

Submission to the 94th Session of the
UN Committee on the Elimination of Racial
Discrimination with Regard to Australia's Failure to Comply
with UN Human Rights
Conventions, Declarations and General Recommendations No. 21 and 23 of the
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Introduction

1. The **Tanganekald, Meintangk, Boandik, Arabunna, Wiradjuri, and Kombumerri - Yugambeh** Nations (among hundreds of other Nations) are Aboriginal Peoples and nations as understood within international jurisprudence¹, and as such we declare, “we are ‘Peoples’” as articulated by the same jurisprudence. Being understood as “Peoples” within the international jurisprudence, the Nations have an inherent right to self-determination, including, but not limited to, title to our lands.

First Nations Peoples’ connections to our ruwi – our land - date from the beginning of time; they are immemorial, and those ancient connections have been sung by hundreds generations of of First Nations Peoples across our lands, now named ‘Australia’. The following song of the Tanganekald and Meintangk First Nations is a record of our ancient connections to country:

Guru’nulun ‘and ‘wardand ‘wanunj ganji
‘goronkanjal ‘lei a’ meinjg ‘nainj’gara’nal
‘guru’nulun ‘and ‘wardand ‘terto:’lin
(h’)end ‘barum ai! ‘walanjala talanja’leir
r’einamb ‘maranj’gara’nal.

¹ The Nations for this submission accept the working definition of “Indigenous Peoples” developed by the Special Rapporteur, Martinez Cobo in his report on the “Study of the Problem of Discrimination Against Indigenous Populations” (Cobo Report), and submit that we meet the criteria as set out in this definition from the Cobo Report reads as follows:

“Indigenous communities, Peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on our territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations our ancestral territories, and our ethnic identity, as the basis of our continued existence as Peoples, in accordance with our own cultural patterns, social institutions and legal system.

“This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e) Residence on certain parts of the country, or in certain regions of the world;
- f) Other relevant factors.

“On an individual basis, an Indigenous person is one who belongs to these Indigenous populations through self-identification as Indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). “This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference”. UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4.

Our Nations' ontological world views differ from those of the British Empire and its successor the Australian State which colonized and continue to occupy our lives and lands. Aboriginal relationships to land and the natural world are different to those of the Australian state, which translates them as 'property'.

First Nations' relationships with the land, or 'ownership' is one with the natural world. Our lands and our natural world have always provided us with the sustenance of life; they have enabled us to live and develop our nations. In addition, our lands have defined our respective cultures, identities and existences as "Aboriginal Peoples." As sovereign peoples we acknowledge the boundaries of our sovereign Aboriginal nations. From ancient times we have always respected the boundaries of each of the separate Aboriginal First Nations. We have retained lawful relations within our various cultures for thousands of years and for just as long, our song lines have determined the First Nations' boundaries of Aboriginal Australia. Such respect and reciprocity is the law of the continent now named Australia.

It is our submission that Aboriginal Australia is evidence of the earliest known inter-nations' relations and lawful observance of those relations. Evidence of the density of international relations is in the numerous Aboriginal languages across Aboriginal Australia.

Aboriginal First Nations have always been subjects in international law, and demonstrated lawful relationships and protocols of engagement across the hundreds of First Nations. These international relationships are ancient and pre-existed the emergence of colonialism over 500 years ago; the formation of the League of Nations, and the United Nations.

It is our submission that the ongoing denial of our existence as Nations of Peoples at the time of colonization is ongoing, and in the two-hundred and thirty year colonial relationship with the Australian state there existed and remain acts of racial supremacy.

First Nations Peoples have survived.

- 2 Accordingly, we assert our Nations' inherent right to self-determination. We demand that our rights and titles to our lands are recognized and respected, and that we might freely pursue economic, social and cultural development of our choosing within our lands. Such inherent rights are based on our respective Nations' time-immemorial presence and connection on and to our lands, and the laws given us by *Kaldowinyeri*,² since the beginning of time, in relation to our lands. Our presence, connection and received laws created an unbreakable responsibility and relationship to our lands which predates British common law

² Kaldowinyeri means the law in the language of the Tangane-kald Peoples, but also the way of life, and the living of a good life, a life which is lawful. There are hundreds of First Nations languages and all of them have an equivalent word and meaning to that provided here with the word Kaldowinyeri.

conceptions of real property, and the common law of Australia. We have never relinquished, ceded or surrendered responsibility or ownership, as such actions are not within our ontology or world view and laws.

The Nations further assert that the Australian state has consistently imposed its laws, policies and procedures on our Nations and lands based on the false and racist premise that our inherent rights to our lands and our natural world are subservient to the Australian Crown's "*presumed underlying title*" to our lands and natural world. The Nations submit that at its core, the belief in the Crown's presumed underlying title is based on *racially offensive* colonial ideologies and attitudes which were enshrined in the doctrine of *terra nullius* used by European colonial powers to deny Aboriginal Peoples' rights to their lands.

3. Since the invasion of our lands by the British Empire the First Nations of Australia have asked the question: "by what lawful authority do you come to our lands? What authorises your efforts to dispossess us of our ancient connections to them?" These questions remain unanswered to this day; we are hopeful that the UN CERD 94th session will acknowledge the standing sovereign position of the Aboriginal Peoples of Australia, whose lands have been unlawfully entered, stolen and governed without our consent.

We have always been here. But our lands have been constructed as 'property', by the colonial legal system of the British invaders. Meanwhile we continue to maintain a lawful relational connection to our lands and our natural world.

We have never ceded our sovereignty and never consented to a 'terra-nullius' construct of our Nations. The assumption that the colonizer could subjugate us to their way of being, to dismantle our relationships to our laws and our lands, is a denial of our ways of existence. The assumption that the colonizer could deny our existence, our ways of being and our relational legal systems is an act of racism.

The racism of colonialism and terra nullius³

4. The High Court of Australia in Mabo stated that the doctrine of *terra nullius* was rejected in its application to Australian laws of property.⁴ However *terra nullius* and its racially offensive principles and beliefs continue to exist in commonwealth and state jurisdictions and political policy across Australia. Terra nullius continues to legitimize the legal foundation of the Australian state,⁵ and as a result, it continues to deny Aboriginal Nations' legal subjectivity and our lawful relationships to land. Instead our identities are defined as subjects of Australian law and our relationship to land is framed within the confines of Australian property law. First Nations have never ceded our sovereignty and we have

³ For further discussion see, Irene Watson, "Sovereign Spaces, Caring for Country and the Homeless Position of Aboriginal Peoples," *South Atlantic Quarterly* 108, 1 (2009): 27–51.

⁴ *Mabo (No 2)* 1992 175 CLR 1.

⁵ Inclusive of the Commonwealth and the states of Australia.

maintained our right to determine our identity and relationship to our lands and natural world.

Post Mabo and in denial of its resolution, *terra nullius* remains the foundation of Australian law and the basis of Australian property law. It also continues to frame the legal identity of Aboriginal Peoples. There has been no recognition of our relationship to land and there is no recognition of our status as subjects of international law. Public perception is largely based on the mis-conception that the *Mabo* decision and the following *Native Title* legislation provided land rights, that ‘reconciliation’ gestures provide social justice, and that the Rudd government ‘apology’ healed a long history of assimilation policies and the attempted genocide of Aboriginal Peoples. It is a misconception because native title is not land rights, ‘reconciliation’ provides for no concrete shift in embedded colonial power relationships, and ‘sorry’ has not ended state interventionist policies which are still assimilationist in their effect.

5. The Australian state’s attempts to reconcile our Nations’ inherent rights while it continues to adhere to *terra nullius* as its baseline is intrinsically not only unable to provide a fair and just reconciliation, but are also a failure on the half of the Australian state to meet its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter the “Convention”), the general recommendations and concluding observations of *United Nation Committee on the Elimination of Racial Discrimination’s* (hereinafter CERD), and the *United Nation Declaration on the Rights of Indigenous Peoples* (hereinafter the “Declaration”).
6. The Australian state’s continued adherence to *terra nullius*, its failure to meet its obligations under the Convention, CERD’s general recommendations and concluding observations and the Declaration on the Rights of Indigenous Peoples, deprives the Aboriginal Nations’ rights to ownership and title to our territories again begs the question; “*On what legal basis does Australia claim underlying title to Aboriginal lands*”? To the present day, the Australian state has not provided an answer to the Aboriginal Nations or to CERD.⁶ The only response we can expect is one which again draws upon *terra nullius* as the mechanism providing a claimed legitimacy.
7. Further, despite the Australian state’s professed objective of reconciliation with our nations and the other nations of Aboriginal Peoples within Australia, the lasting impact of the original false claim to our territories continues to ensure poverty amongst us as the wealth of our country is reserved by the state of Australia and the millions of colonists for their own use. Any attempts to get our territories back, or even a fair break when it comes to resources are met with policies and procedures unilaterally created by the state – all designed to deny us our claims.

⁶ Irene Watson, UN Geneva Seminar on "Strengthening partnership between Indigenous Peoples and States: Treaties, Agreements and Constructive Arrangements - 16-17 July 2012.

8. The poverty brought upon Aboriginal Peoples by Australian colonialism manifests in inter-generational trauma and endless experiences of ingrained racism.⁷ However, First Nations continue to affirm in the face of racism, that we remain sovereign peoples who have never entered into consensual relations with any state or agent of the British Crown to surrender our status as subjects in international law. Attempts to correct that position have to date been unsuccessful, even though there has been much rhetoric and promise on the half of the Australian governments to effect constitutional change. But despite a much-touted ‘recognition’ campaign and now ‘talk’ of a treaty,⁸ First Nations’ experience of racism continues unabated. Australian law does not provide for any Indigenous rights or even human rights protection; the Australian Constitution instead still embeds the principles which support a ‘White Australia’ foundation. The constitution underpinned the iniquitous White Australia Policy of the twentieth century (up to 1972), which was aimed at the genocide of the continent’s Indigenous Peoples and the exclusion of non-white immigrants.

Terra nullius and its application within Australia

9. The imposition of the British Empire over Aboriginal lands in Australia was justified by the idea that Christianity was a superior belief system to that of non-Christian, Aboriginal Peoples. Ideas of superiority masked the real agenda, of the expanding mercantile ventures of the colonial project. As a result the non-Christian Aboriginal Peoples rights to land were nullified, thereby justifying and encouraging Christian Europeans to lay legal claim to Aboriginal lands, for mercantile expansionist purposes.
10. The British adaptation of the *Doctrine of Discovery* held that the principle of *terra nullius* applied to Aboriginal lands, and *terra nullius* shaped early laws, policies and procedures of the colonizing powers in Australia. The principles of *terra nullius* continue to inform present jurisprudence, policies and procedures of the Australian Commonwealth, and all the Australian states.
11. The application of *terra nullius* to that which is now Australia fitted with Eurocentric paradigms of ‘progress’, whereby the British assumption of title to Aboriginal lands was sanctioned by ideologies: Aboriginal peoples were ‘backward’ and ‘uncivilized’, and therefore unfit to ‘own’ land. The progress paradigm provided the legitimacy of the foundation of Australia - the Crown’s underlying title to Aboriginal lands is assumed and taken up by the Crown. The

⁷ Victoria Health, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities. Experiences of Racism: A Summary* (14 November 2012); the Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 2, [12.1.2], identified race relations between Aboriginal and Torres Strait Islander people and non-Aboriginal people to be a central cause of the over-representation in, and deaths in custody of Aboriginal and Torres Strait Islander people.

