded because of the impact they have had on denying her access to country and cultural heritage rights too.

Appendix 3 addresses the intersecting legislative regimes in Queensland as a case study indicating the complexity of the legislative environment that native title exists within.

(d) Sarah Addo

Over the last decade, Sarah Addo has also been fighting on the cultural heritage front, in parallel to her native title fight.

Similar to Coral King's case, Sarah spoke about her people being denied consultation rights under cultural heritage legislation because they didn't have a registered native title claim. Sarah said that this has left the wrong people (who she says do not know or care about Country) with consultation rights. In that time, Sarah and her Elders have seen sacred sites destroyed while they could do nothing to stop it.

Sarah described the direct link between being refused funding for a native title claim and her group's lack of cultural heritage rights.

> We did lodge Form 1 applications, but I was the one that did that because a lot of our sacred sites were getting destroyed. The old people were getting really angry about it because they couldn't do nothing and every time we tried to engage with the government, they were saying 'you don't have a registered claim.' And we're saying, 'yeah we don't have a registered claim, but we're a party to those claims'. But it wasn't good enough for government. They wanted us to be registered and we're saying, 'well under the Cultural Heritage Act you've still gotta consult with all of us'.

> So, they totally ignored our pleas. Our Grandfather's camp got destroyed … they bulldozed that over and we couldn't stop them. We just watched them touch land that was untouched for nearly 230 years and they ripped all of that up. That was the reason for us to put those Form 1s in – trying to stop them from destroying sacred sites.

> They would even try touching fighting grounds down south of Cairns, at Skeleton Creek. They bulldozed that over. You know that significant sacred area? Fighting grounds where we met, we sorted internal tribal disputes out and we also sorted out external inter-tribal battles at that fighting ground. So, I sent a couple of emails to say, 'look yous are going too far over, yous are destroying, you're not consulting with us'. And the same thing: 'you don't have a registered claim therefore you don't have an interest'.

The impact on Country of all of these cumulative failings in the system was particularly upsetting to Sarah and her Elders.

> See that other family, they don't care because they know they don't come from here. They don't care. They're going to get what they want. They're not going to worry about the sacred site or the community issues that's going on Country like we do.

(e) Monica Morgan

As part of their native title claim, the Yorta Yorta went through their history of claiming land rights. This included the way that the Land Rights Act was used to dispossess Aboriginal people before the Native Title Act was around; and the revocation of Aboriginal land for the purpose of giving it to returned soldiers.

In her interview, Monica described a history of the land rights system and its relevance to cultural heritage – how they have dispossessed Traditional Owners.

> … we put the petition that our mob put up for return of land in 1880 or something like that.[233] We asked for our own land. And we said because all the land was cleared, and most of our mob were working on the stations anyway, we wanted our own land so that we could cultivate and live on it ourselves. Like anybody, you know. It wasn't safe to live anywhere, so we wanted a safe place for our mob. So Cummeragunja was created.

> It became an Aboriginal Reserve– we went under the NSW Protection Board. But there was huge holdings of land and our mob farmed it for a while and had the best farms in the district.[234]

> Then, over the years it was looked after by paternalistic government departments.[235] So we basically lived on Cummeragunja under a mission management service; and [then it came] under a Land Council and I'll say it's the same as a mission manager.[236] That's when the Land Rights Act went through.

> [So] the first legislation went through before the Land Rights Act was the legalisation of the illegal revocation of Aboriginal land. More than half of the land that we were handed in the Land Rights Act was taken away from us because it was all given to soldier settlers and farmers and just hived off … We were the only ones that kind of stuck to our land. We got quite a bit. In New South Wales there's huge amounts of reserve areas. Some of them are very small because they've been hived down. But we're all under the Aboriginal Land Rights Act.

> The reality was if we want to live on our Country and we want to hold the titles, then we had to form a land council. Now a land council is not First Nations or Traditional Owners. It's whoever lives in the country. So it's so terrible in the cities. You know because the Dharug and all them mob, they're totally outnumbered.

> So the voting system is one vote one person … the tragedy is that if you've got the largest family, you've got the largest voice and the saying is that your land council is only as good as the family that runs it.

> … and they've reduced the regions so we're in the Wiradjuri region and we're Yorta Yorta. So Cultural Heritage is under the Land Rights Act. So it can be non-Traditional Owners.

> In Victoria, the Cultural Heritage is very poorly. I think there's a lot of flaws in it. It's not based on First Nations. It's based on recognised parties that are recognised by the Minister but before they're recognised by the Minister, they're recognised by Victorian Heritage Council (that is nominated by the Minister), and it does not represent all the First Nations in Victoria.

(f) Francine McCarthy

Francine McCarthy has been employed by the Central Land Council (CLC) since 1994 and, at the time of interview, she held the position of the Manager of Native Title.

Francine discussed the interaction between the Northern Territory's Land Rights Act and the federal *Native Title Act 1993* (Cth). This included the initial and predominant position that the Native Title Act does not really offer anything in the Northern Territory because of the strength of the rights available under the Land Rights Act. However, it also included discussion on what has been a complementary use of the Native Title Act in Tennant Creek.

Francine told of her introduction to native title through the Tennant Creek Township claim (Tennant Creek No.2, *Patta Warumungu People v Northern Territory of Australia* [2007] FCA 1386). This claim was unusual – it involved a lot of vacant Crown Land that was being used, informally, by other people, without a license of any kind. Francine explained how the CLC strategised that a claim over the entire township area might deliver some benefits to the Traditional Owners.

The claim over the township area involved negotiations and ultimately mediation through the NNTT with the Territory Government, which had not negotiated over a township claim before.

Francine spoke of how the differences between the types of rights associated with the Land Rights Act and with the Native Title Act, as well as the CLC's role in relation to each of them, mean that there is significant confusion and misunderstanding amongst communities, native title holding groups, and Traditional Owners.

The details of this unusual Tennant Creek Township Claim are discussed in section 10.3.

10.5 Conflicts of interest

Most of the women interviewed for this Report discussed feeling that the native title system involved inherent conflicts of interest that had not been thought through.

In particular, the system of Commonwealth funding via NTRBs and NTSPs has been experienced as a system of 'gatekeeping' of professional services, including access to lawyers and anthropologists. As part of the system design, NTRB/SPs make funding decisions in relation to opposing First Nations native title parties. For example, sometimes an NTRB will represent one of those parties themselves and then decide whether to fund an opposing family. Several interviewees said that, in their experience, some of the individuals making decisions within their NTRBs are personally connected to the native title claims regarding which they are making funding decisions.

Additionally, several women identified that NTRBs also have a conflict between their role as provider of particular services to native title groups and PBCs, and their role as decision-maker regarding funding PBCs or groups to get services elsewhere. That is, they have a direct interest in PBCs using their services rather than funding them to use other private services because providing the services directly creates revenue. Women further noted that sometimes NTRB/SPs have a direct financial interest in a PBC agreeing to an ILUA on certain terms, whilst also being responsible for facilitating the group to make their own decisions. That facilitation needs to involve providing the group with all the relevant knowledge to make an informed decision, and that the decision-making processes are followed properly.

The way that these conflicts of interest are experienced by First Nations people in the native title system is as a lack of access to independent legal advice and representation, and to independent anthropological services to 'prove' their connections or 'disprove' other groups' claims.

It appears that it was not anticipated just how much conflict there would be between First Nations groups who are reliant on representation by the same NTRB or NTSP.

It also appears to be common that NTRBs make their own initial assessments of connections to Country – which go on to dictate the scope of anthropologists' reports – and that, not infrequently, those assessments turn out to contain errors. Women suggested to us during this project that this was because of a range of reasons including ignorance, bias, pressures associated with unrealistic timeframes in the legislation, inadequate resources, and resignation that the system does not satisfactorily accommodate all the relevant scenarios in First Nations communities.

(a) Thelma Parker

Thelma Parker was frustrated at the 'gatekeeping' that their NTRB appeared to be doing regarding which professionals her group had access to for the services they required. Attempts to secure the funding to seek independent professional advice have been refused and Thelma identified the fact that the NTRB wants the payment for those services itself. Thelma felt it is not necessarily about what's best for the native title group.

> We can't be in a position of having our own lawyers and our own barristers and our own company to make those decisions. They say no you've got to pay us to be a part of this process.

Thelma expressed dissatisfaction with some of the professionals the NTRB have required them to use and feels that this has longer term impacts down the line with the kind of outcomes her native title group is securing – outcomes that do not take into account women's cultural knowledge and roles, for instance.

> For some reason [the NTRB] pick up these people, I don't know where they get them from, and they say 'you have to work with them'. And I say, 'well no, can you give us a female because we want a yarn with them?' 'No, we can't give you a female, you've got to take this person because we've actually engaged them.' So, our cultural capital will not be understood nor will not be listened to …

Thelma clarified that the NTRB does not consult with the group about what kind of person the group needs in the relevant professional role. She has complained in writing that this approach is culturally unsafe and excludes women's knowledge from the process, and yet still the NTRB insist that the relevant professionals have sufficient cultural knowledge. Thelma did not feel this decision-making was in the interests of their group.

(b) Avelina Tarrago

Avelina's personal experience with native title involved what she felt was a significant conflict of interest at the NTRB level. As discussed in section 8.12, Avelina and her family only became involved in the native title system when they realised that two other tribes were claiming land which Avelina's family believe to be their own people's Country. The NTRB was unwilling to help and sided with the other families. This left Avelina to try and address the incorrect boundaries of the application on her own.

> I went to [the NTRB] for help and they pretty much said 'well you're from the Territory, you're not even from that country'. They were listening to that other family and said to my mother and I, it was so disrespectful, 'put up or shut up'. Those exact words, 'put up or shut up'. So, put up the documentation or go away.

Eventually, during the process of contesting the boundaries as a respondent in the BWW claim, Avelina had to hire a solicitor herself, with her own money, and then luckily a barrister agreed to work for them pro bono. The whole thing took a huge toll on Avelina's mental health.

> The anxiety got so much, 'cause it was so personal … It just becomes too much because you can't compartmentalise, you can't exercise rational judgment and objectivity when it's so personal. But I had to do what I had to do to at least have the questions put before the Court. I ended up having to get a loan because [the NTRB] wouldn't listen.

As a lawyer-in-training at the time, Avelina was stunned that this inevitable conflict of interest appears to be part of the structure of the system.

> They're like, 'well you know we have people saying you're not even from there, so you need to prove who you are'. And I'm like, 'well that's your job. If you were doing your job properly …' and that's a great problem that I have. I understand the need for economy by having native title services, legal services that are amalgamated for districts. But the conflict barriers are inappropriate, or they just don't deal with the conflict between groups.

> You've got lawyers in the same office that are dealing with neighbouring claims. They're supposed to represent your interests. Any other legal services, even Legal Aid, they have the referral policy that they'll externally refer you if there's an internal conflict from representing two clients.

These conflicts associated with the NTRB structure also play out in the difficulties facing aggrieved Traditional Owners or native title claimants/respondents in remedying inaccurate or unjust determinations once they are made. This is discussed further in section 10.8, 'Remedies and accountability'.

In Avelina's case, the first claim to which she succeeded in being joined as a respondent, but from which she ultimately withdrew, continued on to a consent determination which included the Country which Avelina's family contested.

> Ultimately, it went through to consent determination, with no excise of the overlap area. So, we just got stuck with whatever. The claim to the east was a bit different. I don't know if maybe 'cause I scared the bejesus out of them by joining as a respondent on that other one, but they just withdrew those areas that there was a potential for overlap. And, so that is going to be a question for another day.

Avelina noted how difficult it is to reopen a determination once it is made, not least because native title parties need the assistance of players involved in the original alleged errors. However, at the time of interview, Avelina had heard through the 'legal grapevine' that the NTRB in her case had sought advice about reopening the determination that her family contested.

> I have heard a lot of word about the fact that there are substantial issues with that claim being determined and that advice had been sought about reopening it under the very limited provision that allows for it …
>
> … but from my limited experience as a respondent, I'm not surprised that they stuffed it up.

(c) Coral King

Coral King and anthropologist Dr Fiona Powell talked at length about the conflicts of interest they believe are involved in Coral's case. They felt like Coral's family have come across conflicts throughout the process.

In Coral's view, the resource allocation by the NTRB to the different native title groups involved in her case has been inequitable and unfair. She told us that her family have never received proper resources for their native title claim or their responses to the other groups claiming their Country. She has had fund her own attempt to become a respondent.

Coral and Dr Powell felt the choice of the professional researcher for the initial connection research report about her great-grandmother and her grandmother in Coral's case was inappropriate. Dr Powell explained that this person was, 'at that time, highly influential with the land council … he was their 'go to' person when they wanted work done … he'd been doing native title claim work for them for different claims …'

Dr Powell was astonished that the NTRB decided not to use her as the anthropologist for this initial research given her previous work in southwest Queensland. It didn't make sense to her, and the result was that she believes inaccurate evidence was provided to the NTRB and later to the court:

> **Dr Powell:** … I've helped Coral's family pro bono because I knew their circumstances. I've done it for years and also because, you see, years ago I did the original research for the Wongkumara claim area and that's when I realised, 'hey it's not just that family, it's the other families;' and I advised [the NTRB] …

> I said, 'look I want to come and interview …' and instead, they sent [the other researcher] not me. And that's where the problem began. I was astonished they made that decision because I said that the Booths have connection to the area I was working on. But [the other researcher], he didn't seem to understand the ethnographic literature and he covered just the Boonthamurra claim area. And he knew that [Coral] identified as Punthamara and he didn't seem to understand that Wongkumara just means South … He seemed to have no understanding of the complexity of the situation.

Coral explained how she believed the CEO of the NTRB has had a significant role to play too:

> **Coral:** Their CEO basically said that the Kungardutyi people didn't exist.

> **Dr Powell:** Coral and her relations and another descent group, they put in their own claim, they got it registered as Kungardutyi Punthamara People, they took that name as their identity label, and later the CEO of the NTRB wrote a letter saying that you are extinct.

The NTRB supported the Wongkumara opposing Coral's application to join the Wongkumara proceedings as a respondent. Dr Powell said this was despite 'lots of documentation' that 'corrected the misinformation about Kungardutyi' that had been put into the court and had, in her opinion, contributed to the original ruling made in 2014 by Justice Mansfield about the location of Coral's grandmother, Toney's, tribe, which Coral strongly contests.

Coral and her family initially registered their Kungardutyi Punthamara native title claim without any legal advice. Dr Powell wrote the application report and described the process:

> The Elders worked and worked, using computers in public libraries doing their own connection affidavits. I can tell you these elderly people, they had a series of questions, myself and another person provided them. They had to write out their answers. We corrected their spelling. They had to take their affidavits to JPs to get them sworn or affirmed … anyway, the claim got registered.

The registration was important as it allowed Coral and her family to negotiate for cultural heritage which they were very pleased about as it allowed them to get back out on Country. However, Coral explained that this didn't last long as the Wongkumara People, 'with support from the NTRB', successfully opposed the Kungardutyi Punthamara claim.

Coral felt that NTRB has done their best to keep her and her family out of the native title claims. While she didn't know for sure why, Coral speculated that this might be because her family had initially rejected them as representatives and tried to get the funding from the NTRB to hire their own private lawyer:

> They have been up against us from the beginning. We don't want them to be involved … I think the only explanation I've been given is that they must have offered Geoffrey, my cousin, an opportunity to represent us, but Geoffrey said 'no, we are not going to deal with you, we will find our own solicitor or you fund us for our own legal team'. And, of course, they didn't do that. They were never going to do that. So, I think because Geoffrey put on a little bit of a turn about it – because we were of the opinion that the money was there to hand out to all of us for our own legal team to represent us …

The result was that, at one stage – when she applied to the Federal Court to become a respondent to the Wongkumara claim – Coral had to pay a lawyer with her own personal funds from her stolen wages payment:

> And you know, this is money that I earned as a young girl and was never paid … and they paid for all of us, my siblings and myself for our mum and dad. Now out of that, I received $14,000. So, I have been getting from my siblings the extra money to pay the solicitor. That was the last representation I had. And $21,000 I had to pay him, so I didn't get a chance to keep any of my money that I worked for, and now I've got to pay back my siblings for the money they threw in to help me.

Dr Powell felt there was an inherent conflict of interest in the role that the NTRBs have in representing conflicting Aboriginal parties:

> What you get in a court system is you've got the State of Queensland versus the opposing parties. But when you have a NTRB which supports only one of these parties and not the other, it's an imbalance. Yet an NTRB is supposed to assist with dispute resolution. You see, so right from the beginning the [NTRB] to me has been deeply conflicted and has not done its role as a rep body. A standard practice should be – when you've got two opposing sides, you appoint two legal teams and let them sort it out. You don't yourself give support to one side and deny support to the other.

Coral and Dr Powell described in detail the lengths to which they have gone to try and get legal representation at various points. Despite pro bono help from Dr Powell, Coral struggled to find a lawyer to represent her pro bono. Both she and Dr Powell understood the repeated refusals from law firms that they approached to be as a result of 'conflicts of interest' – not because those firms had involvement in Coral's case itself, but because they worked for [the NTRB] in other cases. Dr Powell speculated that it was essentially a business decision not to take on Coral's case.

> **Coral:** We had to go with [the lawyer] from South Australia, because all the Queensland ones that we asked to help us pro bono refused because it was a conflict of interest – because they already worked with the NTRB on other claims. I don't know why it was a conflict of interest to work on ours.

> **Dr Powell:** I remember ringing up one of these big legal firms … And I was told, 'no, we do a lot of work for [that NTRB] and we will be conflicted'.

If the native title system results in the permanent loss of her Country, Coral does not believe her family will be able to heal from that. But correcting the record and the determinations over her Country is entirely up to her and her own funds as the NTRB still refuses to fund her and her family.

> I have been told that I need to appeal the first judgement made against my group. But I have no funds to do this and the rep body has no interest at all in helping us. The rep body has been disrespectful to me and my group, they have threatened to sue some of us, and they have made me and others feel that we are being dishonest in our claim, even though we had all the evidence to show that we are not …

> My Traditional Owner group has never been properly resourced; I myself have never been resourced at all. And neither I nor the rest of my group can ever be healed for the loss of our country.

(d) Sarah Addo

Sarah raised several areas of the native title system which she feels involve conflicts of interest. One main area of conflict which Sarah raised is the decision-making structures regarding funding.

Sarah described how she has effectively had to run several strands of native title action for her people since 2012 because the NTRB refused to fund her group. Sarah had to give up her paid job in order to do the anthropological and historical research herself, and draft multiple court documents.

As noted in her story in section 8.10, in 2012, Sarah lodged a Form 5 in the Federal Court to join as a respondent in the 'Gimuy' Waluburra Yidinji Peoples and the Yirrigandji Peoples claim native title over land in the Cairns area, which Sarah and her Elders believe is their traditional Country.

Sarah told us that, from 2013–2018, she worked practically full time on native title, conducting research to 'prove' the oral history of her Elders. During that time, Sarah continued to put in funding applications to the NTRB and was denied funding each time.

Sarah felt that her NTRB disproportionately directed funding to the Mandingalbay Yidinji tribe. She identified conflicts of interest in the NTRB, which she feels were behind their repeated refusals to provide funding for her group.

> It was [the NTRB] to blame, because the Chairperson of [the NTRB] was also the main apical ancestor for Mandingalbay Yidinji. There were other family members of his working there too. That's why we complained to the government. They got government funding for their own gain. That's what happened and that's why they're trying to stop us now because we just know too much of his history and the old people just won't let it go. We're not going to let it go. We've never been anywhere else but here.

Sarah also said that the NTRB has funded other parties after telling Sarah that there was no funding for their claim over the Cairns area:

> [We put in] numerous funding applications in [the NTRB] – in 2013, we put, like, three applications. 2014 another lot of applications. 2015 another lot of applications. We got denied on the basis that there was no funding. But in 2016 the NTRB funded the Cairns Regional Claim and gave them funding to claim the same area that we were claiming. And we said 'how come you're funding the Cairns Regional Claim and you couldn't fund us? And we want to know who are the Cairns Regional Claim people?'

Sarah questioned the motivations behind the NTRB expressly seeking out other groups who 'might have an interest' in the southern area over which Sarah's people have had a claim registered for 10 years. She believes that the reason is that if her group gets a determination over Cairns they won't be using that NTRB as a service provider.

> Now we had that claim, we advertised that, and people knew that that claim was in there for the southern area for the last 10 years. All of a sudden the [NTRB] puts an expression of interest out for any tribe that's got interest there. I asked 'how come you've put an expression of interest out there? Who's the claimant?' and [the NTRB representative] said, 'Oh no, we're going to see who are the claimants that want to come forward'. And I said 'no, no-one's approached you … You're causing conflict …' We've already got a claim on that area but they want to get other Aboriginal people to go up against us, like they did with the Mandingalbay Yidinji claim – to come in and try and get joint native title. So that [the NTRB] could have a say in that area – It's all about the money. They want to keep that RNTBC status if they want to move to a service. Because if Cairns get a determination here, they know we won't want [the NTRB] …

In 2018, Sarah's group and the claimant group agreed to negotiate and enter into a Protocol Deed which set out a process with a mediator, who would provide a final report which the parties would be bound by. Sarah described how the process was initiated by a Registrar, whom she felt was the only official who understood that they have real grievances.

Sarah told us that this was the one time in the native title process that their group received funding – for the negotiation and mediation associated with the Protocol Deed. Sarah recounted how their lawyer for that process told her that the Federal Court effectively required the NTRB to fund Sarah and her group for the process and that's why they got a lawyer for that time:

> [The NTRB] gave some money for that Protocol Deed and [the lawyer we got] said they only gave funding for that Protocol Deed process because the Australian Federal Court sort of railroaded them and said, 'look, how is the other party gonna participate if they don't have the funding?' So, [the NTRB] were obliged to, because they were looking bad that they were giving funding to these other two parties and not us. So we brought on [the solicitor and barrister].

Sarah has tried to hold people on the [NTRB] to account by joining the board, along with her cousin Warren. She and Warren declare their interests whenever decision-making regarding her land or disputes are in issue. However, standing up to inappropriate conduct by others on the board has resulted in retribution – she said they tried to suspend her as a director.

> you've got certain people from the ATSIC era that still think they can dictate how the organisation is controlled. So when I've been vocal about that, and spoke up about that, they tried to suspend me as a director. So I went to ORIC and ORIC said 'no they can't do that'. But it's a big battle everywhere that I'm fighting.

> … because they know the truth … [they] even say that it's Kunggandji land …

Sarah felt that there were enough players in the native title system opposing her group that there appeared to be other agendas at play. Sarah felt that this included the State of Queensland, which tried to remove her group from the Protocol Deed on the basis that their native title claim did not meet registration requirements. Sarah felt that there were ulterior motives for the State to get rid of the Kunggandji claim and that they had tried to do this regardless of the substantive injustice that it would have represented to use the process in this way. In Sarah's recollection, the judge essentially told the State that they were being unfair.

> The judge was saying to the State's lawyer 'that's irrelevant'. And I said: 'Yeah that's true your Honour. That is irrelevant, because she's not trying to kick us out on our genealogy. She's not trying to kick us out on our Traditional Owners and she's not trying to kick us out on our traditional stories. There's nothing to justify it.' I said, 'if you want to know, I did those Form 1s and I'm not a lawyer. I'm just trying to get my tribe from A to B to get 'em registered because the Elders are worried about all our tribal history here and that's not being recognised. We've been here from the start, we've never been nowhere else. And as you read in those affidavits, you'll see that the anthropologist recognises that we had tenure rights in Cairns and Yarrabah and that's because it was one land.'

Sarah told us that there had been a land claim back in the 1970s or 1980s before native title was recognised. Sarah understood that the Kunggandji had already had this argument with the Yidinji people over Cairns at that time and had 'won', however she had been unable to get a copy of any documentation despite approaching various government departments.

(e) Shawnee Gorringe

Shawnee spoke about the experience of the Mithaka native title determination and one remaining area of land regarding which there is still conflict with another native title claim group. Shawnee felt there was a conflict of interest on behalf of the NTSP in the way the conflict was being managed.

> So, there's a bit of conflict and it's more so because of the Native Title Service than the actual different parties. I don't want to say it's them trying to drum up business, but it kind of is. So, we have an understanding with the people for the particular area, but we can't come to any kind of resolution because of the Native Title Service.

Shawnee went on to explain how the NTSP are causing this 'conflict' by insisting on sticking with one recorded account of something Shawnee's Great Grandad said, when the Elders have agreed with the neighbouring tribes about the boundaries and want to go ahead with that agreement.

> My Great Grandad, Bill, he had said something in a recording about the Country. So, they're taking that as gospel. Instead of looking at the whole picture. In the reports … if you look at the maps over time of the boundaries, there's one part where we end up in the Northern Territory border and then there's another part where we're down in Cameron Corner which is near the area that they're questioning.

> So that's been a real challenge – trying to get the Elders to understand how that works, because that's a whole new realm for them – understanding the legalities of it all, when they've talked to their neighbours and everybody's happy. And then they're told 'well you're all wrong' [on the basis of what anthropological reports and the like say]. Again, not looking at what the living Elders have to say. It is challenging 'cause there's not a lot of information. We do rely on these reports and our Great Grandad's interviews and, like, back to Alice Duncan-Kemp, what she said our people said or did.

Shawnee described her understanding that the NTSP has a financial incentive to be retained or engaged as service provider in the negotiation of ILUAs because they would be provided with funding to provide that service. The implication is that the NTSP want native title over that country to be with a group who will use their services.

> … this area in question will have some exploration permits in place at one point. So, there's also that, which does benefit the Native Title Service if they can negotiate those permits and claims as well.

As a result of the inherent conflicts of interest associated with the funding model for native title service provision, the Mithaka Aboriginal Corporation does use the NTSP but also has their own independent lawyer who, 'at the very least will look over the agreements. Just sometimes to cast an eye from a different perspective'. Shawnee has found that being able to do this, using funds they have secured, has enabled them to have confidence that the path they're taking is the best way forward for their group.

(f) Cassie Lang

The culture and conduct of NTRB/SPs was a theme throughout the conversation with Cassie. Cassie feels that NTRBs are an important part or the native title process but need to engage in better work with both clients and professionals. She has witnessed instances wherein NTRBs have not prioritised the best interests of the client adequately.

> They want to beef up their services. But is it not about getting the best advice, and the best outcome for our client? Isn't that what we're supposed to do?

Cassie's described her experience in the industry as 'inclusive, collaborative, and on the same team'. Through her experience, she has found that NTRBs often do not engage in that same collaborative mode of work. Her experience in private practice informs her position that working together will create better outcomes for clients. She emphasised that the professionals within the native title system should all have the same goal and therefore approach the processes collaboratively. This should bring NTRBs into that same team.

Cassie feels the NTRBs should serve a different purpose in funding arrangements.

> It frustrates me because there are so many good lawyers in both the rep body space and private practice but it is important to identify the strengths. In some instances it might be the best strategy for a claim that the rep body or a service provider could be basically the conduit of Commonwealth funds and then outsource … because native title claim is a litigation – use a litigation expert.

> You can have a litigation expert running the litigation, and the NTRB manages the research and maintains all of the community engagement and the lawyer then is briefed. They can come out, but you've got your community liaison people who have the relationships with the client and can help explain.

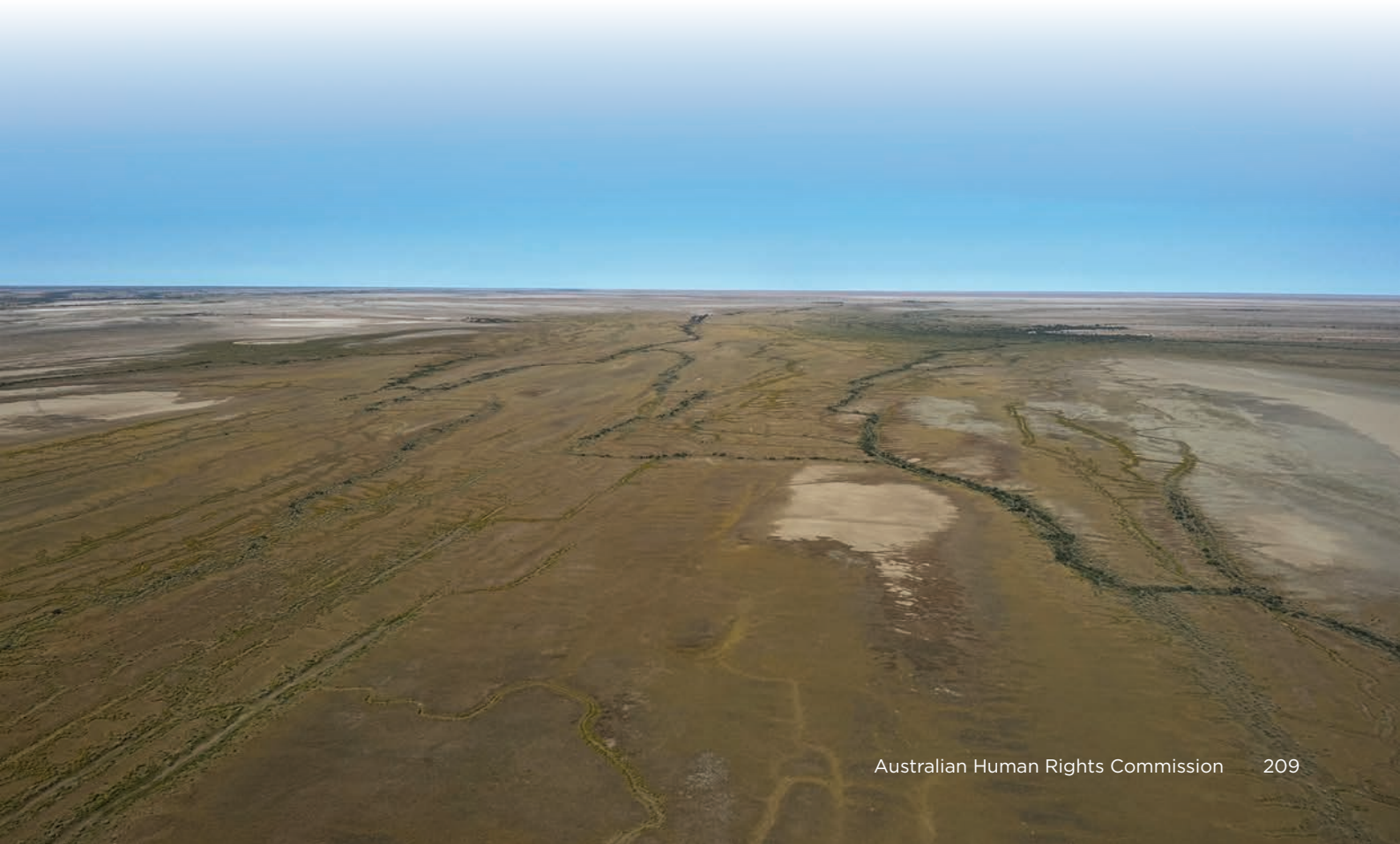
Cassie described a culture where clients suffer from negative experiences with NTRBs and have nowhere else to turn. Cassie emphasised that what she was describing is from her experiences with particular individuals within particular NTRB/NTSP and that she doesn't have these

experiences with all NTRBs/NTSPs. She explained there are other NTRBs/NTSPs with whom she believes she has a good collaborative relationship and work well together to get outcomes for their mutual clients.

She discussed a letter she had been shown a copy of from one of her clients. The letter from the NTRB/NTSP outlined their advice and ended with their decision.

> They don't take instructions. They don't say, 'here's all the evidence, these are your options, pros and cons, this is our recommendation, how would you like us to proceed?' They say, 'here's our advice, you don't take it, we're going to sack you as a client and we'll no longer act.' So, they are not even allowed to ask questions and say 'well, we don't understand how you got to that, can you explain to us why you reached that decision? Can you explain to us why he got to there? We don't know why.' It's like, 'no you're questioning our advice, if you question us one more time we're sacking you as a client, and we won't be funding another … so good luck progressing your claim in the federal court!'

Cassie believes this picture is discriminatory because the lack of oversight, transparency and accountability affects purely First Nations peoples. Professionals not being held to account in native title is unique – this is discussed in more detail in section 10.6 regarding professionals in the sector. Cassie has found that there doesn't seem to be any kind of independent dispute resolution function that can effectively mediate between the NTRB and the group. She has also found that there does not appear to be an independent person they can go to if they have questions or need a second opinion, for example on a connection report.



(g) Media case study: The Beetaloo Basin[237] and land councils as PBCs in the NT

As noted in Francine McCarthy's story, the Northern Territory is in a unique position in relation to native title governance structures. In most of the country, a native title group with a determination establishes a Prescribed Body Corporate (PBC) to hold the native title and manage decision-making in relation to that determination. In the Northern Territory, the land councils play a significant role in governance relating to native title.

Text Box 10.2 gives an outline of the situation regarding fracking in the Beetaloo Basin and media reporting of community conflict regarding whether the representative structures of the land council, and the land council's established PBC which represents over 70 native title groups with determinations in the relevant part of the Northern Territory, is adequately fulfilling its role representing the Traditional Owners.

Text Box 10.2: Northern Land Council, Top End Default PBC, and Nurrdalinji Aboriginal Corporation

The Northern Land Council (NLC) is the land council responsible for the Top End of the Northern Territory. Its constituents are the Traditional Owners and residents of those lands. The NLC is also the Native Title Representative Body (NTRB) for the northern region, including the Tiwi Islands and Groote Eylandt.

The NLC established the **Top End Default Prescribed Body Corporate** (TED PBC), which is the PBC for over 70 native title determinations.

Nurrdalinji Aboriginal Corporation is an organisation made up of more than 60 native title holders from 11 determination areas in the Beetaloo Basin. In December 2020, a group of seven Traditional Owners, represented by lawyer Dominic Beckett, applied to have Nurrdalinji recognised as the PBC for the native title holders in nine of the determination areas, representing them in their dealings with government and developers regarding gas exploration.

Original Power was supporting the application of Nurrdalinji to become the PBC.

The Guardian reported that this 'application collapsed after one pivotal traditional owner withdrew'.[238] The NLC reportedly strongly opposed the application by Nurrdalinji to become the PBC and threatened to pursue an indemnity costs order for its full legal costs to be paid by the individual applicants and Original Power, an Indigenous organisation supporting the Traditional Owners.

Original Power was supporting the application of Nurrdalinji to become the PBC. According to its website,[239] Original Power is a community-focused Aboriginal organisation that builds the collective power of our people and backs our leadership skills and capacity to genuinely achieve self-determination in our community and on Country.

Traditional Owners in the Beetaloo basin have long **questioned the ways that agreement was obtained for gas exploration back in the early 2000s**. The NLC told a Senate inquiry in 2020 that a promised $2 million from the Morrison government to assist the NLC with consulting Traditional Owners over the Beetaloo plan had not yet materialised.

That Senate inquiry heard **concerns over the way Traditional Owners were treated during consultations** regarding fracking and related questions regarding whether any consent purportedly given through the NLC or Central Land Council (CLC) was informed. Some criticisms included: meetings without translators, no details given about what will happen, where they will drill, or about long-term impacts on water, health and cultural heritage.

In relation to the NLC's resistance to the application for more localised control by Traditional Owners, some have accused the NLC of being 'more interested in establishing and maintaining monopolistic control over native title representation than in serving the wishes of native title holders'.[240]

The **group has claimed that the NLC has not effectively represented the native title holders of the Beetaloo Basin in negotiations with gas companies** regarding fracking on their country.[241]

> *A number of them have told Guardian Australia they felt under pressure by the land council to sign agreements with gas companies to frack on their country rather than risk the matter going to the native title tribunal. They say the NLC appears to them to be 'in the business of facilitating fracking'. Johnny Wilson, a Gudanji-Wandaya man who is a jungai, or cultural lawman, for his family's country, said: 'The NLC is supposed to be representing us. But we see them doing not anywhere near that.'*[242]

The NLC reportedly said that there is a diversity of opinion amongst Aboriginal Territorians about fracking, and also noted that **the real problem in this instance is that the *Native Title Act 1993* (Cth) (Native Title Act) does not give a right of veto over gas exploration or production**. This means that negotiations are for benefits to be gained, not whether or not the exploration or production can go ahead. These negotiations under the Native Title Act are time-limited and companies must negotiate in 'good faith'. If after six months they have not secured an agreement, the Native Title Act permits a company to apply to the NNTT to be granted tenure for its activities anyway.

Regarding its strong opposition to the request to have Nurrdalinji recognised as the PBC for the relevant areas, the NLC said that there were only 'at most 36 adult constituents' in attendance at the meetings which decided to create Nurrdalingji and pursue its status as PBC. The NLC said that it was '**not satisfied that this appointment or this creation of Nurrdalinji and the proposed appointment of it as a PBC were decisions that were authorised with the consent of all native title holders**. On the contrary, it was quite clear to us that many groups and many senior native title holders either didn't know anything about this or were opposed to this particular action.'[243]

In response to the NLC, native title lawyer representing the group, Dominic Beckett, said that Original Power had made significant effort to inform and consult with a steering committee to make sure the meeting was well-notified and a sufficiently representative group was invited to attend. He also noted that **this was done without the assistance of an anthropologist and other resources available to the land council as the NTRB**. There had not been any other region-wide meeting organised to discuss gas development despite the people requesting that. **Beckett felt the NLC should have supported and attended the meeting** but instead chose to stay away and then criticise it.[244]

10.6 Impact of professionals in native title

Many of the stories we heard in the preparation of this Report highlight that the role of professionals in the native title system involves more than simply accepting a scope and working to it; or filing applications and formally advising the 'client'.

We heard of the positive impact of professionals who understood that their roles include effective communication with their clients. And we heard of the damaging impact of professionals whose clients did not understand the process, the players involved, their own role, or the outcomes.

In both the claims and the post-determination stages, we heard about the importance of professionals being able to understand cultural governance and traditional laws and customs. Understanding of these is critical so they can be properly taken into consideration in the determination and, subsequently, in the establishment of decision-making processes at group level, and their incorporation into the constitution and rule book of the PBC.

Where these things were not done with the requisite level of cultural understanding, *as well as* Western governance capability, the First Nations groups or individuals and families within those groups struggled to participate properly in the process. Further, in such circumstances, common outcomes have been the exacerbation of community disputes and power disparities, and a more profound lack of free, prior and informed consent to agreements affecting native title rights and interests.

We also heard about the critical positive difference that culturally competent professionals can have in ensuring native title systems are understood by First Nations participants. The stories that highlighted how professionals can positively impact the experience of native title claimants and holders have practical learnings for all professionals in this space (and any other space in which professionals serve First Nations clients).

(a) Cassie Lang

Cassie Lang spoke extensively about the lack of mechanisms holding professionals to account in the native title system.

Cassie commented on the role of anthropologists that are commissioned and funded by the NTRBs. Cassie has found that anthropologists working on a claim will often struggle with the limited scope from the NTRB regarding their research brief.

Cassie has witnessed a number of anthropologists adopt that limited scope and work to it, even when it is not presenting an accurate picture of the families who should be involved. Cassie's view is that this is resulting in determinations having to be reopened because claims excluded families who should have been included and included families who shouldn't have been. Cassie believes that this is a result of limited resources in terms of finances and experts available to be able to complete the work properly and not be rushed or limited to the scope.

Cassie noted that sometimes certain conflicts of interest or individual agendas seems to result in families being unable to get these determinations reopened and, in such circumstances, the disputes just fester.

> You're just going to have this constant disputing family so that you continue to make the group disharmonious … There's one group that I know of based on that really wrong anthropological report that put a family that doesn't actually belong there – they then managed to have the stronghold, they run the PBC because they haven't changed the determination. So, let's say, the boards aren't representative of the apicals. It's whoever is elected, they've got the numbers, they just keep electing themselves, negotiate the money and nothing is getting done with the community.

In her experience Cassie has found that, even in the hands of well-meaning non-Indigenous professionals, the native title processes are often not culturally safe or appropriate. The result is inaccurate and incomplete information with which to work: 'even with the best of intentions, non-Indigenous lawyers and anthropologists still struggle to realise when they are not getting all the information' – they are not making people feel comfortable to share.

Cassie has witnessed 'old Uncles' talk in confidence to the Indigenous assistant at the coffee break rather than the non-Indigenous lawyer who had been asking all the questions on the record.

> Where I've seen it not done well is where they don't listen to, say, if [the anthropologist has] brought, let's say, a paralegal or an admin person from the rep body who is Indigenous, but they don't actually listen to the Indigenous advisor – the support person – they've brought. So, they might be asking all the questions, and they [think] 'Yep this is what we've got' … But, I could see that [the Uncle] was holding back, you know, he wasn't sharing. And again, [the non-Indigenous lawyer or anthropologist] just take what they hear on face value, and then think that's it.

> But then the assistant was making the Uncle coffee or having a quick break and he then shares the stuff in confidence, on the side, and then it's not documented … you're missing so much because of the way you're asking questions. [The Indigenous advisor or support person] and their insights are not sufficiently respected.

Cassie has also found that a lot of information provided to individuals via non-Indigenous lawyers and anthropologists seems to get 'lost in translation because they use unnecessary language and unnecessarily complicate things'. The result is a failure to get genuine consent, even when the professionals think they have followed the correct process.

> **When you're providing your consent and authorising something, that's supposed to be on the basis you understand. But so often there is no focus, at a practical level, on ensuring the affected Traditional Owners and native title holders understand what they're agreeing to.**

Cassie described a more appropriate and effective way of getting accurate and comprehensive information by ensuring everyone feels they can contribute:

> Many of the groups I work with, our whole meeting is done in language. It's translated for my benefit into so that I understand. I sit there to provide guidance and support. So, I would have already briefed the board and the chair. This is where we need to get to, this is the outcome we need. They'll do the whole context and explain everything. I then give my bit – explain what I need to do in English – it gets translated, as I speak, into language. I answer the questions when they ask me, but it's all done, at that level. I don't need to stand up and own a meeting and interfere with it, because it's not my business.

> So that's why … if you let them do it amongst themselves with somebody that they trust, you are going to get much more genuine engagement and sharing of information that can then just be documented.

Cassie has realised that her cultural knowledge and understanding results in a naturally comfortable relationship with native title groups that involves her doing a lot of observation and listening as a lawyer in native title cases. Cassie acknowledges her role as a professional is to facilitate full participation. She has found that she instinctively waits for people to come forward from the group – the group naturally pushes someone to the front in these contexts and this allows the group to participate in a way which is culturally comfortable to them.

> they kind of appoint them, just by default, by the way that they constantly defer to the person. It's almost like community appointment. If you do it a little bit more organically, it seems to work better.

Cassie also discussed the challenges she sees junior lawyers face in the native title space. She discussed how lawyers and other professionals within the system are burned out from the system and are forced to navigate the work without any support. Cassie emphasised the need for mentorship to be better prioritised within the professional side of the native title system. The need for attention to wellbeing was something she described as significant. Cassie said that, without this attention to professionals entering the native title space and the collective responsibility to look after one another, the clients have suffered and will continue to suffer. She described the need for junior lawyers entering this work to be supported to sustain their work and enable needed change in the system for clients.

Cassie described some of the work she has been a part of to heal communities from native title-generated fractures. Cassie understands her professional role as a lawyer in the native title system to be broader than what some others appear to view it as.

> I've got a group that I work with who have been so disempowered – these families were completely exiled and excluded from native title for a very long time. It's only been for the last, say, five years that they have had a seat at the table. So, they're at least 10–15 years behind everybody else. It has taken me 18 months to get them to somehow work collaboratively. They couldn't even be in the same room together …

> And what we've been able to do is get them to hear each other – we focused on sharing information around how the process actually works, and then getting them to look at how do we make sure this doesn't happen again – like, 'you know what it feels like to be completely excluded.' So, I suppose it is recognising what they've been through then using that to motivate them to support other families moving forward.

For Cassie, so much of her role as a professional in the native title system is facilitating people coming together through developing an understanding of the process, of one another, and of the mutual need for time and space. One particular story stood out:

> … you know the meeting was going poorly and the group was so dysfunctional, and it was dysfunctional because these two aunties had been at war with each other for years and they were at war with each other for years because the brother of one of them had raped the other one, and she never told anybody. Literally – we were in the middle of a meeting and it was getting toxic, and this Auntie just walked in and said 'I've had enough'. She walked over to the sister of the perpetrator and told her what happened and said, 'This is why I've hated you and your family for so long'. And then they cried, hugged it out, everyone then hugged each other and then we've got the agreement and meeting was done. It was pretty intense.

> It's so complicated – there's so many layers.

Cassie didn't use the term 'safe space' but what she repeatedly described in her interview was how, within her professional capacity and role, she created safe spaces in what were otherwise fraught and even violent meetings.

(b) Avelina Tarrago

Avelina Tarrago has found the quality and integrity of anthropologists in the native title field to be a critical influencing factor in the experience of the process for First Nations people engaging with the system. Avelina was scathing of the lack of understanding some anthropologists demonstrated regarding the limits of their knowledge.

> [Some anthropologists] don't listen or they think just sitting down for one meeting is enough. You know, it takes a lot to recall things and also – you know some things we don't want to disclose or it's too shameful to disclose things, and you need to build rapport. I just find that they don't and that was actually ultimately an issue when I joined as a respondent …

> Our anthropologist did a report and then there was a dispute between the actual claimants, they had another anthropologist. And so, the Court then ordered for a hot tub of experts, or it might have been a conclave. But they had to come up with one position on the evidence. And I still to this day disagree with that finding …

Once Avelina knew the position of the joint report that the two anthropologists were required by the court to produce, she decided to withdraw as respondent, so she didn't have to spend any more of her own money.

> We could see the writing on the wall … I knew it was a losing battle. So why spend more money? And it meant I didn't have to give evidence at that particular point. They did a hearing on the overlap and the mistake, the other respondent group that I was conflicting with, they did give evidence and the findings were – basically Justice Mortimer, in the nicest and most polite way, said 'everything that you know is learnt, it's not traditional knowledge'. So, in the context of native title, that's fatal.

Avelina remains angry at the way the two anthropologists conducted themselves because of the lasting, unjust impact it has had on her Country.

> So we are still in the position now where there is a consent determination [which includes] an area that, from my point of view, doesn't belong to that native title group.

Avelina also talked about the impact of inadequate communication from legal providers in the native title system on individuals who are particularly skilled at 'walking in two worlds'. She talked about the burden on her, personally, when the lawyers who are supposed to be representing and advising her native title group do not provide accessible enough advice.

> … everyone sort of just falls back on 'well Av's got the law degree. She knows how to do this stuff. We'll just let her do it'. So, a lot of responsibility falls on me to move things along and talk people down, or try and resolve things. Or they don't understand what the lawyer said so they ring me, and I'm like 'it's not my job. I'm not giving you legal advice. I can't give you legal advice.' So, explaining, and then I have to go back to the lawyer and say 'you need to do a better job because they don't understand anything that you've said.'

Like Cassie Lang, Avelina described how she approached her professional legal role in the native title system. For example, Avelina spoke about how careful she was to ensure that the governance requirements for their PBC were clear and in accordance with traditional governance, so far as is possible in the PBC regulatory framework.

> You know, we can't walk away from the construct of colonialism that is now the Native Title Act and the PBC Regs, so we have to work within that framework and incorporate where it is consistent with a traditional law. That's the whole point of Mabo, that it can co-exist and so I try and incorporate it as consistently as possible. So, our traditional decision-making process should align with our rules that we can exercise under the legal framework we're stuck with.

By the time she was working on her own PBC Rule Book, Avelina already knew from professional experience in the native title system that provisions relating to conflict resolution in PBCs were critical, and that conflicts of interest needed to be addressed explicitly in the Rules. In this regard, Avelina ensured that it was written into the Rules that an individual can only be on the Board of the PBC if they are not already a director or member of another PBC in Queensland.

> 'Cause you have vested interests in multiple areas and the problem is that these are people on the areas neighbouring our area of determination. So, it's not like they're down here in Brisbane where it's got nothing to do with any decisions being made in our area, these are PBCs that are next door to our PBC. So, there is a material interest in what happens on our Country because it may affect or impact on theirs as well or opportunities might arise in ours and there's no conflict barriers and information barriers between them. So that I was really concerned about. People not managing their conflict. But I was very strict about what the criteria is for directorship.

Avelina also realised that there will always be a way of changing the Rules to create a situation where traditional decision-making structures are not respected, because ultimately, traditional decision-making structures are not effectively protected in the Native Title Act. Nonetheless, she hopes that through the carefully drafted provisions of the Rule Book and by involving and representing everybody openly and transparently, deterrents and protections are now in place, so far as is possible, against any future attempts to overturn the traditional decision-making process embedded in the Rule Book.

(c) Leah

Leah explained how the original native title claim she was involved with was divided and became two separate claims. At the time of Leah's interview, the first had already been determined and had been run by NTSCORP in NSW. The second claim was still an ongoing claim, being run by SANTS over the border in SA.

This experience of two NTRBs has given Leah the opportunity to compare the different ways that professionals in the native title sector handle claims. It has allowed her to understand where professionals are having significant effects, both positive and negative, on the outcomes for community.

Leah noted that, at times, community members might be perceived as 'unrealiable' for the NTRBs and NTSPs, for example, not showing up for meetings, and not cancelling accommodation. However, Leah went on to say that understanding these issues is part of the role of working effectively with Aboriginal communities:

> There could be better organisation of these meetings. At times our native title meetings appear to be controlled by lawyers, when it should be community governed – community directing the Board.

> Some meetings can go well, if you've got community facilitators who are trying to open conversations and are asking for what can be provided at meetings. Meetings should be actioned from previous meetings, and a full financial annual report, should be provided.

