Decolonising Australia’s Native Title System

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I. INTRODUCTION

There was a strange thing, a buffalo with horns of steel. One day a man came upon it in the plain, just there where once upon a time four trees stood close together. The man and the buffalo began to fight. The man’s hunting horse was killed right away, and the man climbed one of the trees. The great bull lowered its head and began to strike the tree with its black metal horns, and soon the tree fell. But the man was quick, and he leaped to the safety of the second tree. Again the bull struck with its unnatural horns, and the tree soon splintered and fell. The man leaped to the third tree and all the while he shot arrows at the beast; but the arrows glanced away like sparks from its dark hide. At last there remained only one tree and the man had only one arrow. He believed then that he would surely die. But something spoke to him and said: ‘Each time the buffalo prepares to charge, it spreads its cloven hooves and strikes the ground. Only there in the cleft of the hoof is it vulnerable; it is there you must aim.’ The buffalo went away and turned, spreading its hoof, and the man drew the arrow to his bow. His aim was true and the arrow stuck deep into the soft flesh of the hoof. The great bull shuddered and fell, and its steel horns flashed once in the sun.¹

The purpose of this Article is to survey the development of collective rights,²

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¹ Navarre Scott Momaday, The Way to Rainy Mountain (University of New Mexico 1976) 54.

² Includes but is not limited to: the right to group and collective rights; right to self-determination; right to economic and social development; right to a healthy environment; right to natural resources; and right to participate in one’s cultural heritage. While third generation rights build on civil, political, economic, social and cultural rights of the first and second generations of human rights, third generation rights highlight the collective nature of indigenous legal systems to determine their own governments, education, health, natural resources and environment. For further explanation of rights mentioned see Ilias Bantekas and Lutz Oette, International Human Rights Law and Practice (CUP 2013) 409-51.
more specifically Native Title rights and the right of free, prior and informed consent (FPIC) in Australia. Given Australia’s recent colonial history, it is of particular interest to examine whether the effects of domestic legislative mechanisms – *Mabo and others v Queensland (No 2)*\(^3\) [hereafter referred to as *Mabo*], the Native Title Act 1993 (Cwlth) and the National Native Title Tribunal (NNTT) – align with collective rights recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)\(^4\) and the Alta Outcome Document (2013).\(^5\) Holders of collective rights shall be referred to as ‘indigenous’ when discussing rights recognised under the UNDRIP and ‘indigenous Australian’ when discussing land rights specific to Australia.

On the international level, the development of collective rights has played an essential role in the conception of legal resources that support indigenous communities’ rights to land and traditional ways of life. N. Scott Momaday’s oral tradition mentioned above advocates for indigenous people to identify and target weak legislation and gaps in land and development policy along with actively creating resources that assist in and further legal claims to protect these rights. Thus far, this approach has been extremely effective in developing international dialogue about the need and reason for protecting indigenous social and economic rights. Andrea Muehlebach states, ‘Experts in international law and politics have noted that international indigenous political activism has placed itself squarely within the cracks, crevasses, and absences in these fields’.\(^6\) Muehlebach’s observation is a Western understanding of Momaday’s tradition.

While Deborah Bird Rose argues that indigenous people become participants in their own colonisation by utilising institutions, resources and legislation created by the colonial power, the position of this Article is that in the case of Australia, it is beneficial for Native Title holders to actively seek out avenues within domestic and international legal frameworks to protect their Native Title rights. Engaging in said legal frameworks provides indigenous Australians the

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\(^3\) *Mabo and others v Queensland (No 2)* HCA 23, (1992) 175 CLR 1.


\(^5\) UNGA, ‘Letter dated 10 September 2013 from the Permanent Representatives of the Plurinational State of Bolivia, Denmark, Finland, Guatemala, Mexico, New Zealand, Nicaragua, Norway and Peru to the United Nations addressed to the Secretary-General’ (UN Doc A/67/994, 13 September 2013).

opportunity to align the Australian legal framework with international human rights law without ‘fractur[ing] the skeleton of principle which gives the body of [Australian] law its shape and internal consistency’.  