⁸ Treaty Report 1999, para 149 and para 160, the ‘Makarrata’ concluded as a non-event and further treaty debate has not occurred.

hundreds of First Nations' ancient relationships to land simply became 'Crown title'. (In fact, on the ground it wasn't that simple; warfare was continuous along the frontier, and massacre of the people unequipped with guns, likewise continuous. Inside the frontier, repressions continue to this day.) Prior to the colonial invasion of our ruwi-lands, our old people called themselves by our ancient names, (including *Tanganekald*, *Meintangk*, *Boandik*, *Arabunna*, *Wiradjuri*, and *Kombu-merri*, *Yugambeh*), amongst hundreds of First Nations across the continent and (under duress) many of us remain connected to our ancient names and history. The Australian colonial project applied us with many other identities including: barbarians, heathens, savages, Aborigines, British subjects, Australians, and indigenous people. The truth of our connection to land is in our ancient and original language names. The racism of terra nullius disrupted our ancient connections, but we are still here.

12. The status and participation of First Nations Peoples in international fora, provides further evidence of the ongoing racism of colonialist doctrines such as *terra nullius*, and their power to continue to name whom are First Nations and what status is to be accorded to First Nations Peoples. These concerns were raised in the 1999 *UN Treaty Study Report*,⁹ in which Special Rapporteur Miguel Martinez recommended that opportunities be made available for Indigenous Peoples to speak as true subjects of International law in the voice of their own peoples, rather than having to be spoken for by larger representative NGO bodies. It is submitted that the ongoing exclusion of Indigenous Peoples as sovereign subjects of international law, is based upon racist ideologies, enabled by the ongoing *de-jure* power held by states to determine and construct whom and what are 'proper' sovereign subjects of international law.¹⁰ The exclusion of First Nations is racial discrimination, pure and simple.

Aboriginal Laws are complex in their expression of land ownership. Our laws manifest in song-law and stories which are connected to country. Laws' relationship to land is different, if not alien, to colonial understandings of land ownership. The absence of a crown-title deed of ownership should not mean that the ancient ownership of lands held by Indigenous Peoples is displaced. Latterly, we have been called upon to prove our relationship (ownership) in Australian courts, in accordance with Australian property law constructs. The onus of proof should not have to fall on us; the Australian property constructs have been and remain enabled by the racist and genocidal principle of terra nullius.

The songs and stories still lie in the land, and with them remains the ownership of country held by the sovereign Indigenous People. This is a form of ownership which cannot be extinguished by the laying-over of a colonial paper title, nor by the latterly-constructed "Native Title" process (which still remains in Australian

⁹ *Study on treaties, agreements and other constructive arrangements between States and indigenous populations, Final report by Miguel Alfonso Martínez, Special Rapporteur: para 47, E/CN.4/Sub.2/1999/;*

¹⁰ *Ibid* para 50, 55.

law, inferior to the colonial “freehold”). We are excluded from the right to hold and own land unless we buy it back from the colonists, but we are also denied more broadly the right to have an Indigenous world-view held in a distinct body of Indigenous Knowledges.¹¹

An important aspect of work still needing to be done was recommended by Martinez: the inclusion of Indigenous Knowledge in any future work within this area. It is submitted that this work is critical but it is work which requires proper indigenous protocols and approaches.¹²

Across ancient Aboriginal history there is a body of international treaty agreements amongst and between the First Nations Peoples of Australia. However, there are yet no treaties between the First Nations Peoples and the coloniser. *Terra nullius* was used to annihilate Indigenous Peoples, and the position has not been altered post-*Mabo* and the *Native Title* legislation. If anything, these latter-day laws have instead entrenched the colonisers’ position and quest for legitimacy.¹³ From a First Nations’ sovereign position we confront a *process of retrogression*; we are being deprived of the essential attributes of our identity as sovereign subjects in international law piece by piece, and where our original status as sovereign nations was grounded in our territory, our capacity to enter into international agreements and govern ourselves declines with continuing population reduction and the ongoing erosion of our cultures in the face of relentless assimilationist policies.¹⁴ Nevertheless Aboriginal law cannot be extinguished, for there is no principle within Aboriginal law jurisprudence which enables extinguishment. The logic of this would assume that Aboriginal Peoples have consented to our own genocide, an idea which goes against reason, morality and law.

Terra Nullius justification for theft of First Nations lands and the denial of our laws

13. Terra Nullius was the European legal instrument by which the British Empire justified the theft and colonization of our lands now known of as Australia.
14. The justification for the imposition of the British empire over Aboriginal lands in Australia was the idea that Christianity was a superior belief system to those of non-Christian Aboriginal Peoples, and therefore the non-Christian Aboriginal Peoples’ rights to our lands were nullified. This justified and allowed Christian Europeans to legally claim such lands.
15. The theft of Aboriginal lands held since time immemorial by hundreds of Nations became known as ‘Australia’. The theft was justified and legitimized in British law as the lands had been deemed *terra nullius*.

¹¹ Ibid para 223.

¹² Ibid para 62.

¹³ Ibid para 100

¹⁴ Ibid para 105

16. According to *terra nullius*, lands which were believed “empty” or unoccupied by any nation or peoples, or which were in fact occupied but not being utilized in accordance with British standards, were open to the principle of *terra nullius*.¹⁵ Aboriginal Peoples were deemed to be nonexistent or where they were seen and known to exist, hundreds of First Nations Peoples were deemed to have no subjectivity in international law.
17. It was held that since the Aboriginal Peoples had no legal identity and deemed to be no more than akin to the flora and fauna, deemed so low on the scale of humanity that we held no legal personality, and no relationship to our lands. Further, while our territories were seen to be ‘unimproved’ and ‘vacant’ according to English conceptions of property, the English desire to improve such lands through agriculture, pastoralism and so forth also provided evidence and allowed for the justification of the taking of our lands.¹⁶ But meanwhile, we were constructed as British subjects, and without our consent, this act of ‘recognition’ denied our ancient identities, all done in accord with the principles of *terra nullius*. And while we were ‘recognised’ as British subjects, we remained within the range of *terra nullius*. Aboriginal lives and lands were treated as though they didn’t exist, Aboriginal lives were largely unprotected by colonial laws and Aboriginal relationships to land were denied existing.

The Crown

18. The principle of *terra nullius* empowered the Crown to hold full title over all First Nations’ lands and peoples. In Australia, following the initial invasion, the colonies enacted a series of Aborigines Acts and Ordinances. The *Aborigines Acts* provide examples of colonial laws which embodied the principles of *terra nullius*, to position Crown power over Aboriginal First Nations’ ancient authority.

First Nations survivors of frontier massacres were rounded up and removed from their traditional territories and relocated hundreds of kilometers away from their ancient homelands, to be detained in concentration camps known as Aboriginal reserves or christian missions. Life under the *Aborigines Acts* offered two options: to await death, or absorption into the whiteness of the colonial project.

The *Aborigines Acts* provided for the appointment of ‘Protectors of Aborigines’; they were the administrators of a system of rules¹⁷ and had total control over the

¹⁵ The application of *terra nullius*, *Mabo (No 2)* 1992 175 CLR 1.

¹⁶ For evidence of the inherent racism of these principles see John Locke in his “*Two Treaties of Government*”

¹⁷ Under the *Aborigines Acts* the Protector of Aborigines was delegated power by the Crown to determine where First Nations Peoples resided. The Protector also held power to determine the custody and education of children, the conditions under which children were placed in apprenticeships, and the distribution of any monies payable because of labor.

lives of First Nations who were known as “protected persons”, rather than citizens of their own nations.¹⁸ For example, the Protector became the legal guardian of all First Nations children until the age of twenty-one years. All movement of people onto and off reserves was controlled, as were movements across ancient territories which were systematically invaded by pastoralists and farmers. The reserves provided enclaves of slave labor for the local pastoral and agricultural industries. At a time when slavery was no longer practiced within the boundaries of “law,” the Aborigines Acts provided a cheap labor force under the control of the Aboriginal Protectors. For their work, Aboriginal people received bare survival rations. The colonial administration planned the death or alternatively the total absorption of First Nations Peoples into the colonising culture. As towns and settlements expanded, more Aboriginal reserves were set aside, outside the town boundaries. The survivors of the initial impact of invasion were removed to them - away from the genteel eyes of settlers and townsfolk, and rendered invisible. Aboriginal lives were determined by a system of permits, which provided one model for the South African apartheid system. One class of permits provided for “exemption” from the Aborigines Acts. The exemption system was designed to assimilate indigenous peoples into white Australia, separating families and communities. Movement away from a detention center was permitted in accordance with the consideration of a quantum of “white” and “black” blood and “perceived intelligence” in an individual. The certificate of exemption under the provisions of the South Australian *Aborigines Act 1934–39* was in part worded as follows:

*by reason of his character and standard of intelligence and development, should, subject as hereinafter provided, be exempted from the provisions of the Aborigines Act, 1934–1939, does hereby declare that, during the time this declaration remains in force, the said [person] shall cease to be an aborigine for the purpose of the said Act.*¹⁹

Exemption from the provisions of the *Aborigines Act* did not imply freedom from the Act; the Aborigines Protection Board could revoke the exemption at any time. Certificates of exemption were issued by the Protector without notice being given to individuals and without their consent. The following letter from the secretary of the Aborigines Protection Board of South Australia reveals how exemptions were used to facilitate assimilation and dispossession:

I have to advise that you have been expelled from all Aboriginal Institutions and Reserves in South Australia, consequently you will not be permitted to live at Point McLeay or any other Reserve for Aborigines. Moreover the Board will probably exempt you and your Wife from the

¹⁸ For further discussion see John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge: Cambridge University Press, 1997) 32–33.

¹⁹ *Aborigines Act 1934–39* (SA) s 11(a), exemption from the provisions of the *Aborigines Act*. For a further discussion of the history of the exemption system in SA, see Christobel Mattingly and Ken Hampton, *Survival in Our Own Land* (Wakefield Press, 1988) 49.

*provisions of the Aborigines Act. If this course is adopted you will not be permitted to live with or have any relations with the Aborigines of South Australia. My advice to you is to make your home in Victoria and make the best of the situation in which you have placed yourself by your past misconduct.*²⁰

Exemptions were promoted by the colonizers as extending citizen rights; they argued that Indigenous Peoples would be offered freedom from the Act, access to government benefits and the right to consume alcohol.²¹ However the exemption permits were also used as a punitive measure to expel Nungas from reserves and, once expelled, they were restricted from further contact with family. Families or individuals wanting to return home to the mission were forced to apply for a permit. Frequently permit requests were refused. The process was effective in dismantling original peoples' relationships to land and kin.

The exemption permit in Australia had the same objective as the permit system imposed on black South Africans. Both regimes aimed to maintain a white supremacist culture, and while the South African government maintained a white supremacist regime through the separation of black and white, the Australian governments' assimilation policies maintained white supremacy through both separation and absorption.²²

19. The principle *terra nullius* was determined by the Crown in the High Court decision *Mabo*. The common-law position prior to *Mabo* is explained in *Millirrpum v Nabalco Pty Ltd*, (1971) 17 FLR 141:
...On the foundation of New South Wales...every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown. The plaintiffs, who cannot point to any grant from the Crown as the basis of the title which they claim, cannot succeed...²³

²⁰ Ibid 19 in Mattingly and Hampton, *Survival in Our Own Land*, 48.