> So, I can see a big difference between the way the first claim and now the second claim is being managed. The process is complex. There is a combination of things that happen with the way SANTS have meetings. It is facilitated more inclusively and professionally, also it is the input of community members contributing to those meetings more respectfully.

> It's also about the lawyers communicating respectfully.

(d) Leanne Edwards

Leanne Edwards described how important her lawyer had been to the relatively positive outcome in her native title claim:

> I think about – well, it helps when you got … a good lawyer that shows they care. And they understand Indigenous cultures and all that sort of stuff.

In addition to the understanding her lawyer showed, she also discussed the practical accommodations made by her lawyer. Leanne and her husband were managing the remote Delta Downs station at the time, which made attending meetings in town difficult. Leanne's lawyer assisted in making her contributions to the native title claim easier by travelling out from Normanton to the station to get information from Leanne.

In contrast, Leanne spoke of how the anthropologist had not come out to the station and appeared disinterested in gathering Leanne's knowledge. Leanne felt she had missed some critical meetings because of living and working so remotely, and that the evidence gathered did not include some significant information as a result.

Leanne also noted how the claims in her case were combined and this meant that the Land Council-commissioned anthropologist for the other group then was put on the Gkuthaarn side of the claim too. Leanne said this happened despite her own concerns and those of others that the anthropologist in question did not know as much about the Gkuthaarn people. It seemed to Leanne and others in her group that the anthropologist report was more about efficiency than the most accurate understanding and representation of the Gkuthaarn people's connection to Country.

(e) Coral King

After being refused funding from her NTRB to engage a private lawyer, Coral King has struggled to get any legal representation at all, with many law firms saying they were 'conflicted' because they did other work for the relevant NTRB. In the end, she had received a referral-from-a-referral to a solicitor in another state.

At first Coral thought she was being represented pro bono but it actually wasn't the case. At the time of her interview, Coral had paid $21,000 of her own money (including some borrowed from family) to that private lawyer, but felt she had no real information about what had happened with the case and what was happening now. From her perspective, it seemed like the lawyer had abruptly ceased representing her in the middle of proceedings and she had no idea why.

At the time of speaking to Coral and anthropologist, Dr Powell, Dr Powell had recently forwarded a significant volume of material to the private solicitor but commented that he had not yet acknowledged receipt. She and Coral noted that they did not usually deal with the lawyer himself, but another staff member, whose role they were unclear of.

Dr Powell said that at one stage, the lawyer's office had asked her to do a significant affidavit for Coral's case but did not provide enough notice for her to write a responsive report. The result seemed to her to be that Coral's case was put without expert evidence.

> I was working on an active native title case elsewhere and I said I haven't got enough time to read all these expert reports. I was to raise a couple of points and [the other staff member in the lawyer's office] was to let [the lawyer] know and he said 'alright that's okay, tell Fiona she can put in further information later'. But they never asked me to do that, unfortunately.

Coral also recounted that she had had very unpleasant experiences with the two mediations, which were ultimately unsuccessful. There appear to be many reasons why they were unsuccessful, including that Coral's understanding of the mediation process, the potential outcomes, and her expectations appear to have been poorly managed by all the relevant legal players.

Ultimately, in relation to the mediation between Kungardutyi Punthamara and Wongkumara, Coral said that she and her sisters and other Kungardutyi Punthamara People were not after 'permission' to access the Country they knew was theirs. They wanted recognition that they are Traditional Owners of that country. This suggests that the purpose of the mediation was unclear to participants from the beginning.

> When we got back to the table, all together, the barristers came back in and the QC was doing all the talking about this and that … it's our Country, we should have free access to it, not be told that we are 'allowed' to do things because they had already claimed it as their Country and it was theirs already to give us the rights to do things.

> Well, we weren't going to cop that. That was not their Country to be telling us that we could go onto their Country … We want access, we wanted our Country. We wanted to be recognised in court as the Traditional Owners of that country.

> But because it seemed like they had the belief that the Country was already their Country, it was never going to work from the get go. They didn't accept that it was our Country.

Additionally, Coral spoke about the way the mediation itself was handled logistically. Coral said the other side had a team of lawyers and her group, at that time, had none. She also said that members of the other group were threatening but when Coral and the other women present responded forcefully she was blamed for the conflict.

> We had two mediations. The first one that we went to was in the Brisbane office, in the Brisbane courts and they came armed with barristers and QCs and what not and of course we had no one. We didn't have a solicitor and asked the court if they could leave the mediation before it started because it didn't seem right to us.

> So, they did that, they asked them to leave and it was just us people facing each other across the table. Some of the Wongkumara people got very antagonistic towards us, and one of them … he threatened to get up and go around the table and jab her [Coral's cousin].

> He did jump up but he didn't get the opportunity to do anything because the three of us there, the other three women … we jumped up too and said, 'you lay a hand on her and this is what's going happen'. So yeah, he decided against it. Word from other people was that the way he carried on there was like at the meetings that they held and other mediations that he'd been to, where he wants to throw a chair at everybody and that sort of thing.

> Then the two mediators came out from this little room they were locked in and immediately put the blame on us …

> So then what happened after that was that they decided that they'd split us instead of letting us all meet together, they put us in another room and then they did the mediation with us.

Coral didn't know why, but she felt that one of the mediators already seemed to 'have a thing against [her family]', potentially related to a previous mediation involving her cousins. Coral had not been involved in that, but she couldn't think of any other reason why that mediator seemed to be 'blocking us at every turn'.

Coral's description of the second mediation highlights the complexities, cultural norms and long-standing community tensions which non-Indigenous professionals in the system often do not fully understand. These had a fatal impact on the second mediation when, despite clear requests from Coral that her mother not be mentioned, the main applicant for the other side talked about her mother.

(f) Sarah Addo

In Sarah's situation, she felt that the native title processes were being used to thwart what would be a just outcome; and that some lawyers and other professionals in the native title industry just 'do their job' and follow process, when they know what they're doing is not right. Sarah feels that by 'just doing their job', they are a key part of the injustice, particularly when it is done in what feels like a deliberately narrow and even obtuse manner.

For example, Sarah's family learned that there were native title meetings happening with the NTRB and other tribes regarding the Cairns area. Sarah found out from family and confronted the professional involved 'because she would have known that it was not the right thing to do but still went ahead and did it, because she was told to.' Sarah couldn't understand why her family was being deliberately excluded from these meetings about the Cairns area. She felt like it was a deliberate strategy to try and generate interest from other people with connections to the area, but not traditional connections like her own family, for reasons discussed further in section 10.5, on conflicts of interest.

> I rang up [the professional involved] and said 'how come you gave that map knowing that we already had a claim over that area? You should have told them there's already a claim over that area … You've already stuffed the claim up for East Trinity. Stop doing what youse are doing.'

> I said, 'you shouldn't have done it, [name]. Like, you're an intelligent woman. You work for the Australian Federal Government. You knew we had a claim over that area. Why did you go and give [the NTRB] another claim to go and put an expression of interest for historical people to claim that land. When we're traditional people?'

(g) Maria Stewart

Maria Stewart also spoke about how, in her experience, the professionals working in the native title system have created terrible, unjust results for her family and many others.

She told us how anthropologists drafted connection reports without speaking to all the relevant people and just did the bare minimum of basic research, without 'digging' to find out whose Country it really is.

Maria wants the professionals working within the native title system to be held accountable for the impact of their actions and their approaches:

> The system doesn't fit, but also, you've got lawyers and people that working within these systems that are allowing these things to happen. There's no accountability.

At the time of her interview, Maria told us that her family was in the process of trying to get a native title claim registered. She described how the more recent experience in the native title system had been much better than her earlier experience. The reason for that is that her lawyers had listened to her and her family properly this time.

> We're in the process of getting the final report, but I think this recent experience with native title has been a good experience … because our voices have finally been heard …

At the time of her interview, Maria and her family had been working with a lawyer trying to claim what land is left to protect at least some of their country. She described how the native title system essentially requires them to choose a narrow identity in order to claim.

> So, we are Arrernte and Wangkangurru but, you know, you don't just become one group, you come from different groups. From your grandmother, grandfather, you know, you don't just become one group. I can't say I'm [just] Arrernte; I've also got Yankunytjatjara.

(h) Anna Strzelecki

Anna Strzelecki spoke about the way that the Kokatha PBC was set up. She felt that the interpretation of the determination with regards to membership – specifically the definition of who can be a Common Law Holder – has resulted in community conflict. Anna felt that that the attempt at incorporating cultural practices associated with belonging to the group and holding traditional rights in relation to Country had not been done well.

Anna recognised that the determination in this regard was unusual in its breadth of eligibility. However, for the purposes of considering the role of professionals, it is relevant that the Rule Book of the Kokatha Aboriginal Corporation RNTBC replicates the terms of paragraph seven of the determination.[245] The details of the determination and Rule Book are discussed in section 10.7 on recognising customary law and practices.

From Anna's perspective, the rules do not seem to adequately address that the Common Law Holder eligibility requirements for individuals without apical ancestors listed in the determination (and Rule Book) include being 'recognised by other Kokatha native title holders'. That is, there appears to be no process agreed upon to decide that other Kokatha Native Title Holders recognise a person without apical ancestry as a Common Law Holder. As Anna said:

> It could be that 'everybody within the group knows that they are a Traditional Owner', but who is everybody?

In addition to the professionals involved in the PBC set up after the Kokatha determination, Anna had witnessed the impact of the role of professionals in the native title sector on Lake Torrens – the way native title claims by four different native title groups from areas surrounding Lake Torrens were put together and lodged has left it vulnerable.

> So, there are four different Aboriginal Native Title groups that go around this lake but nobody has native title over the lake itself and so they all put in a claim to go over the lake. That actually went to the High Court and was disregarded and part of the reasoning … was if the four groups had worked together to put in a joint claim if you like, then perhaps that would have been successful.

> **The result [of all the contradictory evidence from different families] is that nobody has native title over Lake Torrens … Then, of course, this family doesn't talk to that family. And in the meantime, the mining company gets whatever they want.**

Anna felt that native title was an inappropriate means for protecting Lake Torrens and has only created disputes over the Lake.

> … they couldn't or didn't want to, or whatever, determine who had the most claim over it. It's almost like it should be protected by itself, as a thing rather than giving rights to any of the individual groups.

> So, [the Kokatha] have put in a formal application for the urgent protection of Lake Torrens under the Aboriginal Torres Strait Island Heritage Protection Act, which is Commonwealth. So … nobody's got the Native Title, but they are seeking formal protection.

(i) Monica Morgan

Monica Morgan's story of the early days of native title highlights how important the direct relationship between the native title group and the legal representatives was, and how critical the quality of the legal representation is to the group's experience of native title.

Despite ultimately not securing a native title determination in their favour, Monica spoke about the process as empowering in large part because the Yorta Yorta negotiated to have control of their own funding and a direct relationship with their lawyers. The lawyers were groundbreaking legal leaders in the native title area, all exceptionally competent lawyers as well as interested in respectful engagement and ensuring their services benefited their clients in the bigger scheme.

> Mum went and hunted Bryan Keon-Cohen until he agreed and then he bought a few people on board and Ron Castan and people like that on board. And even Ron Merkel was around at that time too.

Monica explained that at the time of *Mabo (No. 2)*, the Yorta Yorta were in the process of their own court claim like Eddie Koiki Mabo and the other Traditional Owners from Mer Island. After *Mabo (No. 2)*, the Aboriginal Legal Service which was funding their lawyers pulled that funding and they had to wait for the negotiations to take place around what would become the *Native Title Act 1993* (Cth).

Monica described the role of the Yorta Yorta in the earliest days of running native title cases under the Native Title Act; of how the NTRBs didn't know what they were doing and were copying the Yorta Yorta case and how they were structuring themselves, their family groups, ancestors, etcetera. Monica played a very active role in this part of the case:

> I was the go-between – voluntary – between the Elders and everyone and Arnold Bloch Leibler. Ron Castan brought in Arnold Bloch Leibler and did some early work. I think they did early work pro bono until we were able to get the funding. So that was in the early 90's, I was the in-betweener. I was the one who would negotiate and go and get all of the claimants together, and assist Peter Seidel, who was the ABL solicitor. Followed them and gathered the evidence and do all that kind of stuff. The early stuff. Then when the Court process, I coordinated for setting up the tents, to getting the witnesses, to providing the venue, the food, everything.

> I did it voluntary for about two years and then when we got our funding I was paid as the Native Title Co-ordinator. So I ran an office, we had the Cultural Heritage here … that was our prime thing – to get the Elders together, have the native title meetings, sort out the witness list, working with the genealogists and all the different people. And some of it was hit and miss. Some of it stuck.

10.7 Recognising customary law and practices in the court processes

There have been many cases in which native title law has attempted to incorporate traditional law and custom into British Australian law with the aim of protecting it. One aspect of traditional law relevant to these attempts is the way that communal rights are defined and group decision-making processes are agreed upon within the context of the native title system.

Several women we interviewed told us that the native title system has not managed to appropriately and accurately include customary law in a way which preserves and protects it. On the contrary, women felt it has created a forum for misunderstanding of cultural laws and practice, and for disputes over decision-making regarding Country.

> **I have come to realise that as a spiritual woman I must consider the stories from two perspectives, one from Native Title a colony perspective and the other from a cultural perspective. Waluwarra Wangkayujuru Wangkaymunha People who as we like to call ourselves 'mob'. Walking a fine line between the two can be difficult with often opposing priorities and values. In addition, support from mob is often limited given that opportunity to visit and to speak on Country. Education, in many instances, has proven to be the vehicle for empowerment for these opportunities to be created. It can develop a culture theory and pedagogy that considers Aboriginal epistemology (or 'ground of knowledge' based on an Aboriginal world view). But on the other hand, it gave the conception thinking of colonisation.** ***Thelma Parker***

Several women considered that judges and lawyers often did not seem to be able to understand the nuances of traditional identity, decision-making, social interactions and kinship.

We heard of courts requiring anthropologists to come to an agreed position out of necessity, even when their positions were irreconcilable.

Further, the rushed processes and predetermined outcomes associated with the connection reports and genealogical evidence for native title claims has resulted in evidence being put to and accepted by the courts that is not considered accurate, or able to reflect the complexity of the traditions being described by Traditional Owners. The result has been determinations which are later found to have given the wrong people native title rights and excluded other people from their Country, and confusion about the laws and traditions which are presented as being a part of native title, but which are really distortions and which create conflict.

Additionally, as discussed in section 10.1 of this chapter on the disempowering process, we encountered at least two cases in which 'evidence' from many years ago in different contexts was used to discredit or 'disprove' certain connection arguments made in the native title context. In both cases, it was striking that the use of evidence in this way felt unfair and potentially misleading. The history of dispossession and the associated reconstruction of identities featured throughout almost all the women's stories in various manifestations, and is a common and understandable feature of First Nations communities in modern Australia. The cases referred to here in this regard seem to have involved isolating specific historical moments and features of that reconstruction and lawyers and judges attaching intent to 'inconsistencies'. Notably, my team and I did not read through all of the native title cases or transcripts relevant to the women's stories as this Report is about the lived experiences and the truths of the women themselves. This means there are likely other cases with similar evidentiary concerns.

(a) Bunuba

> [I]t's like they're rushing us, and I think that's when all the arguments occur because they're rushing us. 'Oh, so and so put that family on there', 'oh, you shouldn't put that family on there, that shouldn't be here'. And then while we argue they go into court to get native title, and they got native title because certain people have gone there, and they come back and then we're still arguing …

> So, we got Country back, then … it's like, well, okay we've given you native title, well what are we going to do now? Families haven't connected yet and they're still arguing about if they're connected …

Millie felt that something like the Bunuba Cultural Mapping Camp that she was attending at the time of her interview should have been conducted before the native title process begun, or at least before it went through the courts. She felt that NTRBs bear some responsibility for this failure to conduct the process in a way that recognises the reality and complexity of what is being asked of First Nations communities in the native title process.

> So, this process here, connecting people to Country, should be done first … this is a process [the NTRB] should have done longer, and they should have picked up on [the need for it]. [Commissioner June Oscar] picked up on it and said this needs to happen because of the arguing every time we have meetings. How many times have KLC witnessed that over the last 30 years?

> I was there at one meeting … I actually said to my little family group there from my father's side, '[t]he more we argue the more we're keeping them in jobs.' I said 'we need to come together as one nation, one Bunuba nation, and do it ourselves, we could be running it ourselves.' But because we keep arguing with one another we need some middleman to make everything fit in for us. Because if I was to go, or somebody else go and organise these meetings, they would go 'oh what are they doing organising that meeting?' I think KLC can do a lot better with the process and with talking to people about country and getting the right information from families.

The way that lawyers and courts interpreted anthropological evidence and attempted to accommodate cultural law and practices into the native title determination has resulted in additional inaccuracies to those of the original genealogical inaccuracies.

In the Bunuba native title context, there has been conflict over who has authority to make decisions over certain parts of Country because 'communal rights' has been interpreted by some people to mean that all Bunuba people have rights over all Bunuba land. This is not the way traditional Bunuba land law works. Certain people and families have sole decision-making responsibility over specific areas of Bunuba Country. Anthropologist for the Bunuba people, Dr Sandra Pannell, said:

> The issue of what native title looks like after the legal recognition of that title has really become an issue for native title holders in the post native title period, as members of the prescribed body corporate work out the intramural distribution of rights, which the actual native title determination did not address.

> For example, Bunuba people were found to have communal rights which, on the surface, indicates that all of the recognised Bunuba native title holders have equal rights to all of Bunuba Country. From the perspective of Bunuba people, however, this doesn't truly reflect the nature of Bunuba land law and culture, where people express a connection to more localised areas, called muway, and have related cultural responsibilities and obligations to those named countries From a Bunuba perspective this means that being a Bunuba native title holder doesn't mean that a person can just go and camp on someone else's Country and take up a pastoral lease and run cattle there, for example. However, in the post-native title landscape, through the operation of the Dawangarri PBC, Bunuba people have negotiated an on-ground outcome which more closely reflects their localised attachments and identities, as people of a certain muway.

(b) Leanne Edwards

In section 10.1 (and other sections too), I address women's concerns with the way that written evidence is given priority over oral evidence and traditional knowledge held by community. That theme is relevant to this section too because of the number of women who found that the result of the anthropologists, lawyers and courts taking this approach is often inaccuracies in the genealogical evidence, connection reports and court interpretations.

Leanne Edwards was one of many women who spoke about this. Leanne spoke about how some of our knowledge has been passed down generation to generation, and some is from people who have (or had) the knowledge first-hand. But Leanne described a lack of nuanced understanding in the native title system of the whole picture and historical context, and why the written evidence or previous understandings should not be taken as necessarily true, for several reasons.

> I think that's the worst thing of the native title court system – they rather listen to an anthropologist report; and what was written down in history sometimes wasn't exactly right.

> They could have missed or misunderstood what that Elder was saying. They didn't know how to speak English, they would just say 'yes' to that white person because they knew the consequences of saying 'no' or 'that's not right'. You know, there were consequences for speaking back to white people at that time.

> And trying to explain to a white person your connection, and you gotta try and prove it, you know, it's wrong in an Aboriginal person's eyes – we try and tell a white person our connection, our Dreaming, yet they don't have that same belief. How can you understand?

(c) Shawnee Gorringe

As discussed in section 10.5 on inherent conflicts of interest in the native title system, Shawnee Gorringe spoke about how the 'conflicting' native title groups in a remaining area of land not yet determined at the time of her interview were not the ones preventing an agreement over the boundaries. The Elders of each neighbouring group had actually agreed on boundaries.

Rather, the NTRB/SPs were prioritising evidence from one recording of her Great Grandad, and from non-Indigenous historians and anthropologists, rather than the oral evidence of the living Elders as to their understanding.

In Shawnee's case, the traditional way of Elders leading communities in negotiating and compromising on land-related issues is being overruled by non-Indigenous structures within the native title system.

(d) Marilyn Pickalla Campbell

As detailed in section 10.4 on interactions between legislative regimes, in her case the land council was contesting Marilyn's connection to Isabel Street. The land council was trying to show that she did not have the level of cultural knowledge needed, and that others (who agreed with the application for a determination of no native title interests) were better placed than her to give an authoritative position on the cultural value of Isabel Street. They argued that there are other sources of the traditional foods in many places on the south coast of NSW, and that Isabel Street is not, relative to other places on the south coast, of 'significant cultural value'.

In her evidence, Marilyn specifically avoided answering some questions because she 'doesn't speak for other families' as to who is and isn't a knowledge-holder in those families. In response to this, the land council's lawyer suggested that Marilyn was not answering because she didn't want to admit that traditional knowledge-holders from other families were backing the land council in their attempt to develop Isabel Street.

Marilyn's case also reflects the difficulties associated with giving connection evidence in the native title system in the early days when it was unknown how that evidence would be used down the track or what other implications might be drawn from it.

Marilyn's case highlighted how this can play out in practice for Aboriginal and Torres Strait Islander individuals and families who find themselves having to participate in the system multiple times over decades. During Marilyn's cross-examination (in 2020), the lawyer for the land council placed emphasis on Marilyn's affidavit from the earlier native title claim that she was involved in, some 17 years prior (18 June 2003). The lawyer used the lack of mention of Isabel Street in Marilyn's affidavit from back then to argue that Marilyn did not consider the area to be of 'significant cultural value', relative to the other places that she spoke of in that previous claim.

(e) Coral King

In Coral's case, one thing that Justice Mansfield noted in his 2014 judgment was that there was too much contradictory evidence surrounding the way that Coral King's relatives had described themselves at various points in the past.[246] For example, Justice Mansfield referred to Geoffrey Booth's father Clancy Booth calling himself a Kullilli Elder in a letter in 1995.[247] Notably, Justice Mansfield recognised that 'at least to some degree, the concept of group or tribal boundaries required more formal recognition only as a result of the NT Act'.[248]

Coral and Dr Powell told us that a letter from many years ago identifying himself as Kullilli does not mean that Clancy Booth considered himself Kullilli rather than Kungardutyi Punthamara. Coral and Dr Powell explained that the use of 'Kullilli' in that context was a general term for people from Southwest Queensland.

For Coral King, the result of that decision by Justice Mansfield in 2014, which she believes was made 'largely on the basis of weight given to inaccurate anthropological evidence', has been devastating.

Coral told us that the difficulty in correcting the evidence from the original decision by Justice Mansfield feels overwhelming.

> In my case, the first judge made a decision against us, relying on false evidence. Two subsequent judges have relied on that first judge's decision – even though we have tried to correct the false evidence. We are told we have to appeal the first decision, but we have no funds to do this. There should be a process that supports native title claim groups to appeal judgments based on misinformation.

Coral spoke at length about how she could not fathom how the evidence in her case has been, in her view, so misinterpreted. It simply did not make sense to her, or to her anthropologist, Dr Powell.

Dr Powell said she has been shocked at the way the legal system has played out in Coral's case. In particular, she felt that that substantive evidence has been dismissed by judge after judge. Dr Powell questioned how the interpretation that has been given to the evidence relating to Coral King's grandmother Toney is possible, as from her perspective, 'the oral account and documentary material show it is obviously incorrect'.

> **Dr Powell:** [Coral's grandmother] Toney was born at Mount Howitt and had most of her children at Nockatunga, a pastoral station adjoining the Mount Howitt area, to the south. Her husband, who is Coral's grandfather, was actually interviewed by Norman Tindale in 1938 and Tindale recorded that he said his Country was 'about Mount Howitt' and that they journeyed towards Durham Downs, which is also in the Wongkumara claim. The evidence that there is more than one tribe named Kungardutyi and that Kungardutyi was the name of a language that was also known as Punthamara or Wangkumara was dismissed by Justice Mansfield as not important, having no weight. You just have to read the transcript …

From her perspective as an expert anthropologist for the relevant area, Dr Powell felt that important anthropological and linguistic evidence had been ignored:

> When that was brought up – that evidence that a Kungardutyi tribe was sitting in North West New South Wales – I was in court, I was giving evidence and I said, 'no that's not right, there's more than one Kungardutyi tribe, there's another one and in fact Dr Hercus talks about it in another article.' And [Justice Mansfield] just dismissed it. He put in his judgment that I placed too much reliance on linguistic material. Dr Hercus read that judgment and she was terribly upset.

Dr Powell told us that she feels many lawyers and judges do not seem to understand the anthropological evidence, or the anthropological research processes associated with compiling evidence, in order to properly and accurately assess the weight of the evidence presented in proceedings.

Regarding Coral's case, she and Dr Powell described a complicated picture whereby at least three different groups were recorded by the name Kungardutyi (spelt in various ways). Coral identifies as Kungardutyi and Punthamara together because that is the principal language used by their tribe. Dr Powell explained that the Punthamara language is also described as the same or similar to languages named Kungardutyi and Wangkumara. Dr Powell said there is an underlying lack of appreciation in the legal community of the complexity of the recording of naming of languages and groups associated with pre- and post-sovereignty tribes as they dealt with the impacts of dispossession and forced relocation.

Regarding Coral's Kungardutyi Punthamara 'label', Dr Powell explained:

> [One is not a subset of another], the names derive from naming practices. Primarily, if you asked a lot of native title group members, many of the names of claim groups today are what they call language groups. Their members take the principal language name they identify with and they use that name. Coral's mob always called themselves Punthamara, they couldn't go by another spelling of that language name, for example Boonthamurra because [another group] have taken that spelling …
>
> … **Coral**: And Uncle Lindsay and dad also called themselves Kungardutyi.

(f) Sarah Addo

Sarah Addo told us there were significant evidentiary inaccuracies and court misinterpretations which contributed to the 2012 native title determination for the Mandingalbay Yidinji-Gunggandji peoples in Cairns.

Sarah said there was a joint connection report done for the Mandingalbay Yidinji and Kunggandji tribes for that claim, despite both tribes recognising that the Kunggandji people lived on the land prior to the Mandingalbay Yidinji peoples. According to Sarah, the anthropological report was prepared without Kunggandji knowledge and has given rise to genealogical inaccuracies and a conflation by the court of the 'historical' connection of the Mandingalbay Yidinji tribe with the traditional ownership rights of the Kunggandji tribe.

Sarah told us that, due to that 2012 judgment accepting the inaccurate connection report, her family has been 'locked out' of other claims over her Country and denied cultural heritage consultation rights.

Sarah said that despite correcting the record several times, including with written historical evidence that she found in her research, she feels that the evidence has not been treated with the weight it deserves by the court. Sarah has itemised and produced several pieces of written historical evidence supporting the oral history that the Kunggandji people alone are the

Traditional Owners of the Cairns area and that other groups came to the area later and were permitted to stay but were not given Traditional Owner rights. Despite these efforts, Sarah told us that she has been unable to have a native title claim accepted because of the original evidence which she believes to be erroneous.

Sarah described how one of the key problems with the way the evidence was interpreted by the court was the acceptance of the proposition that there was a patriclan, and the corollary that women didn't have rights. Sarah was insistent that this is incorrect and that traditionally, women also had rights associated with country.

> You've got to come back to law and custom. You've got to look at the traditional native structure. Cause you're trying to give all these land tenure to men, but you're forgetting about their sisters. You know you're forgetting about their mother, their grandmother. You know not only men had tenure rights …

> And that's where they totally miss the traditional tribal naming structure. They didn't believe that Kunggandji had such a social organisation where we had the protected inheritance of the land.

Sarah felt that Justice Dowsett was 'not following the evidence' by giving rights to both groups. Sarah felt this was dispossessing her people who actually held the traditional rights.

Sarah has had some wins for all her efforts though – using the written records from her research at the State Library, she was able to show that the Yirrigandji people were not Traditional Owners of the Cairns area and had them removed as native title claimants.

> I got up and I argued [before] Justice Charlesworth that that put Justice Dowsett's report in limbo because he tried to give them north of Cairns from the Saltwater Creek to the Barron. I said to Honourable Charlesworth, 'this document here, that proves that they don't come from here. There's fraud going on, and people are not telling the truth here … He did not come from Cairns. He was sent from timber Country to sea Country. If you're going to give them native title on a historical basis, that opens the door for every other Aboriginal people to claim land. Now you've got to be sensible about this.'

> So, she evicted them out of the case. I was able to get them struck off.

Sarah was still working to have the Yidinji people's claim over the area also refused based on the written and oral evidence she has found:

> So we now ask her to go back and look at the genealogy of the [other] family because if she studied the genealogy properly … and look at Robert Dixon's work – Dick Moses told him that the Yidinji people arrived, 5 of them in a boat or canoe from the north, came and they landed at Yarrabah and they were from the Idi tribe. That's what we're saying. If you check Robert Dixon's material from the Elders it's confirmed that it's true. So they don't really descend from those people and they came here. Kunggandji were the exclusive native title holder.

Sarah feels the legal system, including lawyers and judges, is ill-equipped to appropriately deal with the complexities and nuances of traditional laws and customs, including traditional tribal boundaries (which are different to historical colonial government land boundaries).

(g) Maria Stewart

Maria explained how she and her family struggle to 'get over' the anger and frustration caused by the native title system. In particular, she described how failure to consult all relevant families resulted in – what she believes to be – critical errors being made in the determination, which are then very hard, or even impossible in practice, to correct. Like other interviewees, Maria's family was excluded from a determination of native title over land that covered parts of her family's Country and spoke about how she cannot see a way to remedy that.

> … still I've got anger and frustration from a previous decision. I think it's still quite raw, even though they've got the determination. We'll probably take it with us to our grave.

> There's no proper consultation, you know. Don't just go to one family member and take their stories, just by meeting that one particular family. There's a whole other family that they should have talked to.

She specifically pointed to two failings in the evidentiary processes of the native title system: the way that funding for people to participate is administered, which means some people are left without professional help or representation; and the reliance on old historical records, which were based on limited and/or erroneous information in the first place.

> This is the thing – they didn't let other people challenge it. They just wanted to go by the Tindale map. There is no collecting evidence to prove it was someone else's Country. They thought it was a simple matter. And instead of really digging up, they just did the surface. But if they'd dug underneath, a bit more research, they would have really found out whose Country it was, because you know – whatever white people put there, they only went there a couple of times. Our family lived there for years and years, generation after generation after generation and we are still there today. And they're listening to a couple of explorers that went there, spoke in English. Of course none of [our people] at the time knew how to speak English. So who was the informer? Did they use interpreters to collect all this information to say this was this person's Country or that person, that language was Country, or that language …?

(h) Sarah

Sarah told us that in the case of the Dharug people, a book from 30 years ago has provoked a misunderstanding that Dharug people 'do not exist anymore' and is used by other Aboriginal people in the Sydney area who are in positions of power to maintain those positions.

> [They say] 'you've only known [you're Dharug] for 30 years.' It's like, 'oh this again!' I don't know how they think we only knew we were Aboriginal 30 years ago. I went through school about 50 years ago and everyone there knew.

> It's cause of the Dharug book that was put out. 'The Dharug and their Neighbours'. And I can see, some of the time, a lot of people pop up and say 'I've just found out I'm Dharug'. And we get people like that all the time. But that's what happens when a place is colonised.

> And in my opinion, culturally, people who do that need to listen for a little while. Don't pop straight up, 'well I'm Dharug now' and start telling everybody what to do. You need to culturally listen.

> But there was still a really big [Dharug] community before that. [We were] all active in the community, so it wasn't that Dharug people just appeared. We were already here.

Sarah also expressed how, in her view, the difficulties facing the Dharug people of the Sydney area were exacerbated by the now commonly accepted understanding that inner Sydney is Eora Country. Sarah told us that 'Eora' is a Dharug word, meaning 'people', and that what is referred to as Eora country is part of Dharug Country.

The judge in the original Dharug native title claim – which the Dharug withdrew from, allowing a determination to be made that there was no native title interests – describes the way that he believes, from the very limited evidence available, that the Dharug formed their society or group in the very early days of colonisation. In that early determination, the court found that the re-grouping of smaller groups into the Dharug group of the Sydney basin area as a means of survival was not representative of a traditional society with connection to a bounded area of land – that there was not enough 'evidence' that it was a traditional society for the purposes of the Native Title Act.[249]

(i) Anna Strzelecki

Part of Anna's story involved the significant intra- and inter-group conflict around Common Law Holder eligibility that the native title determination and PBC governance arrangements created. Anna discussed how it appears that the consent determination tried to accommodate the traditional law and custom of the Kokatha, however, it has ultimately confused the situation and created disputes.

AIATSIS provides a case note summary of the relevant part of the determination.[250] It notes that Chief Justice Allsop explained in the determination that the Kokatha people form part of the wider Western Desert society, which has been recognised by the Federal Court for the purposes of native title. Allsop CJ noted that evidence shows that the Western Desert law allows for other ways to gain rights to the claim area. This includes people born in the claim area, long term occupation, and religious knowledge of the land. His Honour stated that this is still consistent with s 87 and s 87A of the Native Title Act, because evidence suggests the Kokatha people continue to hold traditional rights and interests over the claim area.

Anna referred my team to paragraph seven of their consent determination which addresses who are Kokatha native title holders according to traditional laws and customs.

> *7. … the Native Title Holders are those living Aboriginal people who identify as, and are recognised by other Kokatha native title holders as, nguraritja for sites and places in the Determination Area by reason of one or more of the following:*
>
> *(a) … descended either through birth or adoption from [one of the named individuals]*
>
> *…*
>
> *(b) he or she possesses an ancestral connection with the Determination Area, in that his or her parent or grandparent was born in that country, had a long term physical association with that country and/or possesses significant geographic and cultural knowledge relating to the Determination Area;*
>
> *(c) he or she was born on the Determination Area (including, if the person is born in a hospital, the place where they would otherwise have been born);*
>
> *(d) he or she has a long-term physical association with the Determination Area and consequent knowledge of the country; and*
>
> *(e) he or she possesses significant geographic and culturally-confidential religious knowledge relating to the Determination Area under Kokatha traditional law and custom.*

The particular concern that Anna and others in her community had involved alleged misconduct on behalf of some board members. However, Anna felt the very broad Common Law Holder eligibility requirements were obfuscating the misconduct.

As mentioned already, Anna particularly discussed community disputes around Common Law Holders being able to benefit from native title. Anna said she has witnessed the requirement to allow Common Law Holders to benefit from the PBC's funds being used to facilitate people receiving payments despite having no relation to any of the relevant apical ancestors and having no connection to the claim area in any meaningful way.

> That creates a lot of angst because when you read the determination, for example, and it says this is for the good of the people, and then it goes on to say who can become part of it … and it's not just as a result of being a descendant from the apical ancestors … You can be a Common Law Holder. But it doesn't actually say that you have to be a Kokatha person. So, you could have someone from Cape York that somehow or other convinces his best mate who's running the show that he is a Common Law Holder but is not actually of those people.

Anna has personally witnessed what she considers exploitation of these provisions:

> You have people that are not descended from the apical ancestors and they might be living in Melbourne and they say 'my grandfather used to live on that area. He's not Kokatha but he used to live there.' So, therefore, that makes me a Common Law Holder. That is very loose. So pretty much anybody can walk up and say, 'I'm a Common Law Holder and could I have a new fridge please'.

The second PBC which Anna is connected to has much tighter requirements for membership due to receiving a more typical determination. As mentioned in section 10.6 on the impact of professionals, Anna felt that the legal advice early in the process, including the way that advice regarding interpreting the determination and drafting the Rule Book was developed and communicated, was critical to how this played out. She identified the original lawyer whom she was not impressed with, noted there was a lawyer as part of the process of being put into administration, and then noted 'several other lawyers':

> … but nobody seems to want to address this, what seems to me to be a very strange ruling …

10.8 Remedies and accountability

One of the common ways in which lack of access to justice is experienced by women and their communities in the native title system is the absence of effective remedies available when things go wrong.

Many of the women who contributed to this Report spoke about the despair they felt at having 'tried everything': to be heard; to have the record corrected; to have an independent assessment of their eligibility for funding of services; and so on.

Many women felt a lack of natural justice involved in the way they had to participate in the processes. Woman often felt that their participation:

- was not by choice
- was without due respect
- involved their awareness that they aren't quite able to express key cultural concepts in a way that makes sense to the legal system
- involved pressure to disclose private or sacred things without full understanding of what is and isn't necessary for the case
- was without their choice of representatives and advisors, and
- was without anywhere to turn to intervene when the system fails them.

Many women felt that court judgments were factually incorrect and that this was a common feature of native title determinations. The First Nations lawyers we spoke with also agreed that it was a common problem and extremely difficult to remedy.

It is particularly difficult to correct the record in a native title determination without access to qualified, culturally competent and properly funded legal advice and representation. Several women felt strongly that there were too many conflicting interests to make the available remedy of reopening a determination a viable remedy. Many women felt it is even more challenging to correct a determination where it would involve reopening a determination when many of the players involved in reopening it and reassessing the evidence were involved in the original (allegedly) erroneous presentation of the evidence, the court case, and the judgment. The stories in section 10.5 about inherent conflicts of interest in the system refer to these conflicts, and they feature throughout many, or even most, of the contributions to this Report.

The stories in this section therefore overlap significantly with those in the sections on conflicts of interest and the impact of professionals in the system.

Several of the stories featured in this Report involved concerns that the Office of the Registrar of Indigenous Corporations (ORIC) did not respond to complaints in a timely manner and/or in a useful way.

Jolleen Hicks is a Ngarluma Yindjibarndi woman who grew up and lives in Roebourne. She started her career as a lawyer and worked as a native title lawyer for six years. She is now a consultant for her own business, Aboriginal Insights, teaching cultural understanding in workplaces. Jolleen was in correspondence with my office in 2020–21 in relation to this native title project and spoke about significant problems she had observed regarding financial structures such as trusts, which receive and hold funds belonging to native title groups. She referred to a lack of transparency as well as the fact that administrators and trustees are making significant money out of the native title 'industry', which is money not going back into communities for long term advancement.

Public media reporting on the Adnyamathanha case highlights aspects of a similar problem to that raised by Jolleen: a legally permissible trust set up to receive royalties from a large mining company is not, on the face of it, subject to ORIC's oversight. I have included the Adnyamathanha case study in this section (as well as in section 9.2 on gender discrimination) because it is a public example of the difficulty facing many communities in holding decision-makers to account.

(a) Adnyamathanha media case study

This case is introduced above in section 9.2 regarding gender discrimination, and section 9.4 regarding lack of access to justice. It became known after a group of Adnyamathanha women raised governance concerns with the lack of accountability related to the distribution of benefits.[251]

In 2022, the Commission was advised in writing by Mr Vince Coulthard that he believed ORIC was holding the Adnyamathanha PBC in administration when it did not have the right to do so.[252] Public media releases by ORIC say that the ORIC special administrator for ATLA suspended mining royalty payments 'while access to information about trust performance is resolved' and it awaited financial information from the trustee, Rangelea.[253]

For a long time, it appears that there was a stalemate of sorts. On the one hand, Mr Coulthard accused ORIC of intervening where it is not authorised to do so, imposing on the rights of the Adnyamathanha people to control their own organisations and expenditure.[254] On the other, it seems there was no existing, easily accessible mechanism available for holding accountable those in control of the trust funds who were refusing to provide financial information to Adnyamathanha common law holders who are beneficiaries of the 'Master Trust', Rangelea Holdings Pty Ltd.[255]

Finally in August 2023, the court ordered the 'Master Trust' to produce the financial records for inspection by the common law native title holders.[256]

The Court found that ATLA, as a PBC for purposes of the Native Title Act and therefore an agent of the Adnyamathanha Common Law Holders in relation to their native title rights and interests, is entitled to access information about how the proceeds of native title mining agreements are used and distributed by a separate, private trust of which the Common Law Holders are beneficiaries.[257] This is so that ATLA, as a PBC, can fulfil its statutory requirements to consult with the Common Law Holders.[258] The Court ordered that Rangelea immediately produce the Master Trust's financial records to ATLA and the Adnyamathanha applicants, and that an inspector be appointed to investigate the administration of the trust and its distributions.[259]

Ashurst Native Title Year in Review 2022–2023 summarised the issues at stake and the result of this case with regards to trusts in native title.

> Registered native title bodies corporate (RNTBC) are appointed to hold native title rights and interests on trust or as agent for the Common Law Holders and must meet the regulatory requirements of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). This includes the requirement for the RNTBC's financial statements and the rule book publicly to be available on the ORIC website.
>
> However, at the same time, the native title payments flowing from agreements with proponents are commonly held in trusts. These typically have less transparency and fewer financial reporting obligations. This case shows the difficulties individual beneficiaries can have in holding the trustee to account.[260]

The result of this case highlights the critical role of professionals in establishing governance arrangements in the native title space which promote community understanding, control and accountability. Ashurst had this advice to lawyers:

> This decision is a timely reminder that a lack of transparency in the distribution of native title compensation benefits from trusts can give rise to confusion and tension within the native title holder community resulting in lengthy and time-consuming litigation.
>
> It can be helpful to take steps to ensure that the native title holders, the trustee and the community are clear on how, and for what purpose, trust monies can be distributed and what mechanisms are available to hold that process to account.
>
> Trustees should be clear on their obligations in managing and distributing trust monies to ensure they provide beneficiaries with appropriate information and access to accounts when requested. They should also be transparent about how native title monies are managed and distributed amongst the community to help prevent misinformation, mistrust and disputes.[261]

In Text Box 10.3 below, we have included a summary of the Adnyamathanha facts and decision, taken from *Ashurst Native Title Year in Review 2022–2023*.

Text Box 10.3: Summary of the Adnyamathanha case to secure transparency of distributions of native title money from Trust – from *Ashurst Native Title Year in Review 2022–2023*[262]

The Adnyamathanha Master Trust received money from native title agreements which the trustee then distributed to individual representatives of each sub-group or a representative entity of a sub-group. The representatives would then disburse payments to individual Adnyamathanha Common Law Holders.

This dispute arose because the applicants raised concerns about irregularities in the lists of Traditional Owners receiving trust distributions, discrepancies in payments amongst individuals within a sub-group and general concerns regarding the lack of transparency about how much money the trust was receiving or what the trust was doing with the money.

In 2020, the registered native title body corporate for the native title holders was placed under special administration and the special administrator together with various Adnyamathanha people sought to access the trust's financial records. This request was denied by the trustee on the basis that the trust was a charitable trust and therefore the applicants did not have rights to inspect the books (unlike individual beneficiaries of a private discretionary trust).

In response, the applicants applied to the court under section 60 of the *Trustee Act 1936* (SA) (Trustee Act) seeking orders for access to the records of the Trust. Section 60 applied to charitable trusts, not discretionary trusts. Therefore, the court was asked to consider whether the:

- trust was a private discretionary or charitable trust; and
- registered native title body corporate and the applicants had standing to seek court orders for access and inspection of the trust books under the Trustee Act or the general jurisdiction of the courts to supervise the administration of trusts.

Trust found to be a private discretionary trust, with a fiduciary duty to all members and can be ordered to grant access to trust account records.

The court set out several reasons why the trust was found to be a private trust, not a charitable trust. This meant that, among other things, the trustee was bound by a fiduciary duty which it owed to all group members to seek and maintain records. The trustee's refusal to provide any information about its management of the trust deprived group members of information they would require to determine whether to bring an action against the trustee or an eligible entity who received trust funds from the trustee.

The court held that in the absence of an exceptional countervailing consideration, it has general power to order a trustee to grant access to trust account records. On this basis, the court ordered that the trustee make the trust account records available for inspection by the applicants. The court also appointed an inspector pursuant to section 84C of the Trustee Act to investigate the administration of the Trust.

(b) Cassie Lang

In section 10.5 on conflicts of interest in the NTRB structure, Cassie referred to NTRBs' lack of accountability with respect to their role as providers of funding for services. Cassie has experience making complaints about the way NTRBs operate, including what she sees as failure to manage conflicts of interest. She has found there is no effective, independent review mechanism for their funding decisions.

Cassie has found no relief from the Minister or NIAA with respect to these complaints. Cassie said she assumes that NIAA officials hear a different story from the NTRB and form the view that the clients making complaints are just difficult, and that is it likely their fault.

> When you ask to talk to the Minister and you write to NIAA, and you say 'we have issues with our Rep Body or our service provider, we don't believe in them, we've got all of these conflicts, can you fund us directly?' They're like, 'well, you need to reach an agreement with your Rep Body or Service Provider'. [We say] 'the Rep Body or service provider is not going to agree, we just told you we have issues with them.' They say, 'their function under the Act is to outsource …'; 'we've just told you we've asked for that, they're saying no, we want you to intervene and tell them to outsource it.'

> And then they'll say 'well here's our internal review that the lawyer's done nothing wrong'. And you're like, 'well that all depends on who you are asking, because obviously, in the lawyers' eyes, they think they've done nothing wrong …'

In terms of the formal regulator, Cassie Lang has found ORIC frustrating: 'I've found that, generally, they're not interested in thinking outside of the box or to collaborate, at all.' Cassie felt that the Registrar didn't administer the legislation effectively or appropriately and she spent a lot of time as a lawyer dealing with that, including a lot of unpaid time. It is also frustrating because you can get difference approaches and responses from ORIC depending on who you talk to.

To Cassie, ORIC seems to prefer to come in to sanction organisations rather than help before they hit crisis point. She noted that, in her experience, 'their dispute resolution process is not helpful at all'.

Cassie described one PBC client who was prepared, on ORIC's advice, to be audited for a particular period, but when they arrived the auditors chose to go much further back. Cassie noted that of course that is lawful, but it felt like ORIC was using it as an opportunity to 'flex their powers' and watch everyone scramble:

> And there's no funding for this. You're expected just to drop everything and comply with this, like, forgetting that everybody who sits on that board is a volunteer.

Cassie particularly emphasised that, in her opinion, there is a lack of accountability for lawyers and their professional services in the area of native title, which exacerbates the problem of lawyers not providing adequately tailored services in this area of law. Cassie described how this ultimately perpetuates the lack of accessible information and advice that communities are receiving and therefore their ability to participate fully in the native title processes.

> One thing that really frustrates me with the native title process is that lawyers are not accountable to anybody. If you have an issue with your Rep Body or your land council under the Act, you make a complaint, you can then request for them to do an internal review process, then if you're not happy with that outcome only then can you go to the minister and will the minister make a decision. Sorry, that's bullshit because if someone is unhappy with me as a private practitioner, I have the Legal Services Commission looking over my shoulder who can investigate me and take away my practising certificate.

> And yet you've got Rep Body lawyers who are engaging in questionable practices, who do not take instructions from their clients, who turn up and treat them poorly and say 'this is what you're going to do and it's my way or the highway' and there is nobody who you can report them to, to have their behaviour pulled up.

> I have tried to help my clients complain to the Legal Services Commission but the rep bodies are considered a community legal centre or government officers or something, which means the only person under those circumstances who can complain about them is their CEO or their Principal Legal Officer. Now you tell me how many of them are going to put in a complaint to the LSC about their performance?

(c) Leanne Edwards

Leanne Edwards particularly wanted to talk about her experiences in the post-determination period. Leanne was frustrated and angry with ORIC after calling on them to sort out governance problems associated with one individual in one of the Aboriginal Corporations. At the time of interview, Leanne described having already waited 18 months for ORIC to take useful action, and at the time of publication, nearly three years later, she and her community are still waiting.

The background is that long before the native title determination was finalised, several Traditional Owner groups within the broader native title claim group negotiated an agreement with a mining company. They set up Aboriginal Corporations to receive annual payments for disbursal to their members. Two of those Aboriginal Corporations represent two Traditional Owner groups who also now have a shared PBC.

> So, the arrangement with the money – it doesn't come to the PBC. We get compensation money from the mines each year. So, each year there's a 'release' of money. It goes to the organisations that were set up before the PBC because that's what was in the written agreement. This agreement happened back 20 years ago.

Leanne told us that in one of these organisations – 'Aboriginal Corporation A' – one trusted person had not been transparent with the use of funds to which they had access. Leanne provided details but did not want to jeopardise any future legal action so we will not publish those details.

Leanne complained to ORIC about several specific governance issues around 18 months before her interview with us. At the time of her interview – and still at the time of publication – ORIC was yet to take any action.

> … I have complained, and they said to put it in writing. I did that, put it in an email; 'do an affidavit' – I did that. Still waiting.

> I constantly text them, send them emails saying 'what's happening?' You know, they use the COVID excuse. You can't keep using the COVID excuse. There are phones, there are technologies these days … It's ridiculous, if there's issues within a small community and it keeps festering it just gets worse, unless ORIC can say 'yes, we're investigating, we're going to come up, please just let people know that we're gonna be up there as soon as we can.' You just don't get that.

> I approached them early last year, so about 18 months ago. I've got little emails from them saying say 'we'll call you back' and 'we're getting some other people to have a look at it.' There's always an excuse; the person that's supposed to deal with this area saying he's over worked, and there's not enough people to do the job.

Leanne was not the only one who complained but she thought she was probably the only one who had followed up the complaint, noting how onerous the complaint process was.

> I've done all this work to give them the information in writing and they've still not acted. And there's a couple of people made this same complaint. Not just me. But they don't hear anything back because they don't follow up, some of them. You know, they aren't literate with phones and emails and stuff.

> Sometimes, you should be able to ring up and say what your complaint is over the phone and they write it down. You know, there are some people that can't write in an email and try to explain how to deal with community problems … on the phone or on the email because you can't explain some of that stuff. They need to hear it. Or come and see what's happening. They never come and visit. I've not seen ORIC out here for ages …

Leanne told us how the difficulty in holding one person accountable has resulted in members of that organisation not having access to the money they are entitled to for years. ORIC's inaction had left Leanne and others to work out emergency financial help for the members of Corporation A. However, Leanne emphasised that this was not sustainable.

