澳洲原住民族的土地權——由*Mabo*到*Akiba*判例[*]

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原住民族的土地權（indigenous land rights、indigenous rights in land、或是 rights of indigenous peoples to land）[1]的意義，原本應該是相當直截了當，是指原住民族權利（indigenous rights）的財產權當中，相關於土地的權利（land rights, land title, land entitlement, land tenure, tenure rights, ownership of land）。廣義的土地包含陸地、以及海域（sea area, sea water area），也就是所謂的「陸國」（land country）、及「海國」（sea country）的區別[2]，因此土地權其實是包含海權（sea rights）。另外，土地權應該是包含資源權，一般則往往將兩者相提並論為土地資源權，我們可以將原住民族的土地資源權分為地上的漁獵權、地表的森林權、及地下的礦產權，而漁獵權又分為狩獵權、及漁獲權（圖 1）。

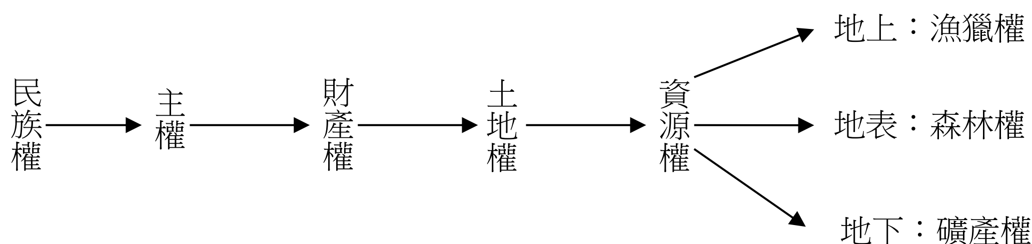

圖 1：原住民族的土地權

在美國、澳洲、紐西蘭、及加拿大，原住民族的土地權又有 indigenous title、native title、Indian title、Aboriginal title、或 Maori title 等用字，儼然是普通法（common law）國家的原住民族所擁有一種獨特的（*sui generis*, unique）權利。

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[1] 比較完整一點，就是 the traditional title of Indigenous people to their land。

[2] 見 *Akiba v. State of Queensland (No 2)*（2010: para. 639）：

> Secondly, there is no land-sea dichotomy. The evidence clearly establishes that the estates are spatially projected out from the shores; they do not stop at the edge of fringing reefs or when deep waters are met. I accept the Islanders' evidence on this and reject the State's "adjacent areas" contention to the contrary. Areas of deep waters, no less so than shallow ones, are claimed and used.

其實在『瑪莫案第二號判例』（*Mabo v. Queensland (No. 2), 1992*）之前，澳洲慣用 land rights，此後，native title 才成為議題（Kildea, 1998: 1）。既然 title 並非等同於 right，原住民族的土地權彷彿是經過打折，那麼，究竟 native title（to land）與 native land rights[3]有什麼不同？到底是舊酒新瓶、還是新瓶新酒？究竟澳洲原住民族土地權的範圍包含到何種程度？

自來，歐洲強權根據國際法擴張帝國版圖，取得領土主權的方式分兩大類，有主之地（inhabited land）不外透過征服、或割讓，至於「無主之地」（*terra nullius*, land of no one, nobody's land），則可以大大方方經過發現、佔領、開發來確認主權（施正鋒、吳珮瑛，2014：10-11）。當年英國人來到澳洲，以優越感認定當地原住民族尚未開化，不屑跟對方簽訂條約，加上自恃國家強大、覬覦土地資源，不像在其他地方溫良恭儉讓，便毫不客氣逕自開發所謂的荒地，也就是把有主之地視為無主之地，大量引入流民開墾，以經過墾殖為由而納入為殖民地（settled colony）（Kildea, 1998: 2-3; Strelein, 2005: 229-30, 235-38）。再來，在甚囂塵上的發現主義（doctrine of discovery）之下，英國又假設殖民地的主權確立後，國家可以順手取得這塊土地的最終所有權（radical title），接著就理所當然認為已經消除（extinguish）原住民族的土地權了（Kildea, 1998; Strelein, 2005; Secher, 2011）。

James Cook 在 1770 年宣布澳洲東岸主權歸屬英國，托雷斯海峽群島則是在 1879 年全數被昆士蘭併吞（Wikipedia, 2018: Torres Strait Islands）。澳洲的原住民族（Indigenous Peoples）包含原住民族（Aboriginal Peoples）、及托雷斯海峽島民（Torres Straits Islanders）。根據 2016 年的人口普查（Australian Bureau of Statistics, 2018a），澳洲原住民總共有 649,171（2.8%），其中 590,056 人（91%）自認為是原住民族、32,345 人（5%）自認為是托雷斯海峽島民、及 26,767 人（4%）自認為既是原住民族又是托雷斯島民，可見托雷斯海峽島民的人口不到 6 萬。

澳洲聯邦最高法院在 1992 年以 6：1 作成『瑪莫案第二號判例』，否定自來所謂「無主之地」（*terra nullius*, land of no one, nobody's land）的原則，明確承認

[3] 又如 native rights and interests、native title rights、native title rights and interests？

原住民族的土地權利及利益（rights and interests in land）源自其傳統的法律及慣俗[4]、而且在主權遞嬗下依然存在（survive）[5]，迫使政府加緊通過『原住民族土地所有權法』（*Native Title Act, 1993*）、並設立「國家原住民土地權裁判庭」（National Native Title Tribunal, NNTT）來處理原住民對於取回土地權所作的聲索（claim, make claims）[6]。聯邦最高法院接著在 1996 年以 4：3 做出『威克民族案』（*Wik Peoples v. Queensland*），判定儘管非原住民向政府承租牧地或農地簽訂了契約書，並未自動消除原住民的土地權。聯邦最高法院在 2013 年作出『阿契巴判例』（*Akiba v. Commonwealth*）[7]，判定政府的法規或可「管制」（regulate）漁獲行為，並未消除原住民族對於土地及海域的權利，包括商業性的漁獲權。

在這篇論文，我們先將回顧澳洲原住民族土地權的發展，特別是聯邦最高法院的判例、以及政府的相關立法；接下來分析『阿契巴判例』，包括背景、爭議、以及法官的論點；最後在結語之前，我們將檢視『阿契巴判例』通過五年來的回應、或是批判。在進入主題之前，我們有必要說明，澳洲的 High Court 等同於美國、或是加拿大的聯邦最高法院（Supreme Court），而各省（State）、或是領地（Territory）另外設有 Supreme Court，只有高等法院的層級，因此，前者不宜按照字面翻譯為高等法院，在這裡意譯為聯邦最高法院。

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[4] Brennan（*Mabo 2*: para. 64）：

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

[5] Brennan（*Mabo 2*: paras. 61-62）：

> The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land.
> It is sufficient to state that, in my opinion, the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown.

[6] 原本，聲索先向原住民土地權裁判庭提出申請（file application）、再由聯邦法院以庭諭（court order）方式來確認，不過，由於這樣的程序在 *Brandy v. Human Rights and Equal Opportunity Commission*（1995）被判違憲，所以從 1988 年起轉而直接向聯邦法院，而原住民土地權裁判庭的功能轉為調解（mediation）（Australian Law Review Commission, 2014: 61）。

[7] 全稱為 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v. Commonwealth*（簡稱為 *Akiba*），又稱為 *Torres Strait Sea Claim*、或是 *Sea Claim*。

澳洲原住民族土地權的發展

在 1960 年代，澳洲原住民族受到美國黑人民權運動鼓舞，開始要求政府承認他們的土地權、以及民權。在 1963 年，北領地 Gove 半島 Yirrkala 地方的 Yolngu 族原住民面對白人牧場、及礦場的擴張向國會陳情[8]，終究，北領地政府還是通過特別條例（*Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968 (NT)*），一意孤行將族人的土地租出去，族人只好轉而向法院提起土地權訴訟『密樂本案』（*Milirrpum v. Nabalco Pty Ltd, 1971*）挑戰該條例、及租約的正當性，依然失敗[9]。

接著，北領地 Wave Hill 牧場的 Gurindji 族人也在 1966 年發難，針對工作條件、工資、及傳統領域被牧場挪用，展開長達 9 年的罷工。工黨 Gough Whitlam 政府（1972-75）在 1973 年成立原住民族土地權委員會（Aboriginal Land Rights Commission[10]），在法官 Edward Woodward 爵士帶領下進行原住民族土地權調查，尋求承認原住民族土地權之道；最後，政府在 1975 年做順水人情，象徵性將部分傳統領域歸還給族人[11]。

再來，自由黨 Malcolm Fraser 政府（1975-83）承續 Whitlam 政府的倡議，在 1976 年通過『北領地原住民族土地所有權法』(*Aboriginal Land Rights (Northern Territory) Act, 1976*)，大體是接受 Woodward 所撰寫的報告（*Woodward Report, 1974*），讓北領地的原住民族可以聲索傳統領域，這也是澳洲政府首度承認、並保護原住民在傳統的法律及慣俗下的土地權。北領地政府率先立法（*Aboriginal Land Act (NT), 1978*），把將近一半領地面積的土地移轉給原住民族；接下來，除了西澳[12]，其他各省陸續通過配套的土地[權]法[13]，特別是南澳工黨 Don Dunstan

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[8] 稱為 Yirrkala Bark Petitions，主要是抗議北領地未經徵詢傳統領域的擁有者，逕自將保留地（Arnhem Aboriginal Land Reserve）的一部分出售給一家礬土公司。

[9] 又稱為 *Gove Land Rights Case*，法官 Blackburn 的理由是原住民族共同擁有的土地權並非澳洲法律的一部分，即使原本有的話，也早在開發的過程被授與墾殖者。

[10] 又稱為 Woodward Royal Commission。

[11] 另外，Whitlam 政府又通過『反種族歧視法』(*Racial Discrimination Act, 1975*)，讓聯邦最高法院可以否決省政府的歧視性法律。