²¹ First Nations who were exempted were entitled to the Commonwealth Maternity Allowance, Child Endowment Payments and Invalid Old Age Pension. But these entitlements were only paid to those who continued to live away from the reserves in a European manner. This was a result of a 1942 Federal Cabinet decision which narrowed entitlement to only those holding a State Exemption Certificate. The *Social Services Act 1959* (Cth) extended entitlement to benefits to all Aborigines except "nomadic full-bloods."

²² In S.A the *Aborigines Act* was repealed in 1963, replaced by the *Aboriginal Affairs Act* until 1972; in Queensland the Act was still law in the 1970s. However, while the *Aboriginal Affairs Act 1962* (SA), revised legislation, it remained assimilationist in both intent and purpose. When the 1062 South Australian Bill was introduced, Minister of Works G. Pearson made the following comment: "the Bill abolishes all restriction and restraints on Aborigines as citizens, except for some primitive full-blood people in certain areas to be defined."

²³ *Millirrpum v Nabalco Pty Ltd*, (1971) 17 FLR 141, at 245.

In response to the outcome in *Millirrpum v Nabalco Pty Ltd*, the Whitlam federal government established the Aboriginal Land Rights Commission in 1973-1974. This led to the introduction of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).²⁴ The *Aboriginal Land Rights Act* established a land claim process for First Nations in the Northern Territory.²⁵

More than twenty years later *Mabo v Queensland (No 2)* (1992) 175 CLR 1, overturned *Millirrpum* when it ‘recognised’ an Aboriginal title to land. In response to ‘recognition’ the Commonwealth enacted the *Native Title Act*, (1993). The *Native Title Act* has effectively limited the already limited ‘recognition’ of Aboriginal title established in *Mabo*.²⁶

20. Pre-*Mabo*, all title was held by the Crown. *Mabo* decided that the Crown retained exclusive title to all lands subject to an Aboriginal title. Therefore, an Aboriginal title can be extinguished by the Crown. Aboriginal title is a beneficial right only to use land, and is one of the most marginal forms of property right recognition within Australian property law. Aboriginal title recognition is limited to the use of our territories, not extending to a relational and caring-for-country responsibility. Lands therefore, under Australian law, remain held pursuant to the Crown’s title. Aboriginal title is subservient to and subjugated to Crown.
21. The High Court of Australia’s *Mabo* decision did not effectively reject *terra nullius*, as our lands remain subjugated to Crown power and the colonial foundational principle. The *Mabo* decision ‘recognised’ that which the High Court determined and characterized as an Aboriginal title. Aboriginal title is a title created by the Crown, centred by the Crown and held by the Crown. All power to determine the future of our lands remains in the hands of the Crown and is held in accord with the overarching principles of *terra nullius*. Ultimately, the principle of *terra nullius* is unlawful. The crown power over our lands is a construct of the same unlawful principal and continues to uphold the unlawful foundation of the Australian state. Notwithstanding these truths, Australian Crown power and control remains genocidal in its impact on Aboriginal Peoples.

The First Nations experience of the ‘recognition’ of an Aboriginal title, is akin to the game of giving in one hand and taking with the other. The ‘recognition’ of Native Title has attracted controversy amongst both Aboriginal and non-Aboriginal peoples; Aboriginal critics have claimed that native title is not about the recognition of land rights,²⁷ while non-Aboriginal interests, comprising powerful industry groups have

²⁴ Aboriginal Land Rights Commission (1973), *First Report* (AGPS, Canberra); Aboriginal Land Rights Commission (1974), *Second Report* (AGPS, Canberra).

²⁵ Prior to the 1967 Referendum, the Constitution provided in s 51 for the Commonwealth Parliament power to legislate with respect to: “(xxvi) The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws” (emphasis added). The italicised words were removed because of the referendum of 1967.

²⁶ For further discussion, see Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 30-31, 88-89, 130-132, 156.

²⁷ Watson, *ibid*.

lobbied government and the public arguing that native title claims placed the backyards of ‘Aussies’ under threat.²⁸ However, this was not the truth; the guarantees of protection of non-Aboriginal property rights were well secured and were not threatened by the High Court in the decision of *Mabo*. Brennan J made this quite clear, in his judgement ensuring that the ‘skeletal foundation’ of the Australian state would remain intact and undisturbed by the recognition of Aboriginal title.²⁹

Aboriginal native title has been represented as something it never was and never could be, that is, land rights and self-determination for First Nations Peoples. Our relationships to land and obligations to care for country could never be accommodated by this limited-concept Aboriginal title. Aboriginal title doesn’t enable First Nations to maintain our ancient and ongoing relationship to country³⁰ nor to care for it. It provides us no power to protect it against destructive land developments such as urban development, irrigated agriculture schemes, uranium mining, natural gas-fracking and coal mining.³¹

Aboriginal Lands

22. The Crown’s presumed superiority can be traced directly back to the principles found within terra nullius.

The colonial history of Australia and its presumed authority over Aboriginal lands is a history of no or little consultation with First Nations over the future of the relationships they have with their ancestral lands. Instead we have witnessed the presumption of Crown authority and power and the manufacturing of Aboriginal ‘consent’. This entails the advocacy of Aboriginal ‘representative’ voices providing ‘consent’ to a whole class of actions which should never have been consented to.

The First Nations of Australia are Aboriginal Peoples and nations as understood within international jurisprudence, having status to self-determination. Our Nations have never entered treaty with any Crown or colonial state. Our Nations’ territories and their resources, are constantly being used by the colonial states without our consent. The state of Australia denies us our right to freely determine our political status and to freely pursue our economic, social and cultural development. Our right of self-determination has been systemically undermined by the actions of the state, while it erects various entities to represent our interests. These actions are also done without our consent.

²⁸ Australian Mining Industry Council, Advertisement, *The Age*, (Melbourne), 14 August 1993; *The Weekend Australian* (Sydney), 21-22 August 1993.

²⁹ *Mabo (No 2)* 1992 175 CLR 1, 30, the fragility of the Australian legal foundation is discussed by Brennan J.

³⁰ Irene Watson, discusses the capacity for Australian environmental laws to care for country, ‘Aboriginal laws of the land: surviving fracking, golf courses and drains among other extractive industries’, in Nicole Rogers, Michelle Maloney (eds), *Law as if the Earth Really Mattered, The Wild Law Judgment Project*, (Routledge 2017) 209-218. Under the South Australian *Aboriginal Heritage Act*, s 23, power is held by the Minister to destroy Aboriginal sites; this provision has been used to destroy Aboriginal women’s sites and more recently has been raised to destroy a part of the Tjulbruki song line, one of the remaining song lines in existence in a metropolitan area.

³¹ The Queensland government’s approval of the Adani coal mine is subject to several legal challenges.

We have never entered into any agreement or arrangement with Australia. We never agreed to come under the “*Australian Constitution*”, or legislation such as the Aborigines Acts. These alone stand as clear violations of our rights to freely determine our own political status and our future. The state of Australia designed to continue to access our resources without our consent. Our Peoples whole-heartedly reject these standing assaults on our rights within our own lands.

We request that CERD ensure that the Australian state takes positive action to ensure our Nations’ free exercise of our inherent right to self-determination and that the Australian state meets its obligation to sit with their real representatives. We furthermore request that CERD ask that the Australian state stops its processes of manufacturing ‘consent’ for its use of our resources and our lands.

First Nations are the original people of this land and the Aboriginal laws of the land form the relationships of first Nations to it, their home. The nations have an inherent right to their lands and law. Aboriginal People are charged by our laws with the obligations and duties of preserving and protecting our lands and waters for future generations.

Any activity on Aboriginal lands requires our Nations’ free, prior and informed consent prior to any development. This notwithstanding, we could never consent to the destruction of the land. The Australian governments have no authority to grant exploration or development permits; the continued development of our lands without our consent is based on racist ideologies which imply that as Aboriginal Peoples, we do not have a right to our lands and therefore, our consent is not required. No other people can have their land staked by mining companies without their consent. That Australia and its states believe that they can issue these permits without our consent is a violation of Aboriginal Peoples’ rights. The authorization of development without our consent is premised on the racist principles inherent in *terra nullius*, and contrary to Australia’s obligations under the Convention, the CERD’s general recommendations and concluding observations, and the Declaration.

Continued adherence to its false belief in legitimate foundations is also contrary to Australia’s policy of “reconciliation” and alleged desire to create new relationships with our Nations. For true “reconciliation” to take place and thereby create a new relationship as so desired, Australia must abandon its reliance on the racist principles which have been normalized through its jurisprudence and legislation, and contrary to its international obligations, and truly begin anew.³²

³² The Australian Human Rights and Equal Opportunities Commission (HREOC), Ronald Wilson, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: HREOC, 1997), this report has become known as the stolen generations of Australia. This refers to the historic and ongoing removal of Aboriginal children often forcibly removed from our communities, taken hundreds of kilometers to schools run by various religious orders, where often, they were denied their culture, physically, emotionally and sexually abused, and had medical experiments performed on them. This occurred while Australia denies they are acts of genocide,

Case Study of weak Australian federal and commonwealth environmental laws and a failure to consult with Meintngk and Boandik First Nations Peoples.

23. We are concerned for the lands of the Boandik and Meintangk First Nations peoples in what is now known as the South East of South Australia, lands which we have kept in a pristine state since time immemorial and are now threatened using hydraulic fracture stimulation or (fracking) to produce gas.

In accord with our Aboriginal laws the Meintangk and Boandik Peoples continue to have the authority and the responsibility to care for and ensure that our territories are alive and well for future generations. Under international law the state is compelled to consult and obtain our free, prior and informed consent regarding any proposals to develop our lands, it is important to note that from a sovereign, self-determining, First Nations, ontological perspective we could not have the authority to consent to the major damage of our territories which could result from gas fracking.

The failure of the Australian state to address the sovereign position of First Nations Peoples in relation to the proposal to produce gas from our territories – or any of the thousands of development project which they have planned and initiated across the continent- is an act of racial discrimination in the denial of Aboriginal obligations and authority to care for country.

Our nations hold a critical concern for the impact which the proposed gas-fracking process will have on the South East of South Australia and upon the quality of our air, water and earth-soils and our food security for the future. We are concerned that fracking, as it has been noted in many other areas in Australia and the rest of the world,³³ has the potential to severely damage the environment of our ancient territories in South-East region. We are similarly concerned with other environmental threats to our lands and waters and our future food security.

The evidence is mounting against fracking as a way forward in providing for the energy needs for future generations. Beach Energy's Statement of Environmental Objectives, reveals some of the company's awareness of the potential risk to the quality of water, land and air in the South-East.

supported by terra nullius and its racist principles and beliefs.

³³ The Northern Inland Council for the Environment, "The Truth Spills Out – A Case Study of Coal Seam Gas Exploration In The Pilliga". See also, http://www.stoppilligacoalseamgas.com.au/wp-content/uploads/2011/12/The_Truth_Spills_Out_Final_May_2012_without_appendices.pdf; <http://www.smh.com.au/environment/santos-coal-seam-gas-project-contaminates-aquifer-20140307-34csb.html> According to a United Nations Environment Programme document, between 15 and 30 million litres of highly pressured water is used per fracked well. These production costs are unsustainable on our water resources in the South-East region.