In practice, members of the other corporation – 'Aboriginal Corporation B' – have had to help the members of Aboriginal Corporation A because they are often related and cannot watch them go without essential assistance.

Leanne described the use of these funds for critical expenses such as transport to hospital:

> The money was supposed to be for, you know, 'cause we're in a remote area, people gotta go out to Mt. Isa and towns for hospitals and stuff and it's an expensive exercise. 'Specially if you're an older person you gotta take a younger person, you gotta pay for your accommodation, meals and you're there for, you know, sometimes over 10 days. Because you can't get flights back 'cause there's only certain amount of flights that come in here. It's used for that kind of stuff mainly, and for funerals and all that stuff.

> The worst thing is the other organisations have to lump it – we have to come up with the money 'cause some of those families are related to us too, so we feel bad, so we have to give them funeral money or hospital money …

Leanne had tried to involve the police at one stage, but the police told her she should have reported the alleged fraud to the police first, and since she didn't, they will not investigate now that ORIC is involved.

Leanne said the result of having nowhere to go and no one to help with the governance dispute has been a massive loss of funds, which she expects are unrecoverable, plus significant discord in the community.

> So now there's friction in the community … I'm getting backlash – daily emails from this [person] that attacks us personally. 'Cause [they know] I'm the one behind it.
>
> … they've had control for so long and now that [they have] started losing control …, they're out to get anyone they can alright.
>
> And it's me. I don't care, I don't mind being the person that has to deal with it, but it's a bit of a struggle I suppose, because you have to deal with it constantly, which can be very hard.

Leanne felt that nothing could improve in the community until ORIC dealt with the dispute. The community was effectively waiting on ORIC and trying to manage the money and the community disharmony as best as possible in the meantime.

> We can't move on from this or begin to sort it out, let alone heal the community, because ORIC just won't respond and deal with the complaint.

(d) Sarah Addo

Sarah Addo described going around in circles trying to get funding in order to be able to have a claim registered. She also said she had complained to the NTRB and then subsequently to the federal Minister. At the time of her interview she had not had a substantive response from the then Minister Ken Wyatt's office.

> That's the problem that we were finding. That the respondents weren't being funded. We had to basically represent ourselves and when we had gone to [the NTRB] and say 'you've got to fund us as respondents', they're saying 'no, you don't have a claim'. I said, 'we don't have a claim because you won't help us to have a claim'.
>
> So, there was big disputes over funding. You know, we kept writing to the Honourable Senator Nigel Scullion at the time who was the Minister for Aboriginal and Torres Strait Islander Affairs and now all our attention has turned to the Honourable Minister Wyatt down in Canberra.

(e) Anna Strzelecki

Anna had strong feelings about how unhelpful the ORIC process had been. Details of Anna's concerns with the Kokatha PBC are discussed in section 10.6. In particular, the Rule Book's very broad definition of Common Law Holders – an attempt at putting into practice the terms of the determination – was causing concerns about people receiving benefits who are not connected to Kokatha by descent or any other meaningful way.

Anna noted how, while in administration, the special administrator was legally able to change the Rule Book without needing to adhere to the normal requirements of voting. Anna felt this would have been a good opportunity to create a more transparent structure for the group, addressing and remedying defects in the existing Rule Book that have caused disputes and concerns. Anna was concerned it would be hard to change those Rules the usual way when there were people in control who were using their power to distribute benefits to their friends and who would not want to make the process around eligibility any stricter.

Anna felt more broadly that there should be more consistency between PBC governance structures and increased levels of transparency regarding benefit distribution for members and Common Law Holders. Anna identified that the lack of transparency of payments by the PBC means people speculate wildly and that causes disputes.

> As you would no doubt be aware, when there is no transparency, then you get many stories. Right? 'So and so has got $500,000.' And the next thing you know it's, 'so and so has got $1 million'. Whereas, if it is clear, defined, transparent – any member of the corporation should be able to know how individuals have benefited.

(f) Donna Wright

Donna Wright has found that 'it is extremely difficult for the PBC to be accountable to community, and to ensure we have stronger decision-making processes.' In Donna's experience, the available appeals and oversight mechanisms have been ineffective.

> You know, we've been fighting to be heard and have a say down home for a while now …

> So then the special administrator come in, did a restructure, was really, really clever at putting in the advisory group and finding out what he needed to find [to put in place] the best governance model to support the tourism. The priority should have been about our right to free, prior and informed consent and self determination … we are disempowered.

Donna was incensed that, despite ORIC ultimately finding that the reasons for the special administration were not true, it was too late by then. The administration had already happened, the Rule Book had been re-written by the special administrator, and the tourism centre had been developed. Donna described how, ultimately, there is no effective remedy for circumstances like this when decision-making processes are manipulated and traditional decision-making is not respected.

> I'm exhausted. We're going up against the Commonwealth who, through ORIC, keep saying to us, 'it's for the community to decide'. It's so complex all the issues Gunditjmara people face, and decision-making is relentless.

(g) Cissy Gore-Birch

In her interview, Cissy spoke about the challenges she has faced trying to protect their board and community from individuals she described as 'self-interested bullies'. Cissy felt there were so many rules that they had to adhere to as an Aboriginal Corporation, but that the rule books regulated by ORIC provided an inadequate framework to ensure accountability and protection.

Cissy described how difficult it was to get ORIC to understand what was going on out in community. She said that it took 18 months of writing and calls before they visited and finally witnessed the threats and 'bullying'.

> We did everything … I was constantly on the phone to ORIC, because the other group were sending off all the letters – 'we want this', 'the board is doing this'. And [the bullies] tried to write petitions because we were stopping them from coming back on the board as directors … So we just wrote letters against what they were putting forward. And they were trying to have all these special general meetings, and we just said, 'nup, they don't need to have a special general meeting, there's a process in the Rule Book that it needs to be called from one of the directors.'

> So, we were making sure that ORIC was on to this … so they'd write their letters, I'd call ORIC to say, 'have you received this petition?' Yes, they did. I said 'well we're writing a letter against that because that didn't go through the right process'. 'Yep, no worries'. So, all that correspondence – I was just constantly on the phone, writing letters all the time. This was time-wasting and we couldn't get on with business due to these constant disruptions.

Cissy said that she felt that ORIC was overwhelmed with correspondence and themselves had been 'bullied' too and didn't know who or what to believe until they sent an officer to attend a meeting in the community.

> Getting them to attend those meetings, and to see it for themselves, is really vital to their understanding because they're at the end of the phone, or at the end of the email … And when the other group could say, 'oh well, this group is saying this,' or 'that group is saying this'. But for them to actually come and sit in the meetings and see who's who, when they receive letters they know exactly who the person is and how their character is and their behaviour.

In her interview, Cissy explained that one of the rules in the BAC Rule Book is that you could not sit on the Board if you had a significant criminal record. Cissy spoke about how they were able to remove the 'bullies' using that rule. However, Cissy also noted that, ultimately, the rule can be changed if they have the numbers to change it.

> So those guys were trying to come back on at that AGM, to get that rule removed because they knew that they had a criminal record and they were always on the board and they can do whatever they want to do. So that's how easy it is to come in and change the rules. This needs to change to protect the operations of the Corporation's success.

Cissy felt that there should be certain rules in every rule book which cannot be removed for the protection of members.

> So, okay, if you've got a PBC, this is what your Rules should be. The standards should be: all directors to have a Police Check Clearance, Working with Childrens and Vulnerable people. Legitimate character reference.

> We're not stopping people from accessing Country; they can access Country any time they want. They can go and run their own businesses. But the PBC has a huge role and responsibility to manage native title effectively, to make these big decisions for the betterment of people moving forward.

As discussed in her story in Chapter 8, Cissy updated my office at the time of publication with her ongoing concerns about the lack of effective remedies provided by ORIC. She described how the ORIC employee who attended a meeting in previous years had left ORIC and new employees appeared not to understand the degree of manipulation, threats and 'bullying' going on. Cissy felt that ORIC – and local media too – were being misled by the 'bullies' and were personally attacking her credibility in an attempt to regain control of the funding Cissy and the previous board had secured for the benefit of BAC and the whole community.

(h) Coral King

At the time of her interview, Coral King and Dr Powell were at a loss as to how to take Coral's case forward.

A key theme of Coral's story was her family's inability to secure funding for legal representation to challenge the original 2014 judgment and findings regarding the identity of Coral's great grandmother Clara and grandmother Toney. As discussed in other sections of this Report including section 5 of this Chapter on conflicts of interest, despite the NTRB funding and representing an opposing group, they refused to assist Coral and her group. Coral felt there was some kind of long-standing conflict behind this, and that her family 'never stood a chance' at getting funding from the NTRB. Coral and Dr Powell both felt that the NTRB had a conflict of interest behind their decisions not to fund Coral and her group.

Coral and Dr Powell had tried and failed to get pro bono legal representation. They had met with Father Frank Brennan of the Australian Catholic University in Canberra, as he was a contact of the family through their church. He offered support and advice that they need to find a lawyer to help them overturn that finding. Father Brennan provided referrals but none of them were able to help. At one point, after referrals from referrals, Coral secured the services of a lawyer in Adelaide.

Coral had approached Minister Scullion when he was in office, asking why they were unable to get funding to be represented like the other parties. His ministerial advisor said they would get back to Coral but never did.

Dr Powell had hoped that by showing that the evidence relied upon was incorrect, Coral's family would be given their rightful place in the groups claiming their traditional lands. So far that had not been the result, notwithstanding all the evidence that had been put to the court at various points. Nonetheless, Dr Powell intends to stand by Coral and support her and her family 'until a just and right outcome eventuates.'

(i) Maria Stewart

As outlined in Maria Stewart's story in section 8.17, Maria's family had been left out of the anthropological report for the original connection evidence and her family was therefore not part of the native title holding group for an area of their Country.

At the time of her interview, Maria told us that she was working with a South Australian native title lawyer trying to claim what land is left to protect at least some of their Country. Maria said they have not yet started working out whether they have a chance of challenging the original determination covering parts of their Country, but it would require her lawyer to continue on with her family and hence would require funding.

> We've got enough evidence … even in the Adelaide archives we've got enough evidence, I believe in my heart, we have enough evidence to challenge it …

Maria explained that, at the time of her interview for this Report, she was 'in the process of getting the final report' that her lawyers were working on and was hopeful about what could be done to right the situation.

(j) Sarah

Sarah spoke about how the result of the interactions between cultural heritage and land rights legislation in NSW is that there is no way of stopping other Aboriginal people from elsewhere claiming an 'interest' in Dharug Country and securing paid cultural heritage work. This is discussed in detail in section 10.4.

Sarah told us that there is no accountability associated with the people putting their hand up to do paid cultural heritage site work. No one knows if they are 'legitimate' or are performing their role properly. Sarah explained that this whole picture means Country is being exploited and not cared for because those people doing the work are only there for the money.

> It's not done properly because the people out there aren't from this Country and they don't care about it. So, they're not sieving properly, they're not looking properly. It's just a money thing, they're there for the day and not really working properly either because they don't care about the Country. So, all of these people are paying astronomical amounts of money for these excavations, for what? There's no point to it.

As discussed in section 8.5, it also means that the Dharug organisations are now deprived of the funding they received from that cultural heritage work, which used to pay for other community services that the organisation provides.

To Leanne, the only way this was going to get any better was with legislative reform to the entire cultural heritage and land rights regime. Sarah explained how the existing legislative arrangements left the decisions regarding paid cultural heritage work to the consultants and developers, even though the consultants and developers do not have any kind of regulation of, or system for, discerning which individuals are culturally entitled to speak for Country. As discussed in section 10.4, Sarah described how making such decisions about who can speak for Country is not the place of developers and consultants and is essentially too difficult for them to deal with. Sarah sees the consultants and developers doing the easiest thing for them and just 'treating everyone equally' by putting them all on roster. The whole system provides no type of 'appeal' mechanism when the wrong people are given that work.

10.9 Traditional decision-making processes

Several women interviewed for this Report discussed the difficulties created by PBC governance arrangements allowing for a majority of members to determine that the group will make decisions according to non-traditional decision-making processes. Some women expressed concerns about members within their native title holding group, who hold less or no traditional knowledge, having decision-making power that is not culturally allowed.

The reasons for the differences in knowledge obviously stem from historical policies of dispossession, but additionally, it is part of traditional culture and Law that some people know more about parts of Country than others. Several women identified that the native title system and processes created a situation where the more traditionally connected families established connection and secured the native title recognition, but then members who could not have established those connections themselves – but who have apical ancestors recognised in the claims – can be required to be given decision-making rights indistinguishable from those who do hold knowledge. Sometimes this is against traditional Law.

The concerns with PBC decision-making processes apply to family groups and also to men not understanding that they do not speak for all of Country – they do not speak for women's sites, Storyings or Dreamings because they do not know about them. Women identified that it is culturally inappropriate not to have a way of ensuring that appropriate women knowledge-holders are engaged on all decisions relating to Country, to ensure that women's knowledge is captured in decision-making processes.

Several women described the real problem as the opportunistic motives of some PBC members, who are interested in decision-making responsibility only for their own gain, rather than for the long-term benefit of the community. It is in these circumstances that the native title system's lack of protection for traditional decision-making processes becomes particularly problematic.

In many communities people 'just know' who is responsible for making decisions about Country and culture is so strong that, if others tried to make decisions over someone else's Country, they would be pulled up. However, several women described how they are in situations where the number of members who understand or know about traditional decision-making processes are fewer than those who do not. Or they are less powerful than those who do not wish to acknowledge the traditional decision-making processes. This makes deciding to use traditional decision-making processes – which recognise a technically 'non-democratic' distribution of decision-making power – dependent on the understanding and goodwill of those members who stand to lose their equal decision-making power with respect to particular areas or issues.

These tensions present challenges for judges in crafting the terms of determinations, for NTRB/SPs and their professionals in advising on the establishment of PBCs and their rule books, and for ORIC in its dispute resolution role. All of these challenges were referred to by interviewees for this Report. However, the tensions are felt most by native title communities which are balancing inclusion with cultural integrity; and balancing welcoming those who had many aspects of their culture taken from them over the last 235 years, with not further dispossessing those who managed to maintain strong traditional knowledge and practice.

This tension is not about who is 'more Aboriginal' – our communities welcome anyone identifying their Indigenous heritage, whenever they discover or choose to embrace it. But the racism within mainstream Australian society which is based on an idea of an authentic Aboriginal or Torres Strait Islander identity does contribute to the problem. The onerous connection requirements and dependence on 'unbroken' connection within native title are directly related to this idea of authenticity, as we know from the Yorta Yorta case.

Linking 'unbroken', 'traditional' connection to Country – in the native title sense – with being 'authentically' Indigenous is a significant part of the problem from a community cohesion perspective. So, it is easy to see how a (legitimate) challenge to someone's native title connection to Country – and hence their right to hold decision-making power – could be either viewed or constructed as a challenge to their authenticity as an Indigenous person.

(a) Thelma Parker

In section 10.2, on women's voices and knowledge, I refer to Thelma Parker's concerns that the result of women not being valued as knowledge-holders regarding Country has been a loss of women's sites and access to Country to pass down culture and Law.

This issue is directly related to concerns raised by many women regarding traditional decision-making processes. Specifically, it seems to be a common scenario that minorities within a native title group struggle to enforce traditional decision-making processes and are in tension with majorities who do not have the knowledge due to colonisation or lack of cultural seniority, particularly where members of those majorities assess that it is not to their benefit to adhere to those traditional processes. Thelma explained how her family struggle to make people understand that there is a traditional decision-making process, even though they may not know about it, or want to adhere to it.

> … because it comes back down to numbers. It's about voting rights and it's the person whose got the votes on the floor that will go totally against what is culturally safe practices.

Thelma highlighted the disparity of knowledge between different members within her native title group and that giving everyone control over decision-making equally is culturally unsafe: 'It's from a cultural perspective because it's culturally unsafe, because they can't align themselves with women's business. Have they ever been taught women's business?'

Thelma found that the traditional decision-making processes were somewhat abandoned once the determination was achieved and people without that cultural knowledge started moving for more control.

> I was instrumental in getting the native title for our people and then once we got it through, then everyone else jumped on board. Then you have these lawyers come in and question who we were in a sense. Not questioning us but questioning the processes that [the NTRB] put us through, and say 'no we're going to run with this', because this is how people are actually starting to come up with their numbers games. And to me, that's not right.

> The Putuma sticks is these sticks for Country and for Law and, to me, we won't let go of that process for us. And we know who it is, but unfortunately, in the meantime our Country is being damaged because you have these people that feel that they are the Traditional Owners … which is – I feel that is so culturally unsafe.

In Thelma's experience, this issue of traditional decision-making versus majority decision-making is something that NTRBs struggle with. In her case, she explained that the NTRB knew that these other people did not have the cultural knowledge that she and her family did.

> You know, in that instance, and this is where we go back to the [NTRB] who has worked for many years with our ancestors and our Elders, but they can't provide a really clear strategy on how to deal with this, and I see that they struggle in this space.

> You know for that given reason – that they know who are the Traditional Owners and all these other ones who are coming through, and the makeup of that and how people are providing their affidavits and their evidence isn't really substantial. For me, knowing full fact that they don't know Storying well.

Thelma feels that the NTRB has played a role in facilitating the failure to follow traditional decision-making processes, partly out of necessity given the legislation and legal processes, and partly because of the western patriarchal lens from which they are approaching it.

Thelma identified that the processes to protect traditional decision-making processes – and therefore ensure the correct people are speaking for Country – are completely inadequate. She has said this to the NTRB, to ORIC and to the Minister.

> I've actually written a letter [to the Minister] to say look this is culturally unsafe practices here. We need to make sure that we have a process that is going to allow us to provide from a woman's business and from a strength-based cultural knowledge and understanding that is acceptable and fully understood.

Thelma identified the layers of ways in which women's cultural knowledge and roles regarding Country have been diminished, as discussed in her story in section 8.7. One of those layers is the lack of control that native title group members have over the professionals engaged on their behalf, and the lack of accountability that NTRBs have in that regard (see section 9.4).

Additionally, Thelma explained that her PBC represents all three groups from the Bularnu Waluwarra Wangkayujuru determination and there are no provisions in the Rule Book regarding who can vote on decisions regarding which Country. Thelma said that she and other members have asked for the PBC to be split into three:

> Yeah and we've actually asked for that to be split and knowing [all the problems], they said we'll have to go back to the determination and I said 'well if that has to be let's go back to Court.'

> Because we all know our boundaries, but the overlap, so say for instance when you've got then Waluwarra Wangkayujuru people making decisions for Bularnu Bulurna people. That's just wrong. You don't do that.

Thelma believed the NTRB was interfering and had been overstepping – making decisions which are not theirs to make.

> … if they allowed us to sort out in our own way who was the rightful people for Country without them coming on board and saying 'no, we want to sort this out and we're going to accept this person and that person'. They put a framework in place that is just so culturally inappropriate …
>
> We didn't agree to it. It was only certain members that did, and once again, it comes back to a numbers game, and whoever was then basically listened to in support of that process, not understanding what the full implications of that process were going to be.

Thelma said that ORIC are looking into it and she is hopeful that they will be able to work out a fairer, more culturally appropriate governance and decision-making structure.

Thelma believes that her people have a similar compensation claim to Timber Creek for the loss of spirituality – specifically she believes the women in her group have lost more than the men 'because of the Western male perspective' which has denied the women their cultural rights and responsibilities over Country, and has seen women's sites destroyed through lack of consultation with women knowledge-holders.

(b) Avelina Tarrago

As discussed in section 10.6 on the impact of professionals, Avelina told us about the particular focus she gave to ensuring traditional decision-making processes were protected in the Rule Book of the PBC.

Avelina explained how she knew, from the conflict they faced during the native title claim process, that the families in dispute with hers would attempt to get control of decision-making and resources by stacking numbers. Avelina explained that she felt this reflected a problem faced by other groups too – that some families within a group did not retain the degree of cultural knowledge about traditional laws and decision-making as other families. This made it important to enshrine in the Rule Book the traditional decision-making process giving only one vote to one family, regardless of how many members of your family you bring along.

> We have a decision-making process: it will follow that which is in accordance with the family groups, and you can see the way the family group structure is in the PBC – it's in there. How decisions are, well at least how family groups are represented. And that's because I wanted to ensure that there was proper representation across all of the families that had a right in our PBC.

Avelina described how the family with whom her own family was conflicting would do things like try to stack meetings in order to gain control. This approach highlighted to Avelina that they do not understand traditional Law and custom.

> So, what they would do was like hire a crowd at authorisation. Bring a bucket load of people which didn't accord with traditional law and custom anyway. You're one family, you only have one voice. You can speak on behalf of everybody [in your family].

Avelina recognised that as a result of colonisation and the policies of dispossession more generally, there are widely varying degrees of traditional knowledge within the group, and in many other native title groups. But she sees that native title introduced a forum in which groups were essentially forced to participate to secure what is left of our connection to Country and culture. Since what is at stake often involves control of money, it is not only those with strong connection to culture and Country who want to be at the forefront. But without that connection to culture and Country, Avelina believes they are undoing the cultural connections and practices that native title purports to protect.

For Avelina, this has become a major part of the challenge of the post-determination period. This is discussed further in section 10.6 on the impact of professionals, specifically the way that Avelina has ensured the PBC governance has been set up extremely carefully.

> We can't walk away from the construct of colonialism that is now the Native Title Act and the PBC Regs, so we have to work within that framework and incorporate where it is consistent to a traditional law. In the same way that Mabo was accepted – you know that's the whole point of Mabo, is that we can, it can co-exist and so I try and incorporate it as consistently as possible. So our traditional decision-making process should align with our rules that we can exercise under the legal framework we're stuck with.

(c) Francine McCarthy

From her experience in the Northern Territory, Francine McCarthy felt that the authorisation process regarding decision-making had not been a problem because everyone knows who is responsible for decisions on particular Country. Majority votes were used for corporate decision-making but it was always traditional decision-making processes for decisions about Country.

However, Francine noted the issue of succession planning was bringing to the fore, and exacerbating, some of the disharmony that confusion around native title and PBCs had caused. This confusion was impacting on families' understandings of traditional decision-making and causing disputes.

> With the PBC that I'm talking about, there was some confusion about whose role it was to make decisions. If there is only, in terms of the decision-making process, there's only two or three people that people can identify. So, we needed to go through a process where others were involved in identifying who the next generation of people that were coming through, and what process, what new process that was going to be formed. So, it was sort of like a way of ensuring that there was some succession after these Elders had passed away.

In section 10.11, on unpaid labour, and specifically regarding how important individuals with both cultural and western knowledge are in the native title system, I discuss further the initiative that Francine mentioned was able to implemented to address this issue in Tennant Creek.

(d) Cissy Gore-Birch

Cissy realised in her first stint as Chair of her Corporation that the initial establishment of the PBC governance structure and the Rule Book was inadequate. The Rule Book did not sufficiently protect the PBC and its broader membership, nor did it ensure that the right people for Country were actually involved in decision-making when it affected their lands.

Cissy noted that the governance structure enshrined in the Rule Book – based on the structure that the anthropologists used to help them make their native title claim – is working for fair representation on the board, but it's not working for where decisions need to be made about a particular area of land.

> So, in our Rule Book we've got, it's split up into four different land groups, and under those four different land groups, there's four or five different family members that sit under those land groups. And that was specifically made up from the anthropologists to be able to help them do their work according to the different claims that we were putting through with native title …

> But when it comes to certain land where decisions need to be made – so for instance, we're talking about an area where there's potential tourism, and that land comes under claim group four area. And within the claim group four area there's three family members who are named, but there's 10 others who aren't on that list, for instance. Other families have not been included in the Rule Book and these changes need to happen to be inclusive of those other family members.

One area which has proved tricky in this respect is when a proposal for development falls on one or two groups' land but will potentially affect the other groups' Country as well. The existing rules around decision-making do not explicitly deal with this and is reliant on the integrity of the board to consult with the right families and include all those whose Country might be impacted.

> Like depending on what the mining is, and where, you know, the flow of water is gonna go, or the airport, you know, there's all these different activities that happen on Country and it affects all the native title holders in that claim area. So that's, we bring in everybody and discuss it. So that's why we're trying to put in these systems and policies.

Cissy is committed to getting clear policies in place in relation to decision-making for development and mining. She wants to try and make sure the processes and opportunities for participation and consultation are transparent, consistent, and fair.

> I think if you have clear policies in regards to mining, tourism, any other activities that are happening on Country, and looking at what position we take: do we say 'no' to fracking? You know, if for instance we need to come up with a position and stand by it. If there's someone who comes in and wants to do fracking, we say 'no'. If someone comes in to say, 'well we want to do this mine,' we talk about it: okay, this is a number two, let's talk about this, what's the process? We need to develop those processes in consultation with the members and families.

> So yes, we've got the Rule Book, but there's still a lot of work that needs to be done in the Rule Book to be able to look at all the other decisions around mining, tourism, water, all the cultural management activities, conservation and environmental activities, income generation, economic development, etcetera.

10.10 Community conflict, trauma and inequity

Most, if not all, interviewees expressed concerns that native title had exacerbated and/or created community disputes. While the presence of such conflict is pervasive throughout the report and is touched on in the context of several other thematic areas, the purpose of this section is to focus some of the key ways that conflict plays out in the native title arena.

Many of the stories involving disputes had a common element of misunderstandings around native title processes and expectations, and a lack of transparency at a governance level. Where community disharmony had been improved, one thing that women particularly noted was that it was helped by increased measures of transparency around expenditure and benefits.

Another common source of contention was incorrect anthropological and genealogical evidence used in native title claims and negotiations. The stories indicate that conflicts associated with this type of evidence are harder to address because doing so often involves reopening determinations, which requires funding for professionals, etcetera.

Many of the women interviewed for this Report discussed being a part of (and often leading) community driven approaches to resolving conflicts. These included things like:

- professionals providing groups with the time to work through issues at their own pace, so that issues were able to be resolved rather than sidelined
- cultural mapping programs to allow everyone to understand the group's connections, and
- increasing the accessibility and availability of education on the native title system and processes.

(a) Bunuba

The Bunuba Cultural Mapping Camps were specifically intended to try and help the Bunuba people heal from the trauma exacerbated and, in large part even caused by native title. The women interviewed by my team were, at the time of their interviews, attending the second of three Bunuba Cultural Mapping Camps that have so far been held.

The women spoke about the rushed anthropological research process run by the NTRB in preparation for the native title claim, which saw the anthropological work done incompletely and communicated with families inadequately. The result has been simmering concern within the community about families who were left out and others who were included without broad acceptance that they should be there.

Like so many others, the Bunuba situation is complicated because so many Bunuba were part of the Stolen Generations and some of those members are only starting to try and reconnect. Some of those families are not known to Bunuba who have lived and continue to live on Country and there was never proper time allocated as part of the native title process for working through these issues.

Millie Bedford described it as the native title process carrying on, 'full steam ahead,' while the families were still disputing who had connection.

The result was inaccurate or incomplete genealogies and incomplete membership of the native title group. As well as suspicion and mistrust amongst different families because of the speed at which they were expected to accept 'new' families and agree on who is and is not Bunuba.

Millie was in a position where her family had been identified by the anthropologist in the native title process and had been included, but that inclusion was contested by another family. Millie's mother had been stolen as a child and she had not been able to grow up on Bunuba country. Millie felt that for some other families, native title has cemented their 'mindset that we have no connection'.

In addition, Millie noted that some of those contesting her family's identity as Bunuba were also driven by the financial gains to be made from native title and associated royalties. In this sense, she felt that even where it isn't quite accurate that native title is the reason for the royalties, it had nonetheless created a perception of monetary gain to be made, in a broader context of poverty and material deprivation.

Millie described conflict-ridden native title group meetings in the past which made her nervous to even attend the Cultural Mapping Camp.

> [S]ince native title came, for us, it created more problems, I believe. It divided us to the extent that we're actually arguing at meetings … I spent six years attending meetings here regarding connection to Country and, you know, I used to not look forward to these meetings because I knew that there was going be tension. In the end, I knew we were going to end up having really heated discussions, having arguments, and there's been threats.

> I had been challenged at the meetings, every meeting, and I really wasn't looking forward to this meeting because I was thinking the same thing was gonna happen. But then my sister rang me and said 'you've gotta go to that meeting'.

The conflict had started back when the anthropologist had originally contacted Millie's mother when researching for the native title claim. This Cultural Mapping Camp was of huge significance to Millie and her family who felt they were finally being acknowledged more widely as Bunuba.

> That was after Sandra came and got an affidavit from my mother and because some of the families who didn't accept us as Bunuba were saying things like 'we don't know you' or 'we didn't see you grow up here' and we're 'just Stolen Generation'. Think about the Stolen Generation, you know, my mother was the stolen child so obviously she was taken away at a young age and didn't come back, she found a husband somewhere else and we had to grow up over there. Having to come back, and families are still blocking us for coming back to Country – a lot of people have given up, and I thought 'well we can't give up', we just keep going, then at the end of the day we'll have recognition. And this is it! So, if we'd given up, we wouldn't be here today. But we kept coming to meetings and talking, and right through we were continuously defending our presence at the meeting.

The Cultural Mapping Camp had a powerful effect for Millie:

> Oh, I tell it, my heart would have burst this morning! Or even yesterday, after we put everything down and June [said] 'do you know it's clear what we can see here …' Finally, someone can actually see our connection to Country and then our connection to Country also shows that we're connected to other people of that Country. It was just amazing, an amazing exercise to do, and it showed everybody, 'well hang on a minute, look at this piece of paper, you're all on this piece of paper!'

As mentioned before, Millie felt this work should have been done before the native title claim proceeded and was rushed according to a timetable that did not prioritise the claimant group's best interests or needs. Millie felt that NTRBs should have realised very early on in the native title process that the process was generating disputes and conflicts and not providing any means or forums for working through them. The result of conflict-ridden native title groups was predictable from Millie's perspective.

> Yep, rushing, rushing, rushing and just haven't got time to pull in and talk to family and yeah, look at us now. We've got to slow down now and start going backwards and say 'well hang on a minute, why are we running at this white man's pace?' We need to slow down and start doing it at our pace.

To Millie, the Cultural Mapping Camp was an opportunity to publicly work through the genealogies and make sure the whole Bunuba tribe could see the family tree and understand their connection and, most importantly, that it aligned with the stories her mother had told her.

> I knew my story will match theirs, but basically I wanted to do it in front of everybody – you know, with a lot of people that were challenging us all the time. It was a good thing and I felt, well, we're here, they can see that and that clears everything. You know, there's no behind backdoor deals, it's out in the open. I told my story, like my mother told me and then the information that I told you in public is all on the records there, and I just thought 'oh, thank you mother!'

Millie also considered that the royalties associated with native title were a significant part of the community fighting over who should and shouldn't be allowed to participate and 'benefit' from native title. She felt this applied in many native title situations, not just Bunuba.

> I think with a lot of developments on the land – mining and stuff – money was another big blockage or creator of our division because of royalties and stuff. I haven't been a part of the royalty process but I've seen other families dealing with the royalty process and what goes on. How they collect their royalties. And I've seen a lot of angry people fighting over who should get money and that bit's sad.

Millie felt strongly that money that comes out of Country through royalties, for example, should go back into the whole community, and that the community needs to properly plan how to become self-governing and how to use that money in a way which will bring long-term benefits.

> And so, if there is any money that's gonna come out of that Country, it should go towards the whole clan, not individuals, not you, not me, not her. It should be part of a bigger plan where you get money and that's to set up something to benefit your community.

> This individual giving money out, it's created a lot of problems within families, like saying, 'how come that family's getting that much and we're getting this much?' I was saying to my family, 'if it comes to the day where we're gonna be getting royalties from anywhere, we need to set up a trust fund, and that money goes into the trust fund and we only use it when our family need it.' I said 'I don't want money be given to me so I can off and buy a brand new Toyota and you go off and buy a brand new Toyota.'

Millie also described how the Cultural Mapping Camp had empowered her to slow down and centre culture, and embrace our cultural ways – the kinds of connecting practices that her mother and father used to do routinely, like popping in and visiting family on long drives. As discussed in her story summary in Chapter 8, Millie had also decided that she was going to try and interact with people using traditional ways, like calling people by their skin name.

Dr Sandra Pannell spoke about the importance of the exploration of people's ancestry and local Country connections in the Cultural Mapping Camps.

> Using the genealogies constructed by previous anthropologists, such as those of Phyllis Kaberry, and their own oral traditions, and assisted by the involvement of the original claim anthropologist, Bunuba people were able to trace and establish the intricate web of their connections to each other and to country, going back well before Whitefellas came to the Kimberley. They were also able to trace and tell the story of those Bunuba people who were forcibly removed from their country and who became part of the Stolen Generations.

Dr Pannell observed:

> For Bunuba people, the genealogical material served to authenticate people's own social memories, while the genealogies themselves stand as lasting memorials to the knowledge corpus of their 'old people', and their survival of one of the most violent periods in Australia's history.

Patsy Bedford talked about how little clear understanding people had regarding what native title was really for and why we were engaging in the processes. The result of the unclear expectations and the new emphasis on descent according to Tindale and other white men from history, was that it was hard to put it into context properly and centre our own culture and connection to Country, on our terms.

> Native title did not bring the cultural understanding in there. The language was gone out. The language is out. The language and the land should be together. So we sort of lost the language and it didn't play a big part in native title. All they wanted to do was go to government and win this native title back. Forgetting about what the land really meant and what it held, and what it holds to this day, for us as Bunuba people.

> [Native title] wasn't really helping with the transfer of knowledge, the transfer of language. All that, you know. We've always been told as part of the protocol, as part of our constitution, is that Country holds the language. No matter where we go in Bunuba Country we are going to still talk the language because the land hears that. It's happy. It fulfils our needs to survive out in the bush, you know.

Patsy talked about how proud the Elders were of achieving native title. But she also noted that all the questions they asked about why this process was necessary were not answered in a way which resulted in understanding of the broader context. This is discussed above in section 10.3, inability to fully participate. The result was a native title determination and subsequent PBC governance set-up, the purpose of which was not properly understood amongst the community. More importantly, the processes which delivered that outcome had interfered with the way that we identified ourselves and prioritised our connections.

Kaylene Marr is from a well-known Bunuba family and has not had her connections questioned. However, in her most recent discussions with my team for this report, Kaylene described a situation in which she was feeling her identity being eroded.

Kaylene felt that communication from the PBC Board was inadequate and although Bunuba are doing well, generally, there are still simmering problems regarding clans not understanding or respecting all the different families' connections.

> We need to bring all the people out together. I'm trying to lift these other people who have no voice. They've got no tools for how to go about [working together].

Growing up, Kaylene's community operated very strongly and Kaylene remembers the Elders and all her brothers and sisters were very engaged in thinking about the next generation to come and the future. Kaylene felt it was 'connected' and remembered a 'feeling of togetherness'.

> Family was so proud in the community – caring, sharing lifestyle, knowledge. They had bush medicine, chemists in the outback, bush markets. Our people was very keen. We could go fishing, hunting, camping and dancing. We had our own community cars and trucks and a community checking account.

Kaylene felt that this changed when most of the Bunuba Elders passed away in 2000: 'those Elders who were really engaged in Bunuba Inc and Junjuwa Inc were gone which has been the biggest change around Bunuba.'

In 2007, a partnership began between Bunuba people and Wesley College which resulted in Yiramalay School where Kaylene works. Kaylene then moved to Melbourne with her Yiramalay students and three children in 2010. She was there as a Galamunda Traditional Owner and a Bunaba woman, moving back and forward between Melbourne and back home. Kaylene described feeling very different when she moved back home four years later.

> I could feel some changes around Bunuba and the partnership. Four years later, back home, I didn't feel the same spirit and I felt so disconnected from Yiramalay and Galamunda because of the changes in the board. But we still here as Traditional Owner in our muwayi (country) Galamunda people and Bunuba people.

Kaylene is now back home with her Bunuba people. She feels as though the PBCs, the ILUAs and native title claims are what her people struggle with on the ground. Kaylene expressed that these players and actors in the wider system do not communicate with her people on the ground and in community. They have not listened. However, like the other women, Kaylene emphasised that we are still strong in our Bunuba culture, language and connection to Country which is the most important thing for our community's wellbeing.

> It can't take away our identity, our spirit, our culture, our language and our knowledge for the whole of Bunuba people and our Country and clan group. It's who we are.

(b) Avelina Tarrago

> **People can't talk about this stuff in open forums, especially where there's internal conflict.**

Avelina Tarrago's successful native title claim came about a decade after her original involvement as a respondent. Again, it was the result of being 'forced' into the native title system, not because there was any perceived benefit for their group. This second round of involvement brought with it significant conflict between the same family who had originally claimed Avelina's family's land.

> [I]t would have been ten years later or eight or nine years later, then one of the property or the lease holders wanted freehold. And so we had to file an application. We had no choice otherwise we would have lost it … So, in 2016 we filed, from memory, but obviously that means a fair bit of work up beforehand. So, all of 2015 was dealing with that, and then comes the conflict.

As discussed in section 10.9, traditional decision-making processes, Avelina described how, in her case, particular families insisted on decision-making powers that they were not entitled to under traditional law because they did not have the traditional knowledge. She described how this created a battleground.

> We're dealing with this colonisation issue, where it's not their fault that they were brought up that way. It's not their fault they had no connection. That's just the way it is in that area. But we've got to live with the consequences of trying to tell people that, and tell people to be in their place, but they don't listen.

> That conflict continued all the way through to the point where on the day of our determination, they wrote an email to the High Court to try and derail the determination. They just weren't happy. 'Cause they didn't get their way.

> But the stupidity of it is that they were on our claim. No-one was saying that they weren't part of our claim. Their ancestors are accepted on the claim but it was just ego – they didn't get it the way they wanted to have it and have control over the process.

> And you know they just want to have control because that means control over what decisions get made, whether we enter contracts, whether we get money … And they're not aspects that exist in traditional law and custom. There have always been communal rights. We're not an individualistic society … It's not about one person. It's about everybody. And it's not just this generation, it's all the generations that are past and all that are going to be coming …

> So you're always dealing with this conflict and one upmanship sort of behaviour … and that includes me getting death threats. Having to have meetings at the PCYC because there's police there. Us having to have security all the time whenever we had to authorise stuff because of people's behaviour.

Avelina discussed how the issue of benefits and royalties is particularly prone to creating inter-group conflict, given the circumstances First Nations communities are in.

> Our people live in abject poverty. And we're talking about money. I'm in a privileged position where I've never had to want for anything. It doesn't mean that I haven't struggled, but by comparison, I'm that privileged old white man to them. As far as economically.
>
> So, when it comes to compensation, I'm trying to talk to them about the point of it being not just our generation that it has to be for. It is for the seven, eight generations that are going to come after us, and beyond. We have to build. If we want our kids to be in a position where they are not struggling, we have to give up and sacrifice now and put it all in trust and only invest in projects that are going to create economic sustainability for everybody, and it's not going to happen in our generation. It will be a couple of generations away.
>
> And then you've got to educate them about how climate change affects that. We're in an area where climate change is going to substantially affect it. Because we're in the Simpson Desert … So, the questions of the Lake Eyre Basin and the Great Artesian Basin as far as those acquifer remaining pure and the pressure remaining at a level that is allowed us to live or work it, at least out in Bedourie. When you've got mining companies that are coming in drilling holes in the acquifer …
>
> I understand all of these issues but when you're trying to explain – this is just hypothetical, it hasn't happened – 'let's turn down this major contract with the mining company … and drilling into the acquifer, for a little bit of money … We're destroying the country, we're not going to be able to live on this Country ever again because the water will be contaminated, we can't live out here and why would you when you've got an open cut mine?'
>
> Trying to have those discussions is really hard. Because people don't want to live in poverty and I get that. I wouldn't either.
>
> **So yeah. The problems that native title creates for our community is extraordinary. The lateral violence that it creates is extraordinary. The impact of native title on our people – I think it destroys more communities than it builds.**

(c) Geiza Stow

Geiza Stow felt that processes associated with native title governance contributed to a reinforcement of existing power imbalances within the community – specifically, the men who already have power in the community were able to bolster their positions through native title governance arrangements.

In Geiza's interview, she talked about how the men in existing positions of power had used 'culture' and 'respect for our forefathers' to exclude women from decision-making roles in the PBC, despite the work of the PBC expanding well beyond land management to things like community facilities and functions.

Geiza had asked if women could sit on the Elders committee and was told that it was only for men. The Badu women were told that women's views could be taken into account by having a women's organisation outside of the PBC and then that organisation could give women's views to the PBC board to consider.

Geiza disagreed that excluding women from decision-making roles in the governance structure of the PBC was the only way to respect traditional culture, instead feeling that things have now changed. Geiza described the wide and varied roles of the PBC, and said she considers that it is not as simple as saying that PBC decision-making is for men alone. Additionally, Geiza noted that she herself has extensive traditional knowledge of country as a result of her father passing this down to her and that there have been situations in which that knowledge was not available but for her providing it.

Geiza also spoke about the other roles she played, and how her experience living on the mainland had exposed her to Western governance and administrative ways of working which were beneficial to providing services back home on Badu.

One example Geiza discussed was in relation to her role as Community Justice Coordinator. In that role, she had organised for the Community Hall to be used every three months for the local circuit court. This allowed over 20 people on each occasion to have their hearings on the island and be supported by Geiza. Geiza had particularly found her knowledge of the broader governance environment useful in problem-solving across sectors. Geiza discussed her administrative knowledge of the grants processes and governance structures, and her community connections from this kind of work, as well as other roles in community, and noted that the PBC would benefit from having that experience in their governance and decision-making structures.

Geiza had witnessed some of those in governance positions attempting to use a range of laws and legal concepts to limit community understanding and participation, and therefore accountabilty. Geiza had been told that under native title law, something like squatters' rights apply: 'some of the people are saying that in native title law, if you clear an area and look after it, make it beautiful, it becomes yours'. She had also been told that the native title determination prescribed that only men could be on the board. Geiza was fairly sure that wasn't true and that if the Rule Book does say that, it could be changed; the men just didn't want to change it.

Geiza also felt there is a lack of transparency around decisions of the PBC board and the distribution of benefits. She had observed that where there is a lack of traditional knowledge, some people were trying to exploit that. It was not clear to her that the men in charge were acting in the interests of the community, rather they appeared to Geiza to be acting in the

interests of their own families. Geiza felt that some were taking opportunities to claim land themselves instead of intentionally facilitating the appropriate families getting their ownership back. The result has been community conflict.

> **Men seem to be grabbing all of their share, more than their fair share, rather than having for the whole community, including those families who are not very outspoken. It seems like for them, well, bad luck, you're going to miss the boat.**

Geiza explained that most families only have their oral history conferring their knowledge of connection to their land. As such, it is a big job to correctly identify the right families for all the land. This is especially so where the knowledge of traditional ownership has been impacted by changes to everyday life on the island.

> Back then, people were living off the garden, they were walking miles and gardening and planting kai kai … So we had those boundaries to work off … and, of course, if you don't do gardening like our generation now, you're really lost.

Geiza believes that, as a woman, she instinctively feels a need for fairness in establishing ownership of the different parts of the island, and in ensuring everyone is involved in decisions that affect them. She felt that many of the men in power did not appear to feel that same responsibility to the community as a whole.

In recent conversations before publication of this Report, Geiza told us that their ILUA of over 35 years had apparently not been appropriately authorised and that people do not really know what is going on with it. Members of Mura Badhulgal are not happy with the existing ILUA which waives the requirement to get agreement of members for every development, saying they did not agree to that ILUA. Geiza noted that members had no proper advice or support to understand, or be able to input into, that ILUA.

Geiza understands that the ILUA is due to be renegotiated imminently and feels this is an important opportunity to ensure that members of the PBC can participate fully, and that services are divested to the local community to run as businesses. She emphasised that local people need support and assistance with this, to plan and execute service-based businesses.

Geiza told us that the 'Values' of the PBC sound positive in regard to the services provided and the roles played by the PBC. Those values talk about the PBC as a 'platform for positive change and well-being.' However, Geiza felt that communication with community was lacking and that locals do not know what the PBC actually does to develop opportunities for local people. Geiza wants the PBC board to look back to their vision and values and to action those.

> No one has given us the opportunity to sit down together and contribute to planning for our community. We want to see a clear direction and workable solutions and we have a lot to offer in those processes. PBCs are powerful and the whole community should know what they do and have the opportunity to contribute their experience, knowledge and suggestions.

> Also, the PBC should look after their own constituents, giving them the rights to operate economic ventures and support them in being able to do that. Giving that responsibility, and actioning it.

Geiza felt that native title and the PBC could be a useful avenue for developing a sustainable framework to plan for the whole community, so the community can move forward and make positive economic progress.

Geiza described how the PBC needs to design a way of working collaboratively towards that framework for economic and social development, 'with the aim of a healthy, happy, working community, as Badu always was.'

> We need to workshop together, collaborate as a whole community. By working and growing together, that's how we make sure we don't lose that flame.

> At the moment we don't have anything to give to our young generation and we cannot keep going like this otherwise we get nowhere.

Geiza felt that as a representative organisation, the PBC should be looking at growing its function to deliver critical services and support new initiatives for the community. She felt the PBC could be doing much more to drive positive change, instead of viewing their role narrowly.

For example, Geiza said that there is currently nothing offered locally employment-wise for Badu residents and she and other women would like to see the PBC drive more growth in this area. She considered that negotiations of ILUAs should include employment and education aims, and the community should be involved in identifying and negotiating those goals.

> Badu was always the leading island and we want to bring it back to that standard. So we mustn't lose that opportunity to keep the fire burning.

> A framework and governance structure using the PBC could show people where they fit in and could boost morale in the community.

(d) Anna Stzrelecki

In her interview, Anna noted that disputes associated with native title are uniquely complex and 'high stakes':

> Because it's not like you're in dispute with the guy next door and there's a resolution, you put a fence down the middle and everyone's happy. Because we're talking about land that is there for everybody if you like, it's not as easy to resolve.

Anna described how the degree of conflict which native title has generated is such that it feels almost intentional in its design, particularly in relation to the identity disputes which have arisen:

> **A lot of people will say that the native title system was set up so that people would argue amongst themselves. And I don't know whether that was the aim of the legislation but in a lot of cases that's certainly the outcome, and particularly when the arguments go around who should be there and who shouldn't be.**

As discussed in section 10.7, in comparison to most PBCs, the Kokatha Rule Book provides for broad member/Common Law Holder eligibility. In particular, Kokatha Common Law Holders do not have to be related by descent or adoption to one of the apical ancestors. In contrast, the other PBC with which Anna is associated has much narrower eligibility for Common Law Holder status.

Although the Rule Book mirrors the determination with regard to the criteria, in Anna's view, the result has not been that traditional law has been successfully enshrined. On the contrary, Anna considered that the Kokatha PBC Rule Book allows for the rules to be exploited with no recourse. Inevitably, community conflict ensues.

> So that creates a lot of arguments within the community, especially with older people that come along and say 'that person is not, shouldn't be part of this'. Now I know you're going to get that anyway, but I do think that they have some sort of basis for it a lot of times and yeah, it does create a lot of angst.

When Anna looked at the determinations which subsequently informed the membership requirements and the definition of who is a Common Law Holder, the determinations were different, which was what, on the face of it, resulted in the different eligibility requirements. However, this is not clearly explained to members who are confused about the arrangements which appear to allow people with no genuine connection to Kokatha country to access benefits from the PBC.

It appears that the attempt to incorporate traditional law and custom into native title law has been thwarted by the failure to include accountability mechanisms with regard to decisions on eligibility, and more broadly, a lack of transparency and education around the governance arrangements and processes.

Anna also spoke about disputes that native title has created regarding Lake Torrens. From her knowledge, the protection of the area has been threatened by disputes between native title groups with interests over the area, and by a system which does not prioritise protection of Country as the outcome. Rather, it seems that processes are followed without consideration for the intent of the Native Title Act and the cultural heritage legislation. As discussed in section 10.6, the way that professionals use the system is critical to the way this plays out.

(e) Cissy Gore-Birch

As discussed in detail in Cissy's story in Chapter 8 and in sections 10.3 and 10.8 and 10.9 above in this chapter, the Balanggarra Aboriginal Corporation (BAC) has had tumultuous times over the last decade or so. Cissy Gore-Birch has had two stints as Chair, with the second being specifically in response to community requests for her help after certain individuals were trying to take back control of the board for their own personal gain.

Cissy described the social and political context of the disputes in her community as including, but certainly not limited to, native title. Cissy's observation is that governance structures associated with managing native title have provided a forum for those who are self-interested, do not want to resolve conflicts, and continue to try and disrupt decision-making and PBC efforts to respond to the whole community.

Cissy described how it was a fraught time for her community when she initially came back home and was elected Chair for the first time. As discussed in her story in Chapter 8, the community was reeling from sexual abuse allegations against senior men and the WA government was threatening to, and eventually did, close down one of the communities involved – Oombulgurri. Cissy told us that the board of BAC included some of the same men who were involved in those allegations and that they were causing serious conflict in the BAC and across the community more broadly.

Cissy recalled her childhood and witnessing the roles that the Elders played in Oombulgurri discussing things and working through matters, including conflict. But what she found when she came back did not resemble that at all and Cissy was devastated by what she found.

> So, growing up and seeing all these old people making these decisions, you sort of take it for granted because there was some order and compassion back then. The Elders had a position and a role and the respect was there … being a part of that and sitting around the circles and listening … And then to where I am now and hearing the disputes and what's come after native title has destroyed community, family and friendships.

> That's what I've seen with native title, that it's really separated family and community members. It's really brought out the ugliness in people – women against women, and women shouting at old men. Men insulting and threatening women. It's really ugly to see.