This Article will use the rights established in UNDRIP and the Alta Outcome Document as a foundation for assessing the realisation of Native Title rights in Australia. To paint a broad picture of Native Title rights in Australia, this Article analyses four cases in which Native Title rights and the conflicting rights of extractive industries have collided: (1) Wonnarua Native Title rights and the Ashton Coal mine; (2) Arabana Native Title rights and the Roxby Down uranium mine; (3) Monadee Native Title rights and Cossack Resources Ltd.; and (4) Koongarra Native Title rights and the AREVA uranium deposit. (Figure 1 maps the locations where these Native Title rights have been contested while Figure 2 outlines the development of domestic and international legal legislation regarding the four mentioned cases).

Figure 1: Cases in Which Native Title Rights Were Challenged

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7 Mabo (n 3) [29] (Brennan J).
To be clear, this Article does not promote indigenous engagement in mining or exploitative practices. Instead, it supports the notion of FPIC and further encourages indigenous communities to ‘make place’ for themselves in domestic and international legal frameworks by constructing resources that target gaps and/or weak areas in existing legislation.

II. ‘MAKING PLACE’8 IN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK9

Since the late 1970s, indigenous peoples have used the United Nations (UN) ‘to protest the destruction of their territories, resources and, by implication, their cultures’,10 and furthermore protect their collective rights to land and natural resources. Collective rights, or what Muehlebach describes as ‘eco-political politics of morality’, integrate indigenous traditional ecological knowledge (TEK) into a ‘larger framework of valuable knowledge, cultural diversity and

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8 Prior to the creation of third generation rights, the collective rights of indigenous peoples were neither recognised nor protected under international law. Rather, indigenous peoples were subjected to individual civil, political, economic, social and cultural rights governed, through the positive obligation of due diligence, by their colonial state government. Given the settler colonial legacy that plagues many indigenous peoples’ histories and rights, third generation rights legally, politically and physically ‘make places’ for the protection of their collective rights in international law. For further information, see Ilias Bantekas and Lutz Oette, International Human Rights Law and Practice (CUP 2013) 409-51.

9 Muehlebach (n 6).

10 ibid 420.
bio-diversity’.\footnote{ibid 423.} Emanating from a unique and continued relationship with a specific land base, the inclusion of indigenous TEK in extractive development policy can significantly contribute to more long-term, sustainable projects and furthermore help foster improved relations between indigenous communities, states and corporations.

After roughly twenty-five years of discourse on the need to protect indigenous social and economic rights alongside an increased support for the incorporation of TEK in the construction of sustainable development projects, UNDRIP was adopted by the United Nations on September 13, 2007. UNDRIP serves as an international instrument concerning the protection of collective rights. Comprised of 46 articles, UNDRIP recognises:

> [T]he right to unrestricted self-determination, an inalienable collective right to the ownership, use and control of lands, territories and other natural resources, [indigenous] rights in terms of maintaining and developing their own political, religious, cultural and educational institutions along with the protection of their cultural and intellectual property.\footnote{‘The UN Declaration on the Rights of Indigenous Peoples’ (International Work Group for Indigenous Affairs) <http://www.iwgia.org/human-rights/international-human-rights-instruments/undeclaration-on-the-rights-of-indigenous-peoples> accessed 19 December 2013.}

Although UNDRIP is non-binding, the document itself is representative of international norms and the UN’s commitment to validating and, more importantly, protecting indigenous people’s social and economic rights.

It is important to note that while 144 countries initially adopted the international instrument, four countries possessing settler colonial histories – Australia, New Zealand, Canada and the United States – voted against it. Each state opposing the document argued, ‘[T]he level of autonomy recognized for Indigenous peoples in the UNDRIP was problematic and would undermine the sovereignty of their own states, particularly in the context of land disputes and natural resource extraction’.\footnote{ibid.} It was not until 2009-2010 that these countries overturned their previous decision and endorsed UNDRIP.