[12] 西澳政府在 1993 年搶先立法（*Land (Titles and Traditional Usage) Act*），打算以「傳統使用權」（rights of traditional usage）來消除原住民族的土地權，後來被聯邦最高法院宣判違反『反種族歧視法』(*Western Australia v. Commonwealth, 1995*)。

政府（1967-68, 1970-79）、及 David Tonkin 政府（1979-92）接力立法（*Pitjantjatjara Land Rights Act 1981 (SA)*），將佔該省四分之一的西北部土地授與原住民族。

在 1982 年，有五位來自托雷斯海峽穆雷群島（Murray Islands[14]）的 Meriam 族原住民向昆士蘭省政府提告[15]，主張族人自來擁有該群島、及海底礁層／大陸棚（continental shelf），認為他們的所有權並未因為澳洲國家主權更替而被「有效消除」（validly extinguished），因此要求政府承認自己是所有者[16]。聯邦最高法院因此必須決定，究竟所謂原住民族的土地所有權是否存在，以及如果有的話、內涵是甚麼。昆士蘭省政府打算斬草除根，先下手為強在 1985 年通過『昆士蘭沿海島嶼宣告法』（*Queensland Coast Islands Declaratory Act (Qld)*），立意回溯性消除托雷斯海峽島民的土地權、而且不打算做任何補償，族人憤而提出違憲訴訟。聯邦最高法院先在 1988 年做出『瑪莫案第一號判例』（*Mabo v Queensland (No 1)*），宣判該法與『反種族歧視法』牴觸而無效，清除族人原來提告的障礙。

聯邦最高法院在 1992 年作出『瑪莫案第二號判例』，除了推翻『密樂本案』、以及駁斥西方國際法自來所持的「無主之地」說法，並判定島民作為原本住民（indigenous inhabitants）擁有自己的傳統法律及慣俗（traditional laws and customs），因而承認他們據之所保有的傳統土地（traditional lands）的土地權（land entitlement）[17]，也就是說，澳洲的普通法[18]承認[19]這種 native title[20]。工黨 Paul

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[13] 譬如南澳的 *Maralinga Tjarutja Land Rights Act 1984 (SA)*、新南威爾斯的 *Aboriginal Land Rights Act 1983 (NSW)*、昆士蘭的 *Aboriginal Land Act 1991 (Qld)*及 *Torres Strait Islander Land Act 1991 (Qld)*、以及塔斯馬尼亞的 *Aboriginal Lands Act 1995 (Tas)*。

[14] 包含主島 Murray Island（*Mer*）、以及 Dowar Island（*Dauar*）跟 Wyer Island（*Waier*）兩個小嶼。

[15] 包括 Eddie Mabo、Sam Passi、David Passi、Celuia Mapo Salee、以及 James Rice。聯邦最高法院的判例是在 1992 年 6 月 3 日下來的，Mabo 卻在 1 月 21 日過世。

[16] owners、possessors、occupiers（*Mabo 2*, Brennan: para. 95）。

[17] 法官 Brennan（*Mabo 2*: para. 39）認為，假設原住民族對於土地沒有業主權益（proprietary interest）的理論，是建立在歧視他們及其社會組織與慣俗：

> The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs.

[18] 普通法源自英國，向來保障人民的權利；澳洲以墾殖建國，承襲英國的普通法傳統（Australian Law Review Commission, 2014: 35）。

[19] 承認的意思是說，原住民族的土地權並非源自普通法（Australian Law Review Commission, 2014: 81-82）。

[20] 原文是（*Mabo 2*: Mason, para. 2）：

Keating（1991-96）政府於次年加緊通過『原住民族土地所有權法』，來處理原住民土地所有權的聲索，特別是設立原住民族土地權裁判庭、受理原住民族申請傳統土地所有權的確認（determination），並賦予原住民族談判權（right to negotiate），鼓勵原住民族與公家機構、礦業公司、或牧場談判有關於傳統領域的協定。

在 1974 年，昆士蘭省 Cape York 半島的 Wik 族原住民 John Koowarta 打算承租 Archer 河的牧場，被省長 Joh Bjelke-Petersen（1968-87）認為原住民族不宜經營而橫加阻遏，憤而以省政府違反『反種族歧視法』而提出告訴（*Koowarta v. Bjelke-Petersen, 1982*），而昆士蘭省政府則告聯邦政府的『反種族歧視法』並不適用（*Queensland v. Commonwealth, 1982*）。聯邦最高法院在 1996 年『威克民族案』判定，非原住民族向政府承租農牧地的契約書並未消除原住民族的土地權，亦即，原住民族的土地權是可以跟昆士蘭州政府依法承租給白人的農牧場共存。

自由黨 John Howard（1996-2007）政府以該判例製造不確定為由[21]，藉口為了平衡州政府、礦產公司、農牧場老闆、及原住民族的利益，強行通過『原住民族土地所有權修正法』（*Native Title Amendment Act, 1998*）[22]，大幅限制原住民族的權利，包括削減原住民土地權裁判庭的權力、及限制原住民的談判權（特別是面對政府的強制徵收），引來聯合國消除種族歧視委員會[23]（Committee on the Elimination of Racial Discrimination, CERD）指控是開倒車（施正鋒，2016）。

> In the result, six members of the Court (Dawson J. dissenting) are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.

[21] 理由是在國會通過『反種族歧視法』（1975）與『原住民族土地所有權法』（1993）之間，非原住民所取得的原住民土地無法根據過去的規定獲得「認定」（validation），也就是就地合法過去的消除行為（validation of the past acts）。有關於政府認為有修法必要的辯駁，見 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund（2000: chap. 5）。

[22] 另外也是針對聯邦最高法院在 1995 年的判例（*Brandy v. Human Rights and Equal Opportunity Commission*），以可能違憲為由削弱國家原住民族土地權裁判庭的權力，並放寬消除原住民族土地權的規定。

[23] 消除種族歧視委員會負責督導簽署國履行『消除所有形式種族歧視國際公約』（*International Convention on the Elimination of All Forms of Racial Discrimination, 1965*）的義務。

實施『原住民族土地所有權法』以來

『原住民族土地所有權法』（附錄 1）的法源是『瑪莫案第二號判例』，這個特別措施（special measure）結合了普通法及國會立法[24]，透過程序上的機制（調解、談判、司法）來承認（聲索、確認）、並保障（談判、補償）原住民族的土地權，以防止被政府恣意消除，包括過去的消除（past extinguishment）、及未來的消除（future extinguishment）。該法的關鍵在第 223 條有關於原住民族土地權（native title）的定義，特別是第 1 款與土地及水域的「關係」（in relation to）、及第 1（b）款與土地及水域的「聯繫要件」（connection requirement）[25]。經過 20 多年來的運作，澳洲確認原住民族是否擁有土地權的條件有三：（一）在非原住民前來墾殖之際，當地的社群已經有一套傳統的法律慣俗；（二）該「社會[26]」（society）根據這套傳統法律慣俗的運作而「持續」（continuity）存在[27]；（三）當下的原住民族社會可以追溯到墾殖時期的原住民族社會（Mansfield, 2017: 8）。

關於確認原住民族土地權的模式有三種，包括聲索（369）、無聲索者（53）、補償（0）、及修訂確認（4）；至於確認的方式也有三種，包括經過調解達成協議

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[24] 見該法 s 223(1)(c)：the rights and interests are recognised by the common law of Australia。

[25] 法官 Brennan（*Mabo 2*: para. 39）認為，只要他們持續遵守慣俗，與土地的傳統聯繫就大致上獲得維繫（*Mabo 2*: para. 66）：

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connextion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise.

參見 Brennan 的總結（*Mabo 2*: summary, para. 6）

> Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

[26] 事實上，『原住民族土地所有權法』並沒有提到原住民族「社會」這個概念（Australian Law Review Commission, 2014: 77-78）。

[27] 同樣地，『原住民族土地所有權法』也沒有提到原住民族「繼續存在」，而是由 s 223(1)(a)推演出來的（Australian Law Review Commission, 2014: 106-14）。

（consent determination, 334）、司法判定（litigated determination, 49）、以及無異議判決（unopposed approved determination, 43）（National Native Title Tribunal, n.d.b; n.d.c; n.d.d）。一旦經過確認『原住民族土地所有權法』符合第 225 條的內涵，就終局判決（*Akiba v. Queensland (No 2)*: para. 157）。

第一件聲索案涉及新南威爾斯中北部海岸 Crescent Head 地方 Dunghutti 族原住民的傳統領域，由於地方政府（Kempsey Shire Council）打算取得當地的公有土地來開發住宅區，剛好『原住民族土地所有權法』通過，省政府只好暫時中止開發案，在 1994 年提出無聲索者（non-claimant）的申請，以便在確認原住民族沒有土地權後可以強制取得土地，而族人則隨後提出聲索；經過原住民土地權裁判庭的調解，新南威爾斯政府承認族人持續擁有土地權，並且願意補償徵收的土地，終究，聯邦法院做出土地權確認的判決，而族人也同意放棄土地權給新南威爾斯政府[28]（National Native Title Tribunal, 2017a: 5-6）。

迄今，總共有 435 件原住民族土地權聲索案獲得確認[29]，目前尚有 294 件正在進行中，特別是 2009 年的修正案（*Native Title Amendment Act, 2009*）主要是針對如何不經過司法程序來與原住民族簽訂土地使用協定[30]（Indigenous Land Use Agreement, ILUA），此後，社會上對於承認原住民族土地權的態度大為改變，連最冥頑不靈的西澳政府也讓步，官方確認的速度大為加快；當下，政府每年大概可以完成 50 件原住民族土地權確認案，在國家原住民土地權裁判庭登錄的土地使用協定也有 1,241 件[31]（Mansfield, 2017: 10-11; National Native Title Tribunal, 2018a; 2017b: 3-4）（圖 2）。