Cissy spoke about the experience of how they determined their native title claimants, the way the claim was presented and determined as four different land groups, and how the PBC structures reflect the evidence that was presented to secure the native title claim. Cissy noted, however, that not all families were named in the determination and the confusion associated with that has allowed some of the louder voices to dominate.

Cissy explained that they have had to go back and get the genealogical work reviewed and presented in family groups for family to understand the connections to try and deal with the issues created by the inadequacy of the original native title research. Cissy felt that the decision to leave out some of the genealogical information has allowed certain individuals to exploit it for self-gain. She felt that it therefore needs to be made explicit that other native title holders, whether named or Common Law Holders, also get a say in decision-making.

> And now we're having to sort of backtrack and say 'well hang on a second, there's only three family members listed, but there's six or seven others who are connected to that Country also. We're having to go back to getting more detailed anthropological information, looking at the genealogy, because this one family member has been dominating and bullying everybody else and saying, 'my grandmother was the one who stepped up at court and she talked for this Country, this is our Country.' Not thinking about when you put in a claim for native title, there's a society of people who came from that area; it's not just one family.

> So, it's just that misunderstanding of the whole claim and it really affects the decision-making process with the structures that have been set up … it's just certain family members … They try and use the current structure without any of that proper connection, but they say, 'well, that says land group four, so we sit in land group four, and this is the boundary for land group four, so we are making the decisions and we want this without taking into consideration the other families connection to that area.'

> No, it doesn't work that way, sorry. Common Law Holders can come in and have a seat at the table. At the end of the day, you're not here as a land group four member, as the land groups were initially set up to assist the anthropologist with the areas of the claim, it wasn't a decision making process. You're here as a Common Law Holder, as a native title holder, with your connection to this Country along with other common law holders with connection to this country.

Cissy described how she felt the native title processes were too fast to enable people to have a proper understanding of what they were participating in and agreeing to.

> It was all moving so fast and we had to react to all the demands without really understanding all of it. Much of the community dispute was because it wasn't ever properly explained how giving evidence tied into native title and rights and the other family connections.

Cissy felt that the native title lawyers, anthropologists and others within the system did not properly explain to native title claimant group members the processes involved, nor did they explain the meaning of native title at the time. Many found it difficult to understand the native title processes and how the system operates. This has resulted in misunderstandings that have festered and developed into more community problems and division.

> People are still really confused today, just around the apical family members, and their connection to the apicals. And then, okay, your Grandfather was nominated to share their story to the courts on behalf of Balanggarra people [but] they just misunderstand the whole process.

> Like 'no, your grandmother was nominated because she spoke well, to share these stories to the court …' … So, we're dealing with all of that stuff still today … even though people have been involved with those conversations initially, and then even in the directors' meetings, people still couldn't fully get their heads around them.

Cissy described how the lack of broad community understanding also provides an opportunity for some people to try and cement their positions of power.

> There's a misunderstanding of what a board is, what the roles and responsibility of the committee … We've gotta be really clear … You vote the people in that'll have a voice to be able to express some of these things [you want represented]. But people are voting and putting forward people with no experience, no skills, unable to talk up, and then they complain afterwards. It's like, 'well you need to nominate the right person. Don't just nominate a person who's going to be bullying and then no actions or activities come out of that.' So, there's a real misunderstanding about corporations. There's a disconnect.

> Before the PBCs were set up, they used to have Aboriginal corporations and, back then, they had management of the CDP, they had decision-making of the staffing, they had, you know, full control of community-controlled organisations, and this is what's happened with Oombulgurri. So, that was made up of all these menfolk who had access to all this grant money. They've mismanaged it [but] they think that they can still have that full control. Whereas it's not about that. This is a completely different game and structure. And there's gotta be more protection around that, I believe, in protecting some of those standards and decisions [in] PBCs.

Cissy spoke about how both the lack of knowledge of the systems, structures, and roles, and the lack of transparency around distribution of benefits, contribute to assumptions that fuel and enable community conflict.

> It's that jealousy thing where they're like, 'oh, well you guys think you're too good for us'. You know, it's nothing to do with that. It's about us working collectively. I don't get paid to do this job. I'm constantly telling people, but there's this misunderstanding, 'oh, Cissy's gettin' all this money'. This is the constant defamation, and lies and tactics that these bullies use to cover up for themselves and what they did in Oombulgurri when they were in control.

> People just have their own understanding and, just really trying to get them to see. It's like 'well how come you've got a car?' or 'how come you've got a house?' And it was like, 'well, I've just worked for the last 35 years.' So, they don't see my other life, like I also work, I save, I have to, I've got kids, I've got a mortgage. Yes, I own a car. Yes, I own some land. Yes, I go on holidays. But I've got a full-time job and life outside of this. So, it's just constantly trying to educate people and just share.

Cissy told us that, in her experience, the individuals causing problems are not interested in benefiting the whole community and that efforts to resolve conflicts with them are futile. Instead, Cissy says she has focused her efforts on those who have been misled by the 'bullies' but who are interested in the whole community. Cissy notes that this is the majority of the community.

At the time of her interview, Cissy told us that the 'bullies' had not had much support since she deliberately focused on being transparent and making sure everyone knew what was happening and could ask questions. Cissy believes that inclusion, transparency, being present and exposing the truth and being patient is the most effective way to sustainably protect against the return of the 'bullies'.

Cissy organised different ways to try and address the lack of effective communication around relevant information and decision-making. For example, she organised for AIATSIS to come in and do some role modelling around ways of learning and bringing together the Western system and the cultural governance structures.

As discussed in section 10.12 on women's role in healing community from dispossession and trauma, Cissy described a key part of her role as Chair is bringing the community together and resolving conflict. But as it stands, Cissy still finds a lot of elderly, women and other family members were fearful of certain individual men and this still continues today with constant intimidation and threats.

(f) Leah

As we heard from many women, the hardest part of the native title process for Leah is 'the way native title affects families and can divide communities.'

Leah identified many issues within the native title process which can result in community division and disharmony. Several times in her interview, Leah spoke about the to be mindful of the 'divide and rule' tactics.

Leah spoke about the lack of genuine and inclusive consultation practices in the native title claims system. In Leah's experience, decisions about who gets consulted are at the discretion of professionals, who are often non-Indigenous. Leah stated that they often hear only the loudest voices and don't make the effort to ensure everyone has the opportunity to be heard:

> I understand that it is challenging to include everybody. However, it's fundamental that the quietly, quietly leaders are heard. These leaders (both men and women) embrace the a kinship way. These leaders have lived experience and knowledge, and are inclusive of the next generation.

Leah emphasised the importance of the process in native title. If the process 'causes fragmentation, including unresolved community disputes, then any other positive outcomes are offset or even outweighed.'

Leah discussed how native title meetings can create an unhealthy and culturally unsafe forum that causes division.

Several times in her interview, Leah expressed how important it is for younger people to step up and be given the opportunity to be supported and encouraged on community boards.

Leah noted that it can be very hard when you have one or two older people who are reluctant to share knowledge because they could possibly feel threatened by the younger generation who bring different skills, experience, and perspectives:

> The older generation need to be accountable for the past and present actions and take full responsibility. People in communities want leaders to take responsibility for their actions.

Leah also noticed that intergenerational conflict seems to be a feature of the community meetings now that more young people are attending. Leah feels that the meetings lack the kinship ways of working – ways that facilitate effective communication:

> [T]here's young people now that are coming to the native title meetings that are starting to be involved and these are young people that are university educated, that run their own businesses, or other professions. Elders could feel threatened by the new generational knowledge that younger people have or the way they present their point of view. 'How do we move beyond that?! How do we create those brave spaces where we can have the difficult conversations?!' If you don't have good facilitators or community leaders that can support those conversations it can be a very negative experience for everyone.

Leah wanted to see community leaders harness the complementary skills of the older and younger generations – to create a brave space in those meetings, where the hard conversations can be had, disagreements can be managed productively, old divisions can be mended, and the community can start to heal.

> There is a whole generation of the most amazing skilled-up young people that are really IT savvy. We need to bring together the Elders with their knowledge and encourage the younger people to bring theirs. The skills complement each other – that's a force to be reckoned with. Together, we create those brave spaces.

Leah suggested, that perhaps to prevent a lot of conflict and misunderstanding, it might be a good idea to have a timeline of the process to date at the start of every meeting. Leah believes that this simple step would make a big difference to community's understanding of the native title system, what they are being asked to do legally and practically, the implications of certain decisions, and why the decisions were made in the past. Leah is concerned about how long the native title cases can go on for. and the importance of everyone understanding the history of their claim.

> So, you come to a community member meeting and it's almost like there's this expectation that everyone is going to understand where we're at and who did what and what decisions were made back in 1995 – no?! After everyone's had a chance to catch up, have a cuppa, the formal meeting commences with a timeline. This is a good idea because it keeps people up to date. Much happens between meetings, for example, intergenerational trauma and grief, families dealing with high incarceration of our people and a high rate of sorry business.

Leah also noted that the PBC board is not sufficiently resourced to support it to perform its role in a way that unites community and allows full understanding and connection.

> The PBC board representative members get travel allowances for fuel and food each time they meet, but that's it. The rest is in their own time.

> An allowance is paid for members' time. However, there are many hours spent in preparation that is not renumerated.

Leah stated that there is mistrust of some Directors and the paid CEOs because of their lack of communication and openness.

> There's a lack of communication and a mechanism to report back to community on a regular basis. I think if you had that, it would dismiss a lot of the distrust members have for the CEO's role, which is a paid position but people are not always sure about what he/she does. People often go to the office and there's no entry for them. People ask, 'where's the previous meeting's minutes, and financial report. It is the responsibility of the Board. However, they don't receive adequate support for the administration role.

Leah noted that more transparency in the native title sector generally would help improve trust. She also noted that it is paramount for healing to take place for communities to move forward together:

> There's a lot of healing that needs to happen in our communities. There is an expectation for partnerships to be established with all services be they government or NGOs.

(g) Thelma Parker

Thelma Parker talked about how the native title framework cements – and creates – male privilege and starts to impact the way some of the community and even her own family view women as knowledge-holders and Elders within the community. This has split families and communities.

Thelma described how even the men in her own family appeared to buy into the colonial patriarchal narrative associate with native title which elevates Aboriginal men's knowledge of Country over Aboriginal Women's. It seems to Thelma that they have started to believe that they alone are the knowledge-holders for Country. Even though that is not traditionally correct and they should know that.

Thelma identified that in her native title group, the elevation of men's knowledge and men's status as most important in the native title structures and processes (via the layers of Western patriarchy discussed in section 10.2, women's knowledge) has allowed men to essentially take over control of what happens on their Country, including women's sites, which they do not know even exist. This is discussed in section 10.9, traditional decision-making processes.

Thelma said that the decision-makers in her PBC are a select couple of men in the group, and the direct beneficiaries of PBC decision-making are overwhelmingly men. In negotiations with mining companies, and supported by the NTRB, the men have agreed, on behalf of the group, to no royalties, just jobs, which are unlikely to directly benefit many women in the group, and training programs:

> ... they'll say that we want to run the training programs. Well how many training programs are you going to run and who's going to be a part of those training? I can guarantee 98% of those people will be males.

Thelma believes the decision-making that has been going on has not been lawful because it has not followed the correct approvals processes, but she understands that those agreements become enforceable once they are made, regardless, as provided for in the Native Title Act: 'that mine will go across anyway regardless of whether we like it or not'.

In the context of community disputes, Thelma believes the imposition of the one PBC for all three of their determination's groups is a significant problem. Without clear rules about decision-making on different Country, it has resulted in the wrong people making decisions over other people's Country. This is discussed in section 10.9 on traditional decision-making.

Meanwhile, Thelma understands that the Department of Natural Resources and the NTRB have around $2 million of her native title group's money that they are unable to access. Thelma said the money was meant for the purpose of scholarships and training for young people in the community but understands that they are holding onto it because of the disputes going on within the PBC membership regarding 'the injustice of people jumping in and out of our claim'.

(h) Maria Stewart

Maria Stewart spoke about how the incorrect native title determination over Oodnadatta has impacted the whole community and created significant ongoing friction.

> It is exhausting, and you know what? It's made a lot of families dysfunctional. People are fighting over land. It's made a lot of enemies and people have died, too, worrying about it. It's caused a lot of friction with families. Not only in our community but everywhere … We wanted to be included – we had to fight our way in to be included. I'd fight tooth and nail. People having punch ups. It caused a lot of damage.

Maria described how the involvement in native title has created a problem where there was not one before. It has not assisted in getting access to Country, but has created a means of excluding Maria's family from recognition and decision-making around land that they have always known to be theirs.

> We still do go on Country, we kind of get permission, we just let the pastoralist know we're going back on Country and we do it anyway, regardless. But I think the recognition – we know in our heart where we belong but I think it's the recognition around involving us in decision-making of our Country. We don't get that at all.

From her experience, Maria felt it was difficult to have a say in how the PBCs spend the money, or try to hold the directors to account, because of the bullying and dysfunction within community.

> There is a lot of violence. When you have those [PBC] meetings there is a lot of lateral violence – they've put people off from going to those meetings because it's really violent. People fight and carry on, argue, get abused, so a lot of people don't attend because they just don't want to be a part of it. And again, that's how bullies – they use those tactics to intimidate people. There are a lot of bullies. Also Elder abuse, in general, like at those meetings, or even just in a community setting. There's no respect for anyone really.

> They've got their own agenda. People do it for power, for money and for status but I don't know why they do it. Maybe they just need to go to anger management.

Maria felt that these issues affected both men and women and were fuelled by poverty, as well as the loss of traditional structures and culture, leaving people trying to fit into the new structures.

> I think it's a mix of men and women. You've got women that are chairperson[s]. That was just a fad. But it is a power struggle for everyone really. You know, I think in the old days there was structure and people knew their roles and responsibilities and where people fitted in society. But now it's just put them in a community. People are struggling for their identity and where they fit into this new community setting.

As determined as she is, Maria sounded exhausted and can see the cumulative effects of years of systemic legislative and policy-based discrimination on her people.

> You know all this stuff has cost us. You know, problem after problem. You've got stolen generation, you've got native title. It just caused a lot of anxiety you know a lot of health problems, mental health problems. It's one problem after another and people just can't get out of it. They need to get out of it.

> At the end of the day it's about whatever affects you, affects everyone else, and the same with my Elders. It affects them and they often ring me many times and I can understand their frustrations, poor things. That's the way it's affecting them. They'll ring me and talk because no one is listening to them, and then it starts affecting me. So, it's a ripple effect. It effects all the way down from one generation to another generation.

> It's so ongoing and you know what? Because it's happened and then they carry it, it's that inter-generational trauma stuff. Inter-generational curse you may as well say.

> And it's hard to heal when the disputes are ongoing.

(i) Donna Wright

Donna Wright spoke about how, in her experience, native title has been 'weaponised against us'. She feels it has provided another way for those with power in the community to cement that power and created a forum for divisions to play out: 'none of which has been to our benefit'.

Donna feels that one of the most important roles she plays at the moment in community is in trying to let all the members know they can ask questions and can stand up for what they believe is right – they don't have to accept what they're told by those in power.

Specifically, at the time of her interview, Donna wanted community members to know that they 'don't have to accept that the direction of development of our Country is inevitable or good'.

> So, young fellas, they said, 'the landscape's changing', and I'm thinkin' 'wow!' I agree there is so much industry, and racism within the native title systems its hurting our people.
>
> We know tourism is gonna be a good thing, but is that what we wanna leave our kids? They have a right to have a say.
>
> We've gotta be able to protect Country from industries. So much of our land has been developed, we need to be part of the decision-making at the end of the day. Our spiritual life, it's the only thing that's kept us healthy, is being able to come home, is being able to have a say and fight, rightfully fight to protect our Country, our family clan areas and Country …

As other women noted in their interviews (discussed specifically in section nine of this Chapter on traditional decision-making processes), Donna also spoke about one significant problem they face, which is that some people who are equally as legally entitled to membership of their native title group simply don't have the same traditional knowledge or connection as others in community.

> We've just come up against people who don't have that strong or deep connection and don't even realise how they're disempowering their own community …

This has created very different priorities within the group and the pro-tourism development 'side' was determined to get the tourism agenda through. In this context, Donna spoke about how the CEO of the corporation tried to remove members from the organisation.

> [All] these letters were sent out about this Special General Meeting, about cancelling the memberships of six women – two Elders, six of us [total] – and everyone went, and probably weren't really understanding what was happening. And then when they saw my Mum's name and some other Elders' names they just walked out of the meeting. They were disgusted. They didn't want to be part of it. So, it didn't happen.

Some of the Elders from Donna's family have had enough and believe that native title has destroyed community:

> … we've got lots of people who've walked away, they're exhausted by the corporate laws and governance systems. An Uncle said to me, 'I wish we never ever got native title, look what it's done to our people'.

(j) Monica Morgan

Monica noted that the lack of understanding of native title means that some other First Nations and some third parties try to use a lack of native title against the Yorta Yorta, as though their native title loss diminishes their standing or their rights to self-determination.

Monica has been involved in land rights and native title for a long time and could see that many other people do not have a sound understanding of what native title is and is not: despite the fact that a failed native title case does not mean a claim group has no connection to, or traditional rights regarding, an area of land, it seems others believe it does.

Monica also noted that people seated at the negotiation tables, including other First Nations peoples, often have limited understanding of the implications of native title and co-management agreements.

Monica spoke about the native title and cultural heritage interface with concern because of the way it can facilitate disunity and allow people to promote personal agendas rather than genuine protection of Country via an agreed traditional decision-making process.

In particular, she noted that the breakaway group from Yorta Yorta, the Bangerang, were applying for management of country and cultural heritage work separately.

> … they're the same ancestors. They just call themselves Bangerang and three times before, the Victorian Heritage Council said, 'you're the same people, work together'. And our system of governance is that you don't have to be a member of the corporation to be a member of your family group.

Unfortunately, there are personal and individual gains to be made by people breaking away in this vein, and Monica notes how this benefits those non-Indigenous groups who are not interested in looking after country – it allows third parties to attempt to 'divide and conquer'.

> … you know who the biggest supporters of the Bangerang are? The Barmah Brumby Association have sided themselves with the Bangerang …

Monica drew parallels to the Yindjibarndi case, saying third parties offering incentives to breakaway groups furthers an agenda to divide First Nations.

> It's happened everywhere. And you'll have the likes of Twiggy Forrest. Well, you've had them everywhere you know. That are trying to get an economic edge in there and say 'oh, you know, we'll help the mob, but you've got to get a job and be like white people'.

The internal conflict and division in the Yindjibarndi case is discussed in section 9.3, power imbalances in native title.

(k) Sarah

Several sections above refer to Sarah's experience of disputes in Sydney between Dharug Traditional Owner groups and non-Traditional Owner-based land councils.

Sarah discussed how the difficulties of claiming native title in Sydney and the entrenchment of non-Traditional Owners in positions of power in the land council set-up have led to bitter community disputes and resentment. Like some other women interviewed, Sarah has found that a lack of native title is now incorrectly used to evidence a lack of connection or traditional rights altogether.

> It just seems to be getting worse. It's not getting better. Land council throws that in our face too – 'your native title got thrown out.' They use that as a power thing. Our native title claim was withdrawn. It's more complicated than no native title means we don't exist or have any rights over our Country.

> But that's why they say 'oh there's no Dharug mob, yous couldn't even do native title.' At that time that native title did go in, there were fractures in the community. Recently the community has come back together and we could quite easily put something through like that if we had the time, resources and capabilities of doing it.

Sarah described a situation where Local Aboriginal Land Councils refuse to acknowledge the Dharug people, refuse them membership, and restrict them from accessing or having any say over their own Country. The community disputes over Dharug people trying to have any control over Country or just be a part of the LALC are intense, ongoing, and sometimes violent.[263]

> We don't have access to any of our Country. We can't even get into any of our sites, and then whenever we do, like when we went out to Sackville, we're confronted with a land council man telling us 'get out, we own this'. He just bullied us and carried on and it was disgusting. But we put up with that down here in meetings all the time. We have people from off-Country coming in doing cultural heritage works and just having a go at the Dharug people, it's just never-ending. I worked in cultural heritage for about 20-something years and you just get abused every day by all these land council workers and different people, and you just get used to being abused like that all the time. It's terrible.

> We never know what development they're doing, they don't have to notify us … They don't acknowledge that Dharug people exist anymore.

> It's absolutely disgusting … They all say that none of us knew that we were Aboriginal until 30 years ago when Jim Kahn wrote the book. I've known all my life I'm Aboriginal. I wish someone had told all the arseholes through school that I wasn't Aboriginal. And my mum, she's known all of her life that she's Aboriginal. So I don't know where land council gets off saying that sort of thing.

Sarah was hoping to outvote the land council in order to get membership by inundating the LALC with Dharug applications: 'they can't say no to all of us!' But she was concerned for her safety if she tried to assert her rights like this.

> Land councils though, they're still very male. They won't let us join. So, nobody has anything to do with land council. Dharug people aren't allowed to join our land councils … and if you ring them up and you say Dharug, you get screamed at. I've had people ring me crying saying I've just spoke to the land council and they were so abusive. They're just awful. So, if you mention the word Dharug, block your ears and run.

> So, what we thought would be a good idea was for us to get about 200 Dharug membership forms written up and just take them in there cause they can't knock 'em all back. Cause if they knock 'em all back then we've got legal action that we can take … But it would never happen because they're actually violent as well so … I don't think it would go very well … for us, I don't think we would be safe to do that. But it's a good idea in theory!

In discussing the potential for making another Dharug native title claim, Sarah was conscious that it could potentially exacerbate community conflicts and impact on individuals' and communities' well-being. Sarah was aware that Sydney was the most thoroughly colonised part of Australia and the number of people discovering and coming to terms with their identity is significant. Sarah described the Dharug people as 'the first colonised and the last recognised'.

Sarah felt she and other Dharug leaders were in a very difficult position. In asserting some of her knowledge of language groups and identity, and trying to assert Dharug people's rights to have a say about their Country, she is conscious that she is perceived as dividing people and making some people feel bad about themselves. Sarah was clear she did not want to contribute to anyone struggling with their identity. But that concern restricts her ability to speak plainly about some of the issues which hinder Dharug people's capacity to be appropriately recognised and respected.

> We need the recognition so land council can stop, like, in Sydney, keeping us out – 'cause they say 'that's Eora Country'. But Eora Country's Dharug Country, it's a Dharug word, it's just, people need to understand we're recognised by our language groups and it's the Dharug language that's spoken in Sydney. But we can't keep pushing that and fighting that because then we're adding to dividing people.

> We try and, the thing about the whole dilemma is that a lot of young people now identify as Eora. So, for us to be saying there's no Eora, that's really hurtful to a lot of the young ones that that's what they've been taught. So, we don't want to be displacing people yet again …

> We've been making it a welcoming and inclusive thing instead. But it's hard when it's being used against us.

Like other interviewees, Sarah is concerned about protecting the young people from the community disputes and, in her case, from the abuse that Dharug people get from the land council.

> Like a lot of 'em are saying 'just let the young ones do that' and my opinion is I wouldn't want the young ones to go, I don't want them to be abused like that.

> It's kind of a hard one. Like all of us older ones are used to it. We've been around 'em, we know what they're like. I've got colleagues that have never had to deal with that. The day will come when they do and I'm dreading it. But it's hard for the young ones 'cause they don't miss out on the abuse when they ring up the land council. This stupid thing that we have where people ask for Aboriginality papers. We don't do them anymore, the other Dharug organisation doesn't. I've got spreadsheets from across Australia with about 120 names on 'em and I was getting abused for not doing all of these papers. So, we just stopped doing 'em. So, nobody does 'em now. So, people are ringing land council and asking 'em and they're getting shreds ripped off 'em. So, they're ringing us very upset saying 'oh my God, they were so abusive.'

Sarah feels strongly that since the land council system was established by the NSW Government, the NSW Government should take responsibility for addressing the problems it has created. As it is, the legislative regime is facilitating the consolidation and abuse of power.

> But the government set 'em up. The government needs to get rid of 'em. I don't know why they are allowed to act the way that they are, but what's the government going to do with 'em now, with how much money they have and how much power they have?

Sarah noted how segregated the world of land rights, land councils, and native title is from the mainstream Australian world. Non-Indigenous Australians looking to do the right thing and get local Elders to do a Welcome to Country call the land councils. But they don't know the disputes about identity and who is really meant to be doing those welcomes.

> The non-Aboriginal population doesn't know any of this. They think 'oh, land councils, they're the Aboriginal people of that area' and it's the same all over Australia. Every country town you go to, they say 'oh, our land council's terrible', or 'Land council's moved in, the Traditional Owners have moved out'.

Sarah expressed some hope for the future based on witnessing young people recognising that the existing land council regime is wrong:

> [T]he [land council] CEO up there, his grandson came, we were out on site one day and he started to do a Welcome to Country and he stuttered and stumbled and then he said, 'I can't do this with her here' and pointed at me and said 'she has to do it. I can't do a Welcome to Country with her standing here'. He did that in front of the CEO and about 20 land council rangers, National Parks, the local Member for Parliament … everyone just was like 'oh my God that has never happened before.'
>
> … I'm crossing my fingers the young ones, when these older ones aren't in there anymore, might change things.

(l) Sarah Addo

Sarah Addo described being devastated by what she feels is essentially a betrayal by the other Aboriginal groups who are claiming traditional rights over her people's Country.

Sarah explained that it is deep in her people's culture to be welcoming and sharing with their land and resources, all the while knowing they are the Traditional Owners. But, in her view, the result of that generosity has been a further dispossession through the native title process whereby groups with no traditional ownership connection are able to exploit the system.

> We've always shared our land. We've always done that from day one. the Torres Strait Islanders came to Alligator Creek, they stayed with my Grandmother and Grandfather. My Grandmother, she gave them fish. You know, we didn't segregate anybody, even white fellas that sit down. You know, we shared … it's just there for, you know, the human race. We knew that we were traditional land holders, but we were very sharing and caring …

> That's why Cairns was so active in the past, because we were a part of those community groups. You know, we were the main standing people. We didn't get royalties from Queensland Government. We put all our traditional Country money into programs where we shared with other Aboriginals and Torres Straight Islanders for the benefit of our community and now they're trying to take all our assets and our recognition.

In Sarah's opinion, the anthropological processes and the court's lack of competence at interpreting the evidence – or lack of willingness to make the hard decisions – have allowed community conflicts to fester. This is also discussed in detail in section 10.8. Sarah feels that these conflicts cannot be resolved until the appropriate people are speaking for Country and have their native title rights recognised.

For Sarah, the dispossession hurts in a very real way on an everyday basis. She described how emotionally draining it is, but also that she has a lot of strength left to fight and isn't going anywhere.

> To hear a Torres Strait Islander person get up and give acknowledgment to Traditional Owners and saying Gimuy Walubara Yidinji, it just cuts me. Because we know they were never the Traditional Owners … I pulled her up about it. It just hurts us … They've got to bite the bullet. When they know we were here way before them. In their testimonies going up, they've never been first people here. Until well after. It's really hard. It's so disrespectful.

> … it's just lucky I've got the stamina to keep coming back. I just say to the Judge 'you can put us down but we're going to keep coming. Because we know this is our Grandad's land and we've always been here from day one'.

10.11 Unpaid labour subsidising the system

As mentioned in section 10.3, 'inability to fully participate', one difficulty associated with full participation in the native title system is the degree to which native title claimants and holders (and even professionals) are expected to work for free. This means that many cannot afford to participate at all and that, for others, ongoing participation is unsustainable.

Unpaid contributions to the native title system are a key feature of the claims process as well as the post-determination stage, which involves ongoing PBC participation, management and decision-making.

Significant sacrifices were made by many of the women interviewed. Some chose to prioritise native title, including by quitting their paid employment for a period of time. Some have managed to retain paid employment. Often this is enabled by an employer that allows work time to be spent on native title and associated governance roles – thereby essentially subsidising the native title system. The Indigenous lawyers we spoke with also did a significant amount of unpaid work in the native title area.

Several women in submissions and interviews commented that women gave huge amounts of free labour to the claims and court processes and then once the decision-making in PBCs emerged as the next stage, they saw more men move in to control negotiations. At that point, it appears that women's caring responsibilities and governance roles in other community organisations make ongoing unpaid native title work less viable. Perhaps the claims stage – as a finite process with an end in sight – enables women to commit, while the ongoing nature of PBC governance deters women who cannot afford to continue providing fee labour indefinitely. Several women expressly noted that there was a lot of unpaid labour in the native title system by First Nations men as well as women.

Impact of highly skilled individuals in particular positions

The stories of the interviewed women highlighted in this section illustrate how important it is that initiatives to help families and communities in the context of native title are informed and driven by those who have the cultural knowledge and community respect to make the initiatives effective. Moreover, the impact is greatest when those women are not performing all of their native title-related work voluntarily.

The women featured in this particular regard were able to play that role in their communities because of their expertise and their lived experience in the particular communities. When they are paid for those roles, and therefore in sustainable positions, we see that their impact can be greatest because they can afford to take a long-term approach and follow through on their learnings over years.

(a) Sarah

Sarah spoke of the extreme amount of volunteer work required by systems associated with land rights, native title and heritage protection. That unpaid labour is for such disproportionately little gain – but gain that Sarah still could not completely refuse, and so the cycle continued.

> With native title, it's the amount of work we need to do to do it. We all work full-time, we all volunteer trying to do community stuff, like our organisation is one of the bigger Dharug organisations, but we have no money whatsoever to do anything. A lot of our work is voluntary. We get crumbs, and then to go through all of the native title – I don't think we have the capacity to do that … anything to do with Aboriginal funding, or anything to do with native title in my opinion is purposely set up so that land councils can benefit by that and not the Traditional Owners.

Sarah and her family are exhausted from having to fight for everything, constantly, and for so long.

> And this has been going on for so long now, my mum's been fighting. Mum, her brother, and her sisters, have been fighting government and land council for 60 years. It's no wonder she's not well, she's so tired.

Sarah was also angry and determined to fix it for her children and grandchildren, and future generations. In her interview she went back and forth from sounding resigned to sounding determined and energised.

Sarah pointed out how much they have managed to do, despite all the obstacles. Her family, the organisation, and the other Dharug Traditional Owner organisation have achieved an impressive amount and play an important role in the community – they are reputable, reliable, credible, skilled-up organisations which are heavily relied upon. But then Sarah is reminded of what more could be done if there was respect and resources given in appropriate amounts in connection with that reliance.

> They were one of the first people out here that went into schools doing the educational stuff. They were told what they could and couldn't say. Mum had a terrible time through school, just had a really hard time being Aboriginal, but she has always been really proud of it, so that her and her sisters really pushed for the education and they started the organisation and they've been activists ever since … So, the way mum went was to bring the language back and do the education in schools …

> The thing is, we're doing all these resources and different things which are all free, we don't want to charge people to have those resources. But it gets to a point where it's difficult to keep going when you don't really have anything to keep going with. Like, we can't print books or do anything like that.

Sarah felt that for all the work in the cultural heritage area – most of which is unpaid now, for her organisation – there are ultimately no good outcomes. Sarah sees the role of Aboriginal people in the process as just a formality, that we cannot actually influence anything. It just wears us out.

> I did it for years, but then I stepped right out of cultural heritage. I just couldn't do it anymore. I had years of just – it was just crap. I stepped back into cultural heritage last week – I had a meeting, got involved and thought 'oh, no wonder I don't do this anymore'.

> There are just no good outcomes. We're box ticking for developers and that's about it. For 20 years, every report I'd say I want a plain English report that the school kids can read what's going on. Like, I don't think it would have been much for them to make up a pamphlet for the local schools. But not one. Never.

Moreover, Sarah emphasised how offensive it is that they are often the only unpaid people at the table.

> Half of what we've done already for most of them is voluntary, it's not going to be paid work. Like we're always the only consultant at the table who's not getting paid. It's just disgusting.

Sarah spoke about how Dharug people in the cultural heritage space just get abused, and then are required to do the free work at the end, after the paid work has gone to individuals with no connection to the Country.

> The last few years it's just gotten absolutely terrible. Like when the airport work started for the cultural heritage, an experienced archaeologist and my site officer just left the meeting and had nothing more to do with it because they were getting abused that badly.

> So, they're just pushing us out of everywhere … if it's not land council it's these other groups that have come in but they've come in here for a specific reason. They want the money paid to them for the cultural heritage stuff. So, it's pushing us out of that as well. We get pushed out of everywhere.

> Yet, as the Traditional Owners, then we still have to go through the reports afterwards and read it and sign off on them and say that it's all good. And we don't get paid for that part. So, they recognise that we need to check it all, but voluntarily – for free.

Sarah highlighted that Aboriginal groups do not all have an equal amount of power, and the systems set up by non-Aboriginal people are perpetuating the status quo and cementing unjust power imbalances. Ultimately, this is leading to poor cultural heritage outcomes for everyone, but in particular, the Dharug people who continue to lose their culture and country, despite significant efforts by individuals like Leanne.

> Yeah I don't really know what we're going to do, but ever since colonisation we've been treated like this by the government. It hasn't changed. It's the same control thing, it's the same lack of money. Those systems aren't any different and then, at the moment we're struggling to go through funding processes. While I'm in this meeting, one of my colleagues is in a meeting trying to get funding for us to be able to do educational resources. Like, it shouldn't be that hard.

> We should be able to be looking after our sites, getting income to pay our guys wages and have that bit extra to create resources. Like, it shouldn't be impossible like it is.

Sarah told me how frustrating it was to see the way funding is organised and distributed with respect to many projects or proposals intended to benefit First Nations people or to promote First Nations cultures. She felt they were not designed with an understanding of how the relevant communities or Aboriginal organisations actually operate and contribute to the problem of the demand for free labour.

Sarah described one situation which highlighted both the lack of consultation with Aboriginal organisations and a lack of respect for the work they do.

> You see these types of things pop up all the time. The pre-schools one is a great example. They all got $50,000 funding to put Aboriginal education into their centres. So then what happened to us? We had about 500 pre-schools contacting us to do like voluntary education packages for all their centres. And people who ask us to do stuff don't normally think that there's a fee. So, we were like well why didn't they give us the $50,000 worth of funding and we could have created a program and given that to the pre-schools. But they did it the other way around. The pre-schools got the money.

> Like there's pockets of money that is kept away from us but the people who get it who then, to use that or create these programs and everything else, need our help to do that. Yet they all get paid to do whatever they're doing and then the money's gone and then we are just asked to do it.

> The free labour is never-ending. People think we're school teachers, singers, story tellers, dancers, like we can do absolutely everything. And that it's all free.

> If we do jobs for like low demographic schools or people ring up, 'can you do some art for a logo or a uniform?' or something like that, and you know they've got no money, we do that for nothing. A lot of us do that. Like, it depends who you're doing it for, but we're always doing that as well. Which is good, we'll always do that.

Beyond providing free labour directly, Sarah is actually selling her artworks and using the funding to keep the organisation going.

> It's just exhausting trying to scrape together money to keep going. COVID's just knocked us right out. To the point of: does the organisation keep going or not? And that's because of this RAP process [cultural heritage]. I did a couple of personal art projects in Parramatta and the money has just stayed in the corporation to keep it going for the last couple of months … So, it's not only voluntary, it's me selling my artwork which is keeping the organisation going.

(b) Francine McCarthy

Francine McCarthy noted that, in her experience at the Central Land Council (CLC), most of the work of PBC directors is unpaid. She noted that the lack of funding for PBCs contributes to the reliance on unpaid labour.

Francine talked about the significant lack of resources that most PBCs have suffered from up until very recently. Like many other PBCs, Patta Aboriginal Corporation does not receive any royalties or other funding associated with ILUAs, aside from some original money from the settlement ILUA.

> No there's no royalties or funding. We did receive some money through the settlement Indigenous Land Use Agreement. But the PBC itself doesn't receive any funding from any activities within the determination area.

> The decisions about leasing or acquiring any land within the town boundary are made by native title holders and therefore the benefits are also determined by the native title-holding group. So, if they want to give some money to the PBC, well then they can, but we're really just living off the money that we've received out of the settlement arrangement.

Francine described the significant amount of negotiating and management that's going on in the Tennant Creek area requiring work from the PBC, and that much of this work is done without payment to the PBC Directors.

> **None of our PBC directors are paid. They're doing all this work for free.**

> You know, some directors are also employed by other organisations in Tennant Creek. So, they're willing for their staff members to come in and participate which is great, I mean, I'm really appreciative of that.

Francine did note that there is a significant gender imbalance on the Board at Patta Aboriginal Corporation. In this context she noted the strain that the unpaid work put on those with other responsibilities.

Francine also noted that it's not just the Directors whose time is called upon in a significant way in managing native title agreements and decision-making – it's all the members. Francine described the process around decision-making on native title land, which requires the authorisation – and therefore time – of PBC members and Traditional Owners more generally.

> So, the process that the land council works through is: an interest comes in, the land council then engages, the lawyers engage with the proponent, the lawyer always came back to the directors and went through what the process was and what was being negotiated. So, it was a very open and informative process.

> Then it was identified that we had to go back to the Traditional Owners, or the native title holders, and they needed to get their decision on this, on finalising the Indigenous Land Use Agreement. Then it was okay'd by them but then the directors had to attend that meeting so that they could see that this process was all okay and then they signed off on the certificate of consultation and consent and the agreement.

The difference in Francine's situation compared with other women who were not paid for their native title work is that Francine was able to work on issues that arose in a considered way. She was able to spend decent periods of time on relevant issues and develop a good understanding of the relevant structures and processes.

Francine had a personal role in the community and a professional role at the CLC, so she knew the community and was able to effectively consult with them.

> At a time when there was a lot of disgruntledness in the community – it was like they were all dissatisfied, or confused, or they were all pushing their own interests. That went on for about two years and then from my perspective, it became very toxic and it came to a stage where even the close families weren't talking to each other.
>
> And you know a lot of them were my own family. So, I was really concerned about how the next generation was going to be able to relate to each other.
>
> And so I asked internally [at the CLC], how can we support this group of people in this community to be able to manage what's happening and also resolve some of those minor issues that I felt had just been brought into the mix of the disagreements because they could bring them in, even if they didn't have any relationship to what was actually the core of these issues?
>
> And so, my manager and a few other managers said, 'yeah, go ahead, let's have a look and see how we can do it.' So, we sat down and worked through various scenarios and then we come up with a scenario that we agreed to trial. And so, we engaged the consultants and provided them with a brief. And then they actually identified how they would do it – they created the methodology because they were familiar with the groups and the families, and families were comfortable with them, they sort of managed it all themselves.

Francine described the formal process that she and the CLC facilitated to address this cause of disputes by providing knowledge and clarity around people's identities and roles:

> The CLC engaged two consultants to actually work with the group and work at the family level but also then at a broader community level. And they identified at the larger meeting – the group identified – what process they would go through.
>
> We had an anthropologist who'd actually worked on the claim and worked in the region undertaking other claims. And then we also had a long-term staff member who also worked in the region for a very long time but with the older generation that have since all passed away, that worked a lot with them on the ground during the Aboriginal land claim process. And so, that person had a lot of that knowledge that was provided to him during that process.
>
> So, we had a male and a female. We had a person that had very long-standing information in the community, on families in the community and engaged in the land claim process, and then we had the consultant that was involved in doing the native title claim. So that individual had a lot of more recent experience working with people here.

The outcome was that the process itself, and the resulting chart, gave people an understanding of where they fitted in and the ability to reference back to it when misunderstandings arise.

> It identified the families, or the family groups that are to be involved in the decision-making about certain Dreamings and you know, there's a lot of that. Because people, as you mentioned, people here know how they fit into Country. Or into space. And then they know what their role is.

Francine also noted how important it was that the report included the history of engagements with the community over time, so that everyone could understand the context.

> There was also a chapter in the report where it included a history of all the consultations and engagement of others that engaged with Aboriginal people in the region. You know, from 1901 all the way through to I think the 1970's. It was a really good way of just, of showing people that are reading the report you know this information hasn't just come from one or two generations but it's come from five or seven generations.

Francine described a process that was open, flexible and responsive. As the project went on, the CLC and consultants amended the brief to accommodate issues that they hadn't thought of.

> In the brief, there was a requirement to provide a report to the CLC, and then the consultants also identified that there actually should be a report provided to the community so that the community could use the information in the report to move forward. That was something that we didn't think about internally here when we had our discussions, we didn't identify that as something that should be done but the consultants did and it's become a very useful document. Particularly the decision-making charts that were attached to the back of the document that are always referred to – by the directors and by the native title holders themselves.

The process also ended up identifying other projects which might have a positive impact on community:

> The consultants also identified other projects that could be undertaken in their report and so the PBC directors are looking at sourcing some funding to do a cultural mapping within the determination area. And also going outside the determination area, 'cause a lot of the sites that relate to country are outside the determination area.

Francine described some of the various previous roles she has played in her employment at CLC and how it has added to her personal knowledge of Country and community.

> In another project, we followed a Dreaming line, a women's Dreaming line, and I found that that was the absolute best way to understand the Dreaming, to understand the Songs, the designs, but also to understand, because in the Dreaming side of the story, they use a different language. So, understanding the language that's associated with the Dreaming as well. That's something that I really found so fascinating and I really loved, I really enjoyed doing that.

> [In my role at the CLC], I was in the Tennant Creek office and I was a person that has responsibility for that dreaming so I was fortunate to be able to be involved. It was a project that was run by another section of the CLC so I was more than happy to be the driver and the cook and the swag roller and collector, all those things!

(c) Cissy Gore-Birch

Cissy's story about her two separate stints as Chairperson of their PBC illustrates just how much the success of the native title system and structures depends on the subsidisation of the system by individuals' contributions, often unpaid. At the time of her interview, Cissy was back in the (full-time, unpaid) role of PBC Chair, had a full-time paid job, worked with Balanggarra as a volunteer, sat on other committees and did consulting work with KALACC and other Land Management groups around governance and supporting women.

Cissy's background made her uniquely placed to do the demanding work within her community to improve the governance and accountability of the PBC Board and deliver benefits equitably. In particular, Cissy noted that she had 'connection with all the family members and the respect and everybody knew me because we all grew up together'. In addition to the cultural knowledge and community respect, Cissy also had the understanding of Western systems, laws and processes from her education and training, and from having lived away from Country in Melbourne.

Cissy was first elected chairperson of the board of the PBC when they were still going through their native title claim, in around 2008–09. She was young, in her early 30s, and shocked at what she was seeing in terms of her community arguing over connections to Country and who's who.

Cissy was initially in the role of Chairperson for a very busy five years.

> During that time, we got our native title, we had our IPA area declared, and we managed to get our rangers employed, and started making some decisions. But at that time also, we lost the community. The Oombulgurri community was closed and demolished. The government removed all services and all those people were displaced.

The role of Chair of BAC is not a paid role but Cissy was clear that it needed to be a voluntary role 'because previously, people were ripping the system off', and she was happy to take it on without pay.

> When I come on board I just said 'look nup, I think we need to reconsider this and just get some control back in, and get the right people for the job, and we'll do that through a voluntary process. And people were happy to make that decision. And, I mean, it takes a lot of time, but I love doing this and I'm happy to still continue to do it as a volunteer. But it is very time consuming, mentally and spiritually draining, so whoever takes on the chairperson's role, it depends on their capabilities and their capacity and their willingness to do more.

Cissy quit her paid job for her first term as Chairperson and in her interview, recalled how hard it was for her and her family. So, when she returned for her second stint as Chairperson, she retained her full-time paid employment. Cissy felt that arrangement is more sustainable than having no income, but it does mean she is extremely busy.

> It's a full-time job because we've got native title decisions; we've got people wanting to access Country through the tourism; we've got negotiations happening with the marine parks; we've had negotiations happening with the conservation parks, and the national parks; we've got mining applications coming through; we've got conflict between family members … so yeah, it's not a walk in the park …

At the time of her interview, Cissy was a senior Executive Manager at Bush Heritage Australia, overseeing Aboriginal partnerships across Australia. She also has five children, three of whom are living at home with her and her partner, the two youngest of whom travel with her whenever she goes out on Country or to the rangers camps. She spoke of a very supportive partner and of Bush Heritage Australia as a very supportive employer, both enabling her to manage her many roles.

> Bush Heritage really supports what I'm doing because we've now just got a new policy put in – they respect that yes, we're not only Aboriginal women in the organisation, but we have children, we sit on a lot of other committees, and we do a lot of these other stuff volunteer, you know, we volunteer a lot of our time.

Bush Heritage Australia has also 'approved and endorsed their Aboriginal staff members to have six weeks cultural leave', which she is able to use to help her do her role as Chairperson, as well as some consultancy work she is able to do with KALACC 'around governance and supporting women, developing Kimberley women's strategic plan around culture, dance and song. And this really fits into native title.'

The pressure on Cissy to manage the abuses of power that she described in the PBC for the sake of her community was clearly significant. Although Cissy loves working for her community and having such a positive impact, it did weigh on her that she, her sister and a few others were the only ones able to take it on and be effective. Reflecting on the impact that the first stint as Chairperson had on her, Cissy said:

> I was doing that full-time, voluntary, for nearly five years, so, and I learnt my lesson! I can't do that anymore because there was no recognition, there was no support for me and my family. But I wanted to do it to get our native title. I was committed to getting the IPA, getting our rangers set up, and once that was done I was able to walk away from it for a little while and have a breather.

> We had no CEO. Myself, my sister and other people we called upon were doing everything. And there was a couple of us who were really committed – so my younger sister, Trisha, she was there doing all the minutes for us when we were having our meetings.

In addition to the role of Chairperson of the PBC, Cissy realised from her interactions with the NTRB that it was not the kind of representative body that could best serve her community, so she decided to go on the NTRB board to try and make some changes. This was also unpaid. Cissy even tried to take on the Chair role but was told it's 'a man's role', and she told us that all the women voted against her (while the men voted for her!).

After that first five years as Chairperson, Cissy left the BAC in a good state and took a break. But she described how once she left, 'the bullies started coming back'. After four years away, people from the community asked her to come back to deal with the governance problems again.

> So, when I came in two years ago, the previous board was in, and they were writing letters to the government, to KLC, to ILSC to say we want all our money back into this account, you know, there was no proper decision or resolution or governance, they were writing, just really poorly managed, and just wanting the dollars to go and mismanage. So, I'm thankful that the government didn't listen and adhere to any of that, so we just had to get on board straight away and deal with all of that.

> They just undermined everything we did. Our rangers were in threat of losing funding. We had some project manager dismissed. We had people wanting to get into the system to try and rort the system again. There were the people who were over on Oombulgurri who got Oombulgurri closed down and they wanted access to the money that we had from the Carbon Project, they were forcing their way through and thank God they weren't successful, but they were successful for the dysfunction of that three or four years.

Cissy described her first job back as being 'to get rid of these people, these bullies.' She spoke about the mammoth effort required to get people removed from the board because of their 'bullying' behaviour. It took a long time and significant procedural and legal knowledge. Cissy engaged a barrister and was able to use a change to the Rule Book – preventing someone with a serious criminal history from being on the board – to remove the 'bullies'.

Cissy also engaged the help of organisations with specialist knowledge. ORIC was prevailed upon to finally come out and understand what was happening in community. Cissy described 18 months of writing and requesting support for ORIC to understand and start the process. She felt the 'bullies' had managed to 'bully' ORIC during that time, too.

Cissy also engaged AIATSIS to assist in working out how to educate community, including the directors, on the processes and effective, culturally appropriate governance arrangements and requirements.

> We spoke to AIATSIS at the time, and they came in and did some modelling around a few ways of learning – that this is a Western system that you need to be doing, and then there's the governance structure that we need to be looking at as a board, and how do we bring those two decision-making processes together. And some of those little case studies worked. You know, like getting different people to understand that role, and they played it out, and I think that worked really well, we need to do more of that stuff …

More recently, Cissy has led the successful negotiations with ILSC to take over the management of Home Valley Station, a tourism business. At the time of her interview, they had just opened. She managed to secure funding for a general manager/CEO Role which had relieved her workload significantly.

Although she emphasised that she loved the work as Chairperson, Cissy also spoke about how hard it is to stand up to the 'bullies' and how much of a target she became because she persisted with cleaning up the governance and ensuring that native title benefits 'go back in for the collective benefit of the native title holders'.

> You have to really be tough to stand up to the accusations, the threats, the lies. You're dealing with people who are mad, and just have no, not no mercy, but they just have no boundaries, I guess. You know, with the constant threats and bullying. So you manage to really toughen up and work with what you have to work with.

Cissy's story was one of many which highlighted the significant weight carried by one or two people in a community, in the context of native title governance.

> I mean, it has been hard. Like just working on weekends, having community meetings, working with people outside of hours and constant writing letters. This is before we had a GM/CEO, it was just myself and my sister and the directors just really pushing. With instructions from the BAC Board, my sister and I carried the load in writing the letters, having meetings with the barrister and ORIC.

Cissy and her sister had been contacted by other people from other communities asking about how they tackled 'bullying' in the PBC, and how they acquired Home Valley – people who wanted help to do similar for their communities.

> So when we got rid of our directors, everybody was calling up 'how did you do that?' 'Can you help us?' 'We're going through the same process.' It's just not an easy process. You have to be committed for at least 18 months to get rid of these people and with the support and backing.

> We want to be a service to other people to say 'you can do this'. You've just got to get the right people on board and we can help you do this. You know, we can set up some stuff. So we,'re trying to just focus on what we're trying to set up with Balanggarra to make sure that it's safe when we walk away.