Stemming directly from UNDRIP’s recognition of the right to self-determination, ‘the right to freely pursue their economic, social and cultural...
and more specifically the ideas codified in Article 32, the notion of FPIC was formed. Article 32 states:

1. 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;

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources;¹⁵

FPIC ‘is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use’.¹⁶ FPIC furthermore, provides a framework for sustainable development, promotes a thorough assessment of environmental and social impacts and establishes an ‘equal level playing field between [indigenous] communities and the government or companies’.¹⁷ More importantly, when consultation principles set forth by FPIC are followed, ‘negotiated agreements provide companies with greater security and less risky investments’.¹⁸

In June 2013, indigenous delegates prepared the Alta outcome document at the Global Indigenous Preparatory Conference for the United Nations high-level plenary meeting of the General Assembly to be called the World Conference on Indigenous Peoples. This document was formally submitted to the UN Secretary-General, Ban Ki-moon, by nine member states – Australia was not one of them¹⁹ – and identifies four primary themes in which indigenous delegates urge states to align their domestic legal frameworks with: (1) Indigenous people’s lands, territories, resources, oceans and waters; (2) United Nations system action for the implementation of the rights of indigenous


¹⁵ UNGA, ‘United Nations Declaration’ (n 4) 12.


¹⁷ ibid.

¹⁸ ibid.

¹⁹ The nine member states include Bolivia, Denmark, Finland, Guatemala, Mexico, New Zealand, Nicaragua, Norway and Peru.
peoples; (3) Implementation of the rights of indigenous peoples and; (4) Indigenous people’s priorities for development with free, prior and informed consent. Unlike UNDRIP, this document not only recognises the rights of indigenous peoples but also provides recommendations by which a state can progressively realise indigenous social and economic rights.

UNDRIP and the Alta Outcome Document are symbolic for reasons threefold. First, these documents ‘make place’ for indigenous perspectives in the international human rights dialogue enabling the deconstruction of colonial ideologies of aboriginality and metaphor of the ‘savage, victim, savior’ (SVS). These concepts reduce indigenous peoples to ‘savages’ who are ‘in need of settler-imposed control’, constructing the idea that state is the ‘savior’ who will provide development and civilisation. Historically, aboriginality and the SVS metaphor have ‘[legitimised] and [supported] the policies and practices of the state’. By actively engaging in such dialogue, input from indigenous communities serves as a moral compass for states attempting to align their domestic legal frameworks with international human rights law. Secondly, in dismantling notions of aboriginality and the SVS metaphor, indigenous TEK is validated and embedded in international human rights law. Finally, allowing indigenous people to participate in the international discourse creates a more democratic system, which ensures that collective rights ‘reflect the evolving needs and practices of [the] aboriginal claimants’.

III. AUSTRALIAN COLONIAL HISTORY AND LEGISLATION

Considering Patrick Wolfe’s notion that ‘invasion is a structure not an event’, it is argued that in order to protect the settler colonial state’s position as a sovereign nation, colonialism is embedded in the structural composition of the state through legislative policy and is reinforced through the use of colonial myths. By examining Deborah Bird Rose’s idea of ‘deep colonisation’ and

20 UNGA, ‘Letter’ (n 5) 5-10.
23 Michael Dodson, ‘The Wentworth Lecture – The End in the Beginning: (Re)defining Aboriginality’ (1994) 1 Australian Aboriginal Studies 1, 2-13; Macoun (n 23).
practices of ‘erasure’, this argument becomes clearer. Bird Rose uses the metaphor of two hands to discuss colonial efforts, which minimise indigenous integrity on a multitude of fronts. While the left hand provides *tabula rasa*, a clean slate,27 the right hand, which is attributed with progress and civilisation, creates a new society void of any prior history.28 In early Australian legislative history, this ‘clean slate’ was achieved through the implementation of *terra nullius*,29 which utilised Lockean notions of property30 to justify the ‘lie that a space existed/exists for [colonial] invasion and settlement’, on indigenous Australian lands.31 By denying indigenous Australians’ history and undermining the extensive knowledge and customary legal systems in which they possess, Imperial Britain created a new ‘civilised’ society – Australia – in which they possessed exclusive autonomy and ownership of the land including its natural resources.