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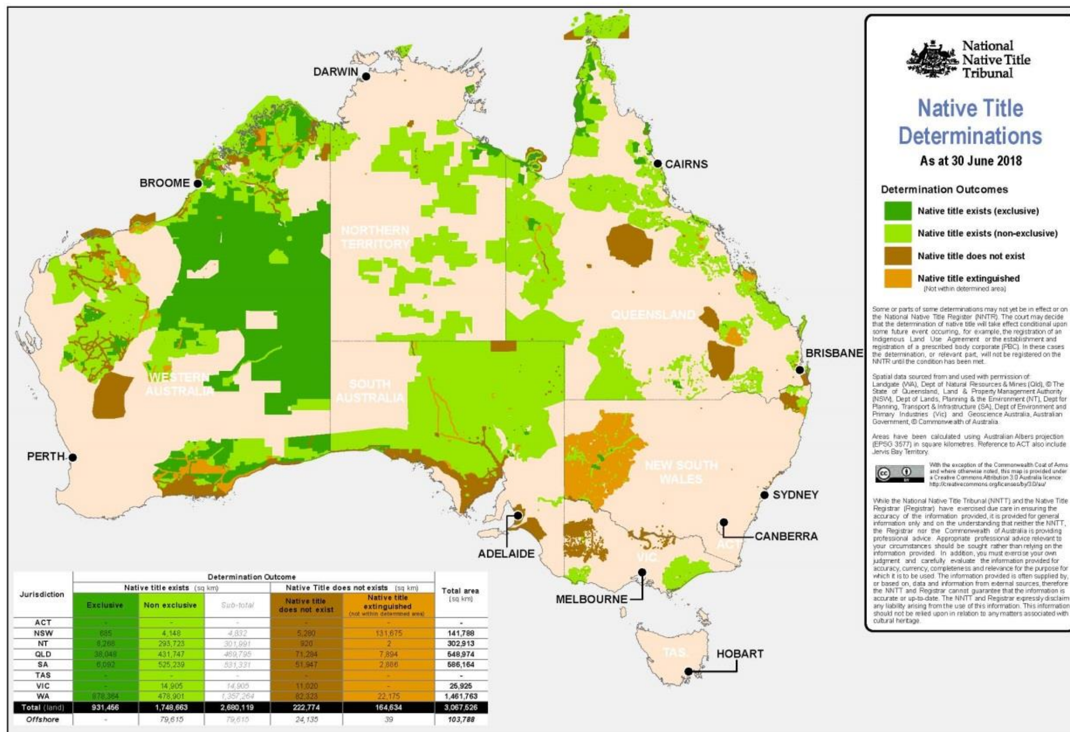
[28] 見 National Native Title Tribunal（n.d.a）相關的判決書（*Mary-Lou Buck v State of New South Wales & Ors, 1997*）、開發案、以及雙方的協議書（deed of agreement）。

[29] 另外，根據 National Native Title Tribunal（n.d.d）最新的線上資料，判定沒有土地權的 74 件、有局部土地權的 206 件、擁有完全土地權的 146 件，總數稍異。確認有原住民族土地權的面積總共佔了澳洲土地的 31.4%，其中有 11.3%是專屬、20.1%是非專屬（Webb, 2017: 4）。

[30] 最新的修訂見 *Native Title Amendment (Indigenous Land Use Agreements) Act*（2017）。

[31] 其實，原住民土地權裁判庭不算真正的法庭，因為法定可以確認土地權的包括聯邦最高法院、聯邦法院、及其他政府所接受的法庭（National Native Title Tribunal, n.d.d）。原住民土地權裁判庭有三份名冊，包括聲索（Register of Native Title Claims, RNTC）、確認（National Native Title Register, NNTR）、及土地使用協定（Register of Indigenous Land Use Agreements）。



Jurisdiction	Determination Outcome: Native title exists (sq km) Exclusive	Non exclusive	Sub-total	Native Title does not exists (sq km) Native title does not exist	Native title extinguished (not within determined area)	Total area (sq km)
ACT	-	-	-	-	-	-
NSW	685	4,148	4,832	5,280	131,675	141,788
NT	8,268	293,723	301,991	920	2	302,913
QLD	38,049	431,747	469,795	71,284	7,894	548,974
SA	6,092	525,239	531,331	51,947	2,886	586,164
TAS	-	-	-	-	-	-
VIC	-	14,905	14,905	11,020	-	25,925
WA	878,364	478,901	1,357,264	82,323	22,175	1,461,763
Total (land)	931,456	1,748,663	2,680,119	222,774	164,634	3,067,526
Offshore	-	79,615	79,615	24,135	39	103,788

來源：National Native Title Tribunal（2018b）。

圖 2：澳洲原住民族土地權的取得

以下是從『原住民族土地所有權法』（1993）到『阿契巴判例』（2013）判例的 20 年間，聯邦最高法院針對該法的實質內涵、以及操作技術，比較具有指標意義的判決[32]（Mansfield, 2017; National Native Title Tribunal, 2017c）：

Western Australia v. Commonwealth（1995）[33]：確認『瑪莫案第二號判例』適用於澳洲大陸，也就是原住民族的土地權並未被消除。

Wik Peoples v. Queensland（1996）：政府授與的牧場租賃並未完全消除原住民族的土地權，換句話說，原住民族的土地權與牧場租約是可以共存的。

Fejo and Mills v Northern Territory（1998）：一旦政府授與非原住民「無限制土地使用權」（freehold），原住民族的土地權就完全被消除了，也就是不能恢復。

Yanner v. Eaton（1999）：原住民族的土地權包含狩獵權（捕捉鱷魚），政府的管制並不切斷原住民與土地的關係[34]；如果政府的法規要消除原住民族的土地

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[32] 其他請參考 *North Ganalanja v. Queensland*（1996）、*Wilson v. Anderson*（2002）、以及 *Griffiths v Minister for Lands, Planning and Environment*（2008）。

[33] 又稱為 *Native Title Act Case*（1995）。

[34] 原文是（paras. 37-38）：

權（含狩獵權），必須有「明確而又清楚的意圖[35]」（clear and plain intention）。此外，原住民族在行使狩獵權的時候，可以採用現代的交通、以及武器，換句話說，傳統方式是可以與時俱進[36]（evolution of traditional means）。

Commonwealth v. Yarmirr（2001）：如果普通法與原住民族的土地權一致，前者就可以承認後者；如果不一致，前者則優於後者[37]。另外，原住民族擁有非專屬（non-exclusive）與非商業性的海權、及海床權（rights to sea and sea bed），換句話說，原住民族的海權並不能排除一般大眾的航行權、以及漁權。

Western Australia v Ward（2002）：儘管原住民族當下並無使用土地、或是水域的證據，並不因此表示沒有任何相關聯繫／關連（relevant connection），換句

> It is unnecessary to decide whether the creation of property rights of the kind that the respondent contended had been created by the Fauna Act would be inconsistent with the continued existence of native title rights. It is sufficient to say that *regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence. Indeed, regulating the way in which a right may be exercised presupposes that the right exists. No doubt, of course, regulation may shade into prohibition and the line between the two may be difficult to discern.
>
> . . . . Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, “You may not hunt or fish without a permit”, does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.

[35] 見 *Mabo 2*（Brennan, para. 75）：

> However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive. This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealing with the extinguishing of the native title of Indian bands in North America. It is unnecessary for our purposes to consider the several juristic foundations - proclamation, policy, treaty or occupation - on which native title has been rested in Canada and the United States but reference to the leading cases in each jurisdiction reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so.

[36] Australian Law Review Commission（2014: 95-105）建議修訂『原住民族土地所有權法』，明確規定傳統是可以調整（adapt）、演進（evolve）、以及發展（develop）。

[37] 原文是（para. 42）：

> Thus the question about continued recognition of native title rights requires consideration of whether and how the common law and the relevant native title rights and interests could co-exist. If the two are inconsistent, it was accepted in *Mabo [No 2]* that the common law would prevail. (The central issue for debate in *Mabo [No 2]* was whether there was an inconsistency.) If, as was held in *Mabo [No 2]* in relation to rights of the kind then in issue, there is no inconsistency, the common law will “recognize” those rights. That is, it will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them. It will “recognize” the rights by giving effect to those rights and interests owing their origin to traditional laws and customs which can continue to co-exist with the common law the settlers brought.

話說，或許族人不再持續有實質的聯繫（physical connection），卻仍然有可能維持心靈上的聯繫（spiritual connection）[38]。另外，既然原住民族的土地權是一束權利[39]（a bundle of rights），便可以逐一消除、必須分開個別討論，因此有所謂的「局部消除[40]」（partial extinguishment）。

Yorta Yorta v. Victoria（2002）：要是原住民族「社會[41]」的傳統法律及慣俗被

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[38] 原文是（para. 64）：

> In its terms, s 223(1)(b) is not directed to how Aboriginal peoples use or occupy land or waters. Section 223(1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a "connection" with the land or waters. That is, it requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a "connection" of the peoples with the land or waters in question. No doubt there may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Aboriginal peoples and the land or waters concerned. But the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection. Whether there is a relevant connection depends, in the first instance, upon the content of traditional law and custom and, in the second, upon what is meant by "connection" by those laws and customs. This latter question was not the subject of submissions in the present matters, the relevant contention being advanced in the absolute terms we have identified and without examination of the particular aspects of the relationship found below to have been sufficient. We, therefore need express no view, in these matters, on what is the nature of the "connection" that must be shown to exist. In particular, we need express no view on when a "spiritual connection" with the land (an expression often used in the Western Australian submissions and apparently intended as meaning any form of asserted connection without evidence of continuing use or physical presence) will suffice.

參見 *Yanner*（para. 38）：

> Native title rights and interests must be understood as what has been called "a perception of socially constituted fact" as well as "comprising various assortments of artificially defined jural right". And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.