(d) Kia Dowell

Since joining the Board, Kia maintained full-time employment (excluding the two years on maternity leave) and continued in her role as Chair of Gelganyem. Whilst the Board role and employment are paid, unlike the roles of many of the women we interviewed, Kia spoke about the significant investment of unpaid time that everyone involved in the Traditional Owner families put into understanding all the relevant processes and fulfilling their roles in decision-making regarding Country.

Despite being paid board member positions, Kia noted that in the arduous and very time-consuming Mine Closure Plan reviews and negotiations to establish a more secure future fund for Traditional Owners, Rio Tinto was not intending to provide any additional resourcing to the Traditional Owners, or more specifically to Gelganyem as the organisation facilitating their participation, in order to ensure they could engage fully and meaningfully in the closure process.

When Kia became aware, early in her time as Chair, that Argyle was about to embark on the closure of the mine, she knew enough to ask the right questions.

> I thought, if we are about to talk about mine closure, having been on the Rio side – having worked with Rio for five years and worked in the Pilbara with them – I felt like I knew enough to ask questions that would then hopefully lead us to asking more questions, which would lead us to actually having a seat at the table.

Kia described how she and then General Manager of Gelganyem organised the Getting Together meeting in 2018 to address the risk and reality at that time – that Traditional Owners were not prepared and were not fully informed about their role in the closure. Rio had not considered the amount of time that Traditional Owners were going to need to spend on the closure preparations, much less provided resources to enable that.

> … one of the Management Plan talks about decommissioning … But no one thought, we have all these technical and regulatory things we need to tick off. And we had never seen anything saying this is the schedule, this is what we are required to do.

> To give you an idea of how obviously unprepared Rio was, we raised points coming out of the Getting Together meeting. We brought in the heads of as many parts of Argyle as we could, and Rio as well. And almost two weeks later, they helicoptered in a closure team of about 15 people.

> Meanwhile, Gelganyem was sitting there saying 'hey, you actually need us to assist you in getting to a point where TOs understand what closure is. You've just pulled together this team of 15 and you are not resourcing Gelganyem, you just expect us to do more with increasingly less resources'.

> … So, we were able to get Rio to the table to fund TO's participation in a meaningful way for TOs. And that has evolved now. And we have set up new groups to ensure that the cultural governance is on par with the agreement governance expectations. And that TOs were not just doing it out of the goodness of their heart, even though they would.

> … we had to get Rio to understand that every one of their staff members around the table at these meetings was getting paid, but that didn't equate to TOs attending those meetings being paid. And so again, having to fight to say, 'if you want us to be involved and participate as equal partners, then you also need to pay for us to be part of it' … we were able to get that happening.

Listening to Kia's story it is clear that the impact on her personally of taking on the load and trying to secure a sustainable, self-determining entity with the board's support, capable management and community resilience has been significant.

> The timing of this. I believe in the magic of the universe and guidance of our Old People. But if I try to even think about me trying to schedule this into my life, it would not have been possible. The fact that this has coincidentally kicked off while I am on maternity leave. I know that there is something bigger at play. It's happened at a time when we can travel with my youngest. Yeah, it's amazing actually … I am already thinking ahead to next year when I have to go back to work and what that looks like in terms of my capacity to progress things.

(e) Sarah Addo

As discussed in her story in section 8.10, Sarah Addo had left paid employment for over six years in order to be able to do the degree of work necessary on her people's native title claims – research, lodging court forms, negotiating with the NTRB, writing letters. She described how her children suffered because they had been used to her earning a good income, but for Sarah, it was important work and it was worth it.

At the time of her interview, Sarah had recently re-entered the paid workforce but was continuing to do significant amounts of work on native title.

(f) Coral King

At the time of Coral King's interview, she and her family were not formally a part of any claim, despite their best efforts, and had been effectively removed from their traditional country.

Not only was Coral spending significant time and energy – and personal financial resources – on trying to secure her family's native title rights, all unpaid, she was also concerned for the lack of resourcing available to pass on cultural knowledge to the next generations. Because she was not a member of a registered native title holding group for southwest Queensland, but is one of the Elders able to pass on cultural knowledge about that area, it again came down to her own unpaid time and resource contributions.

> There is a complete lack of resources. There is no support for someone like me to take on mentoring or leading roles in teaching the younger generation – I do this anyway, with no support at all, because it's my cultural responsibility and obligation to pass on knowledge to our younger generation. We older people all do this.

In Coral King's case, her anthropologist, Dr Fiona Powell, has to date provided significant pro bono assistance because of her understanding from her previous native title work in southwest Queensland of Coral's current situation and how unjust the outcomes are for Coral. In this case, as with others discussed throughout this Report, the requirements for unpaid labour are extending to professionals in the native title system in addition to First Nations parties.

At the time of publication, Coral herself has been unable to raise funds to pursue her appeal and the NTRB has continued to refuse requests from Coral and other family members for assistance.

(g) Monica Morgan

Monica Morgan talked about 'women running everything behind the scenes,' usually for free, noting that the 'burden' often falls on one or two women to 'clean up the mess'. At the time of her interview, Monica herself had been away for a while and had come back to sort out a compliance notice from ORIC which had them 'on their knees', albeit not in administration at the time of her interview.

Monica keenly felt a pressure to pass on not only the cultural knowledge but also her political activist history to the younger generations so that they have the full picture. None of that was paid work.

(h) Cassie Lang

Cassie Lang emphasised how difficult the funding arrangements are for lawyers in her circumstance and how much pro bono work she and others in her situation do.

> There's so much I do, so much pro bono stuff that goes with it, you know, because most of my work is paid by a third party so normally it's by the organisation I'm doing negotiations for native title or cultural heritage with. So they will only pay for so much [regarding the negotiations] and then every other support that goes along with it, you know, I just kind of – you just try to do it as best as you can with the funds that you've got.

These kinds of third-party costs arrangements are industry standard from Cassie's experience. However, she also noted that it doesn't really result in equal legal representation.

> I've never had anyone say 'no'. It's normally a government, or department sometimes. [Any negotiation] is normally just about the rate. And I find it really interesting when they question my rates – normally it's just me when I go to the meeting, so it will be me as the lawyer and, say I've got a board, so I might have say ten directors. So, it's me with ten clients and then you get the other side walk in and there's like partner, senior lawyer, admin person, five people from the proponent, and I'm like 'you're questioning my fees and you've got three lawyers, like, that's like $10,000 a day sitting right there'.

(i) Avelina Tarrago

Avelina was still a law student when she started working voluntarily on her people's native title claim. Whilst she ultimately hired a lawyer (with her own funds), she has also ended up providing a lot of free labour as a 'go-between' for her community and their paid lawyer, for example, when they don't understand something the lawyer has said. Avelina finds that her community comes to her for all kinds of information and advice, including legal advice that she can't give.

Avelina emphasised the disrespect that native title claimant parties are shown by professionals in the native title system, including those that work for the native title claimants. As a barrister, Avelina is constantly shocked and infuriated at the disrespect shown to her by colleagues for her time. For example, they make meeting appointments and then cancel them and rearrange as though she has no other diary appointments.

For Avelina, the conflict and the intense unpaid workload for native title is ongoing. It carries on with the shift from the application and claim process to the post-determination governance of the PBC and all associated functions, as well as into the compensation phase of the native title process.

> I guess that I think there's this misconception that you get native title and that's it. That's all we have to do. No! There's the PBC issues, all of the ILUAs if you're entering into ILUAs. If not, doing cultural heritage agreements with people. You know even though that's not under native title, it's still a huge part in Queensland of the work of the PBC.

> And then you know other than the state, everyone has sort of been ignoring the compensation issue. And so gearing up for that again. That's like native title round two.

> And the conflict doesn't just go away once you get your consent determination. All of those issues, especially it's going to be heightened because you're talking about money.

10.12 Women's roles in healing community

We know that when you listen to and empower women, you empower communities. Many of the women interviewed for this project spoke of the way that Aboriginal and Torres Strait Islander women had a particular skill in bringing people together, and a particular focus on healing community after trauma.

The women identified all kind of ways in which this is done, and these discussions are consistent with the way that women's roles in community were discussed in the *Wiyi Yani U Thangani* consultations also. Women talked about:

- leading explicit healing projects
- taking on powerful, abusive men to secure benefits for the whole community, not just a favoured few
- the ways they were trying to prioritise passing down cultural knowledge in the face of significant obstacles, made worse by the native title system and other related legislative regimes like cultural heritage legislation
- the intrinsically collaborative nature of many First Nations cultures in Australia and how negotiations over Country have always been a part of traditional life
- their concern with the way benefits from native title agreements, such as royalties, are distributed to individuals rather than invested into the community in a strategic way for long term benefit – this is discussed elsewhere too, for example in section 10.10 on community conflicts
- using their skills and experience 'walking in both worlds' to empower communities to make the best of native title, and not let it destroy families and communities – when it did exacerbate or cause conflict, women were trying to find a way through to re-unite and re-focus on culture and connection to Country and to community.

In the preparation for this Report, we heard a range of suggested approaches and accounts of how those approaches had been put into action by women in community. Many of these approaches came from a deep understanding of the role culture plays in decision-making. One woman told us about the role of ceremony and how using ceremony to recentre community, culture and identity at native title meetings empowered the group. It changed the dynamic completely. Previously there was tension, suspicion and mistrust and the lawyers were in control of the meeting and decision-making The recentring of culture seemed to answer a call for connectedness, unifying the group, empowering them to make decisions, and allowing them to instruct the lawyers as a group, and take control of the process.

These approaches that women told us about for this Report all describe the way that women are deliberately empowering their communities and organisations, leading them into a sustainable, self-determining state, able to envisage a hopeful future within their control, which is able to function within the western legal system but centres culture. And that they can take steps to enact that future.

(a) Maria Stewart

Maria felt that, from what she has seen, there were no benefits being provided to the community who remained in Oodnadatta from the royalty payments controlled by the PBC. The PBC gets the money from agreements with the mining company and distributes it to people all over the country. But the community itself is in poverty and struggling badly.

Maria expressed significant concern about the lack of accountability of PBCs regarding the distribution of money:

> No accountability; there's a lot of corruption so, you know what, I'm pulling out. I've resigned from one [PBC] and I'm about to resign from another. I don't want to have anything to do with the PBCs anymore because there's no accountability.

> They're not acting in the best interests of the people. You know, people just go in there with their own agendas … Because they're struggling themselves, or their families, and that's what's going to happen, and that's what is happening.

In Maria's opinion, the PBC 'is wasting a lot of money on individuals', when the community on Country is not receiving any monetary contributions from the PBCs. Maria questioned the legitimacy of some of these payments:

> You know, people get Elder payments. Like, I said 'they're not Elders, Elders are really old people … I'm not after Elder payments, I know there's Elders above, but that person is young!'

But Maria also felt that, even when payments might be 'legitimate' under the rules, such as paying for individuals who live in towns to visit Country, or disbursing cash to individuals to pay bills, this way of spending the money is still short-sighted. Maria wants to see money put 'back into community to keep it viable.'

> You go into the communities, you see how poor the communities are. Honestly, it's heartbreaking.

> I don't know [what the PBC] structure is, but the people in Adelaide or wherever they're living, they make the decisions for that Country, and all the money has been put God knows where … Big money. Meanwhile Aboriginal people back in their communities still on their land are struggling financially in great poverty, with many health, housing, and social problems.

(b) Anna Stzrelecki

As discussed in sections 10.8 and 10.10, Anna talked in detail about the ongoing disputes around who should be receiving benefits.

Anna's concerns in this regard appear to be three-fold, namely:

- the lack of accountability as to who is being considered a Common Law Holder according to the Rules;
- the lack of accountability and transparency regarding allocation of benefits; and
- the broader approach of allocating benefits to individuals across the country, with no benefits apparent for the community on Country.

Anna felt that addressing these issues openly is necessary for trust and community cohesion moving forward. Since Anna's interview, she has advised my team that the allocation of benefits has improved. However, the issue of who is considered a Common Law Holder still remains a point of tension.

(c) Leah

In her interview, Leah discussed her passion of bringing people together, observing that many Aboriginal women bring people together and their skills in doing this important and difficult work are rarely recognised. This is discussed in section 10.10.

Leah is committed to bringing people together and creating brave spaces, to be informed and given sufficient time and support to work through disagreements and perhaps misunderstandings. Leah described how, if these spaces are created in the native title system, then community will heal.

Leah talked of the need to facilitate discussions respectfully and to acknowledge and present options and suggestions at a pace that is accessible, and ensure language is understood so people can keep up with the legal, technical, and foreign nature of the native title system.

Leah expressed her belief that when community meetings are focused on capacity building and respect, and culturally relevant approaches for decision-making, community will flourish.

(d) Shawnee Gorringe

Shawnee Gorringe talked about the way that the Mithaka have a long history of successfully living and working together with the pastoralists from their Country. Like others who discussed the deeply embedded cultural role of negotiating and compromising, Shawnee talked about how decisions about Country were always made with consideration of other nations' interests which were affected, for example, regarding a waterhole which feeds into Lake Eyre.

The Mithaka native title determination is over land that is predominantly pastoral or gas exploration/mining land. This means there are a lot of opportunities for the Mithaka Aboriginal Corporation to come to agreements with third parties which deliver funding for the corporation and the community.

Shawnee pointed out that the positive relationship between the pastoralist's family and the Mithaka people continues with his descendants even today. Shawnee spoke with notable compassion about the misunderstandings that occurred around what native title would mean for third parties. She said that 'those parties were mostly pretty reasonable to deal with, given their concern for their own future,' and that 'there was confusion simply because both sides of the equation didn't really understand what native title meant'.

One of the difficulties associated with the confusion and uncertainty about the implications of native title, in combination with the fortune of having many cultural sites and materials untouched due to their positioning on agricultural land, is that:

> There was hesitation about letting us know of sites because they weren't really sure if there were going to be implications surrounding that. Like, if we would lock up the whole area or that whole paddock. When realistically, if it's fairly untouched, you'd just go and talk, leave it be. You know, record it, make sure they're not going to go and build a dam on the hill or something silly, or put a tank on a hill and run a grader straight through that or you know. Just avoid the area.

After six years of post-determination negotiations, and a lot of work between the corporation and the community to come to an understanding, Shawnee says they 'have formed relationships'. Now there 'is that familiarity that we're not going to just go and just fence off some of their country. We've invited them out on [the research] trips and what not, as well. So there's that understanding'.

Shawnee emphasised the importance of empathy and 'a bit of give and take' in negotiations around land use and coming to agreements. She expressed how much more smoothly things went when those third parties had compassion and genuine understanding of the relationship of the Mithaka to their Country. She couldn't think of a situation since the native title determination which had resulted in significant community distress regarding the destruction or desecration of cultural sites materials.

> We do clearances and what not for them on a fairly regular basis and usually that's to do with the pipelines that they're hoping to lay, and they're pretty good. Those who we have longstanding relationships with, they'll move something if there's something of significance there. Or, if there's, say, scatterings or something, we will just simply relocate it out of the area.

> You know, because at the end of the day, everybody's got to sort of give a little. Like, they're relatively easy to relocate. It's never going to be the same. but it's still out there and it's still on Country kind of thing.

> But things like, we have found remains and we found like massive, massive sites like ceremonial sites and things like that – that's a hard 'no'.

Shawnee said that 'there's a new generation of people coming in now,' and there have been significant efforts on the part of those previous families and outgoing general managers to introduce the new general managers, to help create those relationships which are so important.

Shawnee also talked about the Corporation's involvement in ongoing negotiations with the mining industry. She described how the Corporation uses its own independent lawyer as well as the NTSPs for things like agreements with mining companies. They are able to do this because they have sourced funding which not all PBCs are able to access. The Mithaka Aboriginal Corporation has secured funding through NIAA for three positions on staff, and also received

‘a little bit of money from the current gas exploration in the area … not a lot, in the scheme, compared to others, but it helps pay’.

Shawnee described how it is a constant battle to negotiate with companies trying to ‘pull the wool over your eyes’. This was so particularly in cases where a company had made previous agreements before the native title determination for very small amounts of compensation/ royalties and expected to be able to do so again.

Shawnee told us that the PBC is still waiting to be paid for agreements established with companies pre-determination. The NTSP has had to chase both large and small amounts owed from agreements not honoured – ‘it’s probably barely a drop in the ocean to them but yeah, it all helps us.’ Shawnee commented that companies ‘really do just walk over you where possible’.

In regards to this power imbalance, Shawnee particularly referenced the extreme limitations of the ‘right to negotiate’ in the Native Title Act: ‘negotiate and that’s it, if you don’t like it that’s kind of it, really. So, that’s a frustration.’ They ‘know they have the upper hand’ under the legislation, ‘so they’re going to lowball you with whatever it is, anything really. Whether money is involved or not, they’re still going to lowball you and take whatever they can for their own interests.’

Shawnee told us that the PBC had created its own ranger program, offers land management services, and pastoral services.

> So we do weed spraying, cattle work, yard building. All of that, you name it. We can do it. And we have a really good partnership with a natural resource management organisation (NRM) and they have a lot of contracts for weed spraying in Queensland, in western Queensland, for northern Queensland as well. So we work with them and that’s how we make our money.

Shawnee felt the Corporation’s aims were modest but they have significant vision for what they could do with their Country and with land they were hoping to purchase.

> That’s our biggest thing. Research, employ our people, get some skills happening, employ others as well. It’s not just Mithaka people. We only have 70 something members. 73 I think it is. So we’re not a massive organisation and we are only in two family groups as well.

So far, the developments have shown a lot of promise and excited the community and those Mithaka people who live elsewhere:

> We’re really excited for how it’s been. With those people that we have employed, some stay on for a while and get their first aid certificate, get a few skills and then they go on to do something else closer to home. You know, we’ve had people from Ipswich, Brisbane, Rockhampton, New South Wales even. We’ve had local people employed as well. Like from the Windorah township and nearby in Quilpie and whatnot.

Shawnee described how the PBC is tackling the changing requirements of the employment market in the area and trying to fill gaps that arise with service provision.

> A lot of the challenges have been that there’s no longer those somewhat ‘unskilled’ positions. Like station hands and what not. Because people, and especially with … like Hancock Pastoral, they are stepping away from that and they’re looking for those more experienced people, or they’re outsourcing work which is where we saw that gap to fill.

> So we have our own insurances, our own equipment, we were able to buy a few buggies and whatnot with the initial payments from the NRM. Then we have now a three year deal with those guys for contracting work.

The way that large pastoral companies are structuring their workforces is becoming more streamlined and trim, so Shawnee spoke about the need to tailor their services to that:

> They have reduced staff because it's challenging times, cattle numbers or livestock numbers have reduced with drought and whatnot, so through that and through streamlining their businesses, the bigger properties felt the need to have maybe one or two full time employees and then they'll contract the work out. Because they might only need six, eight, ten weeks of labour per year. So, they see the benefits of sourcing a contractor who has all of that skillset and the whole toolkit that's needed for a higher price, but it works out cheaper for them in the long run.

The Mithaka Aboriginal Corporation has plans to continue the building of self-determined economic and social sustainability, including the ability to offer services to their own vulnerable youth, for example.

> We don't want to be a multimillion-dollar company, but we would love some country, and we are looking around for support to purchase a property and then that will just continue what we're doing now anyway through our pastoral services and mainly our land management services. And a bit of a training facility.

> We have a lot of at-risk youth. People who have recently left prison and haven't got any skills. We've brought them out, we've assisted them with simple things and again, the excellent relationship with the police officer, the simple things like making sure they get to their bail hearings or any other sort of Court appearances. We have helped them get their licences, learners, you know P plates, whatnot. We've supported them to join the SES and the local firies. Things like that to help build their skillset so that they can go out in the world and do something that they're passionate about.

The income streams that they have been able to generate are enough to maintain some community focused work, including getting people back on Country.

> Again it's not a lot but it keeps us chugging along and our main goals are to bring our people back to Country where possible. It's a remote area so it's tough. You know, get more kids in our school, in the schools locally. Give people opportunities for employment, which was again that, the land management and the pastoral services. And have camps and other sort of events I guess that sort of revitalise our knowledge and bring our people back home again. Even if it's for a week.

At the time of her interview, Shawnee advised that the funding from NIAA for the three staff positions would end the following year. They were hoping to be able to retain two positions, perhaps part time. There were some research projects that 'go on beyond the employment terms' so she would 'still be there in some capacity anyway'.

(e) Kia Dowell

Kia Dowell continues in her role as Chair of Gelganyem– an organisation that advocates for the rights and interests of the seven Traditional Owner families who are a party to the Argyle Participation Agreement. In the absence of a native title determination, which is finally being progressed by the KLC, Gelganyem continues to deliver programs through its role as Trustee, ensure the WA State Government and Rio Tinto have clear, Traditional Owner-endorsed closure criteria and provide support to prepare for closure and post mining.

The history leading up to the ILUA 'was really contentious'. Kia spoke of how the 'agreement was intended to reset and renew the relationship between those families connected to that area because [over] the prior 20 years [Argyle/Rio] had absolutely not got it right.'

When the ILUA had been agreed, Gelganyem was not a party to it. Rather, the parties were KLC, Rio Tinto (Argyle Diamonds) and Traditional Owners. Gelganyem was established to receive, manage and distribute funds from the ILUA to beneficiaries.

> … the way that we often talk about it, is to protect the money for kids and grandkids. The intention is to discharge our directors' duties, but more importantly, to make sure that however that money is being invested and the returns from that investment are put into community programs that help improve the lives of TOs.

For many years, Gelganyem played a very prescribed role – Kia had been involved in different ways but in her interview she reflected on the point at which she was nominated as her family/daam representative:

> I naively joined the Board seeing it as an opportunity to learn. And on the day that I was appointed a director, I was also voted in as Chairperson. And I was completely unprepared for that. I really had rose-coloured glasses on, as Gelganyem has been around for such a long time. And I just thought, 'oh well, they have been around for such a long time, they must have it together. So, this will be smooth sailing'. And how wrong I was!

> And that is not a criticism of the board. It really just highlighted for me how important it is to never forget that our role as Gelganyem, from a kartiya way of looking at things, is to be trustee and make sure that all the rules around managing a trust we are doing legally. But no one really ever scratched below the surface to try to understand how we can actually work to bring the cultural governance element up, so it is equally important as corporate governance.

Kia had a vision for how the community could and should benefit from the ILUA monies and a vision for how Gelganyem could deliver those sustainable benefits, beyond annual distributions and limited community programs. She quickly realised there had not been that kind of strategic lens from the board before she joined.

As discussed in section 10.11 on unpaid labour, Kia observed the Traditional Owner board members had been dominated by a very small but influential group of Directors, including the 'Independent Directors' and she could not uphold that type of behaviour. She committed to making sure that Traditional Owner board members are informed, engaged and supported to develop the skills to do their jobs and this continues to be a huge focus for Kia. Quite early on, Kia made a judgement call to put a stop to the behaviour she was experiencing and observing which was incredibly distracting, disrespectful, didn't align with cultural values and

put Traditional Owner Directors in a position that demonstrated the lack of appreciation for the depth or complexity of relationships. Following a distressing period for the Board, with incredible support from the right people at the right time, new Independent Directors were appointed.

> Huge credit and respect to the other TO directors who were on the Board at that time. Because it would not have been easy for them. We have lost talent because of people who are not even part of the TO community coming in and for what purpose?

From that point, Kia has worked tirelessly to make sure the Traditional Owner board members have access to the right information, at the right time, that development sessions are delivered regularly, the Board agenda is not too heavy and the management and leadership of Gelganyem continue to help the Board gain the knowledge and confidence to lead with vision. She and the board ensured that the new Independent Directors understood their role was not to drive any agenda, but to support the Traditional Owners with independent guidance and advice, always with respect for culture.

Gelganyem now has 'amazing Independent Directors' who understand that they are there to be independent, not to pressure Traditional Owner board members or for their own agenda; and the Traditional Owner board members are 'stepping into their own power'.

> We have a board now that when you walk into the room, TO directors are not afraid to talk, not afraid to challenge Rio. They ask really incredible questions. Their knowledge has developed so much over that time. When in comparison, when I joined the board, hardly anyone would speak. And that broke my heart because when I looked around the room, I know that's my auntie who is outspoken but why is she quiet in the Boardroom? There's my uncle who is a really strong community leader who is one of the most intelligent people I know, but he's like a little mouse in here. And it was just so obvious that they had somehow been disempowered, they had somehow been convinced that their voice was not as valuable as the IDs.

> I felt that my first bit of business was to get that Board sorted out. And I am so proud of that Board. I try to tell them and remind them every meeting about what we have – I am extremely humbled and honoured to be their Chair.

Over the year prior to her interview for this Report, Kia and the board had taken steps to reflect on the organisations past and its potential for the future.

> We partnered with organisations like Curtin University to undertake a census type review. The intention of that was to reflect on the twenty years prior and what the next twenty years could look like. From a beneficiary's and member's point of view, we know at some stage TOs will need to navigate native title. And then we have to prepare our organisation and TOs for what that looks like.

> … what we found – going back to my point about distributions and the census type review – is that people were not trying to use money in a way that would leap-frog things … what people were spending that money on was food. Basically, just surviving day to day. And fuel – driving around, to town to buy food. Or to drive out on Country to go fishing or camping or whatever. The last three years has really been a lot of hard work for the Board.

Kia described the evolution of the role of Gelganyem in the closure process with Rio as 'an increasingly important conduit to ensure that TOs are being heard'. She also emphasised that

Gelganyem, as a confident, empowered, Traditional Owner-led representative body, is critical to how the Argyle agreement plays out now for the community.

Kia explained how part of the original Argyle agreement included a draft native title application, illustrating that the intention was always for the agreement to be followed by a native title determination and a PBC. But Kia says that no one in the NTRB or Rio Tinto explained why the native title claim was never lodged. This has meant that Gelganyem is 'actually this quasi-PBC' and has 'had to really manage the expectations of TOs' who have been watching other native title determinations finalised.

> Because in the time that the Agreement was signed, all of these other claims have been determined. So, people have now had their own personal experiences of what the native title process is, what it should look like, or how a PBC can function or not. And we are the last cab off the rank.

> We were the first cab off the rank way back when saying 'here's this blueprint for how to enter into agreement-making with TOs' and now we are the last one, because the rest of that Country has been determined.

Kia felt that it 'was probably a good thing' that the native title application was never lodged because they have been able to watch other native title groups in 'different phases of setting up a PBC' and take lessons from those experiences.

One of Kia's 'first big-ticket items' as Chair was to 'bring everyone together'. This included empowering and uniting Traditional Owner board members, as already discussed, as well as bringing Traditional Owner families together to ensure everyone had all the information they needed to properly understand the role of Gelganyem, the board members' roles, the ILUA itself and the native title process which was about to be embarked upon.

> I just asked a question 'when was the last time all of these different committee, board, sub-committees, working groups, advisory groups were in the same room together?' and the answer was never. They had never brought all of these people responsible for making decisions or giving advice together. So we did and we called it the 'Getting Together' meeting. And Gelganyem orchestrated that.

Gelganyem have maintained that focus of bringing people together and being transparent, with a capable leadership team and staff guided by the Board:

> If we expect TOs to have full free, prior and informed consent, then we have a role to play at least bringing people together so they can have conversations and ask questions. So that's really been the focus for Gelganyem – being a facilitator and making sure there are multiple opportunities for TOs. I know that it has worked, because people are now saying to us 'we are sick of hearing about mine closure', which is a good thing. I would rather them say, 'we are sick of you telling us what you said you were going to tell us', rather than saying 'we didn't know, how dare you keep this from us, all of the things that could go wrong'.

At the time of her interview, Kia was about to fly to Kununurra for the first stage of meetings which dealt with matters related to the Trust. She explained that the last couple of years had involved trying to sort out governance issues in relation to the Trust and the agreement with Rio, in preparation for the native title claim.

Kia has been conscious of the need to 'uncouple ourselves as Gelganyem from this expectation that we will be all things to all people because that is what we have evolved to be'.

> And what I mean by that is spending two years saying to people 'this is who Gelganyem is. We know you know Gelganyem has done all of these things in the past, but actually we need to get you all ready for this next part of Gelganyem's story and Argyle's story, which means that you will have Gelganyem and you will have this PBC. And they may be two separate organisations. They might end up working together, but they might not. Our job is to make sure that you understand the difference between the two. And we want you mob to feel as ready as possible, so that when the NTRB starts the native title meetings, you know that you can go into these meetings not having to worry about all of the trust stuff.'

As mentioned above, when Kia and the board realised that Argyle was not involving the Traditional Owners, they called the Getting Together meeting (in 2018). From that meeting, and subsequent work educating TOs and managing expectations, holding Rio to account, Kia felt that they were at a point 'where TOs feel like they can ask questions and have a space and their voices were being heard, and what they were saying was being respected and being taken seriously.'

As discussed in section 10.11 on unpaid labour subsidising the native title system, Kia was able to ensure that Rio actually funded Gelganyem to facilitate Traditional Owners, participation in a meaningful way in the closure process.

One of the many aspects to the preparations Kia was doing in the lead up to the native title claim was empowering the Traditional Owners in their relationship with the NTRB.

> Gelganyem has had to work with TOs to say 'you get to choose'. Like, yes, we have the NTRB. [But] you do have a choice.

Kia envisages that the empowered Traditional Owners can use their experiences from the other claims they have been involved in, and the information that Kia and CEOs have imparted, to hold the NTRB and the professionals engaged on their behalf to account in a way that many other groups have not managed to.

> The Gelganyem TOs have TOs from all of those surrounding claims that have been determined. And people are bringing those frustrations … people have been saying the same thing [in those other claims]. And now they are like, 'this is our last shot to prove that the way we are telling you to do it is the right way to do it'.

> So, people come into this [NTRB] meeting last week saying, 'this process that you are telling us we have to follow is not working for us'.

> I was there in my capacity as beinga a Traditional Owner but also in my capacity as Chair. So, trying to ask questions that will assist people in getting the answer they want for example, 'whose process is it?'.

One of the issues Traditional Owners were able to get clarified was the way the anthropologist would work with them – that is, that the anthropologist works *for* the Traditional Owners .

> [The NTRB said] 'It's not a court ordered process, it's basically an anthropologist preferred process'.

> Well, if that's the case, then the anthropologist can take instructions from the floor about the process that works best for the people they are actually consulting. It was a good meeting, very civil. You could tell people were frustrated. But it was just good to get things started.

Kia spoke about negotiating with the NTRB for them to accept funding from Gelganyem to get the additional anthropological work done which the Traditional Owners had asked for.

The process of securing that 'extra' anthropological service required, first, ensuring that the Traditional Owners represented by Gelganyem understood the need for additional services to those being commissioned by the NTRB. Secondly, those Traditional Owners needed to agree to the money from Gelganyem being used for that purpose. Then Kia, as Chair, entered into discussions with the NTRB over an extended period.

Kia had asked the NTRB about why the scope of the anthropological work did not include the 'additional meetings or additional work that Traditional Owners requested' and they responded that 'it's the anthropologist's preferred process.' Kia added: 'Now, I'm sure once the anthropologist is appointed and we ask that question, they will say 'no, it's [the NTRB's] preferred process.'

Kia was resigned to this being the way it was and to doing what was necessary to ensure the correct work was done, as requested by Traditional Owners. She was only interested in securing the resources and skills in the best interests of the Traditional Owners and the community more generally. In that spirit, Kia and the rest of the board of Gelganyem were prepared to pay the money for the additional work.

> I guess, in my mind, I would rather get that money set aside the way that we have so that TOs ultimately get what they need out of it. Everything else after that is whatever. But if we don't get it right from the beginning then the rest of those dominoes fall.

But until shortly before Kia's interview, the NTRB continued to find ways to avoid funding or scheduling the additional services specifically requested by Traditional Owners based on their experiences with other native title processes:

> TOs have asked for Gelganyem to negotiate this as part of settling any historical issues and concerns around family connection.

The discussion around this issue spurred questions from Traditional Owners more generally about how the NTRB was supposed to represent them, questions which seemed to be unexpected by the NTRB.

> We even had TOs in there saying, 'well, are you asking us questions and asking for guidance and instruction from the floor, yes or no?' [The NTRB's answer was] 'No, it's just an information session'. 'So, you are telling us this information, we are giving you feedback, what happens then?' These are questions coming from TOs. And they are saying, 'no, we will come back out in the next few months and sit down and meet with you'.

At the time of her interview, Kia and the Gelganyem CEO were preparing for the upcoming family meeting following the NTRB meeting regarding native title. Kia explained how she would need to have very clear questions ready in order to get clear, unanimous agreement from the families to take back to the NTRB in terms of their 'instructions' on how the NTRB is to proceed.

> So that we can then say, 'hey [NTRB], we've just had our family meetings and this Getting Together meeting, so it's on record, here is what TOs have unanimously voted for. So now you have no excuse for it not to happen.'

At the time of printing, Kia confirmed improvements had been made – the KLC had progressed the additional meetings and fieldwork and were taking on feedback from Traditional Owners. Kia reflected on the importance of the role of Gelganyem in empowering the Traditional Owners as a diverse group, united by the Participation Agreement, and how fortuitous it is that it was established before their native title process began.

> if Gelganyem wasn't there, who would do that? The answer is no one. Because if it's reliant on individuals, then it's way too convenient to say, 'well that's John Smith, he's just that squeaky annoying whinger'. And then people believe that label that is put on John Smith.

Kia spoke about how she was conscious that the next couple of years was still going to be tough. She saw Gelganyem's next key focus, after securing the top-up to the Sustainability Fund and additional resources for Gelganyem to support Traditional Owners participation, as supporting the board and the community in preparing for the outcomes from the additional anthropological work. Because of the extent of the questions over the previous anthropological work, Kia was anticipating a need for significant support and healing in the community.

Despite what Kia thought the challenges would be with the native title process, she was looking forward, with optimism and hope, to a future with (potentially) two representative organisations – Gelganyem and the PBC – which have complementary roles, and which both work to ensure that the TOs are safe, healthy, educated, and culturally connected into the future.

> I'm not going to sit here and naively think that once native title is determined it will be all rainbows and unicorns. I think there will still be some teething issues. But I am hopeful that, off the back of the last three years … we will be able to get to a place where you can have two organisations that work together. And the way that Gelganyem has really had to reset and remind people what its role is, the PBC will be there for anything about Country, and Gelganyem will be there for all the other parts – or maybe it's going to be more, or maybe it's going to be less!

> I am just really grateful that we've been able to get to a point where we can demonstrate that we are not afraid of doing the hard work, asking the hard questions, and being in really uncomfortable situations.

Kia viewed the whole process of getting to this point as a 'detoxing process':

> Because from an energetic point of view, you could see that people were holding on to a lot of that emotion still. And that doesn't serve anyone … we talk about wanting to have healthy TOs – well sometimes becoming healthy means that you have to be really uncomfortable, almost like a detox in a lot of ways. And in one way you could say that is what we are trying to do now – trying to detox TOs from the relationship with Argyle and get them ready for hopefully this breath of fresh air about getting Country back and being able to heal Country and heal yourself and being part of it. I think it will still be challenging for the next few years, but I am really hopeful.

(f) Monica Morgan

Monica Morgan was one of several women who noted the deeply ingrained collaborative culture of First Nations peoples largely because of connection to Country.

In the case of the Yorta Yorta, Monica spoke about the inherent conflict management skills they possess as a result of their cultural roles dealing with other neighbouring nations throughout history. Monica described how this culture is intrinsically connected to living, since time immemorial, on a river which affects many different nations, not only their own. Monica described conflict management, negotiation and compromise as something that they have always done. They have always considered the impact of their own actions on other groups around them, for example how to share resources.

After the long legal and political fight, the decision in *Yorta Yorta* was 'devastating' – a 'crushing blow'. However, although she acknowledged the huge disappointment of the determination in her interview, Monica didn't dwell on it. Instead, she was resolutely focused on all they had achieved and were still working towards.

Monica felt that the native title claim had galvanised the Yorta Yorta – and even the broad community of Aboriginal and Torres Strait Islander people and our allies across Australia – and from there, the Yorta Yorta have gone from strength to strength, always coming back from any blows.

> [Y]ou rise from the ashes. You don't ever let those things … it's been instilled in us. Generations and generations and we've got the strength, and all our mob have got strong mob. All mobs are strong.

> But we are, I'm so lucky that we've had, you know, people that were not just local agitators but state, national and even international.

Monica also spoke with passion about her succession planning – about ensuring the cultural and political knowledge is passed on to the younger generations to continue the fight.

> Our family group, we meet constantly. It's in the bush, it's passing on stories. My kids were taken to demonstrations, my mob were there listening to the speeches and what we were doing and sitting around the tables. It's a little bit harder when you become more administrative and that's what's probably killing me at the moment. Obviously, I'm very administrative and that, but it's about talking about your ancestors, learning from your ancestors.

> … the next building we're building is like a Moriah. It will be dedicated to our ancestors and when you come in, you lower your head, you look at your ancestors, you look at the history they went through. The massacres, the fights, the struggles, the battles that they had. Those physical, mental as well as legal and political [battles] in promoting our rights. All the way, and our mob says: you get your rights any way you can! You can use all methods. So you know, I've got 'em all in, our old people, and we have them reminding us every day. To walk in their footsteps.

(g) Bunuba

The Bunuba women described the difference in women's role in community, which focuses on bringing community together, understanding, protecting and handing down culture, and healing community.

As discussed in several sections already, Patsy expressed sadness that language had not been really incorporated into connection to Country within the native title process, noting that language and Country are actually intertwined.

However, Bunuba women certainly had a central role in the post-determination period. That role was in bringing people together and it has become a role in breaking down the boundaries that the men had to establish as part of the native title process. In their interviews, the Bunuba women considered that perhaps this Bunuba way of seeing everyone as connected had to be sidelined by Bunuba men to more effectively pursue the native title claim under Western law.

> The men have done their job. They're really sad they had to really define boundaries and everything to everybody in the group, whoever, but as women we don't look at it that way. We look at our culture. We don't care where their boundary is. It's all about Bunuba. We have language running. Every Bunuba … we're just not going to pick one … So that's where women come in now.

Patsy talked about the women's role after the men had taken a more active role in the native title claims process:

> Now the women, this is where we come. The women are the driving force of putting that back together. We're bringing our connections back. We're bringing the trust in the language back which is the most important thing. The core of who we are. We understand better because when you talk language there's no definition. If I'm talking about Country, I can't find the English word to explain what I'm saying. I would rather explain it in my language to make it more understandable. It's not for the Western world, it's for the future generation that's coming up of Bunuba kids.

One of the ways this healing focus has manifested itself is the way Bunuba women have designed and implemented the Bunuba Cultural Mapping Camps and the way the women 'are the drivers for the language centre'. Central to the approach to that work is that, as Patsy said, 'us women don't have boundaries in who we teach, what we teach, because that ties in with the land that we've got.'

Reclaiming anthropological knowledge through the Bunuba Cultural Mapping Camps and redefining the agenda of governance structures has given the Bunuba a sense of control. This control that the Bunuba now have more generally has had an empowering effect. Patsy, Millie and Kaylene all said in their interviews that they felt the impact of the Cultural Mapping Camps and prioritisation of women's knowledge and women's ways of healing has been personally empowering and also healing for the community generally.

In her interview and subsequent discussions with my team, Kaylene spoke about the importance of prioritising the whole community moving forward. Like the other women, Kaylene found the healing camps were positive but more recently had been struggling with a clan 'coming in over our Country' and making her feel that she was 'losing her identity'.

Kaylene felt that there needed to be something similar to the Cultural Mapping Camps again, involving all the families to make sure everyone understood where they fit in.

Kaylene described how she is of a 'different generation' and so sees and feels this situation differently, perhaps, to younger ones. But nonetheless, she feels it is important that her knowledge and her feelings on this are recognised. Not only for her own sake, but for the sake of the whole community and for passing on her cultural knowledge to the next generations.

Like many of the other women interviewed, the Bunuba women felt that native title royalties need to be used in a way that benefits the whole community – all families not just one family or a few people. Patsy felt that there needed to be a conscious focus from the whole Bunuba group on how to re-centre the community's needs and make sure that our children and grandchildren benefit from any of the agreements or compromises we have made.

After discussing the damaging effect of the timeframes dictated by the native title process and the NTRBs during that process, Millie noted the importance of the Cultural Mapping Camp and the public airing of the genealogical information. She also expressed the need to go slowly and follow up with more connection.

For Millie, the follow up with more connection needs to be both in the way of formal camps like the Cultural Mapping Camp she was attending at the time of the interview, but also 'in the way of the old people'. As discussed in her story summary in Chapter 8, Millie spoke about how her parents used to drive around and pop in on relatives all the time, it was part of everyday life. She wanted to reinvigorate that practice to make sure those family relationships are nurtured the way they used to be.

> I think another meeting to recap on how we did here, how we've been going over the last since we had that meeting, and coming back again and then reconnecting with family again and just making sure we're right. I think in between that we certainly need to keep the connection up. We're only just 280 kms down the road, like we're next door. Like yeah it only takes two and half hours and you're here, you can come and have lunch with family and then go home again … I think that's what I'll be telling my family, any chance you get you need to pull in there and just connect with family, like our Mum and Dad used to do.

First Nations women have seen a need to recentre ourselves in this process of cultural connection and land justice. The Bunuba Cultural Mapping Camp that the Bunuba women talked about in their interviews is an example of how our women have taken action through this pursuit.

The women all noted what a huge undertaking it was to try and reconcile different families' understandings of connection using genealogies. This was particularly because the Stolen Generations impacted the cultural knowledge and kinship connections of many families who are reclaiming their Bunuba connection.

Millie felt that the Bunuba Cultural Mapping Camps were making far more progress than had been made in the previous 30 years since native title began. Millie praised the Bunuba process as an excellent start to the healing process for Bunuba people and acknowledged what a big ask it is of people in the situation of the Bunuba to be able to come together at the camp and work productively on such a highly emotional issue.

> Yeah, so you know this is a good thing, and I think people should look at, you know this is how we can do it. If we walk away from here on Friday as one big family, well you should be given medals – fair dinkum, they should be giving them a medal for bringing the family, bringing the clan together, that has been pulled apart through native title. And I think [the NTRB] can learn from this mob on how to set an agenda for a meeting and this agenda here is the best agenda I've seen.

Millie noted how tentative she had been about attending the camp because of all the tension and disputes at previous native title group meetings, as already noted in earlier sections. Millie's siblings were encouraging her to go on behalf of their family but she almost didn't because she didn't feel she could handle the confrontations which she expected to ensue. At the last minute, Millie felt that her mother told her she should attend and remembered that she had committed to establishing a connection with her mother's Country.

Ultimately, Millie viewed it as a need to 'go backwards before we can go forwards' in terms of working out our connections and centring ourselves and our culture and our identity:

> … because I think we've gone forward and we're stuck, so we've got to put it in reverse and then suss it all out again, and then go forward again. But as a whole group, not just one clan group going. I guess it's like one group leading and everybody else pulling back and saying 'no, we don't follow it'. Now we've got to be together, we're all together.

Patsy Bedford agreed that the native title process and the professionals involved at the time 'did not bring the cultural understanding' and in particular, did not understand the importance of language in establishing connection. As discussed in section 10.2, Patsy's focus was on retaining and revitalising language and she lamented that it was not appropriately incorporated into the native title claim.

Patsy felt the native title process created boundaries and was based on specific ways of identifying that did not take into account the whole complex and nuanced way that Bunuba identity and connect and interact with each other.

Patsy said that, on the one hand, it was exciting to get all the genealogical information from the anthropologists, but on the other, it has changed the way we understand our connections. Patsy felt that some of the specific genealogical information that Tindale and Harvey recorded had been lost until the anthropologists gave it back at the Cultural Mapping Camps. She felt part of the reason it had been lost was because, in our cultural ways of knowing and connecting, it wasn't necessary. It was needed when the interface with Western law meant it was needed.

> Why it was lost? Because I reckon we didn't, we were secure in who we were and where we had come from. There was a security of all Bunuba people together. There was no need for this connection report or this native title … We didn't know what Country they come from but that was their family. As long as that family was a Bunuba person.

Patsy described the conflict from the native title process – and the work to heal from that – as part of journey:

> Of course, we are going to come to potholes and … whatever in the Bunuba nation. But we are on the journey, we have acquired the tools, we have the tools. Tools are the most important things … We're carrying that now. So, there's some tools to fix the pot holes.

> Let's go back and see the potholes, let's go back and do a big, lovely bridge … We're going back and filling the pot holes, going back and fixing up the fences. So after going up there we know everything has been broken so we're coming back down that process of what we do. We're slowly filling that pothole, the fences that will, the fences that were put in – we're opening them. You know like that.

Patsy described building a focus on culture back up, using the tools we now have and described the healing process as a foundation, and the focus on language as a cornerstone.

> I have to go back to my language. Government doesn't look at language. As language as being [about the] wellbeing of people. [The government] don't look at language as being part of the health, [and the loss of it as being part of] the mental health that people suffer. You know there's that missing link and when you're talking about language … that's part of building community, of the wellbeing of people, of the mental state that our people are in today … The language gives you an identity, gives you that inner feeling. Because language is invisible, government don't see that it's something that makes a person strong.

Patsy went into further detail about the importance of language in healing our culture and community. An important part of the re-invigorating culture is having the resources to teach and learn language in the way that we learn language. Not through books.

> And the government don't see that … And they say to us well you've recorded everything. We've recorded everything but we keep telling you that's not how we learnt language. It's your way of learning our language. It's not our way of learning the language.

Specifically, we need resourcing to learn language *on Country* because of the intrinsic connection between Country and language.

> Give us more money to do Country trips where we can sit down like that and immerse our children in language. Because we come from our old tradition. What we know to this day was confirmed by reading books. It wasn't learned by, you know, we write in skin groove … and we have to read the skin groove to say 'oh I'm this, I'm this.' That was only passed down to us and we are still passing that down.

Patsy identified the key role that Aboriginal women are playing in reinvigorating language and through language, culture and identity. Patsy, herself, is a driving force in ensuring our Bunuba young ones are able to know our language and to know Country fully through knowing our language.

> The women are the driving force of putting that back together. We're bringing our connections back. We're bringing the trust in the language back which is the most important thing. The core of who we are … We understand better because when you talk language there's no definition, if I'm talking about Country I can't find the English word to explain what I'm saying. I would rather explain it in my language to make it more understandable. It's not for the western world, it's for the future generation that's coming up of Bunuba kids.

Patsy emphasised the importance of building slowly in this post-native title determination context so that the foundations are strong:

> We have to heal before we move forward … I haven't lost my identity but we know in the Bunuba tribe there are people who have lost their identity. So we got to start from the foundation for that. This is one of the first steps of laying the foundation. Then they might come in and say well, some of them say 'I'd really like to talk Bunuba now' … 'Okay let's have a look at how you really want to learn to speak your language.' That's the next step we look at.

> It's a step, how you build a house. Not on ground, but cement is the hardest thing that the wind can't blow over. So, this is the cementing part of all this.

> Slowly you put the iron pipes in. Okay you want to do language, let's start with this kind of ways that we can work that you want to speak. Do you want to know more about the culture, here is another type … Like that, you know?

Patsy felt that the handing over of all the anthropological work in the Cultural Mapping Camps was handing back control to us. She was personally grateful for the work that those anthropologists and linguists did in the past because it was very specific and it has enabled her to clearly show her mother was Bunuba. She felt that that work has enabled us to recreate our culture in the way that we want to.

> That's the beauty of it all. We're the drivers of the car now. We were always the passengers. All that journey up. Always the passengers and we weren't allowed to tell the driver to turn left or right. Otherwise, we got told off. Now we've got our vehicle, brand new vehicle, with us driving it any way we want to go and how we want to do it.

Patsy talked about the Bunuba vision of recreating a community governance structure that essentially mirrors an actual government. She talked about how the Government's measures of accountability do not align with the community's needs and what the community considers would be valuable measures of success and value for money. That would change if governance shifted back to Bunuba. Patsy described how in earlier times, Bunuba were a government and individuals had 'portfolios'. But the native title system and the professionals working within it didn't understand it like that and 'only saw a small part of our government' because 'we didn't describe it like that'.

Patsy wants that to go further and notes the need to align accountability measures of PBCs and other community governance structures with what the community wants to measure – what we consider is 'success' and 'value for money'.

> Yeah, government has a big pull on the PBCs because they have strings attached to the funds they give and we have to be accountable for all those funds. Government wants books. Their evaluation is the big thing that I struggled with … Because what you had to be accountable for … we kept saying … 'I have to do our evaluation on speaking of the language.' Does that matter to them? Does it matter that we had emerging language speakers here, and how many kids spoke the language? But for us we had to evaluate that too. The government, all they said was 'how many days you did this language at the school?' Nothing about how many kids have now got up and actually spoken the language from your teaching.

Kaylene also talked about the importance of community maintaining a focus on education, on teaching language, and on listening to women, including young women, on what they want to see in their community. She spoke about her work at the Women's Resource Centre empowering women to set goals and timelines with what they want to do and where they want to be in three years' time. But she felt that there needed to be greater engagement with community by the PBC and another focus on healing camps out on Country.

(h) Cissy Gore-Birch

Like other women who contributed to this report, Cissy identified that bringing people together and conflict resolution was a particular skill that First Nations women brought to the table in many different contexts, including native title.

Cissy herself went to Harvard Executive School in 2010 and competed a course in conflict resolution and mediation. She feels as though this honed those skills and prepared her for negotiations in a number of contexts – 'native title, the IPA stuff, working around the marine parks and the conservation parks with the State government.'

> You know, I've always really liked that sort of conflict resolution, mediation stuff, and trying to work through issues and come to some sort of agreement. It really set some of that foundation for me. Sitting around when I was a young kid and then coming back into the space – I'm living and breathing it, and really enjoying it. But it is hard. We are constantly having to justify ourselves over and over again.