Due to this and other mounting evidence against fracking our Nations submit that there is a need for the territories of the Meintangk and Boandik First Nations be determined exempt from any unconventional gas developments. Our obligations are to protect our lands and cultural integrity along with the need to provide for future generations food security.

Meintangk and Boandik peoples are excluded from decision-making processes that impact our territories, this is the terra nullius dilemma, that is the idea we are inhuman or without law. We are currently opposing the development of a golf course-tourist resort on our lands. This development will destroy the burial grounds and ancient midden sites of our ancestors, as it will also place pressure on the survival of our ngaitjes³⁴ who have become like us an endangered species. We have said no, but our voices have minimal ranking in the development plans of the South Australian government.³⁵

Boandik and Meintangk First Nations Peoples, though they provided a long resistance in the 1840s, have not been given due recognition as the first peoples of the South East of South Australia and nor there has been no adequate consultation in accordance with international law. Instead a typical terra nullius approach to First Nations Peoples has prevailed, and this is even though the state is aware of our People's existence in the region.

The ongoing informed terra nullius approach has been to ignore Boandik Meintangk Peoples sovereignty. In applying its governance, the state has a framework which overlooks indigenous ontological understandings of the world. Indeed, the conceptualisation of nature as a resource for appropriation, economic growth as an endless process for the development of the 'nation state', and accumulation as a natural activity of all human societies are the premises of this state and its gas industry and are in opposition to an Indigenous ontological way of knowing.³⁶

³⁴ Our relationship to all things in the natural world.

³⁵ For information on the SA Development Assessment Commission, note at every level there has been no opportunity to speak about our concerns, there is no opportunity to appeal the decision of the Minister, there is almost no possibility for judicial review of the final determination, see

www.sa.gov.au/planning/majordevelopments > <https://www.sa.gov.au/search?collection=sagov-web-search&f.tabs%7C1=All&query=nora+creina+golf+course+and+tourism+resort>

³⁶ Irene Watson, discusses the capacity for Australian environmental laws to care for country, 'Aboriginal laws of the land: surviving fracking, golf courses and drains among other extractive industries', in Nicole Rogers, Michelle Maloney (eds), *Law as if the Earth Really Mattered, The Wild Law Judgment Project*, (Routledge 2017) 209-218. Under the South Australian *Aboriginal Heritage Act*, s 23, power is held by the Minister to destroy Aboriginal sites; this provision has been used to destroy Aboriginal women's sites and more recently has been raised to destroy a part of the Tjulbruki song line, one of the remaining song lines in existence in a metropolitan area.

Arabunna Case Study

24. The allowance of mining permits and the registration of mining interests is based on the notion that the underlying title vests in the Crown. There is no recognition that our Nations have any right to say “no”.

The case of the Arabunna First Nations is they confront the largest uranium mine in the world. That is Roxby Downs in northern South Australia. They demand the right to say ‘No!’ to uranium mining. The Roxby Downs mine and processing plant, established twenty years ago, have degraded the surrounding natural environment and rely upon the waters the Great Artesian Basin around Lake Eyre, the land of the Arabunna People. While the state advises that they have obtained consent, Arabunna elder Kevin Buzzacott has protested the development since its inception, insisting that no Aboriginal standpoint consent to the destruction around the mine could ever be given. The processing plant uses 45 million litres of water per day, principally in the ore-concentration plant. The water is drawn from ancient underground water reserves which connect us all in our future needs and dependencies upon water. These ancient underground waters should not be squandered on concentrating heavy metal ores.

A new uranium mine is also being proposed on the lands of the Martu Peoples in Western Australia; the proponent is Cameco a Canadian company. Though the approvals process is well along, many of the Martu First Nation claim that they have not agreed to it. In 2017, the Martu protest continued.³⁷

Nuclear Waste Dumps and First Nations

25. First Nations have unanimously said ‘no’ to the development of nuclear waste dumps on their lands from the mid 1990s. In those years the Australian federal government proposed the development of a national nuclear waste depository in a region (in South Australia) known as Billa Kallina.³⁸ This was to store the residue of the sole nuclear reactor in Australia, the Lucas Heights machine near Sydney. (currently the waste, generated over the last 60 years, is stored at Lucas Heights.). A group of senior Aboriginal women local to Billa Kallina, the Kupa Piti Kungka Tjuta from the Arabunna, Kokatha and Yankuntjatjara Nations said ‘no!’ to it. Because of their sustained opposition, the Billa Kallina site is no longer

³⁷ Angus Sargent, ‘Martu People Leave on 110km March in Protest Against Pilbara Uranium Mine’, *ABC News*, 5 June 2016 <<http://www.abc.net.au/news/2016-06-04/martu-people-in-the-pilbara-protest-a-uranium-mine/7476440>>.

³⁸ Billa Kallina is about 600 km north-west of Adelaide, South Australia.

³⁸ The Kupa Piti Kungka Tjuta is a group of senior Aboriginal women from the Arabunna, Kokatha, Yankuntjatjara, and other peoples who were based in Coober Pedy, South Australia and were most active against the nuclear waste dump proposal during the 1990s and until the federal government decision not to site the dump at Billa Kallina. Regarding the proposed Muckaty dump site, see David Sweeney, ‘Plan to Use Aboriginal Land as a Nuclear Waste Dump is Flawed and Misguided’ *The Guardian* (London) 31 July 2013. A film about the Muckaty situation is discussed further in chapter three.

threatened. However, the Federal government followed up with plans to site the nuclear waste dump site, in the Northern Territory at a place called Muckaty.³⁹

Agreements over First Nations Peoples' lands in Australia have often involved a small number of individuals co-opted for the occasion of the sign-off, while the majority, and the principle of free, prior and informed consent of the collective⁴⁰ is frequently ignored. Dianne Stokes of Muckaty spoke about her opposition to the federal government's proposed nuclear waste dump being located on the lands at Muckaty and the process by which the government purported to have obtained consent; her opposition was due to the lack of proper consent being obtained from the peoples who had the authority to speak for the land in question. They had not consented to the nuclear waste dump development.⁴¹

So, about the waste dump, there wasn't any proper consent and consultation from the traditional owners back home in Tennant Creek when it started off. The first time, I was really happy to follow these Northern Land Council people and the government people, to get my people to say yes, but the waste dump come to the land. And when I think about it in my heart, I shatter sometimes: I shake inside my heart, because I'm feeling it. I know that I would have a bigger problem at the time if I was accepting the waste dump to come to the land. ...I've seen Lucas Heights⁴², it's got all the drums there all sealed. I went and asked these people at Lucas Heights a question: "Is it open"? "No, it's all sealed, it's all tight and won't crash or it won't rust or anything". But I know drums get rusted; drums do get rusted, because I've seen a lot of these drums rusted along the highway with the tar. That was from before I was born, when they were making the roads going to Queensland. I can see that all along there you've got rusted drums.... I thought about my grandfather's country, and I say now that I'm not happy with the waste dump coming into the land, because most of my families who fought hard, even my uncle, he was one of them. ...But now he's gone, because he had too much stress – he was worried about the stuff coming into the land. So he said to me, "I'm going to keep going."⁴³

In the film *Muckaty Voices*⁴⁴ Barbara Shaw posed a further challenge to the Commonwealth selection of the site and to the interpretation of 'free, prior and informed consent' when she referred to Article 29 of the UNDRIP as follows:

³⁹ David Sweeney, 'Plan to Use Aboriginal Land as a Nuclear Waste Dump is Flawed and Misguided' *The Guardian* (London) 31 July 2013.

⁴⁰ Free and prior informed consent 'recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent.' See the Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Working Group on Indigenous Populations*, Twenty-second session, 19 -13 July 2004, 5.

⁴¹ The National Radioactive Management Bill 2010, which among other measures proposed to override Australian Commonwealth and state laws and suspend environmental and Aboriginal heritage protection. It also proposed to exclude the requirement to obtain traditional owners' free prior and informed consent for any sites being nominated for the nuclear waste dump.

⁴² A nuclear reactor facility in Sydney, New South Wales.

⁴³ Dianne Stokes, 'Muckaty Community and a Nuclear Waste Dump on our Communal Lands' 2007 *Declaration on the Rights of Indigenous Peoples: Where to From Here? Symposium*, David Unaipon College of Indigenous Education and Research, symposium presentation 10 December 2010, the full presentation can be heard at <http://www.unisa.edu.au/ducier/research/symposium/default.asp>

⁴⁴ The film *Muckaty Voices*, was produced by Beyond Nuclear Initiative and Enlightening Productions 2010, www.beyondnuclearinitiative.wordpress.com.

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources...(including) no storage or disposal of hazardous materials... in the lands or territories of indigenous peoples without their free, prior and informed consent.

But again, the Commonwealth withdrew in the face of these criticisms, and the search for a nuclear waste site continued. And once again the state has targeted Aboriginal lands for a waste dump. The contemporary target is lands of the Adnyamathanha Peoples.⁴⁵ For now, they have succeeded in stopping the dump, but the threat of having a nuclear waste dump foisted upon you remains an ongoing in the survival of First Nations and our lands. Elders have many times conveyed to government ministers and their bureaucrat's warnings on the destruction that these developments are causing to all the natural world.

Our Nations wish to bring to the attention of the CERD the above examples which show the continued discrimination against the Aboriginal Nations and Peoples within what is now called Australia. The lawful, cultural and spiritual obligations to care for country which we maintain are constantly undermined by the terra nullius policies of the colonists. Caring for country is a core principle of Aboriginal Law and jurisprudence, and our ways of being have been, rendered simple by the terra nullius underpinnings of the Australian states, while the power of the state to impose dangerous activities on Aboriginal lands continues.

Free Prior and Informed Consent

26. Under *UNDRIP* and the *ILO Convention 169 on indigenous and tribal peoples* we are entitled to be meaningfully consulted and involved in any decisions about proposals to exploit resources on our traditional lands, particularly when that exploitation threatens our future survival.

The 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the General Assembly enshrines the rights of indigenous peoples to self-determination, to our lands and resources, and to consultation in good faith to obtain our free and informed consent prior to any large-scale economic activities which might affect our lands and communities.

It is expected that both the state and industries which are involved in the extraction of non-renewable resources would comply with these international law standards, these minimum standards and expectations around consultation which are set out in UNDRIP.

The right of self-determination of all peoples is recognized in Article 1 of the two international covenants on human rights. The right of indigenous peoples to self-determination is acknowledged in article 3 of the UNDRIP but is also an underlying right

⁴⁵ The commonwealth government of Australia has proposed to create a nuclear waste dump in an area which borders the Yappala Indigenous Protected area – in northern South Australia again - without the consultation of the Adnyamathanha people. Jane Norman, 'Nuclear Dump: Barndioota Station in SA Earmarked as Site of Waste Facility', *ABC News*, 29 April 2016 <<http://www.abc.net.au/news/2016-04-29/nuclear-waste-dump-expected-south-australian-cattle-station/7369346>>.

present in almost all other provisions. To recognize the right to self-determination is to accept that indigenous peoples can and should decide the appropriate development that can take place on our lands. When and if there is no consultation by outside parties in line with the procedures set out in the Declaration, this would deny indigenous peoples our right to determine our own development.

There is general agreement on the obligation of states to undertake consultations with indigenous peoples which might be affected by a state-endorsed activity and the principal is found in several articles of UNDRIP. These include: articles 10, 11(2), 19, 28(1), 29(2), 30(1) and 32(2). Article 32 (2) of the Declaration is particularly relevant to the extractive industries and stipulates that:

“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.”