[39] Schlager 與 Ostrom（1992）運用財產權的「一束權利」概念，將自然資源的共同所有權解析為進入（access）、採集（withdrawal）、管理、排除（exclusion）、及讓渡（alienation）等五類。

[40] 其實，最早提到的是在 *Mabo 2*（Brennan, summary, para. 5）：

> Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of native title.

[41] 有關於社會的定義（*Yorta Yorta*: para. 50）：

> To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even

歷史潮流沖掉[42]，也就是缺乏持續被遵守的規範體系[43]（normative system），既然無法證明跟土地的聯繫，土地權就很難被承認，尤其是已經被高度開發的地方。

> meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.

這裡對社會的定義是（paras. 49-50）：

> Law and custom arise out of and, in important respects, go to define a particular society. In this context, "society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs. To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.

[42] 其實，這是出自 *Mabo 2*（Brennan, para. 66）：

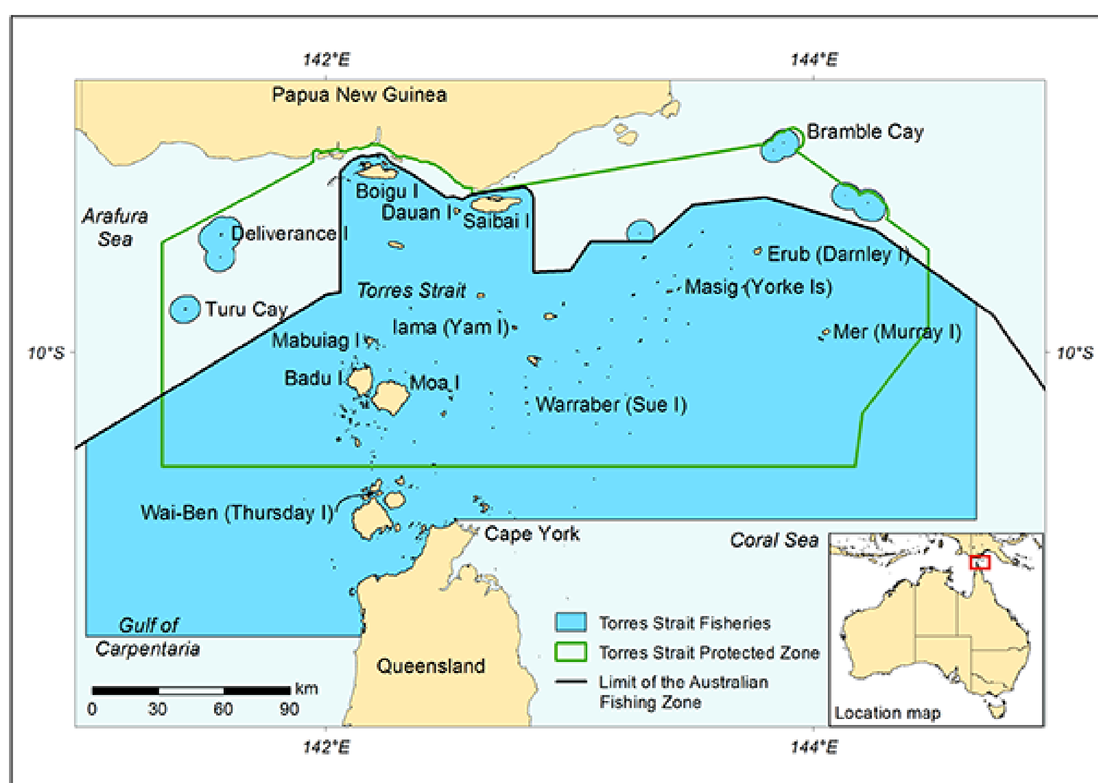
> Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. It is clearly not the position of the Meriam people. Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native tit le has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.

[43] 根據法官，這些「可以觀察得到的規律性行為」（observable patterns of behaviour）如果要構成傳統的法律及慣俗、進而可以衍生權利及利益出來，必須要具有規範性的內涵（paras. 38, 42）：

> When it is recognised that the subject matter of the inquiry is rights and interests (in fact rights and interests in relation to land or waters) it is clear that the laws or customs in which those rights or interests find their origins must be laws or customs having a normative content and deriving, therefore, from a body of norms or normative system – the body of norms or normative system that existed before sovereignty.
>
> This last question may, however, be put aside when it is recalled that the *Native Title Act* refers to traditional laws acknowledged *and* traditional customs observed. Taken as a whole, that expression, with its use of "and" rather than "or", obviates any need to distinguish between what is a matter of traditional *law* and what is a matter of traditional *custom*. Nonetheless, because the subject of consideration is rights or interests, the rules which together constitute the traditional laws acknowledged and traditional customs observed, and under which the rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters.

『阿契巴判例』的背景

托雷斯海峽群島位於澳洲與巴布亞紐幾內亞（Papua New Guinea）間，南北 150 公里、東西 300 公里，總共有 274 個大小島嶼、面積 566 平方公里，其中 14 個有人居住（Wikipedia, 2018: Torres Strait Islands）（圖 3）。根據 2016 年的人口普查（Australian Bureau of Statistics, 2018b），托雷斯海峽群島的人口剩 4,514 人，而且只有 64.6%在血緣上（ancestry）屬於島民；根據澳洲外貿部（Department of Foreign Affairs and Trade, 2006）早先的資料，托雷斯島民有 6,800 住在原鄉，42,000 離鄉背井，主要是搬到昆士蘭，尤其是東北角的 Townsville、及 Cairns。



來源：Williams 與 Mazur（2017: 302, fig. 15.1）。

圖 3：托雷斯海峽島民傳統領域

根據澳洲與巴紐簽訂的『托雷斯海峽條約』（*Torres Strait Treaty, 1978*），澳洲政府有義務維護「傳統住民」（traditional inhabitant）的「傳統生活方式」（traditional way of life and livelihood），包括他們的「傳統漁獲」（traditional fishing）；同時，島民的「傳統慣俗權利」（traditional customary rights）必須獲得

保障，包括土地、海床、海洋、河口、及潮間區的接近及使用；條約也規定非島民的商業性漁獲不能損及島民的傳統漁獲，並允許島民使用現代化的漁獲技術來撈捕。在托雷斯海峽區域管理局正式掛牌後，島民要政府求立法承認漁獲權的聲音日漸高漲，澳洲政府為了執行『托雷斯海峽條約』的規範，通過『托雷斯海峽漁獲法』（*Torres Strait Fisheries Act, 1984*），明文保障托雷斯海峽島民的傳統漁獲權、支持其有限的商業漁獲權、並鼓勵留在當地的島民參與商業漁獲的管理[44]。

其實，在聯邦最高法院作出『瑪莫案第二號判例』之前，托雷斯海峽島民就想要把他們的土地所有權聲索擴延伸到海域（sea claim），只不過，搶先向聯邦法院提出訴訟的卻是北領地的原住民。在 *Commonwealth v. Yarmirr*（2001）[45]，聯邦最高法院首度承認原住民的海權，特別是在潮間區的非專屬漁獲權。在 *Lardil Peoples v. state of Queensland*（2004）[46]，聯邦法院承續上述判例，承認原住民非專屬的非商業漁獲權。在 *Gumana v. Northern Territory of Australia*（2007）[47]，聯邦最高法院判定原住民族水域的無限制使用權，包括商業性、及休閒漁獲在內。從 2000 年起，托雷斯海峽保護區共同管理局已經不再頒發商業漁獲執照給非原住民，並且從 2007 年起，把 70%的漁獲保留給原住民，剩下的再仿效紐西蘭的作法分配給非原住民漁產公司（施正鋒、吳珮瑛，2014）。

自從原住民族的土地權在『瑪莫案第二號判例』獲得政府承認，此後，透過原住民土地權裁判庭的調解，托雷斯海峽的土地依據『原住民族土地所有權法』，經過協商總共確認了 22 件，涵蓋所有的有人居住島嶼、及過半的無人小島（*Akiba v. Queensland (No 2)*: paras. 7, 147）。在 2001 年，Leo Akiba 與 George Mye 代表島民（Torres Strait Regional Claim Group），進一步針對 Cape York 半島與巴紐間 34,800 平方公里的海域提出聲索[48]，由於未能達成協議、只好走司法途徑要求確

[44] 商業暨、及傳統漁獲歸聯邦政府管轄，休閒性漁獲則歸昆士蘭州政府，省政府另有『托雷斯海峽漁獲法』（*Torres Strait Fisheries Act, 1994 (Qld)*）（Loban, 2007: 78）。
[45] 又稱為 *Crocker Island Case*（2001）。
[46] 又稱為 *Wellesley Island Case*（2004）。
[47] 又稱為 *Blue Mud Bay Case*（2007）。
[48] 主要回應者（respondent）是昆士蘭政府、聯邦政府、商業漁獲者（Commercial Fishing Parties）、

認，由聯邦法院在 2008 年審理。法官 Finn 在 2010 年作出 *Akiba On Behalf Of the Torres Strait Islanders Of The Regional Seas Claim Group v. State of Queensland (2)*[49] 判決，承認島民集體（in aggregate）擁有非專屬的原住民族土地權。

聯邦政府不服、向聯邦法院提出上訴，過半法官推翻原判、判定原住民族的土地權並不包含商業性、或是維持生計的漁獲權，也就是認定商業性漁獲已經被消除了（*Commonwealth v. Akiba, 2012*）。原告上訴，聯邦最高法院在 2013 年逆轉作出『阿契巴判例』（*Akiba v. Commonwealth*），判定政府管制漁獲的法規並未消除原住民族對於土地及海域的權利，包括商業性的漁獲權。由於聯邦最高法院的判決維持聯邦法院的初審（primary judge），所以，以下的討論是以初審授命法官 Paul Finn 的判決書（*Akiba v. Queensland (No 2), 2010*）為主、輔以聯邦最高法院的判決（*Akiba, 2013*）。