In her interview, Cissy was full of energy, dynamism and positivity. Throughout repeated attempts to hijack her leadership, she had managed to stay focused on using the PBC to help the community heal and to ensure native title benefitted everyone.

Cissy's first five-year stint as Chairperson of the PBC was a traumatic time for the community. Cissy's telling of the story made it clear how hard it would be to work effectively in that community without being trusted and having intimate knowledge of the history and context.

> I grew up in Oombulgurri as a child and saw the strength in the community and the leadership from the old people who fought hard to get back the community for everyone. And then the threat of the government coming in and closing the community … and to hear what was actually happening out on the communities … it was disgraceful just to see where it ended up, and the leadership of others who really brought that community down.

> There was a lot of conflict happening with people being displaced, people mismanaging the community and their leadership positions and their roles. We had family members committing suicide at that time, and there was a whole inquest into the deaths over in Oombulgurri.

> So, we were dealing with that as a collective, but also having the conversation around obtaining our native title.

Cissy talked about managing the native title process as well as the IPA process in a way which promoted community empowerment, for the benefit of the community.

> So, with us getting our IPA declared, we also had to get our Healthy Country Planning plan developed. That was really to guide the process of our rangers, and the decision-making process, and making sure that we have the Healthy Country Culture Committee members on-board and really guiding our rangers with the work that needed to be done on Country. But also looking at the cultural side – management of rock art, fresh waterways, you know, and doing some work on sea Country.

Cissy mentioned that they have held on-Country trips and healing trips with lots of family and that has been helpful. But the problems they have faced with particular 'bullies' are not possible to address with a focus on healing or mediation 'as they are only interested in getting their power and control back.'

> We've called mediation, we've talked about it. They refused to come to any of the meetings. They just go straight to their lawyer and they continue to interrupt the business of Balanggarra by writing these letters and not actually coming in and being a part of the solution. They're just the problem.

Cissy instead focuses those efforts to educate and engage on members of the native title group who are not operating in bad faith but were able to be misled because of a lack of understanding and the 'bullying behaviour of a particular individual'. She is committed to keeping people informed with better communication, being transparent, staying open to discussing and workshopping, and changing the perception that only one person can benefit: 'it must be about the whole native title membership.'

> It's more about just trying to be positive about this and trying to break through some of those thinkings. That negativity, the jealously, the historical baggage we inherited. And how do we do that better? Coming up with mechanisms and tools for how we can deal with dispute resolution and those disputes usually come from misunderstanding, misinterpretation and the lack of transparency. So, it's more about how do we get this information out there? How do we get more people engaging with activities and positive stuff that's happening around the community.

Cissy is also trying to implement some succession planning for when she moves on next time alongside her other efforts to minimise conflict.

> I've given the warning that in maybe another year or two at the max, that's probably about it. And everyone is saying 'no you can't go' and I said, 'well I am going to go, so people need to start stepping up!' And we're trying to get these processes in place so that there is some protection over the Board.

> We want to have a look at the Rule Book – amend it to make sure that it [protects] the Board and the business of what we're trying to achieve.

> We've got Ernst & Young up at the moment doing a valuation on trying to develop a business plan for Home Valley right now. And they're doing pro bono work for us.

> We've got money now to develop our strategic planning around the tourism visitors permit stuff on Country and we've got money to develop that business plan. But strategic plan, also – really thinking strategically and engaging with all the different family members and looking at what their aspirations are, and looking at how do we complement those aspirations in the bigger picture. So just trying to be as inclusive as possible. So that's gonna take probably around two years and then I'm done.

> We want to build a structure where it's protected and to make sure that our people are benefitting. At the end of the day, it's not about one or two family members benefitting. It's about how do we work collectively to make sure that there's benefits coming back into the families, all the family groups.

At the time of her interview, Cissy felt really positive about the direction of the PBC, its achievements so far, and its role in helping the community move towards genuinely self-determining economic and cultural opportunities.

> [We're] creating jobs – we've got, we fought for this land, to get it back, and we've managed to get 85% of indigenous employment, of local people being employed at the tourism precinct …

> And there are some things that we've got in place. We've employed a GM. We're employing project officers. We've got money coming in. And you know the more people we have employed, the more information that could be put out to the community. People might feel safer.

> So just making sure we have these structures in place and people can see that, ah this is our office, you know, and taking ownership and pride in that.

Cissy also has a bigger picture vision of working on a regional level with other Kimberley native title groups to progress economic development that meets our communities' needs and doesn't threaten our land in ways we should not have to agree to.

Cissy told us that she has witnessed governments 'bullying and exploiting' native title groups and told us she has been encouraging an increased level of resistance among community members. Cissy has found that governments know they are not negotiating with everyone or in a culturally legitimate way. They have been 'going to certain family members, trying to do some backdoor deals,' and trying to take advantage of particular families who will do the deals for themselves and not for all the members. She hopes to use the lessons she has learned to collaborate with others in similar positions and benefit a wider group of Kimberley communities.

> My dream is, I mean I'm hoping to, I have spoken to a number of organisations around developing a Kimberley regional plan. There is a Kimberley regional plan through the State government but there's nothing in there capturing the aspirations of Traditional Owners and taking into consideration the land mass the Traditional Owners have access to and the opportunities through that.

10.13 Agreement making

Alternative agreements of various kinds between third parties (state governments and private corporations) and First Nations have been entered into since pre-Native Title Act times and continue to be used across the country in circumstances where the Native Title Act is not suitable, or has not yielded results. Obviously, agreements are also made within the context of the Native Title Act.

Over the years, native title reports have included reporting on alternative agreements and settlements, including the 2015 and 2016 reports.[264]

Several of the women interviewed for this Report had stories involving alternative settlements in which the Native Title Act has been relevant at some stage.

One thing that stood out from the stories for this Report is that the early alternative agreements which resulted in the establishment of Aboriginal Corporations have managed to serve a critical purpose in the context of native title: specifically, communities seem to have spent the time and energy working through the issues which arise with PBCs in relation to these representative Corporations, enabling a later native title process to go much more smoothly than might otherwise have been the case. One example of such a situation is detailed in earlier sections – Kia Dowell's story in relation to the Argyle Agreement in WA.

As noted in section 9.3, the attitude of governments and other third parties towards agreement-making with First Nations has changed significantly over the decades of native title. The costs associated with litigating native title cases and the increasingly serious prospects of significant compensation both seem to be providing incentives for more 'good faith' approaches in this regard. Governments and companies also appear to have realised that Traditional Owners and native title communities are not going away just because they do not secure recognition of native title.

(a) Sarah

Sarah described an attempt to claim native title in northwestern Sydney in the 1990s, and the resulting – very unsuccessful – 'co-management agreement' between two organisations.

That native title claim over the area now known as Bidjigal Reserve was ultimately withdrawn, with an agreement reached between the local council and the Dharug people that the Dharug would have a say in how the reserve would be managed. But Sarah described a stressful and disempowering co-management committee process where the Dharug people were not given any priority or respect for their knowledge, expertise or values, or their agreed right to have a say.

> As soon as I went to talk I had a hand put up to my mouth and told to shoosh, you can't speak at this time, we have to follow how the meeting runs. It was just the worst meeting I think I've ever been to. So, I only went to one. For a Co-Management Agreement with Aboriginal people, to have a committee like that was just, there was no point in us being there at all.

> That was the Councillors at that meeting but also the residents as well. It was a terrible meeting. It was like a competition of who had the most qualifications. The agreement was between Dharug Custodian Aboriginal Corporation and Hills Shire Council. All the residents were there and it was like we didn't have any priority at all. It's like this all the time for us. Always disrespect.

Sarah had heard that the committee was disbanded after many problems with the local council. One illustration of their attitude is that they do not like to acknowledge the Traditional Owners: 'that's just the tip of the iceberg. But you get the picture' is how Sarah summarised their attitude towards the Dharug people.

In the intervening years between then and her interview, Sarah said the experience of the Dharug people had been one of disempowerment. The *Aboriginal Land Rights Act 1983* (NSW) has firmly established the system of Local Aboriginal Land Councils, which do not operate on the basis of Traditional Ownership as the Native Title Act does. In the case of the Dharug in Sydney, Sarah described how it has resulted in control of development on Dharug land by non-Dharug Aboriginal people.

The difference between the impact of the Native Title Act as a catalyst for alternative agreements back at the time of the Dharug native title claim compared with more recent agreements is striking. Arguably, at that time, the limited applicability of the Native Title Act was a way of avoiding any meaningful or substantive agreements with the Dharug. More recently, we see that the Native Title Act has been used as a framework or conduit for negotiating far more meaningful agreements with far more empowering results. Sarah speculated that the Dharug might now benefit from recognition of native title, even if such recognition entails very limited actual rights.

(b) Monica Morgan

Monica was clear that despite not having their native title recognised, positive things came from the *Yorta Yorta* native title case: the outcome was such an obvious injustice that the Victorian Government knew it must never happen again like that in Victoria. So, from that case came the Yorta Yorta Joint Management Agreement. And from there, a seat at the table in a number of respects.

Ultimately, Monica describes the Yorta Yorta as 'operating a small government in many ways'. They liaise with Victorian Government Ministers, negotiate agreements with departments, deliver services to community, and advocate on an international stage.

Monica's commitment to integrity in her dealings (and those of the Yorta Yorta as a nation represented by the YYNAC) has led to long-lasting relationships with the state government which have 'stood the test of time' despite the Yorta Yorta not having native title.

> We are still a part of the building of major road works and bridges and things. With the Department of Transport … We're a partner with them through thick and thin. Whether we're on our knees or whether we're prosperous.
>
> And it has stood the test of time since our native title application.
>
> Now they've come to us and they're stating that they want to do a whole of Country plan with us. So, it's like a heads of agreement.
>
> We are hoping that will pave the way for agreement cause going back to the very first agreement that went to cabinet, the second part was going to be an aspirations document. So, the aspirations of where Yorta Yorta want to be in the future, how we want to work with the government. So, we were doing that even though we didn't have native title.
>
> It went to cabinet but they brought John Fitzgerald in for him to do negotiations and that just went AWOL … For a long time lost a lot of its steam but we just keep coming back.
>
> And with this last Labor government, at our NAIDOC we had the Minister for Energy Climate Change and Environment there. We have had the Minister for Aboriginal Affairs there with us, who gave the connection for us to do a media piece about the Brumbies … So, we have good politicians in there.

Monica actually felt that it might have been beneficial not having a native title determination in terms of the freedom to negotiate with the state government. Monica felt that they have been able to hold firm and she was proud to say that they had not sold their future generations' rights 'for a piece of gold'; they have become savvy political operators, managers and entrepreneurs.

> So, we become a very sophisticated, for the amount of money that we are working with. We've got over 20 full-time employees.
>
> We've got cultural burns program, Cultural Heritage team, water specialist and TLM officers, working in the Murray Darling Basin, working under the joint management. So we're doing all things based on land like we said we would.

> And enterprises and things, like we're building a bush university so that schools from all around Victoria and New South Wales can come and learn about Country and be taken out by Elders and we've got, we've just got a property that we bought ourselves, an old part of Cummeragunja Reserve that was handed out you know for soldier settlers but we never got any.

> And we have just, I have just come out of a meeting today. We're doing Manuka honey and wattle seed. We're doing it with Byron, gathered by Byron Bay. ILSC have supported us. To the tune of over $3 million.

Monica described how she and the YYNAC were not engaging in the Victorian Treaty process and were not interested in The Voice. To her, neither recognised the existing sovereignty of each Aboriginal and Torres Strait Islander nation. But the day before her interview, Monica had been at a meeting with all the First Nations in Victoria and spoke of how strong all of those nations were, and the work they were doing collectively, even when they maintain different positions.

> Yeah, and I was really pleased yesterday all the nations that we sat down with, regardless of who they come under, every one of them yesterday said that if there's any public lands then it should be in the form of land rights and returned to Victorian First Nations.

> So, I'm very proud of all the nations in Victoria.

(c) Kia Dowell

In WA, Kia Dowell's story is of how the fledgling native title law was in the background of the Argyle ILUA that the seven daam/dawang/estate groups, and the Kimberley Land Council, signed back in 2005. The ILUA was the result of three years of negotiations and replaced a 'Good Neighbour Agreement' that had existed since the 1980s.

Chapter five of the *Native Title Report 2006* featured The Argyle Participation Agreement 'Argyle Agreement' as a case study. In that report, the Argyle Agreement was described as 'a tangible embodiment of practical reconciliation between Indigenous land owners and non-Indigenous industry representatives. The Argyle Agreement provides a mechanism for recognising, accepting and incorporating two worlds.'

In her interview, Kia explained that, although there seems to be a dearth of corporate knowledge around the intentions at the time, it appears that the KLC was expected and expecting to immediately pursue a native title determination with the same seven traditional owner families immediately after the ILUA had been registered. The anthropological work done at the time, which benefited the negotiations for the Argyle Agreement, was intended to be for use in the related native title claim.

However, this didn't eventuate and Gelganyem Trust and Kilkayi Trust continued receiving and distributing monies from the ILUA to the Sustainability Fund, the Law and Culture Fund, the Education and Training Fund and the Miriuwung and Gija Partnership Fund, and to the original signatories.[265]

Since joining the Board of Directors at Gelganyem, Kia relentlessly pursued relationships with Argyle and the NTRB, and represented the views, concerns and perspectives of Traditional Owners in strongly advocating for their meaningful involvement in the closure and all the steps required in that process.

Kia described the delay in pursuing the native title claim as somewhat fortuitous because it has allowed time for the community healing work and for the community to properly understand the relevant processes. The result has been that, in getting the governance of Gelganyem in good shape, with a focus on ensuring everyone understands the role of the Trust, their own rights to participate, and the role of any PBC to come from the native title process, the community has a trusted representative organisation to effectively guide them through the native title process and instruct professionals on their behalf.

(d) Noongar Settlement WA

During the preparation of this Report, my office was contacted with concerns regarding the Noongar Settlement in the Perth area. The people who contacted my office advised that their family was being claimed as family by some individuals who were not actually related, to legitimise their participation as Traditional Owners in the Settlement. The people who came to me rejected the family connection and claimed it was deliberate fraud, resulting in people speaking for country who are not entitled to, and controlling money they should not have any say over. The people we spoke to said they had made significant effort to complain to people in power, including to the state government and to the Ombudsman, but were ultimately dismissed. They believe there is a political incentive not to disrupt the Noongar Settlement and that is why their concerns are being ignored.

The people who contacted my office were extremely distressed by the way they perceived their family was being used and felt that these 'false connections' are destroying people's sense of culture and fuelling mistrust in the native title system. These concerns were broadly similar to some of the other concerns raised by women contributing to this report from other places across the country.

Here, I provide a summary of the Noongar Settlement and its implications in the broader native title and land justice context.

(i) The 'Noongar Settlement' – background

The Commission has been following the negotiations for a settlement between the Western Australian Government and the Noongar peoples for many years. Previous Social Justice Commissioner Mick Gooda reported on developments in his *Social Justice and Native Title Report 2015*.

As noted in that 2015 report, the settlement process arose out of the *Bennell v Western Australia* litigation,[266] which commenced in the Federal Court in 2003 on behalf of over 400 Noongar families (80 applicants), over land covering the south-west of Western Australia, including the whole of the Perth metropolitan region. The trial was split up by assessing only the claims to land in and around Perth, known as the 'Combined Metro Claim'.[267] Mick Gooda's predecessor, Commissioner Tom Calma, monitored this case and its appeal[268] and reported on its progress in the 2007 and 2008 *Native Title Reports*.[269]

To briefly recap here for ease of reference, in *Bennell v Western Australia*, Justice Wilcox found that a single Noongar society had existed since 1829, and that contemporary Noongar communities continued to observe traditional laws and customs, and had a connection with the whole claim area.[270] The court found that, except where it has been extinguished, native title exists for the whole Noongar community over the whole of the land and waters in the area covered by the Combined Metro Claim.[271]

This decision was overturned on appeal. In *Bodney v Bennell*, the Full Court of the Federal Court found that Justice Wilcox had failed to consider:

- whether there had been continuous acknowledgment and observance of traditional laws and customs from 1829 to present
- whether the Noongar peoples had proven a connection specifically with the Perth Metropolitan Area.[272]

Commissioners Calma and Gooda both observed that the decision set a worrying precedent about the ability of judges to take the impact of colonisation into account when assessing the 'continuity' elements of native title claims.[273]

In the primary judgment, Justice Wilcox urged the parties to consider settling the matter outside of court due to its historical significance and its importance for reconciliation in Western Australia.[274] Negotiations were initiated by the Western Australian Government with South West Aboriginal Land and Sea Council in 2010.[275] This was followed by an in-principle offer by the Western Australian Government in 2011 and by further negotiations.[276] The six principle Noongar native title claim groups are Yued, Gnaala Karla Boodja, South West Boojarah, Wagyl Kaip, Ballardong and Whadjuk.[277]

In 2015, both parties reached an in-principle agreement on the text of the Settlement, including six ILUAs, each corresponding to a specific area of Noongar land.[278] The WA Department of Premier and Cabinet said that '[t]here were numerous opportunities to participate in this process, with the offer going to a vote at authorisation meetings, and endorsed by all six Noongar native title claim groups'[279] The Western Australian Government executed the ILUAs in June 2015 and filed them with the National Native Title Tribunal.[280]

(ii) The 'Noongar Settlement' – update

The South West Native Title Settlement (the Noongar Settlement) is the largest and most comprehensive native title settlement in Australian history.[281] Formally commencing on 25 February 2021, the Settlement includes the extinguishment of native title which covers almost 200,000 square kilometres of Noongar land and affects around 30,000 Noongar people. The Noongar Settlement includes rights, obligations and opportunities relating to land, resources, governance, finance and cultural heritage, and is valued at $1.3 billion.[282] The provision of benefits under the agreement is intended to compensate the Noongar people 'for the loss, surrender, diminution, impairment and other effects' of their native title rights and interests.[283]

The land concessions and benefits in the Noongar Settlement are important to note. No other settlement with Aboriginal people has made land concessions of this type, especially in highly populated regions. The Noongar Land Estate will hold up to 300,000 hectares of land on reserve or leasehold, and 20,000 hectares as freehold. The land is held by the Noongar Boodja Trust (NBT). Plans for use include both economic and cultural development purposes, although so far the use and development of the land by the NBT has been minimal.

The settlement has required multiple bodies and Aboriginal corporations to be set up to administer funds toward certain areas such as housing, cultural assessments, etcetera.

(iii) The 'McGlade' case

The Noongar Settlement failed to garner the unanimous support of the Noongar people, some of whom felt that they had 'little or no say' in the negotiation of the Noongar Settlement and were concerned about the surrender of sovereign rights over their ancestral lands.[284]

The validity of the ILUAs under the Noongar Settlement were disputed in the Federal Court in 2017 in *McGlade*,[285] and the Court found that an ILUA under the Native Title Act required the signatures of *all* registered native title claimants ('RNTCs') to be valid – irrespective of the ILUA being authorised by all native title holders within the area of the agreement. This marked a departure from the earlier decision of *QGC Pty Ltd v Bygrave* (2010) 198 FCR 412 ('*Bygrave*'), in which the Court held that an ILUA only required the approval of one or more RNTCs to be valid. As a result, the *McGlade* decision affected the legitimacy of approximately 126 ILUAs nation-wide[286] – including the Noongar Settlement – creating widespread uncertainty.

(iv) The political context

Within two weeks of the *McGlade* decision, the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) was proposed by the Federal Government to mitigate this newfound uncertainty. The Act 'effectively overturned the [McGlade] decision', reinstating the validity of the ILUAs.[287] While the Act served to provide the native title sector with greater certainty, the handling of the proposed law and lack of consultation with Aboriginal and Torres Strait Islander communities was criticised. For example, it was labelled as 'completely disrespectful' by the now Minister for Indigenous Australians Linda Burney.[288]

According to Hannah McGlade, the nature of the Federal Government's response was greatly influenced by the significant state and federal support of the Carmicheal coal mine, the validity of which was also compromised by the *McGlade* decision.[289]

The *McGlade* decision was condemned by SWALSC and others as a threat to Indigenous self-determination and a 'win to non-Aboriginal activists intent on oppressing the true will of Indigenous traditional landowners'.[290] However, Hannah McGlade argues that self-determination requires that the Noongar people, and not the Parliament, control the future of the Noongar Settlement and that self-determination was therefore undermined by the Act due to the extinguishment of native title rights against the wishes of many Noongar people.[291] Ultimately, the issue at stake is regarding the validity and appropriateness of the authorisation processes under the Native Title Act.

The decision to register the Noongar Settlement ILUAs was again disputed on appeal in *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238, the applicants claiming that the National Native Title Tribunal Registrar erred in finding that the authorisation conditions for registration were satisfied in the absence of unanimous approval by all Noongar native title holders. No appeal grounds were successful and the judicial review applications were consequently dismissed.[292]

(v) Australia's first treaty?

As well as marking a new development in native title negotiations, some constitutional law experts have described the Noongar Settlement as Australia's first treaty between Indigenous people and the State:[293] that the Noongar Settlement is symbolic of the coming together of two nations via agreement, coexisting and recognising each other's sovereignty.[294] Others such as Dr Hannah McGlade emphasise the risk in positioning the Noongar Settlement in this way, arguing that it falls 'quite short of what Treaty should actually mean for Noongar people: the right to determine our own internal affairs and be who we want to be as Noongar people'.[295] Rather, McGlade considers that the Federal Government's treatment of the *McGlade* decision can be viewed as another act of colonisation, upholding an ILUA system 'based on non-Aboriginal forms of liberal democracy and formal equality' to the detriment of Aboriginal law.[296]

11 Conclusions

In its structure and focus, this Report is quite different from other Native Title Reports. While this Report focuses on the in-depth stories of individual women and their communities, I have reflected deeply on previous Reports, their themes, and the issues they raise, in the drafting of this one.

It is difficult to reflect on where we are at today whilst reading the thoughtful, informed and comprehensive advice contained in previous Native Title Reports dating back to the early 1990s. The repeated warnings by those eminent First Nations leaders and many of their contemporaries were not heeded.

Like previous Social Justice Commissioners, I have included many positive examples of how native title groups have found ways to benefit from native title despite the limitations of the system. I have recounted stories of women and communities demonstrating extraordinary strength, resilience and persistence trying to protect culture and Country in the face of seemingly relentless barriers.

Some of our First Nations peoples have been able to secure native title and accompanying agreements which serve their communities well. Others have been able to secure beneficial agreements with governments and third parties despite not being able to secure native title. In achieving these goals, the unpaid work done by First Nations people has been at a level unfathomable to most non-Indigenous Australians. The work we do is completely unrecognised by mainstream Australia and by Australian governments, yet it is required of us by the native title system and not compensated for at all.

The reality is that for First Nations Australians to enjoy our rights to culture, property and self-determination, we have to provide significant free labour and participate in a process which inevitably contributes to community conflict and division. No other Australian community is required to fight for those rights in the same way.

The native title system has required unrealistic feats of unanimity from us, on the coloniser's terms – including strict timeframes and culturally incompatible evidentiary priorities and methods – without consideration of the impacts on our communities. So many of us have performed those feats, met those timeframes and participated in the evidence and court processes. But the superhuman contributions don't stop there. We have then also been left to clean up the community conflict and division created and exacerbated by those requirements. The stories of the women in this Report who are doing exactly that are only the tip of the iceberg. This is going on in scores, if not hundreds, of communities across the country.

The degree of commitment to post-determination governance and empowerment of communities through PBCs is also unparalleled in non-Indigenous Australia. Again, mostly unpaid, our people are managing to navigate the unique challenges of balancing Western governance requirements with cultural governance requirements. It is taking time, but the examples of success are proliferating.

Our people are finding workarounds for the barriers and the systemic design flaws – taking control of their own communities, driving sustainable economic and social opportunities. Yet, it must be acknowledged, that even those who have successful outcomes by certain measures have often found significant costs associated with their involvement in the native title system.

For all of us who know and are engaged in the native title system, the technical details force us into a singular and restrictive focus. In attempting to make it work within its current requirements we risk forgetting the purpose and intention of native title and what it could still achieve. We need to stop and honestly reflect on the questions of what we want for the future, and how we are going to get there.

Like many other areas of public policy which uniquely impact First Nations people, land justice and cultural heritage protection require a significant shift in their prioritised values and outcomes, if self-determination and community empowerment are to be genuine goals. Ultimately, it requires a new power-sharing arrangement between First Nations and Australian governments.

(a) Native title in context

Mabo came at a moment in time when a fundamental reset in our relationship with Australian governments – a time of agreement-making – seemed imminent. At that point in history, native title was imagined not as an isolated set of rights regarding the use of our land and waters, but as a key pillar in a broader settlement package. It was always meant to be part of a big agenda of restitution and reconciliation that could lead to a real form of structural settlement with the Australian nation-state.

When Prime Minister Paul Keating delivered his historic Redfern Speech, after *Mabo* and the Report of the Royal Commission into Aboriginal Deaths in Custody, his words pointed to the potential that was opening up through key arrangements being put in place: the formation of the Aboriginal and Torres Strait Islander Commission, the Council of Reconciliation and its mandate. Later, he sought and supported ATSIC's advice to consider the 'Social Justice Package' to complement native title and the land fund, as part of a comprehensive suite of measures.

But our call for Australia to reconcile was derailed into a so called 'practical' agenda. Australia's responsibility to support our self-determination was abandoned and somehow the onus of responsibility was flipped and came to sit with First Nations peoples. We were expected to find a way to fit, without protest, into current structures, as if our grievances were holding back progression.

Our political system was not ready, not brave enough, to state the truth about the structural inequalities perpetuated for generations. Political fear blocked the road ahead – a sudden realisation of the structural implications of what the framework of reconciliation demanded: that governments had to do the hard work, not us. Governments had to alter structures to guarantee our equal place in decision-making, to deliver just compensation, and that by doing this it would be impossible to carry on as we had before.

The legislative attempt at creating a system that settles the land justice issue has been thwarted by political fear and ill-will at different points since *Mabo* in 1992, and by the failure to accept and be open about the fact that native title law as it stands is more about certainty for third parties than land justice for First Nations peoples.

Further, claims as well as negotiations and mediations within the native title system, or in the shadow of the system, involve parties with very different agendas. This can significantly impact on the burden associated with proving a native title case. One side's agendas are easy and clear to articulate, and the parties are well-resourced to do so. The other side's agendas are

deeply spiritual, difficult to articulate and prove to the standards required, and are impacted by generations of colonial dispossession. They often require many different groups to come together and agree on things in a context which does not allow the necessary time and does not have the necessary options on the table in the first place: there is no right of veto. This is not a fair fight, nor a fair negotiation.

Yet, against the odds, we have pursued our rights and interests through decades of arduous court battles and negotiations with relative giants of industry and governments. We have conclusively proven – even on the coloniser's terms – our foundational place in and our undeniable connection to this land.

As First Nations Australians, pursing our rights and interests means we manoeuvre between two worlds of governance and decision-making. We do this without any framework in place to assist us and with very little, if any, acknowledgement of the significance of this on our daily lives. The stories of the women in this Report, and the communities that they represent, lay bare the truth that when we do reclaim our rights to land, language and culture, we have to constantly negotiate within the conditions and expectations of Western society. Being forcefully subsumed into Western legal structures like this, without any real structural change, is driving ongoing injustices, inequalities and intergenerational trauma.

(b) A pivotal moment in history

The 2017 Uluru Statement from the Heart was an invitation from First Nations peoples to non-Indigenous Australia to join with us in forging ahead with a new relationship. As we know, in 2023, Australia voted decisively against the constitutional enshrinement of the Voice. But that is not the end of the story. Treaty and truth-telling remain key pillars of the Uluru Statement from the Heart. And our voice – our right to self-determination and to meaningfully participate in decision-making that affects us – is not something that can be voted away.

We now stand at another pivotal moment in history – a point of reckoning – where the the gravity of truth is irrevocably shifting the balance in how we understand our nation, ourselves and our relationship with one another.

It is my hope that in this emerging era, meaningful reform of the native title system will be put back on the agenda; and that, among other reforms, it will become the new norm in the institutional fabric of settlement for native title determinations (and existing holdings) to be accompanied by the means for restorative processes. I have witnessed those processes: processes such as the cultural mapping that I and other women in this Report have spoken of as critical to truth-telling and healing.

(c) The need for honest reflection and power-sharing

If we are to make the most of this pivotal moment, there needs to be honest reflection by governments across the country about to what they are truly committing. If they are committing to more of the same, there needs to be public acknowledgement of what this actually means for First Nations people: that they are explicitly choosing to bolster non-Indigenous wealth at the cost of First Nations rights, including the right to self-determine our own economic, social and cultural futures.

In that circumstance, when inequalities between First Nations and non-Indigenous Australians stagnate or worsen, as they have done now for decades, governments must publicly accept that these dire outcomes are directly linked to the refusal to grant us our rights to land, culture and self-determination and to instead privilege the interests of others.

(d) Power-sharing in practice

When thinking about what a new power-sharing arrangement between First Nations peoples and non-Indigenous Australia might look like, it is important to note that when First Nations peoples are given a genuine say in what happens on our Country, we are ready to compromise and negotiate. The mainstream political fear of structural relationship change is unfounded. It will not impact the everyday lives of non-Indigenous Australians apart from deepening cultural inclusiveness, generosity of spirit and connection to Country as a whole nation.

Many women who contributed to this Report talked about the deeply-ingrained instincts of First Nations peoples to collaborate, work together for common goals, and take into account other people's perspectives and needs. They noted that this cultural instinct comes from being connected to Country and knowing that what we do impacts others, just as what they do impacts us. That is a key part of how we survived, adapted and thrived on this land for over 60,000 years.

We also heard about pastoralists, for example, who have long-term relationships of trust with the Traditional Owners of their stations. Those relationships of trust and collaboration do involve accepting that sometimes the answer to a request for development in a particular location is 'no'.

Mostly, there are appropriate workarounds that the First Nations groups in those trusting relationships are prepared to make, sacrificing strict cultural protocols and practices where that can be tolerated for the sake of compromise and mutual social and economic gain.

We want the ultimate right to say 'no' to acts on Country, because that responsibility is ours as custodians of this land. We are not interested in blocking development for the sake of it. We can also benefit from development on our land. But we must be in control of that development so the balance between damage to Country and benefits to community are properly considered, and so that we benefit to the full degree warranted. We should not be pressured by the legislative regime to accept pitiful amounts of royalties, or scraps in other forms. There are enough profits from these ventures for us to benefit too. That has been the case when First Nations groups have had sufficient clout, good professional advice, and third parties have genuinely approached negotiations in good faith.

(e) Where to in native title?

There needs to be an acceptance that greater profit sharing is reasonable and just in the historical and contemporary context, on both social justice and economic grounds.

Reform of the conditions for negotiations with third parties regarding claims and the use of Country must be prioritised by policy makers and legislators. Much greater consideration needs to be given to the experience and advice of the many First Nations community leaders, commentators and lawyers who know how this often goes so badly wrong for traditional owner groups. This is one area where the terms of the native title system and processes need to reflect our needs and our rights for the first time.

Community healing work in the claim and post-determination periods needs to be prioritised. Government needs to understand and provide the degree of resourcing necessary for this to happen in the bespoke way that each group needs it to happen.

The structural power imbalances in the native title system must be addressed by a holistic reform process which takes into account all relevant legislation and the interactions between the many relevant legislative regimes. This reform process must be driven, designed and overseen by First Nations people with experience in the native title system and associated

systems. There have been reviews of the Native Title Act and of inquiries into and reports on different aspects of the system such as NTRBs and PBCs. There have also been important case studies made public over the last decade exposing how third parties can and do exploit the structural power imbalances.

The much-needed native title reform process must start from a human-rights perspective and centre the human beings affected, working outwards from there to consider each relevant piece of public policy and legislation and how they interact. The native title system impacts some First Nations people differently than it does others. When lived experience is the starting point, the internal community dynamics as well as the broader legal and political dynamics can be scrutinised for their impact on women, young people, people with disability and other groups within our First Nations.

Despite playing active and important roles in native title and cultural heritage, First Nations women are too often sidelined in the native title system as a result of biased structures and vested interests. Sidelining women deprives communities of our expertise and experience. Just as sidelining our young people also deprives our communities the benefit of their different sets of skills, and of the potential to use the native title system to pass down knowledge. As articulated by several of the women interviewed, we need to create safe, brave spaces to break down barriers to participation so that we can benefit from everyone's skills and knowledge.

A human rights-based, person-centred approach to native title reform would prioritise removing barriers to full and equal participation in the land rights, native title and cultural heritage spaces. It would ensure that the importance of participation is recognised and accompanied by an understanding of cultural knowledge, tradition and law and that these are difficult to reconcile with the Western native title system. Where the Western legal system requires proof of culture and connection, our traditional law around rights and responsibilities to Country is largely based on relationships and trust.

A human rights-based, person-centred approach to native title reform would ensure that all of our people are heard and that we are resourced to tackle the gaps between the native title version of connection to Country, and our true cultural connections to both Country and kin. Where colonisation has meant that we cannot bridge those gaps because too much knowledge and trust has been lost, a person-centred approach ensures that connection and healing are prioritised in developing solutions that work for us.

Further, consistent with this approach, a holistic land justice reform process would necessarily be an exercise in truth-telling. So few Australians know what native title, land rights and cultural heritage regimes have entailed for First Nations peoples. I hope the first-hand accounts in this Report serve to inspire understanding of why a truth-telling element within an overarching land justice reform process is essential.

The value in the in-depth interviews and the detailed submissions that have contributed to this Report is that the women were able to go into detail about their experiences, describing how their interactions with the native title and related systems have played out for them. Many women identified specific aspects of the system which have caused problems. Many had taken steps already to address the problems so far as possible, or suggested steps which could address the problems to differing degrees.

Individuals and groups within communities are doing their best to work with the system in whatever way they can, to find workarounds within the system, and use their own personal skills, experience and knowledge to re-centre their own community and culture. Many of these approaches have had, and are having, significant success.

(f) Governance in native title

The women who contributed to this Report told us about the importance of empowering communities, including board members, PBC members and broader community members, with education on the native title system and governance in the post-determination period. Many women noted the significance of ensuring open, accountable governance and transparency in all decision-making as critical to community cohesion. This emphasis had shown results for several women interviewed for this Report. However, more broadly, women described how resourcing for education and community engagement is lacking and must be prioritised.

We heard about the importance of finding a structural balance between cultural knowledge and decision-making, and Western governance requirements on any Aboriginal Corporation. The women who were managing to do this had both Western administrative and governance experience as well as cultural and community knowledge.

Several women identified concerns with non-Indigenous professionals in various paid positions within the native title system and community governance arrangements. In particular, concerns arose when those individuals did not understand or value culture, imposed their own agendas, contributed to community division by limiting transparency and accountability, or did not try to educate, empower and equip the communities for which they were supposed to be working.

From many of the women's stories it is clear that if non-Indigenous professionals like lawyers and anthropologists in native title are to have a positive impact on communities, they must approach their roles more broadly than they have in the past. Professionals must also have an understanding of their own limitations in relevant knowledge and expertise.

(g) Conflict and healing

One particular theme that stands out from the many submissions and stories in this Report is that that the system is not designed or equipped to settle intra-community disputes about traditional identity and culture. This is despite the fact that the native title regime has specifically created a need to articulate connection to Country and kin through the Western system of genealogy. Where identity disputes already existed, the introduction by the native title system of a perceived incentive (rights to land and cultural heritage consultation in many cases) and high stakes (the loss of access or rights to, and inability to fulfill responsibilities towards, country) has aggravated community conflict, sometimes to extreme degrees.

We heard from many women that there was not enough time allowed for in the anthropological processes, and that the result of limited time and scope, and in some cases, preconceived ideas of the genealogy, was inaccurate evidence. The result has been that some families have been excluded from their Country. Many women spoke about the conflict and mistrust caused by these claim processes.

Many of the women spoke about the importance of re-centring ourselves and our cultural identities as a way of preventing and healing from conflict and division in community created by native title and related systems. This re-centring and healing took the form of things like cultural mapping and a focus on ceremony.

Despite many positive and inspiring aspects to the women's stories, the centring of culture and community that we heard about has been ad hoc rather than systemic, and it has only been achievable in circumstances which are not available to all native title groups. Often it is the result of one or two individuals with particular skills and experience – and critically, capacity – stepping up. Where this doesn't exist, communities remain vulnerable to the divisive impacts

of native title, overlayed with broader colonial dispossession. Where these circumstances do exist, it often puts significant pressure on individuals who do have the confluence of personal resources. The extent of unpaid labour involved in the native title system is objectively impossible to justify.

At a systemic level, there has been inadequate understanding of and investment into the priorities and needs of native title groups and communities. Specifically, the cultural economy has been almost entirely neglected as part of the native title system. As part of both immediate and long-term reform of the native title system, investment in the healing potential of the cultural economy must be prioritised.

(h) Actors in the native title system

Women who contributed to this Report talked about the roles of different players in the native title system and the structural and individual ways in which they impact experiences of native title on the ground.

The court and others broadly appear to consider NTRB/SPs to be part of the community and that they always act in the best interests of First Nations peoples. It seems there is little understanding of the inherently conflicted role played by many NTRB/SPs. Individuals or families contesting the evidence or decision-making of NTRB/SPs and their anthropologists are viewed as difficult, perhaps bitter that they haven't got what they want out of native title. They are left floundering on their own, relying on free legal and anthropological assistance.

Several women told us about experiences attempting to secure funding to either join or contest a native title claim by another group and being refused because of apparent conflicts of interest. It was common to hear from women that there was no effective independent oversight of the 'gatekeeping' role played by the NTRB/SPs.

Many women spoken about concerns with the way PBCs are governed, including the way they are initially established, which itself includes the way the relevant determinations are translated into rule books. Several women spoke of a lack of safeguards in PBC governance arrangements which have allowed power disparities to be exploited and widened within some communities. There appears to have been little if any systematic consideration of the ongoing impacts of colonisation on native title groups' capacity to govern in a culturally sound, transparent and inclusive way, despite the fact that PBCs were corporations established to hold a new form of title in Australian property law which only applies to those colonised peoples.

Women also raised concerns about the way that lawyers and anthropologists within the system – and all non-Indigenous professionals – are often not sufficiently culturally aware and responsive to provide a professional service that is fit-for-purpose. Specifically, it is common for native title holders to spend years participating actively in a claim and still not understand how the system works. This type of inadequate professional service leaves communities vulnerable in the post-determination stage when they rely on a few individuals to govern PBCs and negotiate land use agreements.

Several women told of cultural nuances which they feel the legal players in the system are unable to fully understand, and the legislation is not able to meaningfully incorporate. This includes issues such as historical versus traditional connections not being fully appreciated.

Several women's stories involved difficulties facing them as claimants when evidence from other contexts, often many years before native title, are used in native title proceedings with limited understanding of the potential for misuse and resulting inaccuracies and unfairness.

Women also spoke about the interactions between native title and state-based land rights and cultural heritage regimes, and the land councils which have entrenched roles in those systems. Some women spoke to us about being prevented from speaking for and protecting Country as a result of land councils being the established representative bodies, despite land councils not necessarily representing Traditional Owners. In these circumstances, native title was not viewed as an accessible or effective means to securing the rights to speak for or make decisions regarding Country.

All of the women who contributed to this Report discussed a lack of transparency, accountability and accessible, effective remedies in the native title system. In particular, ORIC was the subject of significant upset in the contributions to this Report. Women reported significant delays by ORIC in addressing community complaints and concerns. ORIC also does not have clear oversight over all the structures involved in native title governance, such as trusts.

(I) History is still calling

While there are many reforms which need to be made to the operation of the native title system, the structural foundation of the Native Title Act also requires reform.

As former Social Justice Commissioner Mick Gooda discussed in detail in his *Native Title Report 2011* on lateral violence, and as many of the women who contributed to this Report noted, the practical impact of the Native Title Act has been extremely divisive in many of our communities.

Several women spoke explicitly of the need to heal our communities before we can engage with third parties in a way that holds any potential advantage for our peoples. That is why healing initiatives and resources to design and implement them are so critical.

The compelling outstanding need for a sustainable, just relationship between First Nations and non-Indigenous Australia through truth-telling and treaty, necessarily requires a just land settlement. It sounds radical to some but a new relationship between First Nations and non-Indigenous Australia, including a new power-sharing arrangement, is unavoidable. That much is clear. We are not going away. If land settlements are not just they will not suffice to settle the outstanding business. Despite decades, if not centuries, of intense political resistance driven by fear, history is still calling.

Image: ABC One Plus One – Jessica Hayes

12 Recommendations

This Report has again shown the need for the Australian Government to enter into a new relationship with First Nations peoples in Australia – one which represents a marked shift in power dynamics and a commitment to working in genuine partnership, both within the native title system and more broadly.

In order to do this, there is a need for concrete measures to be taken in order to address Australia's non-compliance with its international human rights commitments and to remedy the harms that non-compliance has caused.

To this end, the Commission makes the following recommendations.

12.1 Broader structural reforms to create enabling environment

1. That the Australian Government facilitate First Nations communities to establish local and regional voice structures, along with structures to support agreement-making and truth-telling.
2. That the Australian Government introduce a National Human Rights Framework as recommended in the Commission's *Free and Equal* final report, *Revitalising Australia's commitment to human rights* (2023), including a national Human Rights Act (HRA). Further consultations with First Nations peoples should be conducted to ensure the HRA model proposed by the Commission appropriately implements the UN Declaration on the Rights of Indigenous Peoples.
3. That the Australian Government implements the recommendations of the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs in *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (2023) including recommendation 2 to develop a National Action Plan to implement the UN Declaration on the Rights of Indigenous Peoples.
4. That the Australian Government introduce legislation to amend section 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include the UN Declaration on the Rights of Indigenous Peoples, and for statements of compatibility to include three new criteria:
   (a) Detail regarding consultation with affected groups (i.e. First Nations)
   (b) Impacts on First Nations peoples
   (c) Intersectional implications.
5. That the Attorney-General exercise his power under section 47 of the *Australian Human Rights Commission Act 1986* (Cth) to declare the UN Declaration on the Rights of Indigenous Peoples to be a 'relevant international instrument' for the purpose of the human rights functions of the Australian Human Rights Commission.

12.2 Establishment of a First Nations Native Title Reform Council to drive reform

6. That the Australian Government establish and resource a First Nations Native Title Reform Council (FNNTRC) to drive a comprehensive reform process ('reform process') in relation to the *Native Title Act 1993* (Cth) and all related legislation and policy, from a person-centred, human rights perspective, with a view to creating a system for land justice that is coherent, consistent, just, sustainable and gender-responsive.
   (a) The FNNTRC should be comprised of experienced First Nations native title professionals.
   (b) The composition of the FNNTRC must have gender balance.
   (c) As a preliminary step in the reform process, the FNNTRC should be resourced to commission an independent stocktake of all previous land justice and cultural heritage related recommendations from all jurisdictions, noting in particular the Australian Law Reform Commission *Connection to Country* Report, and publish a report on the status of all recommendations.
   (d) A key feature of the reform process should involve First Nations individuals and groups who have experience in the native title process being provided with a safe space to fully participate in consultations, including opportunities to participate as an individual or as a group. Those participating should be fairly compensated for their time and knowledge.
   (e) First Nations representative stakeholders (for example NTRB/SPs, the NNTC), AIATSIS, the NNTT, the Federal Court, and the Australian Human Rights Commission should be resourced to meaningfully contribute to the reform process.
   (f) The reform process should consider all relevant aspects of law, policy and practice which impact on experiences of the native title system, including but not limited to:
      i. The way Indigenous knowledge is collected, used, disclosed and held in the context of native title, cultural heritage and land justice contexts.
      ii. Evidentiary processes involved in the native title system including before, during and after the native title claims stage.
      iii. Conflicts of interest within the native title system and related processes.
      iv. The degree to which existing authorisation and decision-making processes are fit for purpose, and ways to more appropriately hear and respond to concerns about the inability of the native title system to incorporate traditional decision-making processes and cultural practices.
      v. Mechanisms for remedy, including criteria for review and appeal of all relevant decisions within the native title system, and how such reviews and appeals operate in practice.
      vi. Professional standards and accountability mechanisms associated with the anthropological and legal professions (and all other professions) working in the native title space. This should include consideration of any tensions arising between the directions of presiding officers and professional ethical obligations.
   (g) The reform process should identify areas within the native title system which are not resourced to fully fulfill their legal and cultural functions and the degree to which genuine access to justice, and remedy for injustice, will require additional investment.

(h) The reform process should include recognition of the impact that the native title system has had on communities and recommend a mechanism for the Australian Government to resource and support bespoke community initiatives for healing, educating and empowering communities in the wake of native title.

(i) The reform process should include consideration of, and potentially a path toward negotiations regarding, what the *Native Title Act 1993* (Cth) should look like given the agreed upon Social Justice Package in the original native title negotiations never materialised.

   i. Such considerations may contribute to or be conducted in light of Treaty negotiations.

   ii. Such considerations should include potential compensation for failure to implement the agreed Social Justice Package.

(j) The reform process should include consultations with affected third parties such as mining companies, with the explicit understanding that the purpose is to genuinely centre First Nations human rights and seek out a sustainable national land justice arrangement.

12.3 Recommendations drawn from *Wiyi Yani U Thangani*

7. That all Australian governments implement the findings and recommendations of the *Wiyi Yani U Thangani* report. Of particular relevance to native title, all Australian Governments should:

   (a) Recognise that the native title system has itself been a source of harm and invest in culturally restorative and supportive community-led measures identified by local Aboriginal and Torres Strait Islander communities.

   (b) Substantially increase investments to build capacity of Aboriginal and Torres Strait Islander community-controlled service sectors, including with measurable commitments to build career pathways and leadership opportunities for women and girls. This should create opportunities to upskill in land governance-related areas; and address barriers to participation and professional development by embedding trauma-informed and culturally responsive practice, flexibility, and support for caring responsibilities.

   (c) Set targets for the representation of Aboriginal and Torres Strait Islander women in advisory and decision-making roles in government, business and mainstream organisations; and provide funding and support for Aboriginal and Torres Strait Islander community organisations to embed gender equality as a key principle across the native title sector.

   (d) Place greater focus on female professionals at all stages of the native title process, to ensure gender sensitive support for women's business as it arises throughout the claims and land management process.

   (e) Identify options to support fungibility of title without requiring the extinguishment of native title, and support the development of financial products, such as bonds, to underwrite economic development.

   (f) Support and fund an increase of teachers' foundational knowledge of Aboriginal and Torres Strait Islander content through mandatory university units, ongoing professional learning to develop cultural competence, and collaboration with local community and Indigenous education officers.

12.4 Recommendations derived from the contributions of First Nations women to this Native Title Report

8. That the Australian Government fund research into and documentation of Indigenous women's-specific knowledge and systems regarding the handling of collections of First Nations women's cultural heritage material, in collaboration with AIATSIS, the ANU Wiyi U Thangani First Nations Gender Justice Institute and First Nations women with experience in this field. This collaboration should help to inform broader consideration in the recommended First Nations Native Title Reform Council reform process of the way Indigenous knowledge is collected, disclosed, used and held (see recommendation 6(f)(i)).
9. That the Australian Government give urgent attention to conflicts of interest within the native title system, seeking guidance from ORIC and First Nations professionals within the native title system, and partnering with First Nations stakeholders to take immediate steps to alleviate the impacts, while longer term reform to the system is developed.
10. That the Australian Government give urgent attention to the lack of access to remedies in the native title and cultural heritage systems, and partner with First Nations stakeholders to take immediate steps to alleviate the impacts, including additional funding and training for ORIC so that ORIC can fulfill its functions in a way that delivers timely resolution and minimises harm, while longer term reform to the system is developed.
11. That the Australian Government partner with First Nations stakeholders to assess the immediate capacity of PBCs and NTRB/SPs to fulfill the cultural and community functions which they inevitably find themselves holding, and provide urgent additional resources for the relevant bodies in each native title community for the purposes of:
    (a) communicating with and educating their native title membership
    (b) cultural mapping processes
    (c) community healing initiatives.
12. That all Australian governments review the practical outcomes of cultural heritage regimes and work with Traditional Owner communities as well as state-based representative systems to ensure that there is an independent, culturally safe and appropriate way of recognising legitimate representative Aboriginal organisations in the cultural heritage space, and that there are effective, independent review mechanisms available for decisions with funding implications.
13. That all Australian governments take steps to alleviate the burden of unpaid labour absorbed by First Nations individuals and communities in the land justice and cultural heritage systems, including that driven by planning and development initiatives for which responses are necessary to defend rights to Country and culture. Such steps should include fair remuneration for all work undertaken.
14. That the Australian Government resources the implementation of all of recommendations contained in this report.

12.5 Previous NTA-specific reforms

These recommendations have been made previously by the Commission and others and at this point in time they remain relevant. An overarching reform process regarding land justice and cultural heritage would include consideration of these recommendations.