Article 32 requires consultation with the objective of obtaining the free, prior and informed consent of the indigenous peoples concerned. The principle of free prior and informed consent is also referred to in articles 6 and 15 of ILO Convention 169. Article 6 states that:

“consultations carried out in application of this convention shall be undertaken [...] with the objective of achieving agreement or consent to the proposed measures.”

This article can be read alongside article 15 and in relation to indigenous peoples and extractive industries:

“In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples [...] before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.”

While some states have argued that the principle of consent is absent from the Convention, the ILO’s Committee of Experts on the Application of Conventions and Recommendations has on several occasions recalled that, in accordance with Article 6, governments shall consult the peoples concerned with the objective of “*achieving agreement or consent to the proposed measures*”.

The Committee on the Elimination of Racial Discrimination (CERD) in its General Comment 23 of 1997 called upon states parties to “*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.*”

While consultation and the process of free, prior and informed consent are fundamental protocols in any dealings with First Nations Peoples' territories, they are a core principle to First Nations laws. The destruction of the natural world cannot be consented to; it would be unlawful to do so. First Nations Peoples cannot consent to ecocide of our lands and natural world environment; it would be equivalent to our own genocide. Free prior and informed consent has become customary international law and should be consistently applied to bring balance to the limitations in Australian law regarding the laws of First Nations Peoples.

It is our submission that First Nations Peoples, have the authority to say NO to the destruction of our lands and natural world. In Australia First Nations do not, however, have the power and or the mechanisms to support our authority. As a minimum standard free, prior and informed consent should be core to any process of engaging First Nations Peoples on questions to do with our lands and natural- world environments. To deny us the process of free, prior and informed consent is to treat First Nations differently, because of difference.

Native Title Burden of Proof

27. While the advent of Native Title is criticized for its failure to fully reject terra nullius and for its limits in respect of recognition, some First Nations have decided nevertheless to engage with the process. The decision to engage was made in these cases because it is the only option the states and the commonwealth have enabled First Nations to pursue. For those who are still outside the process there is no space left to stand.

Native title processes are difficult to navigate; the burden of proof lies upon First Nations to prove their title. Previous critics of the burden of proof have been unsuccessful in improving the process; to date little has changed. Aboriginal Peoples, continue to carry the burden of proof. In 2015, the ALR Commission Report recommended removing some technical and more complex aspects of the process of proving native title, but to date there have been no shifts in reducing the burden upon Aboriginal Peoples to prove native title.

It is submitted that no other peoples have such an onerous burden - to prove an ongoing, unbroken relationship to the land – such as the present Australian native title process placed upon them. Not only is the burden onerous, but colonialism has impacted on the capacity of First Nations to advocate their ongoing relationships. This has not been fully and properly understood, and such failure is further evidence of the racial discrimination to which First Nations are subjected to.

Native Title Indigenous Land Usage Agreements

28. Native Title law enables negotiations regarding Aboriginal Lands to be managed pursuant to Native Title Act, Indigenous Land Usage Agreements. This process has caused conflict between consenting and non-consenting First Nations Peoples,

often at the core of native title negotiations.⁴⁶ The Adani coal mining development proposed for central Queensland is one of many developments which has in part been progressed through native title Indigenous Land Usage Agreements.⁴⁷ Several actions came before the courts, seeking determinations as to the legitimacy of ILUA agreements.⁴⁸

There is no external or international mechanism available to First Nations Peoples to monitor and intervene in ILUA determinations which would be deemed unlawful from a First Nations' perspective. In 2010 Arabunna elder Kevin Buzzacott spoke about an ILUA which was used to gain support for the proposed expansion of the Roxby Downs mine in South Australia:

'We've got Roxby Downs brothers and sisters and they're talking about a big expansion (to Roxby Downs uranium mine) like a big open cut mine. It's going to be something like 17, 18 kilometres round and about one mile [deep] in the ground and that's going to be right in the middle.⁴⁹ In the 1980s it was Western Mining Corporation that started off this mine. We didn't want it, we protested it, it's a very sacred place, big stories and now they want to do the expansion and this big open cut mine there. We're worried about that already and they getting the water from the Lake Eyre Basin. They're taking out the water, the sacred water from sacred country again and they're using it, then all our uranium stuff and more sacred water being used. So now with the new railway line [from Adelaide to Darwin] ... they're talking about taking the [uranium] waste all the way up to Muckaty.⁵⁰ Then shipping the uranium out into other countries, and along the way they're going to dump off the waste back in the Muckaty area. Aboriginal peoples

⁴⁶ Joshua Robertson, 'Leading Indigenous lawyer hits back at Marcia Langton over Adani', *The Guardian*, 9th June 2017, <https://www.theguardian.com/profile/joshua-robertson> last accessed on 4th August 2017. On the capacity of Australian law to protect country, native title does not provide First Nations with capacity to care for country in the ways in which we are obliged to, but are rather laws intended to assimilate First Nations into the Australian property law system. Under these laws land constitutes property, which contradicts our traditional relationships to our territories. See *Native Title Act 1993* (Cth); *Native Title Amendment Act 1998* (Cth).

⁴⁷ Indigenous Land Usage Agreements (ILUA) may be negotiated pursuant to *Native Title Act 1993* (Cth) s 24BA. Developments on country are frequently negotiated within an ILUA framework. For example, most large-scale developments, including the Roxby Downs uranium mine, involve an ILUA, note the confidential character of this agreement: Barry FitzGerald and Sarah Martin, '\$900m Olympic Dam Windfall to Indigenous Groups', *The Australian*, 5 May 2012 <<http://www.theaustralian.com.au/business/m-olympic-dam-windfall-to-indigenous-groups/story-e6frg8zx-1226347243652>> last accessed 5th August 2017. The Cameco Corporation uranium mine at Kintyre in the Pilbara region of WA on the lands of the Martu People was also negotiated as an ILUA in 2012: 'Kintyre', Cameco Australia <<https://www.camecoaustralia.com/projects/kintyre>> last accessed 5th August 2017.

⁴⁸ In On 22 June 2017 the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* came into force, amending the Commonwealth *Native Title Act 1993*. This was to remove uncertainty around the validity of registered Indigenous Land Use Agreements, following *McGlade v Native Title Register* (2017) FCAFC 10. The amendment confirms the validity of ILUAs currently on the Native Title Register; and provides validity for those agreements where most the registered native title applicants have signed.

⁴⁹ The mine is located at Roxby Downs approximately 500 kms north of Adelaide, South Australia. The proposal was to turn an existing underground copper, gold and uranium mine into the world's biggest open cut mine.

⁵⁰ Muckaty is located approximately 120 kms north of Tennant Creek in the Northern Territory.

living close to this big railway line that they've got now and all the families and people here now are really worried about all that. They're really worried about what's going to happen because again it's a very sacred country. I don't know how they do it; they always want to dig and dump stuff and dig up very sacred places. We want to stop this mob before the bulldozers go in ... because we're born here this old country, our creators created this country for us to look after. Now we're born with the obligations and responsibilities to look after this country. That's what old people say and that's what we've got to do.'⁵¹

As above, the ILUA processes can enable the development of Aboriginal lands, without a consensus and the free, prior and informed consent of First Nations. Agreements are often entered into without an Aboriginal process of consensus and enabled by negotiations which do not respect the authority and protocol of First Nations. Such manipulation of Aboriginal Peoples continues unabated. As with the governments of other states, the Australian state has organized its own "group" of Aboriginal Peoples who have been recognized by its political masters to make "decisions" for all Aboriginal Peoples. Controllers have been used by State governments to enact regressive domestic policies designed to undermine our Nations rights, and to negotiate arrangements that are not fully endorsed by the nation.

The Australian Constitution and terra nullius within the Australian State

29. The following quote is taken from an 1840 speech given by the colonial governor to the parliament of South Australia during the introduction of the Bill to Deal with Aboriginal Evidence in Court:

*'The British constitution is the growth of a thousand years; it cannot be imposed on a nation in a day. It is adapted for Britain—the country which stands highest in the world in the scale of religion, civilization, and improvement; it cannot be fully received or properly appreciated even by civilized nations of an inferior class, much less by the savages of Australia, who stand in the lowest degree in all the earth in religion, government, arts, and civilization. In all these respects they are morally, as in material things they are physically, the antipodes of Britain—and it is not an easy thing to make antipodes meet.'*⁵²

From the beginning of the colonial project in Australia there was never any intention to recognize Aboriginal First Nations

30. The principles of *terra nullius* have informed, and continue to inform not only Australian legislation and jurisprudence affecting our Nations' territories, but also the actions of government regarding our Nations' lands and laws. First Nations contend with a fundamental and allegedly immutable principle, that is, that all our

⁵¹ Cited in Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 41.

⁵² 'Proceedings of the Council' September 25, 1840.

Nations' lands, including lands set aside as "reserved" lands, are subject to the false belief that the Crown has underlying title due to British assertions of its sovereignty. This remains a standing falsehood.

31. The imposition of *terra nullius*, works to negate our ancient relationship to our lands, and laws and to replace our ancient ways with a colonial land ownership system which provides for the Crown's alleged underlying title. We submit that this belief is not only incorrect and based upon racist ideas concerning Aboriginal Peoples, our cultures, traditions and laws, but has also resulted in government actions harmful to the culture and health of our Nations and their members.
32. The Australian Constitution, legislation and the High Court of Australia, all continue to perpetuate the principles of *terra nullius* for there is no recognition of First Nations Peoples as peoples and as subjects in international law. The Commonwealth of Australia came into existence on 1 January 1901, following the British Parliament's enactment of the *Commonwealth of Australia Constitution Act 1900* (Imp). The Australian Constitution enabled the British colonies of Australia to become constituted as the Australian states. The newly established Commonwealth Parliament divided power between the Commonwealth and the states and incorporated a federal court system.

The 1901 constitution of Australia did not discontinue the *terra nullius* colonial foundation, and it currently remains the foundation upon which the Australian Constitution was established. The First Nations of Australia have never consented (we were never consulted) to the drafting or the implementation of the Constitution and never consented to our embedding within it.

The reference to Aboriginal Peoples in the Constitution enabled the new states of the Commonwealth of Australia to legislate in relation to 'the aboriginal race', notwithstanding that we as Peoples continued to be defined as having no legal identity. This remains an obstacle to our ancient authority as the First Nations Peoples.⁵³ As a by-line, the Constitution also excluded 'aboriginal natives' from the national census count.⁵⁴ These provisions were about constructing jurisdiction, that is, the states deemed themselves to have jurisdiction over Aboriginal peoples, but our lives were not counted or included in the national census. Thus, Aboriginal peoples became unilaterally constituted as having a special excluded status in law. Naturally, First Nations did not consent to this newly constructed and constituted status.

The continuity of the *terra nullius* principle is inherent within the Australian Constitution. Meanwhile the Australian Government sees itself as working

⁵³ Section 51(xxvi) as originally enacted provided that the Commonwealth Parliament could legislate with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.

⁵⁴ Section 127 as originally enacted stated that 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.

towards the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. The ideal of recognition raises more questions than it does answers. The current position, provides little hope that the ongoing genocide of Aboriginal Peoples will come to an end, any time soon. The Australian government's recognition campaign has failed and is largely moribund. The Uluru statement mandated by a 'representative' group of First Nations peoples in May 2017, has been rejected (on 26.10.17) by the Commonwealth government. Meanwhile there is a rising number of Aboriginal Nations who are calling for a Treaty. And concern for how this will develop are already being discussed by First Nations.