『阿契巴判例』初審

單一社會

這個議題主要涉及聲索的島民從澳洲取得主權到現在，究竟是否隸屬於同一個社會、因而有資格整體授權而提出確認的申請案，也就是到底是單數（society）、還是複數（societies）的爭議。法官 Finn 用了相當大的篇幅（paras. 162-492）來說明，為何托雷斯海峽的島民構成單一的社會、因此集體[50]擁有傳統法律及慣俗下的原住民族土地權利與利益[51]。根據他的歸納，大致上有五種看法（para. 175）：（一）最廣義的觀點是大的區域社會，涵蓋巴紐南部海岸、並延伸至澳洲本土北

以及一些巴紐人士（*Akiba v. Queensland (No 2)*: summary, para. 3）。在 2008 年，由於 Kaurareg 民族（住在 Prince of Wales 島）及 Gudang 民族（住在 Cape York 半島）提出的聲索有所重疊，法官要求 Akiba 與 Mye 將他們的聲索分為 A、B 兩部分，本案只處理前者（*Akiba v. Queensland (No 2)*: paras. 51-53）。

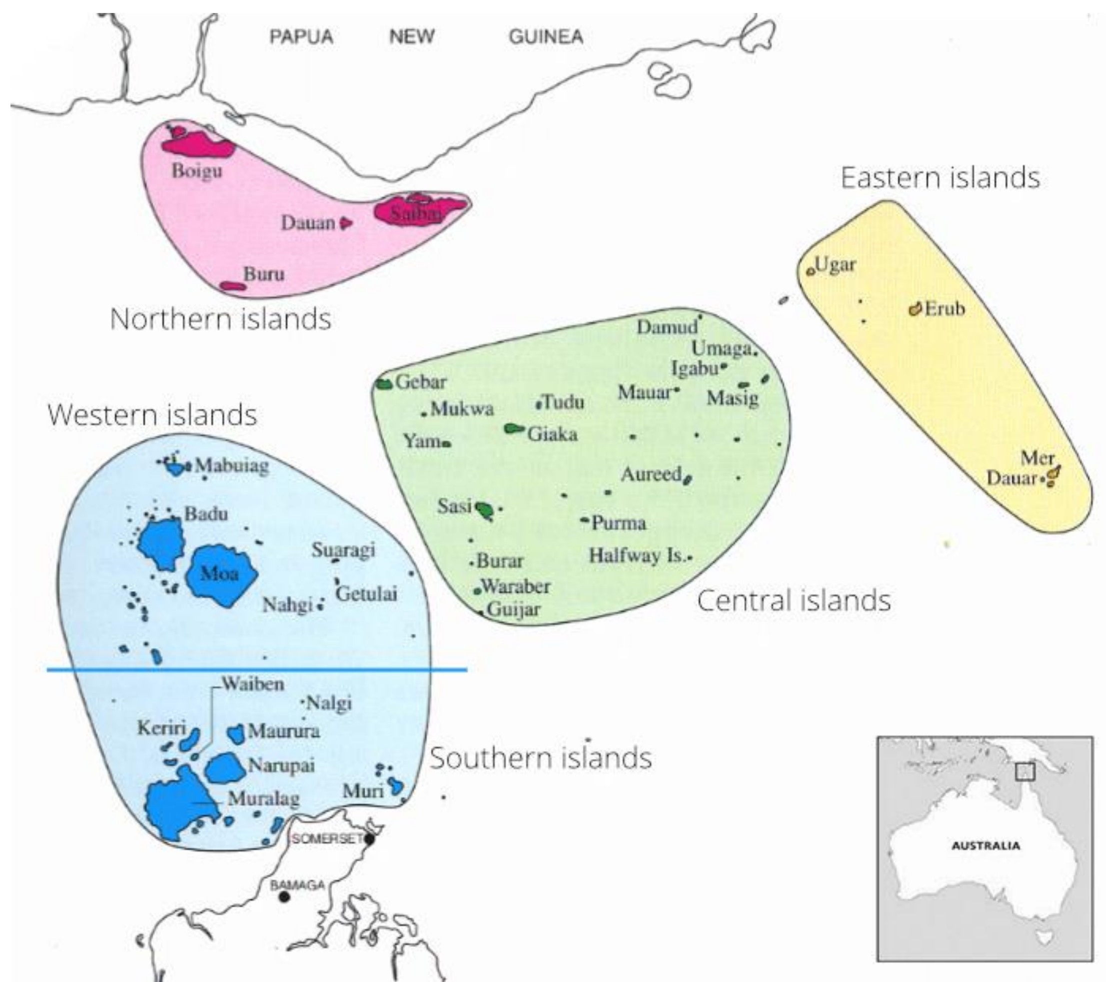
[49] 又稱為 *Akiba v. Queensland (No 2)*、或是 *Torres Strait Regional Sea Claim*（2010）。

[50] 法官從頭到尾的用字是 in aggregate，有時也會用 collectively。

[51] 原文是（para. 9）：

> There is a single Torres Strait Islander society to which the native title claim group belongs. Under that society's traditional laws acknowledged and traditional customs observed, the claim group in aggregate holds native title rights and interests in the waters of Torres Strait, with which I am presently concerned, save in those parts specified in these reasons.

端的 Cape York 半島的 Gudang 民族；（二）聲索者主張除了 Prince of Wales 島的 Kaurareg 民族，其他所有澳洲托雷斯海峽的島民屬於同一個社會；（三）有人認為可以依據東、西 2 個語族（language group）分為兩個社會；（四）聯邦政府則認為應該根據四個區域性的列島[52]（cluster group of islands）劃分為 4 個社會；（五）昆士蘭省政府甚至於主張每一個有人居住的島嶼各自構成一個社會，也就是零碎的 13 個[53]（圖 4）。法官嗤之以鼻，認為不論是幾個社會，有關島民在海域的權利有多少，答案都是一樣的（summary, para. 13; para. 10）。



來源：Creative Spirits（n.d.）。

圖 4：托雷斯海峽群島

52 一般分為北邊的頂西群島（Top/North Western (*Gudamaluilgal*) Islands）、西邊的近西群島（Near/Lower Western (*Malvilgal*) Islands）、中間的中群島（Central (*Kulkalgal*) Islands）、東邊的東群島（Eastern (*Meriam*) Islands）、及南邊的內群島（Inner (*Kaiwalagai*) Islands）；少數接近巴紐的島嶼劃歸該國，人口比較多（Wikipedia, 2018: Torres Strait Islands; Creative Spirits, n.d.; Akiba : paras. 20-22）。

53 不含 Prince of Wales 島（*Muralag*）。

法官 Finn 認為，儘管島民並未形成一個「整合的政治體」（integrated polity），他們的確遵守著一套傳統的法律及慣俗，即使因為各地自主容而有相當的地方性差異（local differences）[54]，卻有明顯的共同點（obvious commonality）[55]；事實上，這些無傷大雅的差異並不破壞社會的整體，不只要包容、甚至於要期待會有才對；法官指出，這套法律及慣俗已經發展出一套島際的成規，特別是尋求進入領域取用（take）的同意、以及海島的風格[56]（paras. 441, 456, 459, 488）。法官更對於昆士蘭省政府的諸多島嶼社會看法、以及聯邦政府的四大列島觀點大惑不解，認為前者未能看到島與島之間的土地及海域的共享、後者略群島在法律及慣俗上的共同點[57]（paras. 474, 477, 491）。

持續聯繫

法官 Finn 提醒，『原住民族土地所有權法』第 223 條第 1 款的「關係」（in relation to）、及第 1（b）款的「聯繫」（connection），強調的要件是原住民族與土地及水域的「真正關係」（real relationship）、而非人與人之間的「互惠關係」（reciprocal relationship）（paras. 498, 508-509）。島民的權利及利益來自於傳統的法律及慣俗，一旦失去與土地及水域的傳統關連，就喪失了這些權利（paras. 500-501）。不過，他認為儘管島民的法律慣俗沒有反映出跟海域在心靈上包山包

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[54] 原文為（para. 488）：

> They did not act as an "integrated polity", but had no need to. What they did, island by island, was to observe and acknowledge a body of traditional laws and customs. That body, though, was a single one. It admitted of some local differences both in content and in applicable laws. I do not consider that any one reason can explain those differences. I have referred to some number of possible causes of difference. The differences were not, in the scheme of things, of real moment for present purposes. For the most part, the laws and customs had, and have, local application. The exercise of local autonomy ought be expected to have produced some variances in practices and understanding over times.

[55] 法官用「拼花被子」（a guilt of united parts）來描寫，另一個用字是 tenure blanket，不好翻譯（paras. 170, 640）。

[56] 原文是（para. 489）：

> What needs to be emphasised is that it was not only local applications of the body of laws and customs that were observed by Islanders. The observance of those that had inter-island applications has been well established. The two enduring symbols of the recognition of the bodies of laws and customs as such were the seeking of permission to take from another's land or marine territory and the practice of *ailan pasin*.