It was not until 1992 that the High Court of Australia overturned *terra nullius* in *Mabo*. While the Queensland government argued that *terra nullius* could not be overturned because upon settlement, the colonial government attained sovereignty as well as ‘absolute beneficial ownership of all land in the territory’,32 Eddie Mabo, a Torres Strait Islander, argued that since the Crown’s exertion of sovereignty did not disrupt his family’s occupation of the island, the Queensland government did not possess the right to extinguish title over his family’s land.33 In proving that Australia was not, in fact, *terra nullius* at the time of colonial settlement nor ceded or conquered, Mabo’s claim challenged Australian sovereignty, forcing Brennan J to innovatively deliver his judgment.

Brennan J acknowledged the validity of Mabo’s claim when he stated, ‘Judged by any civilized standard, such a law is unjust and its claim to be part of the

30 John Locke theorized that land becomes property through the labour. If the land is seen as wilderness, it is considered ‘empty’ or ‘belonging to no one’. This theory was used amongst many settler colonial states as a way to exert sovereignty over land in which indigenous people lived. See John Locke, *The Second Treatise of Civil Government* (CB McPherson edn, Hackett Publishing Company 1980).
32 *Mabo* (n 3) [25] (Brennan J).
33 *Mabo* (n 3) [1], [13], [19] (Brennan J).
common law to be applied in contemporary Australia must be questioned'. 34 Although the government’s use of *terra nullius* was unjust and the country was illegitimately founded, the court does not possess the capability to discontinue their sovereignty. Brennan J states:

> [I]n discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle, which gives the body of our law its shape and internal consistency. 35

In order to remedy this dilemma, Brennan J suggested that Australia should recognise Native Title rights:

> [T]here is no reason why land within the Crown’s territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty. 36

This led to the creation of the Native Title Act 1993 (Cwlth). According to the Native Title Act, Native Title is ‘the recognition by Australian law that some Indigenous people have rights and interests to their land that come from their traditional laws and customs’. 37 Native Title rights 38 can include, but are not

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34 *Mabo* (n 3) [28] (Brennan J).
35 *Mabo* (n 3) [29] (Brennan J), emphasis added.
36 *Mabo* (n 3) [52] (Brennan J).
38 A. the right to access the application area; B. the right to camp on the application area; C. the right to erect shelters on the application area; D. the right to live on the application area; E. the right to move about on the application area; F. the right to hold meetings on the application area; G. the right to hunt on the application area; H. the right to fish on the application area; I. the right to use the natural water resources of the application area including the beds and banks of watercourses; J. the right to gather the natural products of the application area (including: food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs; K. the right to conduct ceremony on the application area; L. the right to participate in cultural activities on the application area; M. the right to maintain places of importance under traditional laws, customs and practices in the application area; N. the right to protect places of importance under traditional laws, customs and practices in the application area; O. the right to conduct burials on the application area; P. the right to speak for and make non-exclusive decisions about the application area; Q. the right to cultivate and harvest native flora according to traditional laws and customs; R. the right to control access to, and use of, the area by those Aboriginal people who seek access or use in accordance with traditional laws and custom. Susan Walsh, ‘Registration Test Decision’ (*National Native Title Tribunal*, 2012) <http://www.nntt.gov.au/Applications-And-Determinations/Registration-Test/Documents/2012/November%202012/NN12_4%2006112012.pdf> accessed 29 December 2013.
limited to, rights to continued occupation in the claimed territory, access to land for traditional practices or ceremonies and/or to employ usufructuary rights.\(^{39}\) All applications for native title are subject to the Federal Court of Australia, while the NNTT assists indigenous Australians in any stage of the native title application, applies registration tests for native title, registers indigenous land use agreements and serves as an arbitrative resource for disagreements between indigenous and development parties.\(^{40}\) It is important to note that the NNTT ‘is not a court and cannot decide whether native title exists or does not exist. However, the President of the Tribunal and its Members make arbitral decisions, chiefly in relation to future statutory matters’.\(^{41}\)