It is submitted that the Constitution and the Commonwealth's attempts to recognise Aboriginal Peoples have instead continued to privilege the positions of both the Commonwealth and the States.⁵⁵ As a result First Nations remain discriminated against as First Nations Peoples. As to treaty proposals there is nothing that would suggest there has been a change of will on the part of the Australian government.

First Nations Ontologies, Aboriginal Knowledge and Racism

33. In respect to Australia the idea of land being empty of Aboriginal peoples was used by imperial Britain to justify the 1788 invasion of First Nations' territories, territories that were re-named Australia in 1901. The renaming of First Nations' territories was imposed, as though our lands had no name or identity of its own. Imperial Britain established the colonies of Australia by drawing straight lines across our unceded territories, while ignoring ancient Indigenous knowledges. Cities and towns were renamed after colonial identities, while ancient names became unspoken. In filling their perceived empty space the colonizers carried on as though there was no violation of First Nations' laws and sovereignty and denied crimes of genocide. The narrative of the peaceful settlement of unsettled native savages became the dominant one, while invasion and genocide became proscribed terms.

Terra nullius was the creation of "western" knowledge and its failure to know other worlds. The racist construction of Aboriginality, as derived from terra nullius has led to a deficit profile of First Nations Peoples. The evidence of this profile of deficit can be identified in the high levels of incarceration rates of Aboriginal people. It is our submission that the complete and 'true' rejection of terra nullius is needed to circumvent this ongoing phenomenon we are witnessing across all levels of the criminal justice system.

The principle of terra nullius underpins the Australian legal system and its future policy directions. If there remains a lack of will and inability to shift the deficit paradigm this phenomenon of over incarceration will continue, as will similar deficit phenomena in areas such as health and well-being, social inclusion, poverty, education and homelessness.

⁵⁵ A discussion of the ongoing colonial project in Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 2, 18-20 and 94.

It is our submission that until the inherent racism of terra nullius is addressed we will not improve Aboriginal Peoples' lives and futures.

Aboriginal knowledges are at the core of Aboriginal lives. Unless our knowledges and languages prevail and remain vital, we will continue to witness a decline across Aboriginal Australia in the lives of Aboriginal Peoples.

Australia's Actions are a Violation of International Obligations

34. It is our First Nations' submission that Australia's actions and inactions are a violation of its obligations under the following international conventions and customary norms:

- a) Articles 2(1)(a), and 5(d)(v) of the *International Convention on the Elimination of All Forms of Racial Discrimination*;
- b) Sections 3, 4 and 5 of the General Recommendation No. 21 of the Committee on the Elimination of Racial Discrimination;
- c) Section 4 of General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination;
- d) Article 1 of the *International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights*; and

35. Australia is a signatory and has ratified both the ICERD and the ICCPR. Accordingly, the country is bound by the articles contained within each of these instruments, and to the norms which flow from each. The Nations submit below how Australia's actions in relation to its laws and policies relating to First Nations' is a violation of its obligations under these international instruments and the norms that flow from each.

International Convention on the Elimination of All Forms of Racial Discrimination

36. According to Articles 2(1) (a) of ICERD, in condemning racial discrimination each State Party to the Convention “. . . undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation”.

37. Article 5(d)(v) provides that State Parties, in compliance with article 2 of the Convention:

“. . . undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction

as to race, colour, or national or ethnic origin, to equally before the law, notably in the enjoyment of the following rights: . . .

(d)(v) The right to own property alone as well as in association with other;”

38. Taking the above articles as whole into consideration, First Nations submit that Australia has failed in its obligations so contained within the articles as follows:

- a) In respect of Article 2(1) (a), the Australian state has engaged in discrimination against our Nations. That we submit is based upon our status as Nations of Aboriginal Peoples. We assert that as Nations of Aboriginal Peoples, we are both sovereign nations and “Peoples” as understood by international jurisprudence, and accordingly possess the capacity to have ownership and possession of title to our lands as a people. Our Nations have neither relinquished our sovereign attributes nor our ownership or titles, and we have never ceded our authority. As a component of our authority over our lives and lands, our Nations have the right to determine our relationship to care for and live within our lands, free from interference by the state of Australia.
- b) In respect of Article 5(d)(v), our Nations assert that Australia’s adherence to the principles within *terra nullius* are based on the racist colonial ideology which holds our Nations as inferior and incapable of having ownership or title to our lands. There exists no evidence of transfer of any right from our individual Nations to the British Crown, the belief that the Crown has a presumed underlying title to any Aboriginal land is false and perpetuated through a normalization of the racist principles of *terra nullius* within the Australian legislative and juridical structures and processes. Racial discrimination denies our Nations’ right to own property as set out in article 5(d)(v) of ICERD.

Our Nations assert that the Australian states failure to uphold its obligations under Article 5(d)(v) in effect prevents our Nations from exercising our rights as Aboriginal Peoples. Specifically, in denying our rights to our lands, and our rights to own the property which makes up our territories, the Australian state also denies our rights to self-determination, to freely pursue our economic, social and cultural development and to freely dispose of our natural resources.

General Recommendation No. 21 of the Committee on the Elimination of Racial Discrimination

39. According to section 3 of *General Recommendation No. 21*, CERD emphasized that:

“ . . . it is the duty of States to promote the right to self-determination of Peoples. But the implementation of the principles of self-determination requires every State to promote, through joint and separate action, universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations.”

Section 4 provides:

“The right to self-determination of people has an internal aspect, i.e. the rights of Peoples to pursue freely our economic, social and cultural development without outside interference”.

Section 5 provides:

“In order to fully respect the rights of all Peoples within a State, government are again called on to adhere to and implement fully the international human rights instruments and in particular the International Convention of the Elimination of All Forms of Racial Discrimination”.

40. These sections of *General Recommendation No. 21* clearly set out that states, in guaranteeing the political, economic, social and cultural rights of those people within their boundaries must take into consideration the right of “Peoples” to self-determination. As noted above, the Nations assert that as Nations of Aboriginal Peoples we constitute “Peoples” as understood by international jurisprudence and as discussed within this general recommendation. Accordingly, taken together with those articles of the ICERD as noted above, the Australian state is required, when meeting its obligations under the ICERD, to fully respect all “Peoples” within its boundaries, such that our rights to self-determination are promoted.
41. The Nations submit that the right contained in section 5 (d)(v), to wit, the right to own property alone and in association with others, is an integral component to the right of self-determination. Without a secured right to property, the ability of a self-determining Aboriginal People to exercise our right to freely develop our cultures and societies using the natural resources found on our lands is a hollow right. The Australian state’s adherence to the racist principles contained in *terra nullius* whereby our Nations’ rights to our territories are minimized for the benefit of the Crown is therefore not only a violation of its obligations under the ICERD, and the directions provided by CERD, but also the *International Covenant on Civil and Political Rights* (the ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR) as set out more fully further below. The denial of our Nations’ rights to our lands and our rights to freely dispose of the natural resources contained within such lands is also a violation of our right to self-determination as Peoples.

General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination

42. According to section 4 of *General Recommendation No. 23*, CERD called on State parties to:

“(a) Recognize and respect Aboriginal distinct culture, history, language, and way of life as enrichment of the State’s cultural identity and to promote its preservation;

(b) Ensure that members of Aboriginal Peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Aboriginal origin or identity;

(c) Provide Aboriginal Peoples with conditions allowing for a sustainable economic and social development compatible with our cultural characteristics;

(d) Ensure that members of Aboriginal Peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to our rights and interest are taken without our informed consent; and

(e) Ensure that Aboriginal communities can exercise our rights to practice and revitalize our cultural traditions and customs and to preserve and to practice our languages”

43. In conjunction with what has been stated above in its totality, the Nations submit that the Australian state’s failure to meet its obligations under the ICERD and *General Recommendation No. 21 of the Committee on the Elimination of Racial Discrimination* is also a failure to heed the *General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination: Aboriginal Peoples*. The Nations submit that the Australian state’s continued adherence to the principles of terra nullius that minimizes our Nations’ right to our Territories, and thereby legitimizes the Australian state’s alleged underlying title to our Territories, is based on racism.

Article 1 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights

44. According to Article 1, *“All Peoples have the right of self-determination. By virtue of that right they freely determine our political status and freely pursue our economic, social and cultural development”*.

The Nations submit that given its recommendations in *General Recommendation No. 21 of the Committee on the Elimination of Racial Discrimination* which requires a State, in protecting the rights of all Peoples within the State, must adhere to and implement fully the international human rights instruments. Hence, the Australian state must adhere to and implement fully Article 1 of the ICCPR and the ICESCR. The Nations submit that the Australian state has not only not adhered to or implemented these articles, but has in fact violated these articles by not protecting and implementing our Nations' inherent right to self-determination as set out in this submission. Since the Australian state has neither adhered to nor implemented these articles, it is also in violation of ICERD and *CERD's General Recommendation No. 21 of the Committee on the Elimination of Racial Discrimination*.

Although the Australian state purports to be a “champion of human rights” Australia's record has recently come under critical scrutiny, before the UN Human Rights Committee, where the Vice chair of the committee commenting upon Australia's failed response to the directions of the committee stated, “While we can accept, in some cases, delay, because changes take time especially in implementing domestic legislation, it is unacceptable for a state to almost routinely fail to implement the views of the committee and in essence challenges the expert nature of the committee.”⁵⁶

Child Welfare System and Australian laws. (Articles 2 and 5)

45. Australia represents that it has a strong legal and policy framework to combat racial discrimination. The evidence suggests the government has a long standing racist violent past and present against Aboriginal Peoples.
46. The removal of Aboriginal children from their families and communities was a program designed by the state which utilized a destructive and vicious legal framework invoking “theories of racial superiority,”⁵⁷ part of a civilizing project to forcibly remove hundreds of thousands of Aboriginal Peoples' children from our Nations and our lands. Our children continue to be removed at ten times the rate of non-Aboriginal children from our homes and families into the state child welfare systems. The effects and devastation of racist colonial violence in our Nations continue to be felt through the poverty, incarceration rates, ongoing forced removals of children and young people from their families, suicides and addictions. Chief amongst other concerns is always however, our relationship to our lands and territories.

⁵⁶ https://www.theguardian.com/australia-news/2017/oct/20/un-condemns-australia-on-indigenous-detentions-and-asylum-policies?CMP=share_btn_link

⁵⁷ Hiram Abtahi & Phillipa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol 1 & 2 (Leiden, Netherlands: Martinus Nijhoff Publishers, 2008). The Ukraine and the USSR argued that theories of racial superiority were at the root of genocide during the drafting of the United Nations Prevention and Punishment of the Crime of Genocide from 1946-1948.

47. The forcible removals of our children are in contravention to CERD's preamble in the ICERD, in which it is "convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere[.]"⁵⁸ Australia's removals of First Nations children into state-controlled institutions is evident in over-representation at every point in the child protection system, measured at a national level, including placement in out-of-home care.⁵⁹
48. Australia's perpetration of destructive policies against our Nations, through the forcible removals of our children into state-controlled institutions and into Aboriginal and non-Aboriginal families not their own, continues in the child welfare system. It is iniquitous that a state such as Australia continues to engage in destructive conduct against our Nations and there exists no international body to examine this issue. It is imperative that CERD sees through the façade of care and engagement which continues to be portrayed by this government as being in the 'best interests' of the child.