[57] 事實上，法官也反對島以下的單位作為聲索者（para. 636）。

海的聯繫，然而，還是可以從傳統心靈上的信念看出一些蛛絲馬跡，在實務的效用上，大致可以滿足聯繫的要件，毋庸置疑（summary, para. 6; paras. 3, 648）。

權利來源

法官把傳統的權利及利益分為祖先「先佔而來的權利」（ancestral occupation based rights, emplacement (ownership) based rights）、及衍生的「互惠權」（reciprocity based rights, reciprocal relationship based rights, status based rights）：前者是共有權（communal rights）、或是集團權（group rights）[58]；後者則是指因為互惠關係而來的，譬如與島民的親戚關係，尤其是 Prince of Wales 島的 Kaurareg 民族、Cape York 半島的 Gudang 民族、或是劃歸巴紐的相近民族（paras. 59, 68-70, 493, 502-10, 645）。法官 Finn 同意島民的原住民族土地權是來自先佔（prior occupation）的說法，但否定宣稱與島民有關係而來的互惠權層面，可以看出法官是不希望確認案彼此糾纏不清、治絲益棼。

權利內涵

法官 Finn 指出，島民所擁有的（possess）原住民族土地權是依據傳統法律及慣俗而來的權利及利益，這裡的 title 未必是指英澳的財產（property）、或所有物（belonging），因此，不應該跟不動產（real property）的概念相提並論（paras. 497, 500）。島民所聲索的權利（claimed rights）包含三大類[59]：（一）進入跟停留（enter and remain）、及使用跟享用[60]（use and enjoy）的權利；（二）近用跟取用（access and take）資源、及仰賴近用與取用作為維持生計（livelihood）的權利；以及（三）保護資源、棲息地、及其他重要地方的權利（para. 512）。法官判定[61]：

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[58] 『原住民族土地所有權法』第 223 條第 1 款所提的是共有、集體、或是個人權利（communal, group or individual rights and interests）。所謂的共有權是因為成員的身分而取得（Glaskin, 2003: 78）。法官指出，原住民族的土地權並非開放給大家的共同財（commons）（paras. 541-43, 640）。

[59] 比較『原住民族土地所有權法』第 225 條。

[60] 法官提醒（para. 522），島民聲索的是「使用跟享用」的權利，並不等同「擁有與佔有」（possess and occupy）的權利；請參考他對於這些名詞的討論（paras. 541-43）。

[61] 畫龍點睛的是（para. 11）：

> The native title rights I have found are the non-exclusive rights of the group members of the respective inhabited island communities first, to access, to remain in and to use their own marine territories or territories shared with another, or other, communities; and, secondly; to access resources and to take for any purpose resources in those territories. In

島民有非專屬的近入、停留、及使用海域權利，也承認近用及取用該領域資源做任何用途（for any purpose）的權利，但是並不承認他們有仰賴近用與取用資源做維持生計的權利（paras. 519-24, 530）；法官並強調這些權利不可以排除他人，同時也不承認他們有管制他人在海域近用、或其他舉止的權利（territorial control），也就是否定他們擁有為了資源保育的保護權（protect rights）（paras. 531-39）。

主權擴張

隨著澳洲的主權擴張，由 12 浬領海（territorial seas）、24 浬鄰接區（contiguous zone）、到 200 浬經濟海域／專屬經濟區[62]（exclusive economic zone, EEZ），也就是由沿海（coastal seas）到公海（high seas），原住民族的土地權是否也跟著延伸適用，包括大陸棚／礁層（continental shelf）？當然，最基本的要求是不能與『公海公約』（*Convention of the High Seas, 1958*）衝突，也就是公海的無害通過的自由。在 *Yarmirr*（2001），法官已經判定原住民族在領海擁有非專屬的非商業性漁獲、及採集權（paras. 709-10）。根據『原住民族土地所有權法』第 6 條，該法適用於依據『海域及浸水土地』（*Seas and Submerged Lands Act, 1973*）而來的沿海、及海域，法官 Finn 表示沒有道理不承認原住民族超越領海在經濟海域的土地權（paras. 735-41）。

消除意圖

法官 Finn 再三提醒，領土的主權更替並不意味著消除既有（pre-existing）土地水域的權利及利益[63]。昆士蘭省政府、及聯邦政府主張，由於對於商業漁獲

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exercising these rights the group members are expected to respect their marine territories and what is in them. Importantly, and this requires emphasis, none of these rights confer possession, occupation, or use of the waters to the exclusion of others. Nor do they confer any right to control the conduct of others.

[62] 依據『聯合國海洋法公約』（*United Nations Convention on the Law of the Sea l, 1982*）。

[63] 譬如（paras. 6, 652, 706）：

Unlike with so much of Aboriginal Australia, the acquisition of sovereignty over the islands of the Strait did not lead to the Islanders being dispossessed of their lands or sea domains, or deprived of their traditional means of livelihood.

I noted at the very beginning of these reasons that the acquisition of sovereignty over the islands of the Strait did not lead to the Islanders being dispossessed of the land and sea areas, or their being deprived of their traditional means of livelihood.

I commence with the well accepted proposition that a mere change in sovereignty over a territory does not as of course extinguish pre-existing rights and interests in land (or, for

的立法管控（regulatory control）不斷擴充，島民的商業漁獲權已經被消除；法官 Finn 則認為，既然確認島民有取用資源的權利，自然包含交易、或是商業（trading or commercial）的用途；事實上，政府的諸多立法[64]，所要管制的是商業漁獲的方式、島民作為澳洲公民有遵守的義務，然而，不管從過去到現在，這些法規並無（did not and do not）「明確而又清楚的意圖[65]」表示要消除原住民族商業性漁獲[66]；其實，不承認專屬權並不等於消除；政府既然宣稱已經消除權利，不管是授與、或是頒發執照給第三方，就有義務舉證到底是透過哪些立法或行政措施、消除的性質以及內涵為何（summary, para. 16; para. 745, 765-67）。

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that matter, waters) in that territory.

[64] 譬如聯邦『漁獲管理法』（*Fisheries Management Act, 1991*）與『漁獲行政法』（*Fisheries Administration Act, 1991*）、昆士蘭『托雷斯海峽漁獲法』（*Torres Strait Fisheries Act, 1994 (Qld)*）。

[65] 他引用法官 Brennan 的說法，光有管制原住民族土地權的法規，並不等於就有「明確而又清楚的意圖」（*Mabo 2*: 76）：

> A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title. A fortiori, a law which reserves or authorizes the reservation of land from sale for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native title works no extinguishment.

[66] 原文是（summary, para. 16）：

> I have found that the right to take resources includes the right to take marine resources for trading or commercial purposes and that such use of them would be recognized by the common law. I have rejected the contentions of the State and of the Commonwealth that the ever expanding regulatory controls placed upon commercial fishing by legislation extinguished any native title right to take fish for commercial purposes. Those legislative controls were not directed at the underlying rights of the native title holders who were obliged to comply with the regulatory measures imposed on them if they were to enjoy their native title rights. The various Acts severally or together did not, and do not, evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes in the Part A Claim Area. Having said this, it needs to be emphasised that, to the extent that those legislative regimes regulate the manner in which, and the conditions subject to which, commercial fishing can be conducted in a fishery in the native title holders' marine estates, or prohibit qualifiedly or absolutely particular activities in relation to commercial fishing in the fishery in those estates, the native title holders must, in enjoying their native title rights, observe the law of the land. This is their obligation as Australian citizens. Complying with those regimes provides them with the opportunity – qualified it may be – to exercise their native title rights.

又見（para. 765）：

> The manner in which the State and the Commonwealth have formulated their extinguishment submissions requires a protracted and detailed examination of State and Commonwealth legislation. My conclusion is that the legislative regimes of the State since 1877, and of the Commonwealth since 1952, concerning fisheries, while of evolving complexity, were regulatory and not prohibitory in character. They were not directed at the underlying rights of the native title holders who were to comply with the regulatory measures imposed if they were to enjoy their native title rights. The various Acts severally or together did not, and do not, evince a clear and plain intention to extinguish in the Part A claim area native title rights to take fish for commercial purposes. They did not abrogate those rights and create new statutory rights to fish.

聯邦最高法院對『阿契巴判例』的判決及後續

初審法官 Paul Finny 在 2010 年 7 月 2 日判決，原住民族的土地權包含非專屬的近用、停留、及使用海域的權利，同時有權近用及取用該領域的資源做任何用途，也就是漁獲權包含商業、或是交易（commercial or trading）用途。聯邦、以及省政府不服提出上訴，認為既有的法規禁止無照從事商業性漁獲。聯邦法院全席庭（Full Court of the Federal Court）在 2012 年 3 月 14 日以 2：1 做成判決，認定原住民族的漁獲權已經被歷來的漁業法規局部消除，也就是不包含買賣、或是交易（sale or trade）。

島民不敢苟同聯邦法院全席庭的裁決，往上向聯邦最高法院上訴，理由如下（*Akiba*: French & Crennan, paras. 4, 20）：政府的漁獲法規所管制的是某些魚類、及海洋資源的商業用途，這些證照規定並不是禁止所有資源的商業用途，因此，全席庭把管制等同於消除是錯的見解。換句話說，島民認為依據傳統法律及慣俗而來的原住民族土地海域權，當然有權近用、取用魚類及其他海洋資源來從事交易或買賣用途。

法官 French 與 Crennan 首先指出，根據『原住民族土地所有權法』第 223 條第 2 款，原住民族的土地權包含狩獵、採集、或漁獲的權利及利益（hunting, gathering, or fishing, rights and interests），這些是用益權（usufructuary rights，或譯為使用權），在執行第 225 條的土地權確認之際，那是澳洲普通法所承認的（第 1（c）款），基於一般的法律程序、及平等原則，應該予以這些權利及利益的擁有者補救性的支持（para. 9）。再來，消除是承認的反面，意味著『原住民族土地所有權法』第 223 條的原住民族土地權利及利益不再被承認，然而誠如 *Yanner v. Eaton*（1999）判決，政府的管制並不切斷原住民與土地的關係，也就是儘管政府規定無照不能漁獵，並不等於消除原住民族的權利（para. 10）。

根據 French 與 Crennan 法官，廣義的原住民族土地權既然承認近用及取用該領域資源做任何用途的權利，當然可以包含商業、及非商業用途；他們也同意，

原住民族土地權是原住民族與土地的關係，至於權利在特定用途的行使（exercise）又是另一回事（para. 21）。初審法官認為歷來的相關法規並未有明確而又清楚的意圖消除商業性漁獲，相對地，全席庭法官判定，光是禁止無照漁獲就足夠消除原住民族的商業漁獲權，而非只是單純的管制而已，而兩位聯邦最高法院的法官則主張必須進一步著手法律解釋（statutory construction/interpretation）的努力（paras. 22-23）。French 與 Crennan 認為，所謂的消除是指權利的消滅或終止（extinguishment or cessation of rights），至於歷來的漁獲法規只是條件式禁止（para. 24）。