IV. CRITICISMS OF AUSTRALIA’S LEGISLATION AND CASE LAW

Although *Mabo* and the Native Title Act are considered progressive in terms of indigenous Australian land rights, criticisms expose the state’s continued use and reinforcement of myths to control these rights. Irene Watson argues that while *Mabo*, and later the Native Title Act, undermined Australia’s sovereignty, the myth of *terra nullius* was only overturned in language, not in practice.\(^ {42}\) Returning to Deborah Bird Rose’s notion of ‘deep colonising’ and the metaphor of two hands, the overturning of *Mabo* triggered a need to reassert colonial power. While the left hand wiped clean and voided the colonial myth of *terra nullius*, the right hand – the hand of the coloniser – reaffirmed its power by assigning the High Court of Australia the role of determining Native Title. This reassertion of the settler colonial power is demonstrated through the challenging and lengthy process of obtaining Native Title. Native Title cases often take years, if not decades, to determine and requires extensive amounts of resources and financial support. Additionally, in order to attain Native Title, a community must be able to demonstrate a continued and uninterrupted connection with their ancestral lands, one that has not been extinguished, ‘by a valid exercise of sovereign power inconsistent with the continued right to enjoy Native Title.’\(^ {43}\) This prerequisite is disconcerting because it denies aboriginal communities their collective right ‘to borrow ideas, change and evolve over

\(^{39}\) ‘Exactly what is native title?’ (n 37).

\(^{40}\) ‘Tribunal Overview’ (*National Native Title Tribunal*)


\(^{41}\) ibid.

\(^{42}\) Watson (n 33) 260.

\(^{43}\) *Mabo* (n 3) [29] (Brennan J).
time, and maintain their economic rights in the process.’\(^{44}\) Australia’s ‘progressive’ Native Title rights thus forces indigenous Australians to remain culturally stagnant in order to protect and realise their inherent rights as indigenous peoples.

Finally, the recognition of Native Title does not grant indigenous Australians exclusive jurisdiction over their traditionally used lands, nor does it equate to or allow the veto of development practices, which threaten Native Title rights. ‘The main argument against the right to veto is that it restricts access to minerals that are owned by the Crown’.\(^{45}\) This is concerning for Native Title holders, especially when considering the lengthy process and amount of resources that it takes to recognize these rights in the first place. As seen in Mabo, the Crown’s possession of ‘beneficial ownership of land’ and view that indigenous Australian rights are indispensible continues to determine the realization of Native Title rights.

V. NATIVE TITLE RIGHTS IN PRACTICE

Below are four cases that exemplify the complexity of Native Title rights. These cases not only demonstrate the convoluted hierarchy of rights in Australia but also examine approaches taken to protect and uphold Native Title rights in Australia.

5.1 Ashton Coal Mine

The expansion of the Ashton Coal mine in the Hunter Valley region in New South Wales is one example in which Native Title rights of the Plains Clans of the Wonnarua people were disregarded. In 2011, the Planning Assessment Commission (PAC) rejected the project due to popular concern about the pollution of waterways and health concerns\(^{46}\) alongside archaeological evidence that Wonnarua burial and traditional ceremonial grounds were widespread in

\(^{44}\) Bhandar (n 27) 102; Louise Mandell, ‘Offerings to an Emerging Future’ in Halie Bruce and Ardíth Walkem (eds), *Box of Treasures or Empty Box? Twenty Years of Section 35* (Theytus Books Ltd 2003) 157-74.


the desired region. One year later, the ruling of the PAC was appealed and overturned in the Land and Environment Court without the introduction of any new evidence. For the Wonnarua people, the most troubling aspect of the expansion of the Ashton Coal mine included the partial removal of waterways where traditional Wonnarua sites are located. Ashton Coal’s plan was to replace these waterways ‘with man-made channels’, 1.7 kilometres away from its original location.