Since 2014, despite opposition by all peak and local Aboriginal and Torres Strait Islander children's organizations and communities, Australian governments in each state and territory (except Western Australia) have passed legislation which mandate short time frames before children in out of home care are permanently removed from their families. For example, in NSW permanent placement decisions are made after 6 months if the child is under 2 years and after a year if they are over 2. While permanency and stability is important for Aboriginal, and all children, the reforms will have an adverse and discriminatory impact on Aboriginal children and young people for the following reasons:⁶⁰

- the limited data available indicates that it takes longer on average for Aboriginal children to be restored to their families than non-Aboriginal children. Thus, this legislative reform, in terms of children permanently removed, will have a disproportionate impact on Aboriginal families and communities in terms of children permanently removed.

Many families have complex problems which cannot be resolved within the short time frames provided before permanent placement decisions must be made. The following conditions exacerbate the separation of children from family and Nations:

⁵⁸ *International Convention on the Elimination of All Forms of Racial Discrimination* Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

⁵⁹ SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016), Melbourne, 9; Australian Institute of Health and Welfare 2017. *Child protection Australia 2015–16*. Child Welfare series no. 66. Cat. no. CWS 60. Canberra: AIHW.

⁶⁰ Libesman 2016, 'Indigenous Child Welfare Post Bringing Them Home: From Aspirations for Self-Determination to Neoliberal Assimilation', *Australian Indigenous Law Review*, vol. 19, no. 1, pp. 46-6

- The lack of available and culturally appropriate resources to support restoration.
- The lack of support for ongoing contact with families once children are permanently placed. (This means that families rely on the permanent carer for ongoing contact with their child. This is problematic as there is not always a good relationship between birth families and carers and ongoing contact with birth families and communities may not be one of the priorities of adoptive parents or permanent guardians).
- Oversight of the quality of care being provided to children placed in permanent care and access to specialist out of home care services end with the permanent placement. We know that many children placed in long and short-term care in Australia are vulnerable to physical, sexual abuse, bullying and a failure to look to basic needs such as education, medical care, nutrition, cultural and emotional connections. At the very time that an Australian Royal Commission into sexual abuse in institutional care is taking place, the oversight and protections for vulnerable children placed in out of home care are being reduced and removed.
- There is a lack of data on re-notification once children are permanently placed which means that we cannot monitor how permanent so called ‘permanent’ out of home care placements are.
- Permanency is understood differently by First Nations families and communities, with responsibility for children held by a broader cultural and family group. This is not reflected in the permanency reforms which focus on permanency within an Anglo nuclear family.

49. Our Nations acknowledge that genocide is outside of the scope of CERD’s mandate; however, the information concerning genocide is critical to the framework which Australia espouses to meet international objectives with respect to racial discrimination. We refer to genocide in the context of racial violence prosecuted against Aboriginal Nations and Peoples in the colonization of our lands and natural environments.

50 Recent legal scholarship concludes that Australia is culpable for genocide, and violates international customary laws with respect to the forcible transferring of Aboriginal Peoples’ children from their families and Nations into its state child welfare systems. Furthermore, despite the high threshold of specific intent, a case has been made to show that the state is indeed guilty for crimes against the First Nations on the continent of Australia.⁶¹

51 As part of the Stolen Generations Inquiry and the Rudd apology,⁶² the Don Dale inquiry indicates that there is a pretense in Australian society and in the

⁶¹ Aboriginal protest highlights the contemporary face of genocide in Australia, Natalie Bochenski, “Weather Takes Heat out of G20 Protests”, *Brisbane Times*, November 16, 2014, <http://www.brisbanetimes.com.au/queensland/brisbane-g20/weather-takes-heat-out-of-g20-protests-20141116-11nukt.html> (accessed November 20, 2014).

⁶² On the fifth anniversary of the National Apology to Australia’s Indigenous Peoples (13 February 2013)

international community that the state has redressed and accepted accountability for the stolen generations.⁶³ The ongoing and increasing rate of removals of First Nations children from their families, which will further increase as a result of permanency reforms referred to above at para 48, is an example of the failure of laws and policies to accept responsibility for the ongoing trauma and harms which are experienced as a result of the overtly discriminatory laws and practices of the past. It is also problematic that the scale of the ongoing impacts will be concealed when children and young people are placed permanently and thereby removed from out of home care costs and statistics. These children will become invisible to review bodies such as the Human Rights Committee and the Committee on the Rights of the Child.⁶⁴ The invisibility of Aboriginal children will continue the history of terra nullius, as Peoples we still do not exist.

Genocide and Racial Superiority

52 Given the civilization project is born in theories of racial superiority, it is critical to unpack the importance of this position to the Australian state's conduct both historically and in contemporary times.⁶⁵ The crime of genocide has been constructed in such a way that crimes of genocide committed by the state against First Nations living within the boundaries of Australia cannot be prosecuted. That is, the state will never be tried for its own crimes of genocide against First Nations. The constructed norms and principles of a universal crime of genocide does not apply to First Nations Peoples of the continent now known as Australia.

It is submitted that the exclusion of the crime of genocide in its application to First Nations Peoples is left to the offending colonial states to determine the crime and its application. This position inevitably leaves First Nations without a remedy in preventing ongoing genocides.

53 During the drafting of the UN Genocide Convention, the USSR contended that cultural genocide is a central tenet of the crime.⁶⁶ Their opposition with respect to the deletion of the terms cultural genocide were concerned that "fascism, Nazism and doctrines of racial superiority"⁶⁷ are at the root of genocide and should remain in the preamble to the UNGC.

the Federal House of Representatives unanimously passed the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2013 which also passed unopposed in the Senate in March 2013. This entered effect on 28 March 2013.

⁶³ The Australian Human Rights and Equal Opportunities Commission (HREOC), Ronald Wilson, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: HREOC, 1997).

⁶⁴ *Supra* note 49.

⁶⁵ Henry Reynolds, *An Indelible Stain? The Question of Genocide in Australia's History* (Ringwood, Vic.: Viking, 2001). Robert Williams Jr writes about the construction of native savagery as a being a tool used in the expansion of colonialism: Robert Williams Jr, *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012).

⁶⁶ *Supra* note 46 at 1318-1319 for the Ukraine's position.

⁶⁷ *Supra* note 46 at 2083.

- 54 The concern of the USSR delegations, highlight an important principal which is embodied in ICERD: “Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end.”
- 55 The Genocide Convention has proven impotent in being able to provide a remedy for First Nations Peoples, due to its limited scope and the removal of cultural genocide as a possible avenue in which to pursue First Nations’ claims. Those limits are further embedded, the *International Convention on the Prevention and Punishment of the Crime of Genocide* was ratified on 8 July 1949, through the *Genocide Convention Act 1949* (Cth).

The Australian High Court in *Teoh* decided that, even if the state is a party to an international convention that is not sufficient to give rise to rights and obligations under states’ law.⁶⁸ In an earlier decision, in *Koowarta v Bjelke-Petersen*,⁶⁹ the Australian High Court decided that ratification of an international treaty alone was not sufficient to bring international law into the Australian common law system and that further legislation was required for the crime of genocide to be incorporated into domestic law. However, an Advisory Opinion of the International Court of Justice described the principles underlying the *Genocide Convention* as “principles which are recognised by civilised nations as binding on States, even without any conventional obligation.”⁷⁰ The court considered the *Genocide Convention* to be a special treaty, which required a more liberal interpretation than ordinary treaties because its objects are fundamentally humanitarian. The Australian courts rejected this position.

In *Mabo (No 2)* Brennan J commented on the influence of international standards on indigenous peoples’ common law rights to property:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights ... However, recognition by our common law of the rights and interests in land of the indigenous

⁶⁸ See Mason CJ and Deane J in *Minister for Immigration v Teoh* (1995) 183 CLR 273, 286–287. Also in *Chow Hung Ching v The King* (1948) 77 CLR 449, 478–479, Dixon J said, “a treaty, at all events one which does not terminate a state of war, has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty.” The same view was expressed in *Koowarta v Bjelke Petersen* (1982) 153 CLR 168, 224–225 (Mason J).

⁶⁹ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224.

⁷⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) ICJ 15, 23.

inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.⁷¹

Justice Brennan's judgment alludes to the problem of recognition of the crime of genocide and that such recognition would call into question the jurisdiction of the court and the foundation and legitimacy of Australian law.⁷²

In *Re Thompson, Ex parte Nulyarimma and Ors*, in which First Nations Peoples made an application to the Australian Capital Territory (ACT) Magistrates Court, it was argued genocide was inevitable if further amendments to the *Native Title Act 1993* (Cth) were successful.⁷³ The application was refused because the court found there was no crime of genocide known to the common law of Australia.

A further application was made to the (ACT) Supreme Court as to whether there was a crime of genocide known to the common law.⁷⁴ Justice Crispin of the Supreme Court of the ACT decided that, even though the evidence before him showed there was genocide committed against First Nations Peoples, there was no crime of genocide known to the laws of the ACT.⁷⁵ He concluded as follows:

*For present purposes, it is unnecessary for me to determine whether the particular conduct to which he referred would have been sufficient to sustain charges of genocide if such an offence formed part of the domestic law of Australia. There is ample evidence to satisfy me that acts of genocide were committed during the colonization of Australia.*⁷⁶

56 Australia as a colony of Great Britain was created by an act of British Parliament. The Australian government supported the issue of cultural genocide being placed under the international covenant of human rights. The result of maneuvering of the issue of cultural genocide under a human rights framework is that Australia's oppression of Aboriginal Nations and Peoples continues unabated and unnoticed by international scrutiny. The decimation of Aboriginal languages equates to the linguicide of many First Nations languages.

57 In his report to the United Nations Cobo argued that states deliberately discriminating against people for their refusal to abandon their culture, customs, and traditions could be deemed "ethnocide" or "cultural genocide."⁷⁷ Cobo saw

⁷¹ *Mabo v Queensland* (1992) 175 CLR 1, 16 (Brennan J).

⁷² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, p 112, refers to terra nullius as a doctrine which jurists and the courts might consider reversing, but they find that they have no choice but to continue to function within the established framework of these doctrines.

⁷³ The Adnyamathanha native title claim was one of the first to be registered in South Australia in March 1999. Within a month of registration and with that the "right" to negotiate, the Australian federal government approved the Beverly Uranium Mine. The mine has been criticised for its use of underground leaching methods in its extraction of uranium. Agreement was not reached by traditional consensus protocols; only a proportion of the Adnyamathanha people agreed to the development of the mine.

⁷⁴ *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACTR 9.

⁷⁵ *Ibid.*, 13 September, paras 69, 72.

⁷⁶ *Ibid.*, para 78.

⁷⁷ Cruz, *Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres*, para 450, and cited in the *Cobo Report*, 16.

the damage to First Nations lands as being tantamount to ecocide which, with the consequent ethnocide, would result in a form of genocide. Preventing a group from preserving its traditional forms of life and bringing about the destruction of the culture based upon those forms of life and the disappearance of the group as such, are serious violations of the basic rights and fundamental freedoms of the populations in question.⁷⁸

- 58 Racist theories are the cornerstone of the legalized persecution against Aboriginal Nations and Peoples. Colonial laws forced the removal of our children into the state welfare system. The removal of children continues and destroys the ability of their parents to properly parent them. The direct result is the crises faced by the state's child welfare systems. The states develop the standards ("inability to parent") for forcible removal of Aboriginal children into foster care homes away from their own families and territories under a further destructive auspice termed the "best interests of the child".