15. That the Australian Government introduce legislation to amend section 223 of the *Native Title Act 1993* (Cth) to clarify that claimants do not need to establish a physical connection with the relevant land or waters.
16. That the Australian Government introduce legislation to amend the *Native Title Act 1993* (Cth) to allow for 'the traditional laws acknowledged, and the traditional customs observed' under section 223 of the *Native Title Act 1993* (Cth) to change over time, provided they remain 'identifiable', are consistent with the recognition of Aboriginal and Torres Strait Islander peoples' rights to culture and would clarify the level of adaptation allowable under the law. Furthermore, a presumption of continuity as suggested above would be undermined if respondents could rebut the presumption simply by establishing that a traditional law or custom is not practised as it was at the date of sovereignty.
17. That the Australian Government introduce legislation to amend the *Native Title Act 1993* (Cth) to address the Court's inability to consider the reasons for interruptions in continuity, and empower the Court to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.
18. That the Australian Government introduce legislation to amend the *Native Title Act 1993* (Cth) to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test; and provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.
19. That the Australian Government introduce legislation to amend the *Native Title Act 1993* (Cth) to clarify that native title rights may be exercised for any purposes, including commercial and non-commercial, and provide a non-exhaustive list of native title rights and interests.
20. That the Australian Government work with state and territory governments to encourage more flexible approaches to connection evidence requirements.
21. That the Australian Government introduce legislation to amend the *Native Title Act 1993* (Cth) to provide a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded in relation to interruption or change in the acknowledgement and observance of traditional laws and customs, such as the forced removal of children and the forced relocation of communities onto missions.
22. That the Australian Government introduce legislation to amend the *Native Title Act 1993* (Cth) to extend the amendments allowing historical extinguishment of native title to be disregarded to marine parks and reserves.

23. That the Australian Government pursue consistent legislative protection of the rights of Indigenous peoples to give consent and permission for access to or use of their lands and waters. A best practice model would legislatively protect the right of native title holders to give their consent to any proposed acquisition.
    (a) Consistent with this best practice model, the Australian Government should immediately introduce legislation to amend section 26 of the *Native Title Act 1993* (Cth) to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city.
24. That the Australian Government introduce legislation to amend the *Native Title Act 1993* (Cth) to include explicit criteria as to what constitutes 'good faith'. The criteria for good faith should be based on the model set out in section 228 of the *Fair Work Act 2009* (Cth), consistent with the Njamal Indicia set out in *Western Australia v Taylor*, and legislative provisions should be supplemented by a code or framework to 'guide the parties as to their duty to act in good faith'.
25. That procedural rights are permitted in relation to offshore areas.
26. That the Attorney-General use the power in section 137 of the *Native Title Act 1993* (Cth) to ask the National Native Title Tribunal to hold a public inquiry and report to Parliament:
    (a) on how the compensation provisions of the *Native Title Act 1993* (Cth) are currently operating;
    (b) whether they operate to effectively provide for Indigenous peoples' access to their human right to compensation; and
    (c) options for reform to ensure that Aboriginal and Torres Strait Islander peoples can effectively and practically access their human right to compensation and that the amount of compensation is just, fair and equitable.
27. That the Australian Government consider decision-making provisions regarding authorisation processes in the *Native Title Act 1993* (Cth) to better acknowledge and protect traditional protocols carried and observed by minorities within native title groups. Specific attention should be given to:
    (a) Reconsidering the appropriateness of the majority default rule for authorisations within the context of colonial interruption to the widespread practice of traditional protocols, and in respect of Australia's obligations to uphold First Nations peoples' rights to self-determination, respect for and protection of culture, and free, prior and informed consent.
    (b) Addressing the gap in remedies for minorities within native title groups whose traditional interests are at risk of a majority acting in accordance with an authorisation process established through the majority default provision.
    (c) Ensuring section 31 agreements be expressly subject to the same authorisation and registration requirements as ILUAs.
28. That the Australian Government provides Prescribed Bodies Corporate with adequate funding to meet their administrative, legal, and financial functions, including funding for work towards ensuring gender parity in representative structures.
29. That the Australian Government facilitate native title claimants having the earliest possible access to relevant land tenure history information, including through the creation of a comprehensive national database of land tenure information.

13 Glossary

Definitions are taken from the National Native Title Tribunal[297] unless otherwise specified.

Term	Definition
Access agreement	an agreement between native title holders and non-native title holders about access to areas of land and waters where native title may exist or has been recognised. Most often used in relation to non-exclusive pastoral leases (see also Part 2 Division 3 Subdivision Q Native Title Act).
Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)	Australia's only national institution focused exclusively on the diverse history, cultures and heritage of Aboriginal and Torres Strait Islander Australia. They create opportunities for people to engage, encounter and be transformed by the story of Aboriginal and Torres Strait Islander Australia. They support and facilitate Aboriginal and Torres Strait Islander cultural resurgence and reshape the national narrative. Their functions are established under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth).[298]
Aboriginal Land Rights Act (ALRA)	*Aboriginal Land Rights Act 1976* (Cth) as amended by amendment Acts.
Alternative procedure agreement	a type of Indigenous land use agreement.
Amendment Act	an Act of the Australian Parliament that amended the Native Title Act.
Amendment	a change or alteration to a document, such as an application to a court. Amendment of a claimant application will usually trigger the application or re-application of the registration test, however there are exceptions (see ss 64(4) and 190A Native Title Act).
Apical ancestor	a common ancestor from whom a lineage or clan may trace its descent.[299]
Applicant	the person or persons who make an application for a determination of native title or a future act determination.
CATSI Act	the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) is the law that establishes the role of the Registrar of Indigenous Corporations and allows Aboriginal and Torres Strait Islander groups to form corporations. It began on 1 July 2007. Registration under the CATSI Act is mostly voluntary. However, some corporations – for example, 'prescribed bodies corporate' set up under the Native Title Act – are required to register under the CATSI Act.[300]
Common Law Holders	the people the Federal Court proposes to include in a determination of native title as the native title holders (ss 253 and 56(2) NTA).

Term	Definition
Connection	the relationship that must be shown between Aboriginal people and Torres Strait Islanders with the land and/or waters over which they want native title recognised. To establish 'connection' the native title group must show they have continued to observe and acknowledge, in a substantially uninterrupted way, the traditional laws and customs that give rise to their connection with the claim area, from the time of the assertion of sovereignty by the British to the present day (s 223(1)(b) NTA).
Determination	a decision by an Australian court or other recognised body that native title does exist or does not exist. A determination is made either when parties have reached an agreement after mediation (consent determination) or following a trial process (litigated determination).
Directions	formal binding instructions to the parties from a court or tribunal made as part of the management of the case.
Extinguishment	this term is used when Australian law does not recognise native title rights and interests because some things governments did, or allowed others to do in the past, have made recognition legally impossible. These things include the passing of laws or the grant of other interests inconsistent with the continued enjoyment of native title. Complete extinguishment is when the whole bundle of rights is extinguished. Partial extinguishment is when one or more specific rights are extinguished. As a general rule, once they are extinguished, native title rights can never be recognised again under Australian law. However, in certain circumstances, the Native Title Act allows the courts to ignore the effect of extinguishment.
'Good faith' negotiations	all negotiation parties must negotiate 'in good faith' in relation to the doing of future acts to which the right to negotiate applies (s 31(1)(b) NTA). Each party and each person representing a party, must act in good faith in relation to the conduct of the mediation of a native title application (s 136B(4)).
Indigenous Land Use Agreements (ILUAs)	a voluntary agreement between native title parties and other people or bodies about the use and management of areas of land and/or waters. An ILUA can be made over areas where native title has been determined to exist in at least part of the area; a native title claim has been made or; no native title claim has been made. While registered, ILUAs bind all native title holders to the terms of the agreement. ILUAs also operate as a contract between the parties.[301]
Land council*	land councils represent Aboriginal affairs at state or territory level with the aim to protect the interests of Aboriginal communities.
Law women and men*	men and women who might be bosses of the law; practitioners of following and/or living according to language, law and custom; maintain transferring knowledge and understanding to continue tradition and customary law. The abilities, roles and term used for this position will differ between Aboriginal nations.
Mediation	the process of bringing together all people with an interest in an area covered by an application to help them reach agreement.

Term	Definition
Mediation (claimant)	the process of bringing together people with an interest in an area covered by a native title claimant application who are parties to the application, to help them to reach agreement about such things as: ▪ whether or not native title exists ▪ who holds the native title ▪ what the native title rights and interests are ▪ what other interests exist in the area ▪ the relationship between native title and other rights and interests. Mediation allows everyone involved to explore the potential for agreement, including agreement about a consent determination or an Indigenous land use agreement.
Muwayi*	home, country in Bunuba language
National Native Title Register (NNTR)	the record of native title determinations.
National Native Title Tribunal (NNTT)	an independent statutory body established under s 107 Part 6 of the Native Title Act to assist people to resolve native title issues. The Tribunal has a number of powers and functions under the Act including: ▪ mediating between the parties to native title applications at the direction of the Federal Court (Part 6, Divs 4 to 4AA, Division 5, Subdiv AA) ▪ acting as an arbitrator in situations where the people cannot reach agreement about certain future acts, such as mining projects (In South Australia the Tribunal only performs this role in relation to the grant of petroleum tenements. The Supreme Court and the Environment, Resources and Development Court undertake this function in relation to the doing of certain other future acts under the alternate right to negotiate provisions that operate in South Australia) ▪ helping people to negotiate Indigenous land use agreements (ss 24BF, 24CF and 24DG) and determining any valid objection to the registration of an Alternative Procedure Agreement (a type of ILUA) (Part 6 Division 5 NTA).
Native title	the communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land and waters, possessed under traditional law and custom, by which those people have a connection with an area which is recognised under Australian law (s 223 NTA).
Native title application	an application for a determination of native title, a revised determination of native title or a compensation application under s 61 of the Native Title Act.
Native title claimant application/claim	an application made for the legal recognition of native title rights and interests held by Indigenous Australians.
Native title determination	a decision by an Australian court or other recognised body that native title does or does not exist. A determination is made either when parties have reached an agreement after mediation (consent determination) or following a trial process (litigated determination).
Native title determination application/claim	a claimant application or non-claimant application seeking a determination of native title.

Term	Definition
Native Title Holder	a person who has native title rights and interests over a particular area of land or waters or, where there has been a determination of native title, and a prescribed body corporate (PBC) is registered on the National Native Title Register as holding native title rights and interests on trust (s 224 NTA).
Native title party	this term is often used to refer to the Indigenous parties to a variety of agreements or participants in legal actions or proceedings. However, under the Native Title Act it also has a specific definition in relation to 'right to negotiate' applications. In that context it means the registered native title claimants and registered native title bodies corporate, that meet certain statutory requirements (ss 253, 29(2) and 30 NTA).
Native Title Registrar	a statutory office holder who performs a range of native title related functions and also assists the President in the management of the administration of the Tribunal.
Native Title Representative Body (NTRB)	organisations recognised and funded by the Commonwealth government to perform a variety of functions under the Native Title Act. These functions include assisting native title holders to access and exercise their rights under the Native Title Act, certifying applications for determinations of native title and area agreements, resolving intra-Indigenous disputes, agreement making and ensuring that notices given under the Native Title Act are bought to the attention of the relevant people.
Native Title Act (NTA)	*Native Title Act 1993* (Cth) as amended by amendment Acts.
'On Country'	description applied to activities that take place on the relevant area of land, for example mediation conferences or Federal Court hearings can take place on or near the area covered by a native title application.
Office of the Registrar of Indigenous Corporations (ORIC)	an independent statutory office holder who administers the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.[302]
Peak body	organisations which represent people with common interests in relation to native title e.g. a farmers' federation, fishing industry councils, native title representative bodies and local government associations.
Prescribed Body Corporate (PBC)	prescribed body corporate, a body nominated by native title holders which will represent them and manage their native title rights and interests once a determination that native title exists has been made.
Traditional law	refers to the common features of acceptable and unacceptable behaviour in Aboriginal communities.[303]
Traditional Owners	Australian law defines Traditional Owners as a group of Aboriginal people who have 'primary spiritual responsibility' for sacred sites on a piece of land, and who are entitled by Aboriginal tradition to hunt and gather on that land. Traditional Aboriginal owners are the key decision makers for their land.[304]

*Our understanding of the term

14 Appendix 1

14.1 Acknowledgements

In addition to the women and organisations named in this Report, the Aboriginal and Torres Strait Islander Social Justice Commissioner thanks the following people and organisations for their assistance in preparing the *Women in Native Title Report*.

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PhD Candidate, The University of Queensland

15 Appendix 2

15.1 *Native Title Report 1998*, Chapter 2, 'Striking the Balance'[305]

> The spirit of the High Court's Mabo decision will never be achieved simply by court actions or divisive political debate. The essential truth is the unbreakable connection of Aboriginal people to the land. It never will be possible to recognise that adequately in law. It can be achieved at the local level and only by reconciliation founded on agreement.
> ***Noel Pearson, Executive Director of the Cape York Land Council***

> Our members want to improve the security of their enterprises. That involves resolution of native title and conservation issues and improved tenure. When these things occur, it will be far easier to attract necessary investment. This agreement is a tremendously significantly step towards achieving our objectives. It will be good for us, good for the land, good for the region.
> ***John Purcell, President of the Cattlemen's Union of Australia***[2]

Reconciliation between Indigenous and non-Indigenous Australians must be founded on justice if it is to be durable. Reconciliation essentially concerns our future co-existence. Fine words crafted to describe our aspirations will be sterile unless they are supported by an alignment of interests that will draw us together, rather than draw us into conflict and dispute.

The alignment of Indigenous and non-Indigenous rights to land will be a critical part of this balance of interests. It must rest on fairness and equality. This much is self-evident and common ground. What is much more contentious is the concept of equality employed to strike this balance.

The Wik decision laid down some straightforward propositions. Native title is not necessarily extinguished by the grant of a pastoral lease. Native title rights can co-exist with pastoral rights. Where there is an inconsistency or conflict between the exercise of these rights, the pastoral rights will take precedence.

It should not be overlooked that, from the very outset, the concept of native title is based on a principle which is unfair from an Indigenous perspective. It was held in *Mabo (No. 2)*[3] that the Crown had a power to extinguish traditional Indigenous ownership of land. 'Aboriginals were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement.'[4] Before the introduction of the *Native Title Act 1993* (Cth) (NTA), the only explicit protection against such a discriminatory exercise of sovereign power was the *Racial Discrimination Act 1975* (Cth) (RDA). Before 1975, when the RDA was introduced, there was simply no protection.

2 Spoken on the signing of the historic Cape York Heads of Agreement regarding future land use on Cape York at Cairns, 5 February 1996. The seeds of the agreement were sown in August 1994 when, against the background of the Wik litigation, the Peninsular Branch of the Cattlemen's Union decided that issues and conflict with Aboriginal people should be resolved by negotiations wherever possible. Subsequent to the High Court's decision in *Wik v Queensland* (1996) 187 CLR 1 ('Wik'), all parties determined they would stand by the agreement.
3 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 ('*Mabo (No. 2)*').
4 *Mabo (No. 2)* per Brennan J, p69.

One of the primary provisions of the NTA enabled the validation of all non-Indigenous interests in land resulting from past acts by the Crown, such as the grant of a pastoral lease, which may have been invalid because of the existence of native title. Given this validation of pastoral leases, the only live issue in Wik was whether or not the original native title to the land was completely extinguished, or whether native title could in some way survive the grant of a pastoral lease. The potential co-existence of native title with pastoral interests was a modest recognition and realignment of interests, with limited potential for Indigenous interests to impede the use of the land for pastoral purposes. Indigenous representatives, in their detailed response to Wik, *Co-existence—Negotiation and Certainty*,[5] offered to remove any impediment to the exercise of existing pastoral rights flowing from the NTA. They agreed to:

> guarantee under the NTA that the rights of pastoralists under all forms of pastoral leases … are confirmed in the same way as the rights of native titleholders …[6]

It is in this perspective that we must consider the recent amendments to the NTA, which were largely shaped in response to Wik. The High Court of Australia had laid the foundation for the co-existence and reconciliation of shared interests in the land. In many ways the decision presented Australia with a microcosm of the wider process of reconciliation. The final response of the Australian Parliament reveals the great distance we still have to go to achieve, not only a just basis for reconciliation, but also an understanding of the principle of equality on which it must rest.

The recognition of native title by the High Court of Australia in *Mabo (No. 2)* recast the landscape of our country. The judgment not only upheld the existence of common law rights to land predating and surviving the assertion of British sovereignty, the judgment also threw the history of Australia into a different perspective. While native title survived the Crown's acquisition of sovereign power, as we have already observed, the Crown's power was untrammelled and was exercised repeatedly to grant Indigenous land to others.

It did not require the recognition of native title to reveal the blunt facts of Indigenous dispossession. Recognition did, however, give a new edge to that history and established in law what Aboriginal and Torres Strait Islander peoples had always known, that:

> their dispossession underwrote the development of the nation … The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and a retreat from, those past injustices.[7]

This challenge to our national values was met with the passage of the NTA, the establishment of the Indigenous Land Fund and the promise, as yet unfulfilled, of a package of social justice measures.

With the introduction of the NTA, the Australian Parliament endeavoured to accommodate the realities of the past and provide a fair way to deal with land in the future, based on contemporary notions of justice. The validation of 'past acts' conferred the absolute security on all non-Indigenous titles. Provisions dealing with 'future acts' established a framework for the interplay of all land interests in future dealings. The belated recognition of native title necessarily created complexity in the structure of the NTA.

5 National Indigenous Working Group on Native Title, *Co-existence—Negotiation and Certainty*, Canberra, April 1997
6 ibid., pp9–10. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996–97*, Human Rights and Equal Opportunity Commission (HREOC), Sydney, 1997, pp11–12.
7 *Mabo (No. 2)* per Deane and Gaudron JJ, p109.

The original Act was by no means perfect. Criticisms of certain core, structural principles of the legislation were made in the Aboriginal and Torres Strait Islander Social Justice Commissioner's First Report 1993.

In the original NTA, the validation of past acts required the unequivocal suspension of the RDA, effected by section 7(2) NTA. This was agreed to by Indigenous representatives in acknowledgment of the legitimate need to provide security for all non-Indigenous titles granted before the recognition of native title. Section 7(1) NTA purported to expressly maintain the protection of the RDA in all other circumstances. It was avowed that the NTA should conform with the principle of non-discrimination.

The procedural protection embodied in the right to negotiate over activities affecting native title land did not satisfy the Indigenous position that such activity should only proceed with the consent of the native titleholders. It was argued that consent was necessary to reflect the traditional right to control access to country. Nonetheless, the right to negotiate formed a core component of the protection of native title interests provided by the NTA. Together with the 'freehold test', it contributed in a major way to the balance between Indigenous and non-Indigenous interests which was agreed in negotiations between the Commonwealth Government and Indigenous representatives.

The right to negotiate was included in the original NTA in recognition of the 'special attachment of Aboriginal and Torres Strait Islander people to their land.'[8] The Government considered this particular form of procedural protection to be a special measure under Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and section 8 of the RDA.[9]

The Indigenous position held that the right was a diminished statutory reflection of an inherent right of title and was, accordingly, required as a matter of principle. On either analysis the right to negotiate responded to the distinctive character of Aboriginal and Torres Strait Islander laws and customs. It offered some protection based on the recognition of the unique spiritual, social and cultural dimensions of the Indigenous relationship to land.[10]

The grant of a leasehold title was considered by the Commonwealth Government to extinguish native title, and this view is recorded in the preamble to the Act. This view was in contrast to the Indigenous position on the effect of a leasehold grant. No substantive provision of the NTA dealt directly with this matter. It was anticipated that the effect of the grant of various interests in land, and in particular those interests described as 'pastoral leases', would await judicial determination. The Wik proceedings were actually commenced before the passage of the NTA in 1993.

Seen from an Indigenous perspective, these and other aspects of the original NTA rendered it very much a less than perfect legislative response to the recognition of native title. However, overall it achieved a reasonable balance of interests.

8 Commonwealth of Australia, *Mabo – The High Court Decision on Native Title*. Discussion Paper, Commonwealth Government Printer, Canberra, 1993, p102.
9 The RDA implements CERD in domestic law: Preamble, *Racial Discrimination Act 1975* (Cth).
10 Chapter three of the report argues that the right to negotiate cannot be characterised as a special measure.

After its enactment, several matters created a pressing need for amendment:

- The unexpected implications of the Brandy decision[11] for the role of the National Native Title Tribunal necessitated amendment of the Tribunal's function.
- The Lane and Waanyi decisions[12] suggested a need to revisit those provisions setting the threshold for the registration of native title applications. Registration provided native title claimants with access to the right to negotiate. All stakeholders agreed that the threshold was too low.
- The absence of a sound statutory basis for the negotiation of broad reaching agreements generated an interest among all stakeholders in amendments to support such agreements.
- The decision in *Western Australia v Commonwealth*[13] revealed that the provisions of the NTA override and exclude the RDA from the NTA's field of operation, despite the apparent protection offered by section 7(1).

In the course of 1996 'workability' became the utilitarian catchcry coined by the Commonwealth Government to justify extensive amendments of the NTA, addressing these and other more contentious matters. It was not proposed to amend section 7 to provide the protection of the RDA to native title.

Then, in late 1996, the High Court delivered its judgment in Wik.

The reaction to the High Court of Australia sparked by the decision was intense. The focus swiftly shifted to the NTA and proposals for its amendment. Legislation designed to protect native title, and to facilitate its accommodation within the Australian legal system, was seen as a potential vehicle for 'blanket extinguishment' or, at least, 'bucketloads' of extinguishment. A great deal of confusion was created by the rhetoric which characterised the public debate.[14]

'Certainty' became the new catchcry for the legislative response to Wik. This apparently neutral word carried a great deal of value laden assumptions concerning the level of protection that native title should be accorded under amendments proposed in the Ten Point Plan.[15]

Underpinning these amendments was a major assumption concerning the concept of equality. The Commonwealth Government was, and remains, committed to the notion of formal equality.

Formal equality asserts that all people should be treated in precisely the same way: to recognise different rights is inherently unfair and discriminatory. Emphasis is placed on formal equivalence judged by a narrow, direct comparison of rights. Difference is necessarily discriminatory. Within this construction, any distinctive right accorded to native titleholders or native title applicants is seen as inherently racially discriminatory, unless it is justified as a 'special measure' under Article 1(4) of CERD and section 8 of the RDA. This view regards special measures as being discretionary privileges which the Australian parliament is at liberty to reduce or remove completely.

11 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
12 *Northern Territory v Lane* (1995) 138 ALR 544; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 ('Waanyi').
13 (1995) 183 CLR 373.
14 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996–97*, op.cit., considered the rhetoric in detail. See Chapters 1 and 6 in particular.
15 Senator the Hon N. Minchin, Federal Government's Response to the Wik decision: The Ten Point Plan, Commonwealth of Australia, Canberra, 1997.

The application of the concept of formal equality is seen most clearly in the amendments to the right to negotiate relating to pastoral leasehold land. Under the Government's analysis, the right to negotiate was a special measure. Its removal was a matter of pure discretion. In relation to pastoral leasehold land the right was removed so that native titleholders would have the same procedural rights as pastoralists.

Formal equality can be contrasted with substantive equality which has a broader frame of reference. Substantive equality recognises that different treatment is not only permitted, but may be required to achieve real fairness in outcome. Differential treatment may be necessary to respond adequately to the particular circumstances of a person or a group or to reflect the special character of their interests. For example, the particular needs and interests of war veterans are taken into account through special benefits tailored to their particular needs.[16] The recognition of difference applies to all Australians, not just Indigenous Australians. A rational, proportional accommodation of the distinctive rights of native titleholders and native title applicants is not racially discriminatory: in fact, different treatment may be required to avoid racial discrimination.

Indigenous spiritual beliefs are unique in form. Sacred sites and places of ceremony lie embedded within the landscape of Australia. Because of their nature they require special legislative protection. This is not preferential treatment. It is appropriate protection of the common human right to freedom of religious practice under Articles 18 and 27 of the International Covenant on Civil and Political Rights (ICCPR).

Similarly, the right to negotiate is required not as a 'special privilege' but as a means of achieving substantive equality in the protection of a distinctive and particularly vulnerable form of property. The direct comparison of the right to negotiate with the rights of pastoral leaseholders compares incommensurable interests only brought together by an accident of history – the grant of a pastoral lease – which has already adversely affected the underlying native title. Even if formal equality were a proper standard to apply, the selection of a pastoral lease as a comparable title or benchmark of native title rights would be inappropriate.

This report primarily examines the concept of formal equality which provides the foundation for the amendments to the NTA by the Australian Parliament.[17] It is contrasted with a broader human rights framework and international standards relating to equality and the principle of non-discrimination. Particular attention is given to the reduction and removal of the right to negotiate and to the national standards set where it is permitted to replace that right with state and territory procedures of objection and consultation. The 'validation' and 'confirmation' provisions, registration test and other amendments are also considered within this human rights framework.

This report contends that a cascading series of amendments, effected through such devices as 'validation' and 'confirmation', subordinate the native title interests of Aboriginal and Torres Strait Islander people in a racially discriminatory manner. Through complex and subtle means the amendments either adversely affect or extinguish native title while permitting the expansion of non-Indigenous interests in land. For example, the amendments include provisions which purport to 'confirm' the application of the common law to extinguish native title. Various interests granted in the past, often the distant past, are classified as previous exclusive possession acts, with the effect that they are deemed to have permanently extinguished native

16 A further example of differential treatment is programs relating to the particular needs of rural and remote Australians. For example, Prime Minister and Minister for Primary Industries and Energy, Agriculture – Advancing Australia, Rural Communities Program, Commonwealth of Australia, September, 1997.

17 The *Native Title Amendment Act 1998* (Cth) was passed on 8 July 1998 and amends the *Native Title Act 1993* (Cth). Most of the amendments came into force from 30 September 1998.

title. Schedule 1 of the amended *Native Title Act 1993* proclaims a list of interests deemed to extinguish native title. The list runs to 50 pages in length. An excerpt from the schedule is reproduced overleaf, by way of illustration.

The list of scheduled interests goes far beyond its purported scope of merely confirming the application of the common law.[18] The schedule constitutes the present day extinguishment of native title. It constitutes a repetition of the historical pattern of dispossession. It is by no means a reconciliation or balancing of interests.

The cumulative effect of the various amendments is disturbing. There is, however, room for debate about the precise nature of the future impact of some of the amendments. For example, it is not known at this stage what the effect will be of state or territory based legislation, authorised by the Commonwealth amendments, which may replace the right to negotiate with a right of consultation and objection in certain circumstances. However, it is appropriate that this report considers the human rights implications of the minimum national standards that the Commonwealth legislation establishes.

The actual implementation of several amendments, such as the potential to acquire native title for the up-grading of pastoral leases, will be closely monitored. The degree to which other amendments are racially discriminatory in subordinating and removing the rights of Aboriginal and Torres Strait Islander peoples, may be open to some legitimate difference of opinion.

Of one thing there can be no dispute. The amended Section 7, which deals with the inter-relationship of the *Native Title Act 1993* and the *Racial Discrimination Act 1975*, ensures that native title legislation is unconstrained by the only national standard of non-discrimination available under Australian law.

The RDA was introduced to comply with Australia's obligations as a signatory to CERD. It is our country's primary legislative guarantee to all citizens that they will not be treated in an unequal, racially discriminatory, way: that our law will respect internationally established standards. The absence of such a guarantee for the native title interests of Aboriginal and Torres Strait Islander Australians has been consciously confirmed by the Australian Parliament.

In *Western Australia v Commonwealth* the High Court concluded that section 7, as it was originally enacted, was in fact ineffective to provide general RDA protection in the face of the specific, subsequent provisions of the NTA:

> Section 7(1) provides no basis for interpreting the Native Title Act as subject to the Racial Discrimination Act. The Native Title Act prescribes specific rules governing the adjustment of rights and obligations over land subject to native title and s 7(1) cannot be intended to nullify those provisions ...[19]

Accordingly, the NTA covers the field in matters pertaining to native title while the RDA continues to operate on matters outside the scope of the NTA. The recent amendments to the NTA provided an opportunity to redraft section 7 in order to effectively apply the RDA to the provisions of the NTA.

Appropriately amended, this section could have made it unequivocal that the provisions of the NTA are subject to the provisions of the RDA. There was precedent for this level of protection.

18 This is discussed further in Chapter 2 in relation to Justice Lee's decision in *Ward (on behalf of the Miriuwung and Gajerrong People) v Western Australia* (1998) 159 ALR 483. This decision is currently on appeal to the full Federal Court.

19 *Western Australia v Commonwealth* (1995) 183 CLR 373, per Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ, p484.

The *Social Security Legislation Amendment (Newly Arrived Residents' Waiting Periods and Other Measures) Act 1997* (Cth) contained an equivalent section defining the interaction of the RDA with Social Security legislation:

> **Section 4 – Effect of the *Racial Discrimination Act 1975***
>
> (1) Without limiting the general operation of the R*acial Discrimination Act 1975* in relation to the provisions of the *Social Security Act 1991,* the provisions of the *Racial Discrimination Act 1975* are intended to prevail over the provisions of this Act.
>
> (2) The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act 1975*.

A similar amendment was not adopted in the amended NTA. Section 7 was amended in the following terms:

> **7 Racial Discrimination Act**
>
> (1) This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*.
>
> (2) Subsection (1) means only that:
>
> (a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
>
> (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.
>
> (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.

As amended, section 7 does not ensure the protection of native title by the general standards of equality and non-discrimination enshrined in the RDA. The exercise of powers unambiguously authorised by the NTA is freed from the constraints of the RDA.

The central, pivotal international standard of non-discrimination has been abandoned by the Australian Parliament in setting the balance between Indigenous and non-Indigenous rights. A void was inadvertently created by section 7 as it was originally drafted. In the recent amendment of the section this void was unambiguously confirmed.

The criterion employed to strike the balance between Indigenous and non-Indigenous interests was home crafted: a notion of 'formal equality' which is out of kilter with the direction of international law and the concept of equality as recognised within the human rights framework. Disregarding the particular character of native title, its source in the traditional laws and customs of Aboriginal and Torres Strait Islander peoples, its spiritual, social and cultural depth, a right to land for the purposes of pasturing sheep and cattle for a period of time, has become a benchmark of equivalence. In other circumstances other, equally arbitrary, benchmarks are used.

The rationale of direct comparison with the rights of the adjacent title, such as a pastoral lease, leads to unnecessary complexity. It creates different rights as between native titleholders depending on where their interests are located. The rights attached to their title change like a chameleon, depending on whether their title stands on a pastoral lease, within a town boundary or on vacant Crown land.

Such local rules for equality are an embarrassment to our national values viewed from an international perspective. Viewed from an Indigenous perspective, they are simply unfair and offer no incentive to make peace with the past. Viewed from a perspective which values the broader, long term interests of all Australians, they are highly regressive in their domestic impact on our potential for reconciliation.

The Mabo decision reflects the values of a modern nation moving forward to achieve a fresh relationship between its original inhabitants and all those who came after. It is a relationship based firmly on genuine principles of equality and non-discrimination. As Justice Brennan stated:

> It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination … Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted …[20]

The social division which can arise from the perception that Aboriginal and Torres Strait Islander people hold special rights superior to other Australians, no matter how misconceived this view may be, must be honestly acknowledged as damaging to our sense of community and common purpose. It should also be acknowledged that, in a time of great stress in the rural and remote areas of Australia, the management of the tensions generated by the Wik decision and genuine anxiety about its implications, created a very hard task for the Government. This was particularly so as the amendments were formulated against a backdrop which included the emergence of the One Nation Party.

The practical realities of governance and the importance of perceptions of fairness were certainly not over-looked by the Commonwealth Government. Respect for human rights cannot be considered in some ideal vacuum removed from the real world. As Mick Dodson, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, predicted in his First Report 1993 regarding the original NTA, the final terms of the legislation:

> will be determined in the heat of public debate and whatever settlement is arrived at, it will almost certainly represent a compromise between appeals to immutable standards of human rights and the immutable urgings of self-interest.[21]

To acknowledge that successful political resolutions inevitably represent a compromise is not to abandon regard for principle. It is to recognise that the political process must consist of negotiation to arrive at a point of settlement in which the interests and concerns of all parties are properly valued and taken into account. Where the end point entails significant concessions of fundamental rights, these can only be made by the party affected. The process of negotiation establishes the legitimacy of the end resolution which, in turn, provides a stable, durable basis for future relations. The amendments to the NTA do not rest on such a basis.

While the Commonwealth Government considers that the Ten Point Plan already represented a compromise position, proved by the fact that 'no single interest got all they wanted'[22] it is clear

20 *Mabo (No. 2)* per Brennan J, pp41–42
21 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1993–94*, HREOC, Sydney, 1994, p16.
22 Senator the Hon N. Minchin, Fairness and Balance – The Howard Government's Response to the High Court's Wik Decision. An Overview of Native Title and the Commonwealth Government's Native Title Amendment Bill 1997, January 1998, para 2.

that the Plan, the process of its translation into legislation and the final terms of the legislation, drew no Indigenous allegiance.

Indigenous representatives rejected both the substance of the *Native Title Amendment Act 1998* and the process by which it was arrived at. The National Indigenous Working Group prepared a statement, which was read into the parliamentary record on the penultimate day of debate on the amendments. The statement reads, in part:

> We, the members of the National Indigenous Working Group, reject entirely the Native Title Amendment Bill as currently presented before the Australian Parliament.
>
> We confirm that we have not been consulted in relation to the contents of the Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.
>
> We have endeavoured to contribute during the past two years to the public deliberations of native title entitlements in Australian law.
>
> Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the Australian Government to properly integrate our expert counsel into the law making procedures of government.
>
> We are of the opinion that the Bill will amend the *Native Title Act 1993* to the effect that the Native Title Act can no longer be regarded as a fair law or a law which is of benefit to the Aboriginal and Torres Strait Islander Peoples.
>
> We remind the Australian Government and the Australian Peoples that the Native Title Act is not the mechanism which creates our ownership of land, waters and environment.
>
> Our ownership derives from our ancient title which precedes colonisation of this continent and our ownership must continue, in Australian law, to be recognised in accordance with our indigenous affiliation with the land, waters and environment.
>
> Our relationship with the land, waters and environment is a complex arrangement of spiritual, social, political and economic associations with the land which cannot be replicated, substituted, replaced or compensated.
>
> We regard fair and equal treatment of our indigenous land rights, or native title, in comparison to the land title of other Australians, to be determined by the level of respect and regard for all titles and not by the assimilation of titles.
>
> It is therefore a fundamental flaw of the Australian Government to consider that fairness or equality in the Native Title Act has been achieved by limiting the rights of Aboriginal and Torres Islander Peoples, for example to the rights of pastoral lessees ...
>
> The National Indigenous Working Group is extremely disappointed that the Australian Government has failed to confront issues of discrimination in the native title laws and implicitly provoked the Aboriginal and Torres Strait Islander Peoples to pursue concerns through costly and time consuming litigation, rather than through negotiation ...
>
> We are determined that the future generations of Australian society are raised and educated in a spirit of tolerance and understanding which will ensure that the measures of justice important to the reconciliation between our peoples can be appreciated and embraced ...

> The National Indigenous Working Group on Native Title absolutely opposes the Native Title Amendment Bill, calls upon all parliamentarians to cast their vote against this legislation, and invites the Australian Government to open up immediate negotiations with the Aboriginal and Torres Strait Islander Peoples for coexistence between the Indigenous peoples and all Australians.[23]

The substance of the assertions in this statement are considered in the body of this report. The immediate purpose of considering the statement here is to demonstrate that the aftermath of the amendment process has been a spoiling of our potential for any reconciliation based on a perceived alignment of interests.

The legislative response to the Wik decision which proffered a basis for the sharing of interests has been lost, at least for the present. Both the process and the substance of the amendments have been destructive of the most valuable resource we have in working towards reconciliation: trust.

It may be thought that the position of Aboriginal and Torres Strait Islander peoples is unreasonable, that their claims are inflated, that they ask too much. There is no doubt that a significant number of Australians believe that. That perception must be acknowledged and addressed constructively. Similarly, the deep sense of grievance felt by many Indigenous Australians must also be acknowledged as sincere.

The recognition of native title, together with the ventilation of issues such as the separation of Aboriginal and Torres Strait Islander children from their families and the constant, seemingly intractable, backdrop of Indigenous disadvantage on every social indicator, give some non-Indigenous Australians a feeling that the problems are growing, not diminishing, that they are overwhelming and defy solution. This is said, not to justify the appeasement of prejudice, but to make the point that, as matter of reality, reconciliation will never be imposed, it must be sought. It will require a genuine movement, based on a realisation of our shared interests, by a critical mass of the entire Australian community.

There is tangible proof of this potential for a convergence of interests, worked out in a practical way by ordinary people dealing directly with each other, setting a new basis for their relationship.

The final chapter of this report considers the growing number of agreements which have been negotiated between Indigenous and non-Indigenous people and communities. Not all were specific settlements of native title rights, but in most instances native title was a catalyst. These agreements are the realisation of constructive outcomes through negotiation. When they are considered certain factors become immediately apparent.

The first is that, contrary to the continual claims that the native title process does not work, the past five years have seen the emergence of a large number of highly productive agreements. They represent a positive approach based on mutual respect, co-existence, the recognition and protection of native title.

The second is that the scope and potential of such arrangements could be enhanced and strengthened with the support of a more sophisticated statutory framework. The amendments to the NTA relating to Indigenous Land Use Agreements (ILUAs) provide such a framework.

The ILUA provisions are a positive feature of the amendments. They offer an effective foundation to move beyond reconciliation as an abstract concept: to set about the real task of working out a fair and durable balance between the interests of Indigenous and non-Indigenous

23 Hansard, Senate, 7 July 1998, pp4352–54. The NIWG statement is reproduced in full in Appendix 1 of this report.

Australians. The very process of striking this balance will bring about a new engagement. The difficulties of arriving at agreement should not be underestimated, but the Quandamooka Native Title Process Agreement with Redland Shire Council illustrates the starting point. Goodwill and commonsense may see it through:

> **8.2 The parties agree that:**
>
> (a) Negotiations shall be conducted in good faith;
>
> (b) It shall be necessary for the parties to consult with their respective principals prior to the finalisation of any agreements;
>
> (c) The parties may, by agreement, request the assistance of the National Native Title Tribunal to resolve any negotiation impasse by way of mediation;
>
> (d) The custodial obligations and the aspirations for self-determination of the Quandamooka people shall be respected;
>
> (e) The cultural decision making processes of the Quandamooka people shall be respected;
>
> (f) The rights and responsibilities of the Redland Shire Council shall be respected;
>
> (g) The negotiations shall foster reconciliation between Aboriginal and non-Aboriginal people; and
>
> (h) The Agreement on Native Title (Paragraph 6.2(e)) shall require adequate resourcing.[24]

There is a way forward. There is also a natural bedrock to the Indigenous position:

> We can embrace pastoralists and their cattle in our land. We have no problem with that.
>
> We can negotiate our native title rights. That is no problem either.
>
> We can negotiate access, and movement around their leases – gates, roads, rubbish – all of those things.
>
> What we cannot do is allow our identity, and the birthright of our identity, to be rubbed out.
>
> No human beings on earth can allow that.
>
> None.[25]

24 The Quandamooka agreement is extracted at Appendix 2. The agreement is available in full on the National Native Title Tribunal's Agreements database on the internet.

25 Neowarra, P, 'Ngarinyin response to the Wik decision' (1997) 4(1) *Indigenous Law Bulletin* 16.

16 Appendix 3

16.1 Queensland Statutory Regime Overview: Native Title, Cultural Heritage, Land Rights and Human Rights

The following information is intended to detail the legislation that impacts on Traditional Owners in respect of native title, cultural heritage, land rights and human rights in one state – Queensland. The content sets out the following:

A. each statutory regime

B. how the regimes interact with development (mining, petroleum, residential etc.)

C. the interaction between Queensland state laws and Commonwealth laws regarding native title, cultural heritage, land rights and human rights, with regard to the obstacles each regime presents to individual Traditional Owners and groups

D. proposed reforms currently being considered by the Queensland State or Federal Parliament

E. whether any statutory regime has specific reference to gender issues.

This information was current as at January 2024 but is not intended to be exhaustive and should not be relied upon as legal advice. The purpose of the information is to provide a high-level overview of each piece of legislation and convey the complexity of the relevant legislative picture that Traditional Owners are trying to work within. Each piece of legislation is extremely complex, and the information must always be considered with reference to the facts in any particular situation.

(a) Statutory regime: *Native Title Act 1993* (Cth) (NTA)

Short summary of object of Act and regime created

The main objects of the NTA are to:

1. provide for the recognition and protection of native title
2. establish ways in which future dealings affecting native title may proceed and to set standards for those dealings
3. establish a mechanism for determining claims to native title
4. provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

The NTA recognises and protects native title. It provides that native title cannot be extinguished contrary to the Act.[306]

The NTA also provides for the Federal Court to make determinations of native title and compensation, and establishes the National Native Title Tribunal (**NNTT**).

Interaction with development (i.e. what rights do these statutes give Traditional Owners when development impacts them)

The NTA grants protections to Traditional Owners where native title has not been extinguished in the area of development.

In order to establish that native title exists, a claimant application (Form 1) must be filed in the Federal Court of Australia[307] for a determination of native title over an area. The Applicant[308] must demonstrate that they are authorised[309] to make the application by the native title claim group.[310] Once an application is made, it must then pass the registration test.[311] Once a claim is registered the claimants bear the burden of providing the existence of native title as defined in section 223 of the NTA.

If the claim is registered, the claim group receives procedural rights under the NTA in relation to future acts. These rights include the right to negotiate for certain activities such as mining tenements, as well as other procedural rights depending on the type of activities taking place on the land or waters.

If native title is established and a determination of native title is made by the Federal Court, the rights recognised will be specific to each determination. For example, exclusive native title[312] may be recognised over some areas, or more commonly non-exclusive native title,[313] and in other areas native title will have been found to have been extinguished. Native title rights if recognised may include the right to hunt, fish and gather, maintain and protect sites, to participate in ceremony, to take and use resources, and to camp and live on the land. The rights recognised depend on the particular traditional laws and customs of the native title claim group, and what is able to be proven through the provision of expert and lay evidence.

Therefore, where a native title claim is registered, or determined, Traditional Owners have certain rights under the NTA depending on the nature of the activities proposed. For example, native title rights are more likely to create opportunities for Traditional Owners to be engaged in mineral or resource projects, as those are more likely to be undertaken over land such as pastoral leases or unallocated state land (where native title has not been extinguished).

The NTA has a future act regime[314] which sets out the different types of future acts, the process that must be followed for the particular act to be validly done, and the procedural rights afforded to the native title party. At a high level, a future act is an act done after 1 January 1994

that affects native title rights[315] for example a development, the making, amendment or repeal of legislation, and the grant or renewal of a licence of permit. Future acts will only be valid if they are undertaken in accordance with the NTA.

The NTA provides for two kinds of agreements, Indigenous Land Use Agreements (**ILUA**)[316] and section 31 agreements.

An ILUA[317] is a voluntary agreement made between native title parties and other people or bodies about the use and management of land and/or waters. For example, allowing a future act (i.e. a development) to be done on native title land; providing use and access to pastoral land, compensation and other matters. The NTA requires that ILUAs are to be registered by the Native Title Registrar. The Registrar must also keep a record of section 31 agreements. You can search for both through the NNTT's website where an extract is publicly available.

Section 31 agreements are to be negotiated in good faith and record the consent of the native title claimants/holders to the doing of a particular future act (for example the grant of a mining tenement).[318] Generally a separate ancillary agreement is also entered into alongside the section 31 agreement by the parties. This ancillary agreement is confidential between the parties and sets out the relationship and agreement that has been reached between the parties. The grant of a mining tenement is an example of a future act where a section 31 agreement may be entered into. In other instances, such as the granting of a permit relating to the management or regulation of living aquatic resources[319], the native title party only receives the right to comment under the NTA.

The Applicant or Board of the Prescribed Body Corporate (**PBC**) is able to negotiate an ILUA or section 31 agreement, however before either agreement can be entered into on behalf of the group it needs to be authorised.

The process for authorisation varies slightly between the two types of agreements[320], whether there is a native title claim or determination, and the type of agreement.[321] Where native title exists, before an 'area ILUA' can be registered it must be authorised by all those people who hold, or may hold native title. If it is a body corporate ILUA, the PBC which holds the native title on behalf of the common law holders must consult with and obtain the consent of the common law holders before making a decision to enter into the agreement. It is also important to note that decisions are made by the relevant group in accordance with their internal decision-making processes. There is no set time frame for completing this process, instead it is imperative that there is free, prior and informed consent to ensure it is authorised properly and to avoid any opposition to the ILUAs registration. As native title rights exist where native title has not been extinguished by a past act (e.g. an act undertaken by government prior to the commencement of the NTA), the NTA gives limited rights to Traditional Owners in respect of developments like urban residential developments where the land underlying such developments typically is freehold, and native title has been extinguished. In this instance, and as discussed below, the *Aboriginal Cultural Heritage Act 2003* (Qld) comes into play.

Proposed reforms (i.e. are there any proposals on the table to reform these statutes in a relevant way?)

At the time of preparing this Report, there are no proposals to reform the NTA.

It is however worth noting that the NTA was amended in 2021, as well as other associated legislation, including the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (**CATSI Act**) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth). Those amendments generally provided some positive changes to the relevant legislation. Here is a factsheet produced by the NIAA which explains the changes.

However, there remain some criticisms of the existing process under the NTA. These include:

1. the onus of proof falling on the native title party, potentially causing further trauma;
2. how time consuming and onerous the process of seeking a determination can be, and that sadly key knowledge holders sometimes pass before a determination is made;
3. how resource intensive it is for all parties to the proceeding, in particular the Traditional Owners. For example, filing a native title claim and preparing all of the necessary material and evidence to have it registered, proving connection, negotiating a consent determination and having to engage in often complex negotiations with stakeholders including government agencies, infrastructure providers and resource companies through the future act process in the NTA;
4. the native title process involves a significant amount of free time and resources by Traditional Owners, ranging from members of the Applicant and Board of Directors, down to members of the claim group; and

Specific gender issues (both actions and omissions)

The NTA does not deal with any specific gender issues. However, it is common in native title claims for evidence to be taken on a gender specific basis. This is because gender-based secrecy is an integral feature of most Aboriginal societies under traditional laws and customs. For example, there may be some sites that are women's sites (or men's sites), and there may be others that only certain families or individuals have knowledge of, or have the authority to speak for.

In a native title claim gender restricted evidence can be important to establish and substantiate connection to Country. In QLD the State has prepared Guidelines for preparing and assessing connection material for native title claims.[322] Each claim is assessed on a case-by-case basis. However, these guidelines provide guidance as to what evidence the State is looking to receive. For example, one of the elements to proving connection is that there is a society which is bound by the acknowledgment and observance of laws and customs. Amongst other things, this may involve gender specific evidence.

It is acknowledged that having to prove connection and provide evidence can in itself be extremely difficult and sensitive. When navigating the processes under the NTA to obtain evidence for the purposes of providing connection, these sensitives at times need to be considered and accommodated in a culturally sensitive manner.

These sensitivities can also sometimes come into play when dealing with the future act regime under the NTA. For example, through the right to negotiate, an assertion that the expedited procedure is attracted, or if a future act determination application is made. For example, if a future act determination application is made, the NNTT will conduct an inquiry into whether the future act is able to proceed. In that instance, the Tribunal must take into account the matters set out in section 39 of the NTA. This is similar to matters where it is asserted that the expedited procedure applies. In that instance, if the native title party opposes that assertion, they must address why the matters set out in section 237 of the NTA don't apply. Other than where the right to negotiate applies, the Tribunal generally makes directions, and the relevant parties are required to put on submissions and evidence.

Given the nature of those elements the onus generally falls on the native title party to prove that the activity should not proceed, or should proceed with conditions. That evidence may often be gender or family group specific depending on the location of the activity.

(b) Statutory regime: *Aboriginal Cultural Heritage Act 2003* (Qld) (ACHA); *Torres Strait Islander Cultural Heritage Act 2003* (TSICH Act)

The main purpose of the ACHA is to provide effective recognition, protection and conservation of Aboriginal cultural heritage.[323]

The following fundamental principles underlie the main purpose of the ACHA:

1. recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices
2. Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage
3. it is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage
4. activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to 'law and country'
5. there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.

Interaction with development (i.e. what rights do these statutes give Traditional Owners when development impacts them)

Once a claim is authorised and registered, in addition to the rights imposed under the NTA, the native title party has cultural heritage rights under the ACHA (or TSICH Act).

The ACHA[324] identifies who the relevant party is for the purpose of identifying who should be involved in the assessment and management of cultural heritage. In QLD, identifying the Native Title Party (Aboriginal Party) is linked to the NTA, which creates certainty for proponents. In essence, the Native Title Party for an area is defined as one of the following:

- native title holders – native title has been recognised by the Federal Court of Australia
- registered native title claimants – a native title claim is before the Federal Court of Australia
- previously registered native title claimants – native title claims that have been removed from the Register of Native Title Claims administered by the NNTT.

With respect to previously registered native title claimants, they will continue to be the Native Title Party for that area providing:

- there is no other registered native title claimant for the area; and
- there is not, and never has been, a native title holder for the area.

In the event that there is no Native Title Party for an area, the ACHA provides that a person will be the Aboriginal party[325] for the area if the person:

- is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and
- has responsibility (or is a member of a family or clan group that is recognised as having responsibility) under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area.

Unlike the NTA, under the ACHA and TSICH Act the Native Title Party (Aboriginal Party) has cultural heritage rights regardless of the underlying tenure. Therefore, Aboriginal and Torres Strait Islanders have cultural heritage rights even when native titled has been extinguished, for example where the tenure is freehold. This can be particularly relevant for developments.

In Queensland, a cultural heritage duty of care[326] is imposed on any person carrying out an 'activity'. This duty requires all reasonable and practical measures be taken to ensure the activity does not harm matters of Aboriginal cultural heritage.