根據『原住民族土地所有權法』，法條（act）可能全盤、或是局部影響到原住民族土地權的行使（第 227 條），然而，並不會因此就全盤、或局部加以消除（第 228 條第 2 款）；此外，即使法條與原住民族土地權利及利益的行使有局部不一致的地方，原住民族土地權依然完整地存在（第 228 條第 4 款）。換句話說，法律或可限制、或是禁止某些原住民族土地權的行使，未必因此消除加以消除（*Akiba*: French & Crennan, para. 26）。兩位法官提醒，第 211 條也針對原住民族土地權利及利益的行使或享用，在從事狩獵、漁獲、採集、及文化或心靈等行為（activity）之際，如果是滿足個人、家用、或是非商業性的共有需要（for the purpose of satisfying their personal, domestic or non-commercial communal needs），是可以排除禁止、或是限制（removal of prohibition）；那麼，立法的用意如果只是想要影響原住民族土地權的行使，就不應該解釋為消除底層的權利（*Akiba*: French & Crennan, paras. 27-28）。

事實上，自從『瑪莫案第一號判例』（1988）、以及『瑪莫案第二號判例』（1992）以來，要判斷原住民族的土地權利及利益是否被國會立法、或是行政措施消除，關鍵在於是否有明確而又清楚的意圖，特別是推定立法意圖[67]（imputed legislative intention）（*Akiba*: French & Crennan, para. 30）。比較麻煩的是，要是『原住民族

[67] 法官 French 與 Crennan（*Akiba*: 31）指出，探究立法意圖得方式有三：看法律操作的明顯法律效果、明確的立法意旨、以及外在的損害。

土地所有權法』的規定與現有的法律相左，也就是原住民族土地權利及利益與法定權利（statutory rights）相互競爭、或是不一致之際，怎麼辦？法官 French 與 Crennan（*Akiba*: paras. 32）指出，從 *Fejo*（1998）到 *Yanner*（1999）判例，大體依據的是採取「不一致判準」（inconsistency criterion），也就是議會立法所授與（grant）第三者、或創造（creation）的權利，譬如政府授與非原住民族的「完全土地所有權」（fee simple）[68]，消除了原住民族既有的權利。

兩位法官注意到 *Yanner*（1999）判例，儘管昆士蘭省的『動物保護法』（*Fauna Conservation Act 1974 (Qld)*）規定原住民族狩獵必須有許可證，然而，並未因此廢除原住民族的狩獵權，也就是政府的管制與原住民族權利的繼續存在並非不一致（*Akiba*: French & Crennan, para. 32）。同樣地在 *Yarmir*（2001）判例，除了大眾的航行權、漁獲權、以及無害通過的自由，原住民族的土地權利及利益延伸至海域，其他則大致上沒有不一致的地方；只不過，兩位法官提醒，兩種權利到底有沒有不一致，還必須經過客觀的探究，有就有、沒有就沒有[69]，不能光憑主觀意識，也就是說，不能拿來跟是否有「明確而又清楚的意圖」混為一談（*Akiba*: French & Crennan, para. 33）。他們更指出，昆士蘭省政府上訴的理由是島民取用魚類、或海洋生物作為商業用途，與聯邦及省政府的漁獲法規不一致，那是謬誤的，因為漁獲管理制度只規定捕魚必須要有執照、並不能消除原住民族的土地權利及利益（*Akiba*: French & Crennan, para. 36）。

Karpany v. Dietman（2013）[70]：地方法院（Magistrates Court）同意被告，也就是依據『原住民族土地所有權法』第 211 條，可以排除『漁獲管理法』有關於

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[68] 也就是前面所提到的 freehold。

[69] 他們特別引用 *Ward*（2002: para. 82）：

> Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment.

[70] 相較於 *Akiba* 判例是原住民族土地權聲索案，本案則是原住民族以土地權作為抗告的依據（Butterly, 2014: 23）。南澳省政府起訴兩名 Narrunga 族人違反違該省的『漁獲管理法』（*Fisheries Management Act 2007 (SA)*）捕捉 24 只未達尺寸的野生青邊鮑魚（Greenlip abalone），被告援引『原住民族土地所有權法』第 211 條辯護，指稱限制、或是禁止捕魚的規定並不適用於原住民族土地權所有者（第 1（b）款、3（b）款），也就是排除適用（remove the exclusion）；當然，該法也明文規定，這些行為必須是滿足個人、家用、或是非商業性的共有需要（第 2（a）款）。

禁止或排除的適用（*Karpany*: para. 10）。然而，聯邦法院全席庭的法官 Gray 則認為，經過「合理推論」（reasonable inference）[71]，判定該省的『漁獲法』（*Fisheries Act 1971 (SA)*）已經刪除原住民族的排除適用，也就是消除原住民族的土地權；相對地，法官 Blue 以為看不出該法有消除原住民族土地權的意圖（*Karpany*: paras. 14, 28-30）。終究，聯邦最高法院認為本案跟 *Akiba* 一樣，管制未必與原住民族繼續享有土地權不一致，因此判定原住民族土地權並未被消除（*Karpany*: paras. 5, 22, 27）。

Western Australia v. Brown（2014）：Ngarla 民族提出土地海域聲索的協議調解，確認的癥結在於西澳政府與合資公司所簽訂的礦產租約，是否消除了原住民族的土地權。聯邦法院在初審判決，政府的租約並未授與專屬所有權（exclusive possession）給礦業公司，因此，原住民族的土地權利及利益並未被完全消除；然而，法官又判定在礦產、礦鎮、以及相關設施的地方，政府授與礦業公司的權利的確與原住民族的土地權不一致，換句話說，原住民族的土地權利及利益在這裡被消除（para. 22）。族人不服提出上訴，認為都不應該有影響才對（para. 24）。究竟政府所授與的權利（rights granted）與所謂的（alleged）原住民族土地權利及利益是否不一致（para. 33）？聯邦最高法院判定，原住民族的土地權跟礦權租約並沒有不一致（para. 3）。

結語

自從『瑪莫案第二號判例』（1992）承認原住民族依據傳統法律慣俗的土地權利及利益，政府通過『原住民族土地所有權法』（1993）來落實，重點在於承認、以及消除的拉鋸戰。此後，聯邦最高法院針對原住民族的土地權又做了一序列判例，主要是在釐清『瑪莫案第二號判例』的原則，進一步提出一些判準作為

[71] 原文是（*Karpany*: paras. 28）：

> It may be reasonably inferred that a decision had been taken to bring to an end the exclusion of Aboriginal people from the purview of the new regime enacted in 1971.

確認的依據，包括聲索者是否與土地持續聯繫、原住民族土地權是否與普通法或國會立法不一致、立法是否有明確而清楚的消除意圖等等。就實質的內容來看，原住民族的土地權還延伸到海域，也就是原住民族擁有非他性的進入領域、及使用資源做任何用途的權利，包括商業性的漁獲權。

相較於過去，澳洲的原住民族可以透過法定的程序來聲索土地權，政府不再可以恣意授與第三者而消除[72]。只不過，儘管原住民族土地權在一束權利的概念下可以跟政府的立法授權共存，相對上的位階還是比較低，特別是侷限於傳統慣俗而來的權利及利益，不多不少，當然也就沒有自由轉讓的權利。其實，不管是私有、還是共有權，為什麼原住民族的土地權要被大打折扣？另外，不管採取何種確認的方式，聲索的過程還是相當繁瑣。表面上，這是原住民族法律慣俗、普通法、以及過會立法的妥協（Perry, 2014: 4），實際是在普通法的框架下，嘗試著以立法方式來承認原住民族的土地權；前者是三者的交集，後者則是包含的關係（圖 5）。

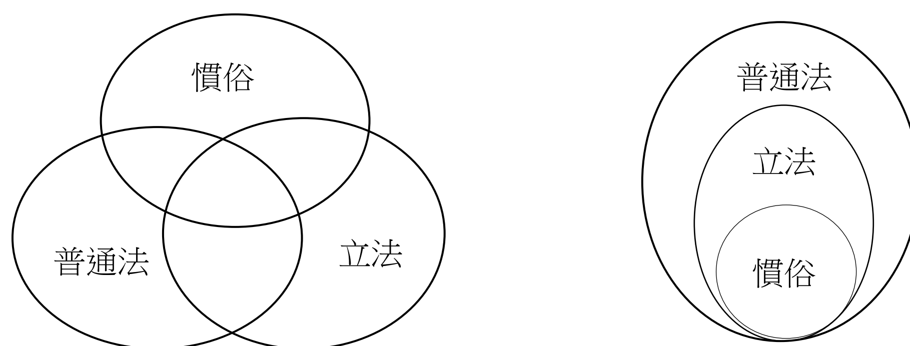

圖 5：澳洲原住民族土地權的位階

[72] 大體而言，在 1975 年之前，只要澳洲政府授與土地給非原住民，原住民族的土地權就被消除了、無法要求補償；在 1975-92 年間，儘管原住民族的土地權尚未被政府承認，然而，端賴相關的配套法規，未經補償的土地授與是違法的；自從 1993 年以來，也就是在『原住民族土地所有權法』通過後，除非經過法定的程序，總算原住民族的土地權不可以任意加以消除（Mansfield, 2017: 9-10）。

附錄 1：『原住民族土地所有權法』

Preamble

This preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms through:

(a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and

(b) the acceptance of the Universal Declaration of Human Rights; and

(c) the enactment of legislation such as the *Racial Discrimination Act 1975* and the *Australian Human Rights Commission Act 1986*.

The High Court has:

(a) rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement; and

(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and

(c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The people of Australia intend:

(a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

(a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
(b) proposals for the use of such land for economic purposes.

It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.

3 Objects

Main objects

The main objects of this Act are:

(a) to provide for the recognition and protection of native title; and
(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
(c) to establish a mechanism for determining claims to native title; and
(d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

4 Overview of Act

Recognition and protection of native title

(1) This Act recognises and protects native title. It provides that native title cannot be extinguished contrary to the Act.