As a concept, the concept of the "best interests of the child" is a colonialist value-based judgment. This is a continuation of destruction against our Nations based upon racist values and concepts maintained by the colonizer. As at 30 June 2016, Aboriginal and Torres Strait Islander children represented 36.3 per cent of all children in statutory Out of Home Care,⁷⁹ and were 9.8 times more likely to be residing in OOHC than non-Indigenous children.⁸⁰ The population of Aboriginal and Torres Strait Islander children in OOHC is projected to triple by 2035 if today's policies remain the same.⁸¹ Over-representation itself, and the resulting disconnection from family, community, culture and country that often occurs, impinge upon Aboriginal and Torres Strait Islander children and families' entitlement to the equal enjoyment of social and cultural rights. The over-representation of Aboriginal and Torres Strait Islander children in child protection and OOHC raises further concerns given the inextricable link between the child protection and youth justice systems,⁸² such as the increased likelihood of simultaneous contact with both systems,⁸³ and youth or adult criminal justice

⁷⁸ *Cobo Report*, 17–18.

⁷⁹ Australian Institute of Health and Welfare, *Child protection Australia 2014–15* (2016), child welfare series no. 63, cat. no. CWS 57, Canberra; and Australian Institute of Health and Welfare, *Child protection Australia 2015–16* (2017), child Welfare series no. 66, cat. no. CWS 60, Canberra: AIHW. Australian Institute of Health and Welfare, *Child protection Australia 2015–16* (2017), child Welfare series no. 66, cat. no. CWS 60. Canberra: AIHW.

⁸⁰ Australian Institute of Health and Welfare, *Child protection Australia 2015–16* (2017), child Welfare series no. 66, cat. no. CWS 60. Canberra: AIHW.

⁸¹ SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016), Melbourne, 23.

⁸² Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report* (2017), 2.

⁸³ Australian Institute of Health and Welfare 2016. *Young people in child protection and under youth justice supervision 2014–15*. Data linkage series no. 22. Cat. no. CSI 24. Canberra: AIHW; Wise, S. and Egger, S. (2007) *The Looking After Children Outcomes Data Project: Final Report*, Australian Institute of

involvement after leaving care.⁸⁴

59 The forcible removal of our children past and present is catastrophic and “criminal” when examined from this standpoint.

Forcible Removal of Aboriginal Children

60 When the drafting of the crime of genocide took place between 1946 and 1948, the Australian government cloaked the devastation which First Nations children endured in their forced removal as something which is in the ‘best interests of the child’. It is important to emphasize that this analysis is critical to the method with which a colonial framework based on theories of racial superiority and violence (domination and dehumanization) is maintained by Australia and it continues without scrutiny or condemnation as a crime of genocide.

61 Following the ratification of the UNGC state governments were under an obligation to legislate the crime into their domestic penal codes. While it was incorporated into domestic law, this did not provide a remedy for crimes of genocide against First Nations as noted above and in *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACTR 9.

62 Australia will not hold the commonwealth or its states accountable for crimes of genocide. This begs a serious question; why go to great effort to have genocide recognized as a crime in international law, and then render the integrity of the crime inapplicable within domestic state borders? It shows that Australia well understood the loopholes created in the ratification process. The limits of the crime translated into domestic laws would later render any possible government prosecution of genocide as impossible or moot in a Australian court, again as illustrated in *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACTR 9.

63 We submit that the Australian government removed any possibility that its racist state violence against Aboriginal Peoples’ children to be scrutinized by its own judiciary.⁸⁵ However, Australia is not above international law with respect to ICERD and other international conventions. Australian law does not protect Aboriginal Peoples from long standing colonial violence and it entrenches racial domination and dehumanization.

Family Studies, 15; and Katherine McFarlane, *Care-criminalisation: The involvement of children in out-of-home care in the NSW criminal justice system* (2015), UNSW.

⁸⁴ S Raman and, B Inder and C Forbes, C., *Investing for Success: The economics of supporting young people leaving care* (2005), Centre for Excellence in Child and Family Welfare, Melbourne; and J McDowall, *Report Card: Transitioning from Care* (2008), CREATE Foundation, Sydney; J McDowall, *Report Card: Transitioning from Care: Tracking Progress* (2009), CREATE Foundation, Sydney.

⁸⁵ *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACTR 9.

- 64 Colonial violence and terror against our Nations' children is a common and widespread experience. Historical, in the form of torture, forced starvation, forced labour, sexual predatory acts, and death by disease and dilapidated living conditions, it continues in modern guise. So rhetoric like "abuse, mistreatment, and neglect" acknowledged in the government Apology of 2008 dodges the implication that the state has engaged in racially-based policies of destruction against our Nations and Peoples.
- 65 Aboriginal children were historically dehumanized by denigrations such as "savage" or "heathen" and staff officials whipped, beat, starved, confined, and committed brutal acts of sexual violence, against them. Forcible indoctrination was designed to destroy the national identity of Aboriginal Peoples' children; it is common knowledge that children were brutalized for speaking their languages. Short of death, atrocities of this kind will cause our First Nations' collective serious bodily and mental destruction. We depend on our children to transmit our national identities to further generations.
- 66 Children violated and dehumanized by racist beliefs and practices will believe and accept those ideas about themselves and their people. Children are indoctrinated by the colonizer to view themselves through the eyes of the colonizer as racially inferior and not as children of Aboriginal people. Aboriginal people depend on their children to transmit the healthy and beautiful aspects of their identity onto further generations.
- 67 Our Nations' spiritual laws are encoded in our original languages and respect of our land (Mother Earth) for the future generations. Children that are dehumanized and racially indoctrinated as inferior will not understand the languages or laws which guide or instruct an Aboriginal identity which is foundational to our way of life and our relationship with our Territories.
- 68 The collective genocidal traumatic effects (inability to parent) brought about by the removal of our children has been used by a colonialist society which created that trauma (dysfunction) to justify the child welfare system phase of the process. The system carries on the racist beliefs which originally mandated the removal of children. The state uses its imposed standards of judgment to create the institutions which create the destructive conditions, and then use its standards of judgment to forcibly take away further generations of our Nations' children by racially demonizing the parents for not having the parenting skills. The rates of removal are appalling.
- 69 Our Nations' children in the child welfare system experience the same rates of racist violence in the child welfare system that their predecessors endured. The suicide rate is pandemic for children in care.⁸⁶ Our Nations' children are sexually

⁸⁶ SNAICC – National Voice for our Children, *The Family Matters Roadmap* (2016); and SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016).

preyed upon while in the care of the system. The death rates of children in care are at an all-time high. Australian welfare systems have devastated our communities and Nations.

- 70 We assert that the racist underpinnings of state laws and policies with respect to Aboriginal Peoples continue to oppress our Nations. Motivated by a framework that is grounded in racial superiority, the Australian state has not changed its position with respect to the earlier policies and laws. If it has not ceased, then the catastrophe that we currently are forced to contend with will not cease either.
- 71 We submit that under international jurisprudence, Australia cannot unilaterally decide that international law will not be applicable to its conduct with respect to the on-going forcible transferring of our Nations' children and the serious bodily and mental harm that they continue to experience at the hands of the Australian state. To reiterate, our Nations again pose the question: is it legal or just that a perpetrator state responsible for destruction of the innocent, appoint, fund and set the terms of reference for a process to investigate its own conduct in creating and implementing a racist framework which forcibly removes our Nations' children?

Contemporary removals of Aboriginal children

- 72 The Australian state claims that the issue of the removal of Aboriginal children has been resolved, but its evasion of true accountability for that forcible removal of our children is evident in the current statistics on current welfare removals of our children.
- 73 Ongoing forced removals are part and parcel of the long-standing goal to extinguish the underlying title we hold to our lands. Children violently traumatized and indoctrinated in a language which demonizes their identity will not remember that they have a responsibility to protect the land for future generations.
- 74 Under both international law and domestic Australian law there is no remedy. Even if there were to be a finding of cultural genocide, this would not provide a remedy, because cultural genocide is not a crime in international law. It does not make the state answerable to any tribunal and it would anyway allow Australia to get away with its vicious conduct against our Nations' children.
- 75 We submit that Australia cannot decide for itself whether it has engaged in criminal conduct and that unilaterally creating the process which examines its own conduct is a violation of international laws. The recent research on genocide certainly upholds the view that racially motivated state violence committed against our Nations children in the removal of our children and their passage through the child welfare systems causes the (trauma and dysfunction), the high

suicide rates, poverty, and despair which are grossly over-represented in our Nations to the present day.

- 76 As Aboriginal Peoples, we depend on our children to transmit our languages, spirituality, cultures, healthy characteristics of our identities so that we can continue to survive as First Nations Peoples.
- 77 The solution is apparent in the future self-determination of our Nations and the decolonization of our lands. We call on CERD to unmask the ongoing terra nullius policies we live under so that we can begin to heal and recover from the horrors and traumatic impacts caused by a racist regime. We call on CERD to intervene on our behalf.

Questions for the Australian State

- 78 In Australia, the denial of rights to our lands and the foundation of the colonial state was and remains based on the racist and unlawful principle of terra nullius. This unlawful foundation has resulted in the continual reduction of our Nations' rights to our lands and environments, as well as whom we are as Nations of Aboriginal Peoples. It has resulted in the degradation of our Nations by way of the forceful removal of our children by state-mandated laws, regulations and policies. While the Australian state may currently wish to "reconcile" with our Nations and build a "new relationship", our Nations will reject these desires if the Australian state continues to proceed on the presumed baseline that it has an overarching and superior claim to our lands, and continues to refuse to fully address the past and present harms confronting our children.
- 79 Our Nations assert that Australian governmental policies and actions which it effects in 'our interests', and which are purportedly based on neoliberal concepts of equality has nothing to do with equality, they are concocted to sooth its collective cognitive and moral dissonance. In fact, at their foundation all current Australian policies and actions, including those of the child welfare systems, are based on the racist principles of *terra nullius* and fantasies of racial superiority, and are aimed at the extinguishment of our identity as Nations of Aboriginal Peoples. Ultimately, they still aim to unilaterally absorb us into the body politic. We submit that the continued adherence to *terra nullius* and neoliberalism proves that the Australian state does not accept us as self-determining Nations of Aboriginal Peoples with the subsequent inherent rights and continues to discriminate against us.
- 80 Accordingly, the Nations respectfully requests that the UN Committee on the Elimination of Racial Discrimination puts before the Australian State the following questions:
- a) On what legal basis, both domestically and internationally, does Australia

claim underlying title to Aboriginal lands?

- b) Does Australia support that all “Peoples” have an inherent right to self-determination, and that as a component of such a right, that all “Peoples” have a right to collectively own property and to derive whatever benefit from such property?
- c) Does Australia renounce *terra nullius* and the racist principles and belief which make up such a doctrine?
- d) Does Australia’s stated goal of creating a new relationship with Aboriginal Peoples within Australia, incorporating the need for reconciliation between the Australian state and Aboriginal Peoples include Australia’s international legal obligations pertaining to Aboriginal Peoples, including the norms contained within such obligations
- e) Does Australia consider it has an obligation, to respond to its historic and ongoing genocidal treatment of First Nations Peoples in that which is now known as Australia? How might that response be truly international without the Australian state controlling the investigative processes?