If native title has been found not to exist, or is extinguished the NTA does not apply. In this instance, unless an environmental impact statement (**EIS**) is required, a development can generally proceed without needing to negotiate a Cultural Heritage Management Plan (**CHMP**). However, the proponent is still required to manage its duty of care under the ACHA. Regardless of there being no strict legal requirement, the proponent can voluntarily seek to enter into a CHMP and have it approved under Part 7 of the ACHA. This is best practice and often what happens in Queensland.

In these instances, if proponents enter into a CHMP with the relevant Aboriginal Party,[327] compliance with the terms of that CHMP will mean that the proponent is deemed to have met its duty of care. This ensures that there is a process, and certainty for all parties. It is also ensures that Aboriginal parties are engaged with, and the protection and management of cultural heritage becomes an integral part of the project.

There is also a statutory time frame[328] imposed under Part 7, therefore, CHMP negotiations cannot be prolonged unnecessarily. There is no right of veto under the ACHA. When an agreement cannot be reached, the proposed CHMP can be referred to the QLD Land Court where the Court will consider the matters and make a recommendation to the Minister for a decision. If an agreement is reached, the approved CHMP is placed on the Aboriginal and Torres Strait Islander cultural heritage register.[329] Although this is the process, invoking Part 7 and taking a matter to the Land Court is not necessarily common, and generally the parties will work together to try and reach agreement.

CHMPs set out how land use activities can be managed to avoid or minimise harm to Aboriginal cultural heritage. They often provide for processes as to how Aboriginal cultural heritage will be identified in a project area prior to development, and systems for what is culturally appropriate if Aboriginal cultural heritage is identified (e.g. relocated or an exclusion zone implemented). CHMPs also often involve monetary and non-monetary benefits being delivered to Aboriginal parties as consideration for their agreement. This is not strictly required under the legislation and is negotiated on a case by case basis between the parties.

Proposed reforms (i.e. are there any proposals on the table to reform these statutes in a relevant way?)

There is an ongoing review of the ACHA in Queensland. In December 2021, an Options Paper was released by the Queensland Government.

A suite of proposals (both legislative and non-legislative) have been developed to increase the role of Aboriginal and Torres Strait Islander people in managing and protecting their cultural heritage, as well as strengthening existing and introducing new compliance mechanisms.

Part of this review is focussed on reframing the definition of Aboriginal party. The changes propose to amend the definition in two instances – (1) where there is not a registered native title claim, or (2) if the area is subject to a negative determination. In these instances, it is proposed that section 35(7) will be removed and therefore any previously registered native title claimant will no longer be the native title party. This will remove the 'last man standing' scenario, and allow any Aboriginal and Torres Strait Islander person who claims to have a connection to the area, the opportunity to apply to be recognised as the Aboriginal party.

The review is also focussed on providing opportunities to improve cultural heritage protection, and promoting leadership in the cultural heritage space by First Nations peoples.

Specific gender issues (both actions and omissions)

Agreeing on processes for identifying and managing Aboriginal cultural heritage can be complex and sensitive, especially when dealing with sites of cultural significant, and also where those sites, or finds are gender specific. Proponents or archaeologists can assess a site for suspected cultural heritage, but only the Aboriginal Party can determine what Aboriginal cultural heritage is. That is why it is best practice to engage with the Aboriginal Party from the very outset.

Identifying and discussing what Aboriginal cultural heritage is with the Aboriginal Party requires respect, and culturally sensitive engagement. For example, in some instances, the cultural heritage may involve a gender specific site or story. In those instances it is likely that only a man or woman, or particular family, will have the cultural authority to speak for that site. Further, some information may be sensitive, and sometimes the reason why a site or object is culturally significant can't be disclosed. How much can be disclosed, is to be determined by the group in accordance with their traditional laws and customs.

(c) Statutory regime: *Human Rights Act 2019* (Qld) (HRA)

The main objects of the HRA are to:[330]

1. protect and promote human rights
2. help build a culture in the Queensland public sector that respects and promotes human rights
3. help promote a dialogue about the nature, meaning and scope of human rights.

The regime aims to protect every person's human rights in Qld, regardless of residency status.[331] Further, the Qld public sector must consider the impact of their decisions on an individual's human rights, and make decisions in a way that is compatible with human rights (**compatibility principle**).[332]

The HRA specifically recognises and protects the distinct cultural rights of Aboriginal and Torres Strait Islander peoples. In particular, their 'distinctive and diverse spiritual, material and economic relationship' with Queensland's 'lands, territories, waters and coastal seas.'[333]

However, human rights may be limited if the justification for doing so is reasonable in a free and democratic society based on human dignity, equality and freedom,[334] amongst other factors.[335] Otherwise the limitation contravenes the compatibility principle.

Interaction with development (i.e. what rights do these statutes give Traditional Owners when development impacts them)

Human rights complaints may be made to the Human Rights Commissioner by an individual the subject of a public entity's alleged contravention of s 58(1) of the HRA, or an agent of the individual or a person authorised in writing by the commissioner to make a complaint for the individual.[336] The complaint can also only be made by someone personally affected by a situation. However, the agent of the individual could be a community group or support organisation for people from affected communities.

Under the HRA, public entities[337] include:

1. state government departments and agencies
2. public service employees
3. Queensland Police Service and other emergency services
4. State Government Ministers
5. public schools
6. public health services, including hospitals
7. local governments, councillors, and council employees
8. organisations providing services of a public nature.

However, under the HRA, a public entity does not include:

1. the Legislative Assembly or a person performing functions in connection with proceedings in the Assembly, except when acting in an administrative capacity; or
2. a court or tribunal, except when acting in an administrative capacity; or
3. an entity prescribed by regulation not to be a public entity.[338]

If a public entity makes a decision that is incompatible with a human right, or fails to give proper consideration to human rights when making a decision, complainants are entitled to seek relief or remedy if the decision also relates to an action available under another law.[339] For example, the EDO is representing First Nations complainants objecting to a mining lease and environmental authority for a coal mine under sections 216 and 217 of the *Environmental Protection Act 1994* (Qld) and sections 260 and 261 of the *Mineral Resources Act 1989* (Qld).[340] The complainants are also arguing that the decision to grant the lease and authority is incompatible with a number of human rights under the Act, including the cultural rights of Aboriginal and Torres Strait Islander people enshrined in section 28 (set out below).

However, the making of a human rights complaint to the Commissioner is available regardless of any grounds under another act, if the complainant is the subject of the entity's contravention of the compatibility principle.[341]

The cultural rights referred to above that are enshrined in section 28, include:

1. maintaining and developing their traditional knowledge, spiritual practices, observances, beliefs and teachings
2. maintaining and using Indigenous languages
3. maintaining kinship ties
4. teaching cultural practices and educating children;
5. maintaining distinctive spiritual, material and economic relationships with land, water and other resources that there is a connection with under traditional laws and customs
6. conserving and protecting the environment and productive capacity of their land, waters and other resources.

Aboriginal and Torres Strait Islander people also have the right not to be subjected to forced assimilation or destruction of their culture.

Section 28 of the HRA arguably protects the cultural rights of any person with a cultural interest in lands or waters, beyond those with an interest under native title legislation. Ensuring the right and appropriate Aboriginal peoples and Torres Strait Islander peoples are involved in managing and protecting cultural heritage is consistent with section 28. However, section 28 on its face does not require a party to investigate who might hold Indigenous spiritual connections to the land. As a result, whether an act falls within the scope of this right may only become apparent if any Indigenous people who are able to provide information about connection with the relevant land come forward claiming a breach of the right – demonstrating the potential breadth and limitations of the application of this section.

Further, while it is unlawful for a public entity to act or make a decision in a way not compatible with human rights, this doesn't apply if the entity could not reasonably have acted differently or is prevented from doing so by another law.[342] Parliament can also expressly declare in an act that the Act or another act has effect despite being incompatible with one or more human rights.[343] These qualifications to the distinct cultural rights is significant because it signals a limitation on the way in which the law, philosophy and interests of First Nations peoples will be treated in the context of government decision-making around planning and development. That is, the HRA does not temper parliamentary sovereignty as it does not create constitutionally enshrined rights. Moreover, the High Court made very clear in *Kartinyeri v The Commonwealth*,[344] that the principle of parliamentary sovereignty cannot be fettered even when the integrity of Aboriginal cultural heritage is at stake. The Parliament in Queensland retains legislative authority to negate or reduce the scope both of cultural heritage legislation and the protections afforded to cultural rights, provided it does so in clear and unambiguous terms.

The Act does not affect native title rights and interests otherwise than in accordance with the NTA, and provisions of this HRA must be interpreted and applied in a way that does not prejudice native title rights and interests recognised and protected under the NTA.[345]

Proposed reforms (i.e. are there any proposals on the table to reform these statutes in a relevant way?)

There are no formal proposals to reform the HRA at the time of writing. The HRA commenced on 1 January 2020 and has not yet been reviewed, however s 95(1) of the HRA requires the Attorney-General to ensure a review of the Act's operation between 1 January 2020–1 July 2023, or as soon as possible after this period.

During the Act's drafting period, advocates for human rights legislation in Australia expressed the need for legal reform in Australia to strengthen:[346]

1. enforcement mechanisms for the Human Rights Commission
2. outcomes available to those suffering human rights abuses
3. the process for making a claim.

Although the Act sought to address the above considerations, it fell short, causing further calls for reform.

The central reasons for reform stem from sections 58 and 59 of the HRA, referred to at the start of the 'Interaction with development' section. If a public entity makes a decision that is incompatible with a human right under the HRA or makes a decision without giving proper consideration to a human right relevant to the decision,[347] complainants are entitled to seek relief or remedy **only** if the cause of action also relates to an action available under another law.[348] This means:

1. a person must have a pre-existing (non-human rights) claim for relief
2. an act/decision was made by a public authority
3. that act/decision was unlawful.

This creates a significant barrier for people bringing claims for human rights breaches, as a human rights breach under the HRA cannot be the sole cause of complaint if a complainant is seeking a remedy via the courts system (as opposed to the Human Rights Commission).

Further, complainants are not entitled to damages (i.e. money) as relief sought as a result of unlawfulness under the HRA.[349] This leaves complainants with no option but to launch complex proceedings in the Queensland courts if they seek compensation, as aside from lodging a complaint with the Commission, remedies under the HRA are limited to a right to judicial review and a right to seek a declaration of unlawfulness and associated relief such as an injunction to stop further infringement.

An example of court action is the *Waratah Coal v Youth Verdict* case (led by First Nations people) in the Queensland Land Court, which commenced on 26 April 2022 (after multiple instances of prior procedural hearings). The judgement was delivered on 25 November 2022.[350] The Court provided a detailed consideration of the mine's human rights impacts through its contribution to climate change, and effect on the surrounding area. The Court ultimately concluded that the limitations to human rights imposed by the mine were unjustifiable. This case was the first time First Nations cultural rights in the HRA have been used as grounds to reject the mining lease and environmental approval applications for a new mine. Specifically, the likely loss of land due to rising sea levels and storm inundation will result in forced migration, severing connection to Country as a significant component of First Nations cultural identity and infringing upon section 28 cultural rights.

It is likely some legislators realise the HRAs shortcomings with respect to claiming damages for unlawfulness under the Act, as laws are beginning to attempt circumvention of this issue by introducing First Nations cultural rights in legislative statements. In 2020 for example:

Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020 provides an application process for a cultural recognition order to transfer a child's parentage from their birth parents to their cultural parents (known as Ailan Kastom, 'Island Custom'). This custom is an integral part of Torres Strait Islander life, giving a sense of stability and social order to society.[351] If there is a dispute about a cultural recognition order, the court proceedings are governed by the *Uniform Civil Procedure Rules 1999* (Qld), which permits damages to be claimed as part of the pleadings.[352]

This indirect means of reform (i.e. including First Nation peoples' special cultural rights in various laws) is aimed at providing First Nation peoples an opportunity to claim an instance of unlawfulness separate from claiming a public entity has acted in a way incompatible with human rights or otherwise failed to give proper consideration to human rights under section 58 of the Act.

Specific gender issues (both actions and omissions)

There have not yet been identified gender issues in the context of Aboriginal and Torres Strait Islander cultural rights under the Act in case law or secondary materials.

However, the Act protects an individual's right to life (s 16) and a right to enjoy their human rights without discrimination (s 15). Domestic violence and coercive control are recognised violations of both these rights.[353] In relation to First Nations women, statistics show:

1. During the 10 years from 2007–08 to 2017–18, First Nations peoples represented 43.3% of persons charged with a contravention of a Domestic Violence Order.[354]
2. Breaking this down further, First Nations women accounted for a higher proportion of aggrieved on DVOs (13.5% of all aggrieved) and DVO breaches (32.9% of all aggrieved for DVO breaches) than First Nations men (3.2% and 4.5% respectively).[355]
3. Aboriginal and Torres Strait Islander women are 35 times more likely to experience domestic and family violence compared with non-Indigenous women.[356]
4. In a 2003–2004 study by the Australian Institute of Health and Welfare (**AIHW**) on hospitalisation due to assault in Australia, Aboriginal and Torres Strait Islander women were hospitalised at 38 times the rate of hospitalisation of other women for assault inflicted within a domestic and family violence context.[357]

The state of Queensland is obligated by the Act to 'protect and promote' human rights,[358] such as those described above. This can be done by providing an effective legal response to combat coercive control as a form of domestic violence. However, as evidenced by the Women's Safety and Justice Taskforce (the '**Taskforce**') report in 2021 where victims say that the state has not protected them and their children from human right breaches,[359] there needs to be further reform.

(d) Statutory regime: *Aboriginal Land Act 1991* (Qld) (ALA)

The ALA (and TSILA – see below) replaced the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld).[360]

The preamble to the ALA recites that 'special measures' need to be enacted for the purpose of securing adequate interests and responsibilities of Aboriginal people in Queensland.

The ALA and TSILA enable the Minister to facilitate land transfers, land grants and declarations about land management.

Two principal mechanisms are established under the ALA: transfers of transferable land and grants of claimable land. Land is designated either transferable or claimable.

Land rights and native title are not the same. Under the ALA Aboriginal people are granted land by the Crown (i.e. Aboriginal freehold). Native title is not tenure granted by the Government, instead it is the recognition of rights and interests that already exist under traditional laws and customs. When granting land under the ALA, or recognising native title rights and interests under the NTA, the relevant facts and legislation need to be considered. Only certain land is transferable/claimable under the ALA, and only certain types of land tenure can recognise native title rights and interests. It must always be considered on a case by case basis. It is possible for both sets of rights to complement one another. For example, when resolving a native title claim, the use of freehold grants under the ALA can be negotiated as part of a tenure resolution package. Further, if native title is not able to be proven, then it may be possible for land to still be granted under the ALA.

Transferable land

Transferable land can be converted without a claim being made under the ALA because in most cases this land has been designated or recognised for Aboriginal purposes and does not require a claim for the continuance of the Aboriginal use.

A grant of transferable land occurs where ownership of land is transferred from a trustee (usually a government department or community council) to a group of Aboriginal people as

trustees to hold the land for the benefit of Aboriginal people who are particularly concerned with the land.[361]

Transferable lands include:

1. Deed of grant in trust land (**DOGIT**)
2. Aboriginal and Torres Strait Islander reserve land under the *Land Act 1994* (Qld)
3. Available State land declared by regulation to be transferable land
4. National Parks in the Cape York Peninsula region and on Moreton Island.

If land is classified as 'transferable' land, then a deed of grant in fee simple will be issued to the grantees, appointed by the Minister, as trustees for the Aboriginal people of the land.

Transferable land is termed 'transferred' land after it becomes Aboriginal land under the ALA.

Claimable land

Claimable land is land that is declared by regulation to be claimable. It may then be claimed by and granted under the ALA to a group of Aboriginal people.[362] Importantly claims can no longer be made under the ALA. The time for making a claim ended on 22 December 2006.[363]

Claimable land is:

1. Available State land declared by regulation to be claimable for this Act;[364] or
2. Aboriginal land that is transferred land and became transferred land before 22 December 2006.[365]

A claim may be brought in the Land Tribunal on the grounds of a traditional or customary affiliation to the land; or an historical association to the land.[366]

Under the ALA traditional affiliation is established where the Land Tribunal is satisfied that the members of the group have a common connection with the land based on spiritual and other associations with, rights in relation to, and responsibilities for, the land under Aboriginal tradition.[367]

Historical association is established when the Land Tribunal is satisfied that the group has an association with the land based on them or their ancestors have, for a substantial period, lived on or used the land, or land in the district or region in which the land is located. The claim may be established whether or not all or a majority of the members of the group have themselves lived on or used such land.[368]

If claims are made by two or more groups of Aboriginal people for the same area of claimable land, and are established on the same ground, the Land Tribunal must recommend to the Minister that the land be grated jointly to the groups.[369]

If more than one claim is established and each competing claim is established on one or more grounds and one or more of the claims is established on the ground of traditional affiliation, a recommendation must not be made in favour of any other group on the ground of historical association.[370]

If claimable land is granted, it will be held in fee simple by the grantees as trustees for the Aboriginal people and their descendants. Granted land is claimable land that has been claimed by, and granted under this Act, a group of Aboriginal people.

Interaction with development (i.e. what rights do these statutes give Traditional Owners when development impacts them)

Land granted as transferable under the ALA, becomes inalienable freehold which means that the trustee is prohibited from selling or mortgaging that land.[371] The ALA does however set out how the land can be transferred, depending on the entity that holds the land.[372] No veto or negotiation regime explicitly exists under this legislation. However, once land is transferred, the transferor becomes the trustee of that land and the ALA sets out requirements for how that land can be dealt with.[373] For example, the trustee must consent to any lease or licence being granted, or the creation of a mining interest in the land. If the trustee subsequently wishes to transfer the land, approval must be sought from the Minister.

Amendments to the ALA in 2015 saw the creation of easier pathways for trustees to grant freehold title, not just for land to be held in trust.[374] This was a result of encouraging, amongst other things, home ownership opportunities for Aboriginal people living on trustee land.

If native title interests exist, those interests do not need to be surrendered, and are not automatically extinguished by a grant of ALA freehold.[375] Generally, it is after a determination of native title is made, the registered native title body corporate may apply through the expression of interest process to have land transferred to them under the ALA. This process can take many years, and the Minister must approve that transfer.

Grantees of Aboriginal freehold have similar rights to those that hold ordinary freehold, subject to exceptions in the legislation – though there are numerous pieces of legislation regulating different aspects of land and associated rights – e.g. *Mineral Resources Act 1989* (Qld) and *Petroleum Act 1923* (Qld) vest ownership of minerals and petroleum in the Crown; and *Nature Conservation Act 1992* (Qld) vests ownership of protected animals and plants in the Crown too. Note some of these acts have their own specific provisions for rights for First Nations people (e.g. the *Nature Conservation Act* permits the taking, using or keeping of protected wildlife under Aboriginal tradition or Islander custom, however these rights can't be exercised in a protected area without authority (s 93) and these rights are subject to any conservation plans).

Proposed reforms (i.e. are there any proposals on the table to reform these statutes in a relevant way?)

There are currently no public proposals for reform to the ALA. The only recent review was in 2005 where the QLD government undertook a review of the role and operation of the ALA.

Specific gender issues (both actions and omissions)

There are no references to gender in the Act, nor are we aware of any case law that identifies a gender issue.

However, when lodging an expression of interest for land to be transferrable under the ALA, the Aboriginal person, or Aboriginal people particularly concerned with the land, must, amongst other things, provide information about their connection or relationship to the land, and the significance of the land. Depending on the individual circumstances, this information may include gender and cultural sensitives.

Further, the trustee of ALA freehold land is required to manage and hold that land on trust, and for the benefit of the Aboriginal people (or native title holders). This includes taking into consideration Aboriginal law, customs and believes, which may be gender specific.

(e) Statutory regime: *Torres Strait Islander Land Act 1991* (Qld) (TSILA)

The TSILA provides for the grant, and the claim and grant, of land as Torres Strait Islander land.

The TSILA enables the transfer of land to Torres Strait Islander peoples 'particularly concerned or connected' with transferable land.

A Torres Strait Islander is particularly concerned with land if the Torres Strait Islander has a particular connection with the land under Island custom, or they live on or use the land or neighboring land. Further, Torres Strait Islanders are particularly concerned with the land if they are member of a group that has a particular connection with the land under island customs or they live on or use the land or neighboring land.[376]

Transferable lands includes:

1. DOGIT land
2. Torres Strait Islander reserve land other than land declared by the Minister.[377]

However, where the above mentioned land is taken under the *Land Acquisition Act 1989* (Cth) by a constructing authority, or is available land approved for a grant of fee simple by the Chief Executive, the land ceases to be transferable land.

Torres Strait Islander persons particularly concerned with land that is:

1. Available State land;
2. Land dedicated as a reserve under the Land Act;
3. Land subject to an occupation license; or
4. Land held under a lease under the Land Act by or for Torres Strait Islanders;

may by notice given to the Chief Executive, express an interest in having the land made transferable land.[378]

Before available land is transferred, an eligible person is required to seek approval for the grant of the land. Where approval is granted, the Governor in Council may grant the land in fee simple under the *Land Act*.[379]

Where the Chief Executive prepares such deed of grant in fee simple as necessary over transferable lands, the deed must declare the land as being held by a registered native title body corporate or for the benefit of Torres Strait Islanders particularly concerned with the land and their ancestors and descendants.[380]

Where the transferable land was, immediately before becoming Torres Strait Islander land under the TSILA, subject to a Native Title interest, that interest continues in force.[381]

Interaction with development (i.e. what rights do these statutes give Traditional Owners when development impacts them)

The trustee of Torres Strait Islander land may grant a lease or license over all or part of the land, consent to the creation of mining interests, grant an easement over the land, enter into a conservation agreement or enter into an agreement with the State of Commonwealth in relation to getting and sale of forest products or quarry mineral above on or below the land.[382]

Nothing within the TSILA prevents the creation of an interest in transferable land if, the interest is a:

1. mining interest;
2. geothermal tenure under the *Geothermal Energy Act 2010*;
3. GHG authority under the *Greenhouse Gas Storage Act 2009*;
4. residential tenancy;
5. lease or permit granted in relation to transferable land that is Torres Strait Islander trust land; or
6. where the interest is the transfer, mortgage or sublease of a trustee lease; or
7. for another interest the Minister consents to the creation of the interest. However, if this is the case the Minister cannot consent to the creation of the interest unless satisfied that it is for the benefit of Torres Strait Islanders particularly concerned with the land.[383]

Proposed reforms (i.e. are there any proposals on the table to reform these statutes in a relevant way?)

There are currently no public proposals for reform to the TSILA.

Specific gender issues (both actions and omissions)

As above – the ALA and the TSILA are very similar in this regard.

(f) Statutory regime: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act)

The objects of the EPBC Act are to:[384]

1. provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance
2. promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources
3. promote the conservation of biodiversity
4. provide for the protection and conservation of heritage
5. promote a cooperative approach to the protection and management of the environment involving governments, the community, landholders and Indigenous peoples
6. assist in the cooperative implementation of Australia's international environmental responsibilities
7. recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity
8. promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge.

The EPBC Act also states that it promotes a partnership approach to environmental protection and biodiversity conservation through (relevantly):

1. conservation agreements with landholders
2. recognising and promoting Indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity
3. the involvement of the community in management planning.

Interaction with development (i.e. what rights do these statutes give Traditional Owners when development impacts them)

One of the objects of the EPBC Act is to promote ecologically sustainable development. The principles of ecologically sustainable development are defined as:[385]

1. decision-making processes should effectively integrate both longterm and shortterm economic, environmental, social and equitable considerations
2. if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
3. the principle of intergenerational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations
4. the conservation of biological diversity and ecological integrity should be a fundamental consideration in decisionmaking;
5. improved valuation, pricing and incentive mechanisms should be promoted.

The EPBC Act makes it an offence for a person to take an action that has, will has, or is likely to have, a significant impact on the national Heritage values of a National Heritage place, to the extent that they are Indigenous heritage values of a National Heritage place.[386]

An Indigenous heritage value of a place means a heritage value of the place that is of significance to Indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history.[387]

The EPBC Act provides the legal framework for the joint management of three Commonwealth National Parks—Kakadu, Uluru-Kata Tjuta and Booderee. Traditional Owners lease their land to the Director of National Parks (**DNP**), a statutory position established under the EPBC Act. For each of these parks, a joint management board is established to work in conjunction with the DNP.

As part of that framework, the EPBC Act includes the concept of Indigenous people's land, which is defined as land where:

1. a body corporate holds an estate that allows the body to lease the land to the Commonwealth or the Director; and
2. the body corporate was established by or under an Act for the purpose of holding for the benefit of Indigenous persons title to land vested in it by or under that Act.[388]

Commonwealth reserves can be jointly managed under the EPBC Act if the reserve includes Indigenous people's land held under lease by the DNP, and a Board is established for the reserve under Division 4, sub-division F.[389]

The EPBC Act also provides for a land council for Indigenous people's land in a Commonwealth reserve, which is defined as:

1. if the land is in the area of an Aboriginal Land Council established by or under the *Aboriginal Land Rights (Northern Territory) Act 1976* – that Aboriginal Land Council; and
2. if the land is in Jervis Bay Territory – the Wreck Bay Aboriginal Community Council established by the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*; and
3. if the land is elsewhere – a body corporate that:
   (a) is established by or under an Act; and
   (b) has functions relating to the Indigenous people's land in the reserve; and

(c) consists of Indigenous persons who either live in an area to which one or more of the body's functions relate or are registered as Traditional Owners of Indigenous people's land in an area to which one or more of the body's functions relate.[390]

In preparing a management plan for a Commonwealth reserve, the EPBC Act requires that the DNP and the Board (if any) of the reserve must take account of (among other things) the interests of:

1. any owner of any land or seabed in the reserve; and
2. the Traditional Owners of any Indigenous people's land in the reserve; and
3. any other Indigenous persons interested in the reserve; and
4. any person who has a usage right relating to land, sea or seabed in the reserve that existed (or is derived from a usage right that existed) immediately before the reserve was declared.[391]

The Traditional Owners of Indigenous people's land are:

1. a local descent group of Indigenous persons who:
   (a) have common spiritual affiliations to a site on the land under a primary spiritual responsibility for that site and for the land; and
   (b) are entitled by Indigenous tradition to forage as of right over the land; or
2. if the land is in the Jervis Bay Territory – the members of the Wreck Bay Aboriginal Community Council.[392]

Under the EPBC Act, special rules apply to Commonwealth reserves in the Kakadu region, Uluru region and Jervis Bay Territory, affecting the activities that can be carried on in those reserves. In particular, special procedures apply to planning for management of reserves in the Kakadu region, Uluru region and Jervis Bay Territory. These provide for extra involvement of Indigenous people in the planning process.[393]

The EPBC Act also establishes the Indigenous Advisory Committee, to advise on the operation of the Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity.[394]

Proposed reforms (i.e. are there any proposals on the table to reform these statutes in a relevant way?)

The EPBC is required to be reviewed every 10 years. The second Independent Review of the EPBC Act, led by Professor Graeme Samuel AC, was released in January 2021. This review, known as the Samuel Review, found that the EPBC Act required significant reform, in particular around Indigenous culture and heritage. In particular, the Samuel Review found that:

1. the EPBC Act has failed to fulfil its objectives as they relate to Indigenous Australians. Indigenous Australians' traditional knowledge and views are not fully valued in decision-making, and the Act does not meet the aspirations of Traditional Owners for managing their land;
2. the operation of the EPBC Act Indigenous Advisory Committee is tokenistic. The Act does not require the Committee to provide decision-makers with advice. Instead, the Committee is reliant on the Minister inviting its views. This contrasts to other statutory committees under the Act, which have clearly defined and formal roles at key points in statutory processes; and
3. the Department has issued guidance on best practice Indigenous engagement, which sets out expectations for applicants for EPBC Act approval, but it is not legally required or enforceable. The way that the Commonwealth Minister factors in Indigenous matters in decision-making for EPBC Act assessments is not clear or transparent.

Although there are provisions under the EPBC Act which give Traditional Owners a right to voice their opinions and views about proposed projects under the Act, the only legal requirement under the Act is for these views to be considered when a final decision is made about the proposed project, meaning Traditional Owners have little ability to actually influence the outcome of a decision about a project.

In all other cases, the right of Traditional Owners to engage with the development authorised under the EPBC Act is only triggered at law once an Indigenous heritage value has been identified in a National Heritage place.

Government's response

In December 2022 the government released its Response to the independent review. That review outlines a number of reforms to national environmental law. At the centrepiece of these reforms will be the establishment of a federal Environment protection agency. Amongst other things, the government also proposes to develop as a priority a National Environment Standard for First Nations Engagement and Participation in decision-making which includes developing new standalone cultural heritage protection laws.

Specific gender issues (both actions and omissions)

Nil in the statute itself.

However, agreeing to processes for identifying and managing Indigenous heritage values can be complex and sensitive, and may often involve gender specific information. Whether this is relevant will be on a case by case basis as determined by the relevant Indigenous group and their own traditional laws and customs.

(g) Statutory regime: *Planning Act* (Qld) (PAct)

The purpose of the PAct is to establish an efficient, effective, transparent, integrated, coordinated, and accountable system of land use planning (**planning**), development assessment and related matters that facilitates the achievement of ecological sustainability.[395]

Ecological sustainability is defined as a balance that integrates:

1. the protection of ecological processes and natural systems at local, regional, State, and wider levels; and
2. economic development; and
3. the maintenance of the cultural, economic, physical and social wellbeing of people and communities.[396]

The PAct provides that advancing the purposes of the Act includes (among other things), valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition (s 5(2)). Specifically, the Act requires any entity performing a function under the Act to perform the function in a way that advances the purposes of the Act, one of which includes 'valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition'.[397]

Interaction with development (i.e. what rights do these statutes give Traditional Owners when development impacts them)

Other than in section 5 of the PAct, there is no mention of Indigenous rights, traditional owner rights, or Aboriginal and Torres Strait Islander rights. That is, these key words are not used at all within the PAct, other than in section 5.

The PAct primarily focuses on the rights of owners of land. An owner is defined as the person who:

1. is entitled to receive rent for the land, premises or place; or
2. would be entitled to receive rent for the land, premises or place if the land, premises or place were rented to a tenant.

Accordingly, unless Traditional Owners satisfy the definition of an owner in the PAct, Traditional Owners will have no statutory right to interact with any development authorised under the PAct.

Proposed reforms (i.e. are there any proposals on the table to reform these statutes in a relevant way?)

The PAct commenced on 25 May 2016 and has not yet been reviewed, and at the time of writing there are no formal proposals to reform.

However, the State Government has committed to reviewing all statutory Regional Plans that are older than five years, in a program commencing in late 2022. This is relevant as regional planning is government by a number of legislative instruments in Queensland, including the PAct.

When the PAct commenced in 2016, it was the first time in the history of planning law in Australia that planning legislation included a provision which required the consideration of Aboriginal and Torres Strait Islander peoples' knowledge, culture and tradition as an integral part of advancing the purpose of the Act.

Inherently the planning framework is expected under the Act to ensure that it can demonstrate that it is protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition. This requirement has led to the development of policy statements within the planning industry, such as the policy statement from the Planning Institute of Australia (**PIA**):

> Queensland Division of PIA supports the application of the principle of 'free, prior and informed consent' when engaging with Aboriginal and Torres Strait Islander peoples on all planning matters that may affect their rights and interests.

The PIA Code of Professional Conduct also states that in adhering to the Code, members should pursue an appropriate balance of a number of matters, including Aboriginal and Torres Strait Islander peoples' connections to country and their internationally recognised rights to self-determination and free, prior and informed consent (consistent with the UN Declaration on the Rights of Indigenous Peoples).

However, despite the inclusion of the requirement to consider, value, protect, and promote Aboriginal and Torres Strait Islander knowledge, culture and tradition under the PAct, there is no inherent right for Traditional Owners to engage with, be consulted about, or make comment on, the development authorised under the Act.

There are also no rights specific to Traditional Owners that are triggered by cultural heritage values identified under the Act. Rather, the PAct makes reference to places of cultural heritage significance, which are defined in a general manner under the *Queensland Heritage Act 1992* (Qld) as the aesthetic, architectural, historical, scientific, social, or other significance of a place or feature of a place, to the present generation or past or future generations.

Specific gender issues (both actions and omissions)

Nil in the statute itself.

(h) Statutory regime: *Environmental Protection Act 1994* (Qld) (EP Act)

The object of the EP Act is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (defined as ecologically sustainable development).[398]

The EP Act is required to be administered, as far as practicable, in consultation with, and having regard to the views and interests of, industry, Aboriginals and Torres Strait Islanders under Aboriginal tradition and Island custom, interested groups and persons and the community generally.[399]

Interaction with development (i.e. what rights do these statutes give Traditional Owners when development impacts them)

Traditional Owners are considered to be affected persons under the EP Act in respect of EIS in the following certain circumstances:

1. where they are the owner of land (freehold or in fee simple)
2. where the subject land is Aboriginal land under the ALA
3. where the subject land is Torres Strait Islander land under the TSILA
4. where the subject land is DOGIT land under the ALA or TSILA
5. where the subject land is lease land under the *Aboriginal and Torres Strait Islander Land Holding Act 2013* (Qld).[400]

Under the EP Act affected persons must be notified of a project that is preparing an EIS,[401] and will have an opportunity (as any member of the public will) to make a submission or provide a comment to the chief executive about the EIS and the proposed project.

Under the EP Act, owners of land also have a number of rights to be notified of certain activities, and may have a right to compensation for activities occurring on the land under the EP Act which cause a compensable effect.[402]

The EP Act defines an owner as:

1. for freehold land – the person recorded in the freehold land register as the person entitled to the fee simple interest in the land; or
2. for land held under a lease, licence or permit under an Act – the person who holds the lease, licence or permit; or
3. for trust land under the *Land Act 1994* – the trustees of the land; or
4. for Aboriginal land under the ALA – the persons to whom the land has been transferred or granted; or
5. for Torres Strait Islander land under the TTSILA – the persons to whom the land has been transferred or granted; or
6. for land for which there is a native title holder under the NTA – each registered native title party in relation to the land.

Proposed reforms (i.e. are there any proposals on the table to reform these statutes in a relevant way?)

On 12 October 2022, a new Bill was introduced into Queensland's parliament – the Environmental Protection and Other Legislation Amendment Bill (EPOLA Bill). The EPOLA Bill proposed a number of amendments to the EP Act and other legislation.

On 29 March 2023 the EPOLA Bill passed bringing into force a number of changes to Queensland's environmental laws likely to have implications across a number of industries.

The most significant amendments to the EP Act include:

- expanding executive officer liability, such that executive officers (which can capture employees and directors) now face indefinite liability
- making public notification mandatory for all major amendment applications to environmental authorities (EAs) for resource activities
- changes to the EIS process for projects to be assessed under the EP Act, including subjective project refusal triggers.

Specific gender issues (both actions and omissions)

Nil in the statute itself.

Agreeing processes for identifying and managing Indigenous heritage values can be complex and sensitive, and may involve gender specific issues. This needs to be dealt with on a case by case basis (as needed), and in accordance with the relevant Traditional Owners laws and customs.

Endnotes

1 Indeed the Australian Government has previously recognised the potential for the native title system to contribute to closing the gap of disadvantage between Indigenous and non-Indigenous Australians: Attorney-General, *Closing the Gap – Funding for the Native Title System (Additional Funding and Lapsing): Budget 2009–2010*, Fact Sheet (2009), cited in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009) 56.

2 For example, see Chapter 2: Changing the culture of native title, in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009).

3 See discussion in J Haughton, Parliament of Australia Parliamentary Library, An unsettling decision: a legal and social history of native title and the Mabo decision' Research Paper Series 2022–2023 (5 December 2022) 17. This has, of course, been far from consistent across governments and across negotiations – state governments have been widely known for their roles in undermining the rights of native title holders in negotiations which are more obviously between mining companies and native title holders. See for example, discussion on the role of the Queensland Government in the Century Mine negotiations in C Howlett, *Indigenous Peoples and Mining Negotiations: The Role of the State* (PhD thesis, Griffith University, 2007); L O'Neill, 'The Role of State Governments in Native Title Negotiations: A Tale of Two Agreements,' (2014/2015) 18(2) AILR 29; D Ritter, *The Native Title Market* (UWA Press, 2009) 35; M Langton and O Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26(1) *Journal of Energy and Natural Resources Law* 31.

4 As described by James Haughton of the Parliamentary Library, 'Prior to the [*Timber Creek*] case, Australian Governments appear to have thought that compensation for cultural and spiritual harm caused by loss of native title would be comparable to a 'solatium', a small additional payment for loss of enjoyment calculated with reference to economic value – hence the Commonwealth and Northern Territory initially appealed the Federal Court's award (which was upheld by the High Court, for the cultural and spiritual component) as "manifestly excessive"': J Haughton, Parliament of Australia Parliamentary Library, An unsettling decision: a legal and social history of native title and the Mabo decision' Research Paper Series 2022–2023 (5 December 2022) 21. See also regarding the impact of compensation litigation on government policies regarding native title: F James, 'High Court Awards NT Native Title Holders $2.5m Partly for "Spiritual Harm"', ABC News, 13 March 2019. See also discussion on the potential for the Commonwealth to be found liable for compensation under section 51(xxxi) of the *Constitution* in W Isdale, 'Dr Yunupingu's Claim for Native Title Compensation – the Constitutional Path Not Yet Trodden', *Australian Public Law* (blog), 18 March 2020.

5 R Webb, 'The Birthplace of Native Title: From Mabo to Akiba', 23 (1 January 2017) *James Cook University Law Review* 31–40, cited in J Haughton, Parliament of Australia Parliamentary Library, An unsettling decision: a legal and social history of native title and the Mabo decision' Research Paper Series 2022–2023 (5 December 2022) 22.

6 See, for example, discussion in M Langton & O Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26(1*) Journal of Energy and Natural Resources Law* 31, 38, cited in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009) 57.

7 *Australian Human Rights Commission Act 1986* (Cth), s 46C(2B); and by direction of the Minister, *Native Title Act 1993* (Cth), s 209.

8 *Australian Human Rights Commission Act 1986* (Cth), s 46C(2A).

9 *Human Rights Legislation Amendment Act 2017* (Cth), s 20.

10 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social justice and Native Title Report 2016* (2016) at https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-2.

11 This summary was adapted from materials by the Scottish Human Rights Commission on the principles of a human rights-based approach. Further information can be found on the Australian Human Rights Commission's website at https://www.humanrights.gov.au/human-rights-based-approaches. Cited by

M Gooda, *Social Justice and Native Title Report 2015* (2015) at www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-1.

12 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (2015) 50.

13 The Preamble to the Native Title Act states that in enacting the law, the people of Australia intend: to rectify the consequences of past injustices .. for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

14 United Nations International Covenant on Civil and Political Rights, 16 December 1966.

15 United Nations International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

16 United Nations International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.

17 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

18 United Nations Convention on the Rights of Persons with Disabilities, 12 December 2006.

19 United Nations Convention on the Rights of the Child, 20 November 1989.

20 United Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

21 *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly*, 2 October 2007, UN Doc A/RES/61/295, articles 3, 4, 5, http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx

22 *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly*, 2 October 2007, UN Doc A/RES/61/295, articles 18, 19, 5, 10, 11(2), 27, 28, 29, 32(2), 41, 46, http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx

23 *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly*, 2 October 2007, UN Doc A/RES/61/295, articles 31, 11(1), 11(2), 12(1), 13(1), 15(1), Preamble paragraphs 3, 7, 10, 11, http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx

24 *United Nations Declaration on the Rights of Indigenous Peoples : resolution/adopted by the General Assembly*, 2 October 2007, UN Doc A/RES/61/295 articles 8(1)(e), 9, 15(2), 21(1), 22(2), 44, 46(3), Preamble paragraphs 5, 9, 18, 22, http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx

25 S J Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in C Charters and R Stavenhaven (eds), *Making the Declaration Work* (2009) 184.

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113 *Adnyamathanha Traditional Lands Association & Ors v Rangelea Holdings Pty Ltd* [2023] SASC 51 at [4]–[6].

114 Discussed in the judgment at *Adnyamathanha Traditional Lands Association & Ors v Rangelea Holdings Pty Ltd* [2023] SASC 51 at [152]–[160].

115 The impression has been created by considering correspondence from Mr Vince Coulthard to the Australian Human Rights Commission, media reports, ORIC media releases and the judgment in *Adnyamathanha Traditional Lands Association & Ors v Rangelea Holdings Pty Ltd* [2023] SASC 51. Correspondence by email from Mr Vince Coulthard to Aboriginal and Torres Strait Islander Social Justice Commissioner, dated 25 July 2022; correspondence by email from Mr Vince Coulthard to Aboriginal and Torres Strait Islander Social Justice Commissioner, dated 9 August; correspondence by email from Mr Vince Coulthard to Aboriginal and Torres Strait Islander Social Justice Commissioner, dated 20 August 2022; correspondence by email from Mr Vince Coulthard to Aboriginal and Torres Strait Islander Social Justice Commissioner, dated 17 November 202; ORIC, 'Adnyamathanha people's corporation in need of overhaul,' 26 March 2020; ORIC, 'More support for Adnyamathanha people's corporation,' 1 July 2020; ORIC, 'ATLA structure a labyrinth,' 25 September 2020; ORIC, 'One more extension for ATLA special administration,' 21 December 2020; ORIC, 'ATLA special administration extended,' 20 April 2021;

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305 Z Antonios, Aboriginal and Torres Strait Islander Social Justice Commissioner*, Native Title Report 1998* (1998), 2.

306 *Native Title Act 1993* (Cth) (**NTA**) s 4.

307 Ibid ss 13 and 61. Further, Regulation 5 of the Federal Court Regulations requires a native title determination application to be made using a Form 1.

308 The Applicant is the person or group of people *authorised* by a native title claim group to make an application and to deal with matter arising in relation to it. The applicant is to act jointly, and can also have a role in representing the native title claim group in making agreements concerning areas where native title has been claimed. The NTA is silent on how the Applicant is to be chosen, and whether there are any sub representative functions for different family groups for example. The NTA leaves this matter entirely to the internal processes and cultural politics of the claim group. If the Applicant is not performing its role, the NTA provides a mechanism for the claim group to replace the applicant through NTA s 66B.

309 NTA s 61(1).

310 Ibid s 251B. Note there is no requirement for every single member of the claim group to participate actively in the authorisation process and there is no requirement for the decision to be unanimous unless that is dictated by traditional law and custom, or by a process agreed to and adopted by

the claim group. The fundamental principle is that everyone in the claim group must be given ever reasonable opportunity to be involved in the decision making process. There is a large body of case law which discusses these points.

311 Ibid ss 190B and 190C.

312 Exclusive native title is the right to possession of an area to the exclusion of all others. They are akin to freehold and provide similar rights, however they do not amount to full legal ownership and cannot be sold.

313 Non-exclusive native title rights exist alongside other non-Indigenous property rights, for example pastoral leases.

314 NTA subdivision F.

315 Ibid s 223.

316 There are three types of ILUAs depending on the circumstances; NTA ss 24CD and 25–44.

317 Under the NTA there are three types of ILUAs – Area Agreements, Body Corporate Agreements and Alternative Procedure Agreements.

318 For future acts that satisfy the criteria in section 26 of the NTA and that do not attract the expedited procedure, the right to negotiate applies. If no section 31 agreement is reached, the proponent can approach the NNTT for an arbitral determination.

319 NTA s24HA.

320 See section 251A of the NTA for what is required for an ILUA to be authorised, and s31 of the NTA which deals with section 31 agreements.

321 If a determination has been made, and there is a PBC, under the *Native Title (Prescribed Bodies Corporate) Regulations 1993* (Cth) (**PBC Regulations**) entering into an ILUA or section 31 agreement amounts to a high level native title decision and the PBC must follow the consultation and consent process in regulation 8 of the PBC Regulations.

322 *Guidelines for preparing and assessing connection material for Native Title claims in Queensland* (2016); Department of Natural Resources and Mines.

323 *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**) s 4.

324 Ibid ss 34 and 35.

325 Ibid s 35(7).

326 Ibid s 23.

327 Sections 34 and 35 of the ACHA defines native title party and Aboriginal Party.

328 There is a statutory one-month notification of an intention to develop a CHMP, followed by a three-month negotiation and consultation period with the Aboriginal Party regarding the terms of the plan.

329 ACHA, Part 5.

330 *Human Rights Act 2019* (Qld) (**HRA**) s 3.

331 Ibid.

332 Ibid s 4(b).

333 HRA Preamble; noting that particular significance is given to Aboriginal and Torres Strait Islander peoples' right to self-determination.

334 HRA s 13(1).

335 Ibid s 13(2).

336 Ibid s 64.

337 Ibid s 9(1)–(3).

338 Ibid s 9(4).

339 Ibid ss 58 and 59.

340 'First Nations challenge over approval of Clive Palmer's coalmine begins in Queensland', *The Guardian* (webpage, 26 April 2022), https://www.theguardian.com/australia-news/2022/apr/26/first-nations-challenge-over-approval-of-clive-palmers-coalmine-begins-in-queensland; 'Landmark hearing into Clive Palmer's Galilee Coal Project Legal Challenge Begins', Environmental Defenders Office (webpage, 20 April 2022), https://www.edo.org.au/2022/04/20/landmark-hearing-into-clive-palmers-galilee-coal-project-legal-challenge-begins/

341 HRA s 64.

342 Ibid s 58.

343 Ibid s 43(1).

344 (1998) 195 CLR 337.

345 HRA s 107.

346 Emma Phillips and Aime McVeigh, 'The grassroots campaign for a Human Rights Act in Queensland: A case study of modern Australian law reform' (2020) 0(0) *Alternative Law Journal* 1, 5.

347 HRA s 58.

348 Ibid s 59.

349 Ibid s 59(3).

350 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21.

351 'Our journey', *Officer of the Commissioner (Meriba Omasker Kawiz Kazipa)* (webpage, 15 May 2022), https://www.ocmokk.qld.gov.au/our-journey

352 *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld) s 82(1).

353 United Nations General Assembly, *Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence*, Seventy-fourth session, Item 72(a) of the preliminary list, Promotion and protection of human rights: implementation of human rights instruments, A/74/148, (12 July 2019) <pdf (undocs.org)>.

354 Queensland Government Statistician's Office, Queensland Treasury, Breaches of domestic violence orders in Queensland, 2008-09 to 2017-18 (2021), 34, https://www.qgso.qld.gov.au/issues/11101/breaches-domestic-violence-orders-qld-2008-09-2017-18.pdf

355 Ibid.

356 Harry Blagg et al, ANROWS, *Innovative models in addressing violence against Indigenous women: Final report* (2018), https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2019/02/19024934/4.3-Blagg-Final-Report.pdf; Liesl Mitchell, 'Domestic violence in Australia—an overview of the issues' (Background notes index page, 22 November 2011), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/DVAustralia#_ftnref54

357 Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, *Family violence among Aboriginal and Torres Strait Islander peoples* (Australian Institute of Health and Welfare Canberra, 2006) 54–55, http://www.aihw.gov.au/publication-detail/?id=6442467912

358 HRA ss 3 and 4; international case law also establishes this: *Opuz v Turkey*, App. No 33401/02 (Eur. Ct. H. R. June 9 2009), *Goekce v Austria*, Comm. 5/2005, U.N. Doc. A/62/38, at 432 (2007).

359 Women's Safety and Justice Taskforce, *Hear her Voice Part 2* (webpage, 2 December 2021) 313, https://www.womenstaskforce.qld.gov.au/__data/assets/pdf_file/0014/700601/volume-2-the-mountains-we-must-climb.pdf

360 Whilst this act has now been repealed by the ALA/TSILA, the *Aboriginal Land Holding Act 2013* (Qld) was brought in to resolve problems affecting the 1985 Act's leases and entitlement satisfaction requirements.

361 'Aboriginal Land Act 1991 (Qld)', *Agreements, Treaties and Negotiated Settlements Project* (webpage, 18 September 2002), https://database.atns.net.au/agreement.asp?EntityID=674

362 *Aboriginal Land Act 1991* (Qld) (**ALA**) ss 22(1)–(2).

363 Ibid s 60.

364 Available land refers to vacant State land that is not excluded for other reasons such as vacant Crown land that is in a city, town or township; is set aside for public purposes; is a stock route, forest or timber reserve; is subject to a special mining lease; is freehold land, leasehold land, sea waters, sea beds or most watercourses: ALA ss 24-31.

365 ALA s 23.

366 Ibid s 58.

367 Ibid s 65(1).

368 Ibid s 66.

369 Ibid s 72.

370 Ibid s 72.
371 Ibid s 100.
372 Ibid ss 104, 109, 114.
373 Ibid s 97(2).
374 *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014* (Qld) s 5; Div 3.
375 ALA s 45.
376 *Torres Strait Islander Land Act 1991* (Qld) (**TSILA**) s 3 (1) and (2).
377 Ibid s 12.
378 Ibid s 31.
379 Ibid s 28C.
380 Ibid s 34.
381 Ibid s 41.
382 Ibid s 64.
383 Ibid s 187.
384 *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) s 3.
385 Ibid s 3A.
386 Ibid s 15B(4).
387 Ibid s 528.
388 Ibid s 363(3).
389 Ibid s 363(5).
390 Ibid s 363(2).
391 Ibid s 368(3).
392 Ibid s 368(4).
393 Ibid ss 388 and 390.
394 Ibid ss 505A and 505B.
395 *Planning Act 2016* (QLD) (**PAct**) s 3.
396 Ibid s 3(2).
397 Ibid s 5.
398 *Environmental Protection Act 1994* (Qld) (**EP Act**) s 3.
399 Ibid s 6.
400 Ibid s 38.
401 Ibid s 43.
402 Ibid s 579.