Two Native Title holders, Barbara Foot and Scott Frank, petitioned against the expansion of the coal mine and repeatedly asked for a reassessment of the grant. Frank has also brought this case to the ‘NSW Land and Environment Court and, separately, lodged a request with the federal Environment Minister, Tony Burke, for an emergency declaration of protection under the Aboriginal and Torres Strait Islander Heritage Protection Act’. Despite these efforts, many of the traditional sites have already been ruined to the point that Native Title holders can no longer utilise these lands for reasons granted through Native Title.

Despite repeated FPIC efforts of the Native Title holders of Hunter Valley to protect their traditional and sacred sites, their Native Title rights have once again become subject to the interests of the state. This is in clear violation of UNDRIP Article 12(1) which recognises ‘the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects’. Furthermore, despite extensive efforts from both Foot and Frank, all rights to FPIC were ignored altogether.

5.2 Roxby Downs Uranium Mine

The Roxby Downs uranium mine is another example in which the Native Title rights of the Arabana have been compromised. After a fourteen-year long Native Title case, the Arabana attained Native Title rights to ‘unlimited access for hunting, camping, fishing and traditional ceremonies’. The expansion of

49 ibid.
50 ibid.
51 UNGA ‘United Nations Declaration’ (n 4) 6.
52 Paddy Gibson, ‘Twenty years since Mabo: why Native Title hasn’t delivered’ (Solidarity, 14 June 2012)
the mine has been approved despite civil opposition to its negative impacts on economic and social rights protected under Native Title. It is expected that the mine will ‘use 100,000 [litres] of water a minute, much of it pumped from Arabana country, devastating the fragile eco-system of the Mound Springs and surrounding areas’. The expansion of the Roxby Downs mine is in clear violation of the principles of FPIC as codified in Articles 18 and 32 of UNDRIP alongside Article 20 which recognises that the Arabana people should be ‘secure in the enjoyment of their own means of subsistence and development, and [they should be able] to engage freely in all their traditional and other economic activities’. Article 20 also states that if the Arabana usufructuary rights are ignored or eroded, they are ‘entitled to just and fair redress’. Regrettably, neither were the Arabana people’s Native Title rights upheld, nor were any efforts to provide redress taken.

5.3 Monadee/Western Australia/Cossack Resources

While the existing Native Title policy has failed to uphold the rights of indigenous Australians in the Ashton Coal mine and the Roxby Down Uranium mine, not all extractive practices have undermined the integrity of Native Title rights in Australia. In the case of Monadee/Western Australia/Cossack Resources, Cossack Resources Pty Ltd sought access to natural resources in Karratha, Western Australia. In effort to protect their Native Title rights, the Monadee Native Title party members presented extensive evidence to the NNTT. They argued that the practices of Cossack Resources Ltd would disrupt religious and related activities of the indigenous church in the subject area; that the practices would conflict with an existing indigenous owned pastoral lease; and that because there had been little to no surveying of the land and its natural resources, the environmental and social impacts could not be properly assessed. The NNTT ruled in favour of the Monadee noting that the grant sought by Cossack Resources would ‘likely to have substantial impact on community and social activities’.

This ruling is an important step in aligning Australian domestic law with international norms. Whilst the religious practices of the Native Title party had evolved from the traditional practices of their community, their rights to Native


53 ibid.
54 UNGA ‘United Nations Declaration’ (n 4) 8.
55 ibid.
56 Monadee/Western Australia/Cossack Resources [2003] NNTTA 38.
57 ibid [31] (Member Sosso).
Title had not been extinguished despite the need, under Australian Native Title legislation, to prove a continued and uninterrupted connection with the land. The ruling explains:

[F]ollowing Members of the Yorta Yorta Aboriginal Community v Victoria … where it was recognised that some evolution and development of traditional law and custom may be acceptable, the [NNTT] held it was open to it to take into account the fact that members of the first Native Title party are members of an indigenous church which meets on the subject area for religious and related activities.  