Topics covered

(2) Essentially, this Act covers the following topics:

(a) acts affecting native title (see subsections (3) to (6));
(b) determining whether native title exists and compensation for acts affecting native title (see subsection (7)).

Kinds of acts affecting native title

(3) There are basically 2 kinds of acts affecting native title:

(a) past acts (mainly acts done before this Act's commencement on 1 January 1994 that were invalid because of native title); and
(b) future acts (mainly acts done after this Act's commencement that either validly affect native title or are invalid because of native title).

Consequences of past acts and future acts

(4) For past acts and future acts, this Act deals with the following matters:

(a) their validity;
(b) their effect on native title;
(c) compensation for the acts.

Intermediate period acts

(5) However, for certain acts (called intermediate period acts) done mainly before the judgment of the High Court in Wik Peoples v Queensland (1996) 187 CLR 1, that would be invalid because they fail to pass any of the future act tests in Division 3 of Part 2, or for any other reason because of native title, this Act provides for similar consequences to past acts.

Confirmation of extinguishment of native title

(6) This Act also confirms that many acts done before the High Court's judgment, that were either valid, or have been validated under the past act or intermediate period act provisions, will have extinguished native title. If the acts are previous exclusive possession acts (see section 23B), the extinguishment is complete; if the acts are previous non-exclusive possession acts (see section 23F), the extinguishment is to the extent of any inconsistency.

Role of Federal Court and National Native Title Tribunal

(7) This Act also:

(a) provides for the Federal Court to make determinations of native title and compensation; and

(aa) provides for the Federal Court to refer native title and compensation applications for mediation; and

(ab) provides for the Federal Court to make orders to give effect to terms of agreements reached by parties to proceedings including terms that involve matters other than native title; and

(b) establishes a National Native Title Tribunal with power to:

(i) make determinations about whether certain future acts can be done and whether certain agreements concerning native title are to be covered by the Act; and

(ii) provide assistance or undertake mediation in other matters relating to native title; and

(c) deals with other matters such as the keeping of registers and the role of representative Aboriginal/Torres Strait Islander bodies.

6 Application to external Territories, coastal sea and other waters

This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*.

10 Recognition and protection of native title

Native title is recognised, and protected, in accordance with this Act.

11 Extinguishment of native title

(1) Native title is not able to be extinguished contrary to this Act.

Effect of subsection (1)

(2) An act that consists of the making, amendment or repeal of legislation on or after 1 July 1993 by the Commonwealth, a State or a Territory is only able to extinguish native title:

(a) in accordance with Division 2B (which deals with confirmation of past extinguishment of native title) or Division 3 (which deals with future acts etc. and native title) of Part 2; or

(b) by validating past acts, or intermediate period acts, in relation to the native title.

14 Validation of Commonwealth acts

(1) If a past act is an act attributable to the Commonwealth, the act is valid, and is taken always to have been valid.

Effect of validation of law

(2) To avoid any doubt, if a past act validated by subsection (1) is the making, amendment or repeal of legislation, subsection (1) does not validate:

(a) the grant or issue of any lease, licence, permit or authority; or

(b) the creation of any interest in relation to land or waters;

under any legislation concerned, unless the grant, issue or creation is itself a past act attributable to the Commonwealth.

17 Entitlement to compensation

Extinguishment case

(1) If the act attributable to the Commonwealth is a category A past act or a category B past act, the native title holders are entitled to compensation for the act.

Non-extinguishment case

(2) If it is any other past act, the native title holders are entitled to compensation for the act if:

(a) the native title concerned is to some extent in relation to an onshore place and the act could not have been validly done on the assumption that the native title holders instead held ordinary title to:

(i) any land concerned; and

(ii) the land adjoining, or surrounding, any waters concerned; or

(b) the native title concerned is to some extent in relation to an offshore place; or

(c) the native title concerned relates either to land or to waters and the similar compensable interest test is satisfied in relation to the act.

Compensation for partial effect of act

(3) If the entitlement arises only because one, but not both, of paragraphs (2)(a) and (b) are satisfied, it is only an entitlement for the effect of the act on the native title in relation to the

onshore place, or the offshore place, mentioned in the relevant paragraph.

Who pays compensation

(4) The compensation is payable by the Commonwealth.

211 Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holders

(1) Subsection (2) applies if:

(a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and

(b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and

(ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and

(c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc. on native title holders

(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

(a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and

(b) in exercise or enjoyment of their native title rights and interests.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of class of activity

(3) Each of the following is a separate class of activity:

(a) hunting;

(b) fishing;

(c) gathering;

(d) a cultural or spiritual activity;

(e) any other kind of activity prescribed for the purpose of this paragraph.

223 Native title

Common law rights and interests

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

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

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

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

Hunting, gathering and fishing covered

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

225 Determination of native title

A *determination of native title* is a determination whether or not native title exists in relation to a particular area (the *determination area*) of land or waters and, if it does exist, a determination of:

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a

non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

226 Act

*Section affects meaning of **act** in references relating to native title*

(1) This section affects the meaning of ***act*** in references to an act affecting native title and in other references in relation to native title.

Certain acts included

(2) An ***act*** includes any of the following acts:

(a) the making, amendment or repeal of any legislation;

(b) the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument;

(c) the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters;

(d) the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise;

(e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;

(f) an act having any effect at common law or in equity.

Acts by any person

(3) An ***act*** may be done by the Crown in any of its capacities or by any other person.

227 Act affecting native title

An act ***affects*** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

238 Non-extinguishment principle

Effect of references

(1) This section sets out the effect of a reference to the non-extinguishment principle applying to an act.

Native title not extinguished

(2) If the act affects any native title in relation to the land or waters concerned, the native title is nevertheless not extinguished, either wholly or partly.

Rights and interests wholly ineffective

(3) In such a case, if the act is wholly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety but the rights and interests have no effect in relation to the act.

Rights and interests partly ineffective

(4) If the act is partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety, but the rights and interests have no effect in relation to the act to the extent of the inconsistency.

Who the native title holders are

(5) Despite the fact that the native title rights and interests have no effect (as mentioned in subsection (3)) or have only limited effect (as mentioned in subsection (4)) in relation to the act, the persons who are entitled in accordance with the traditional laws and customs, as applying from time to time, to possess those rights and interests continue to be the native title holders, subject to Division 6 of Part 2 (which deals with the holding of native title on trust).

Complete removal of act or its effects

(6) If the act or its effects are later wholly removed or otherwise wholly cease to operate, the native title rights and interests again have full effect.

Partial removal of act or its effects

(7) If the act or its effects are later removed only to an extent, or otherwise cease to operate only to an extent, the native title rights and interests again have effect to that extent.

Example of operation of section

(8) An example of the operation of this section is its application to a category C past act consisting of the grant of a mining lease that confers exclusive possession over an area of land or waters in relation to which native title exists. In such a case the native title rights and interests will continue to exist but will have no effect in relation to the lease while it is in force. However, after the lease concerned expires (or after any extension, renewal or re-grant of it to which subsection 228(3), (4) or (9) applies expires), the rights and interests again have full effect.

253 Other definitions

Unless the contrary intention appears:

interest, in relation to land or waters, means:

(a) a legal or equitable estate or interest in the land or waters; or

(b) any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with:

(i) the land or waters; or

(ii) an estate or interest in the land or waters; or

(c) a restriction on the use of the land or waters, whether or not annexed to other land or waters.

waters includes:

(a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or

(b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in paragraph (a)); or

(c) the shore, or subsoil under or airspace over the shore, between high water and low water.

附錄 2：條約、判例、法規

Convention of the High Seas, 1958
International Convention on the Elimination of All Forms of Racial Discrimination, 1965
Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968 (NT)
Milirrpum v. Nabalco Pty Ltd, 1971
Fisheries Act 1971 (SA)
Seas and Submerged Lands Act, 1973
Woodward Report, 1974
Fauna Conservation Act 1974 (Qld)
Racial Discrimination Act, 1975
Aboriginal Land Rights (Northern Territory) Act, 1976
Torres Strait Treaty, 1978
Aboriginal Land Act 1978 (NT)
Pitjantjatjara Land Rights Act 1981 (SA)
United Nations Convention on the Law of the Sea l, 1982
Koowarta v. Bjelke-Petersen, 1982
Queensland v. Commonwealth, 1982
Aboriginal Land Rights Act 1983 (NSW)
Maralinga Tjarutja Land Rights Act 1984 (SA)
Torres Strait Fisheries Act, 1984
Queensland Coast Islands Declaratory Act 1985 (Qld)
Torres Strait Islander Land Act 1991 (Qld)
Aboriginal Land Act 1991 (Qld)
Fisheries Management Act, 1991
Fisheries Administration Act, 1991
Mabo v. Queensland (No. 2), 1992
Land (Titles and Traditional Usage) Act, 1993
Native Title Act, 1993
Torres Strait Fisheries Act 1994 (Qld)
Aboriginal Lands Act 1995 (Tas)
Brandy v. Human Rights and Equal Opportunity Commission, 1995
Western Australia v. Commonwealth, 1995
Wik Peoples v. Queensland, 1996
North Ganalanja v. Queensland, 1996
Mary-Lou Buck v State of New South Wales & Ors, 1997
Native Title Amendment Act, 1998
Fejo and Mills v Northern Territory, 1998

Yanner v. Eaton, 1999
Commonwealth v. Yarmirr, 2001
Western Australia v Ward, 2002
Wilson v. Anderson, 2002
Yorta Yorta v. Victoria, 2002
Lardil Peoples v. state of Queensland, 2004
Gumana v. Northern Territory of Australia, 2007
Griffiths v Minister for Lands, Planning and Environment, 2008
Native Title Amendment Act, 2009
Akiba v. State of Queensland (No 2), 2010
Commonwealth v. Akiba, 2012
Akiba v. Commonwealth, 2013
Karpany v. Dietman, 2013
Western Australia v. Brown, 2014

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