This explanation is the realisation of Article 11 of UNDRIP, which states:

[I]ndigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

Thus, while Monadee’s religion has adapted as a result of colonial assimilation and integration efforts, their cultural and religious development did not violate their Native Title rights nor did it ‘fracture the skeleton of principle which gives the body of [Australian] law its shape and internal consistency.’

5.4 Koongarra Uranium Deposit

The Koongarra uranium deposit in Australia’s Northern Territory is yet another example in which indigenous Australians’ efforts to protect Native Title rights contributed to the veto of the mine. Jeffery Lee of the Djok clan ended repeated efforts of AREVA, a French nuclear giant, to mine the massive uranium deposit. Realising that ‘the deposit is estimated to hold 14,540 tonnes of uranium ore worth approximately $5 billion’, the Australian government

58 ibid.
59 UNGA ‘United Nations Declaration’ (n 4) 6.
60 Mabo (n 3) [29] (Brennan J).
62 ibid.
63 ibid.
left Koongarra out of Kakadu National Park’s original borders. However, after continued efforts by Lee to create awareness about the damaging impacts of the mine, letters sent to the UN Secretary General Ban Ki-moon asking for international legal assistance and gaining support from UNESCO World Heritage Center, the borders of the Kakadu National Park were redrawn in 2012 to include the uranium deposit, successfully discontinuing AREVA’s efforts.

Lee’s main concern regarding the uranium deposit was continued access to clean water and a healthy environment. Lee argued:

[I] want to ensure that the traditional laws, customs, sites, bush tucker, trees, plants and water at Koongarra stay the same as when they were passed on to me by my father and great grandfather. Inscribing the land at Koongarra as [a] World Heritage [site] is an important step in making this protection lasting and real.

Although introduced a year later, arguments put forth to protect the Koongarra uranium deposit also paralleled notions presented in the Alta Outcome Document, specifically theme 1(6) which states:

[W]e recommend that States uphold and respect the right of self-determination and the free, prior and informed consent of indigenous peoples who do not want mining and other forms of resource extraction, ‘development’ and technologies deemed to be degrading to their human, cultural, reproductive and ecosystem health ...

With help from international organisations, the incorporation of the Koongarra uranium mine as a part of the Kakadu National Park was an important step in recognizing the collective right to a healthy environment, FPIC and subsequent rights of UNDRIP in domestic Australian law.

VI. CONCLUSION

As a settler colonial state, Australia has historically used legislative mechanisms and colonial myths, such as the Native Title Act and terra nullius, to assert colonial power and limit the affirmation of the rights of indigenous Australians.

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64 Ahni (n 61).
66 UNGA ‘Letter’ (n 5) 5.
The expansion of the Ashton Coal mine and the Hunter Valley mine are only two examples in which Native Title rights have been compromised due to interests of the state. However, given continued efforts of indigenous Australians working within both domestic and international legal frameworks, ‘a picture emerges as to what might happen in the rest of Australia over the coming years as indigenous people become familiar with the Native Title Act 1993 (Cwlth), and Australians learn to live with the *Mabo* High Court decision’. 67 As exemplified by the Monadee people and Lee, through the extensive compilation of resources and by working collaboratively with international organizations, it is clear that indigenous Australians are ‘making place’ for themselves in domestic and international legal frameworks, disabling colonial ideologies, protecting the social and economic rights of their people and more importantly aligning Australia’s domestic framework with rights codified in UNDRIP and the Alta Outcome Document in a way that does not ‘fracture the skeleton of principle which gives the body of [Australian] law its shape and internal consistency’. 68

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68 *Mabo* (n 3) [29] (Brennan J).
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