Many Interests, One Place: The Unsustainability of a Hierarchy of Rights to Land

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MANY INTERESTS, ONE PLACE: THE UNSUSTAINABILITY OF A HIERARCHY OF RIGHTS TO LAND

KATE GALLOWAY* AND MELISSA CASTAN**

Real property law enables the grant of multiple rights in the one parcel of land. However, there are other sources of rights in land, and obligations that burden property rights, that might subsist over or in relation to the same physical space. The full complement of rights and obligations over land are therefore in tension with each other. Although these tensions are often not exposed in an urban metropolitan context, they frequently arise beyond Australia's cities. That some rights prevail to the exclusion of others that exist over the same area of land, reveals the legislature's priorities and the privileges it bestows. The ordering of rights over land has implications for the sustainability of sites designated as Indigenous cultural heritage within the Australian legislative framework, and for First Nations' lands more generally. This article assesses the capacity of the existing framework of rights over land to uphold self-determination of First Nations in Australia as a measure of the sustainability of the current hierarchy of those rights.

I. INTRODUCTION

In mid-2020, mining company Rio Tinto controversially, but lawfully, destroyed caves in the ancient Juukan Gorge.[1] Since then, the Western Australian government has released a draft of cultural heritage legislation to replace the 1974 Act that permitted the caves' destruction,[2] and the Parliamentary Committee on Northern Australia has inquired into the circumstances of the incident and what is required to protect such heritage in the future.[3] Amidst submissions to the Inquiry was evidence that Rio Tinto had permitted the dumping of hundreds of irreplaceable cultural artefacts it had taken from the Pilbara. The company had failed, for decades, to notify the Eastern Guruma Elders of the disposal.[4] Both incidents have attracted considerable public attention in Australia and internationally. The destruction of the Juukan Gorge caves ultimately led to the resignation of Rio Tinto's CEO[5]—signifying the perception of the event as a breach of the company's social licence if not its legal obligations.

These two examples raise questions of principle relevant to the co-existence of different frameworks of rights and obligations affecting land, and the tension between various stakeholders in relation to that land. Of particular interest, is that the public's response indicates surprise at the inability of the Traditional Owners to protect the site, pointing to an assumption amongst the public that First Nations peoples have the right to protect Indigenous cultural heritage.

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* Associate Professor, Griffith Law School.
** Associate Professor, Faculty of Law, Monash University.

1 For background, see Joint Standing Committee on Northern Australia, 'Never Again' Interim Report of Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara region of Western Australia ('Inquiry'); Kate Galloway, 'A Legal Lacuna: Between Cultural Heritage and Native Title' (2020) 35(4) *Australian Environment Review* 110 ('Legal Lacuna').

2 Aboriginal Cultural Heritage Bill 2020 (WA).

3 Inquiry (n 1).

4 The assertions were made in documents seen by reporters though not appearing amidst the Inquiry submissions. Lorena Allam, 'Rio Tinto Accused of Allowing Irreplaceable Indigenous Artefacts to Be Dumped in Rubbish Tip' *Guardian Australia* (25 June 2021) <https://www.theguardian.com/business/2021/jun/25/rio-tinto-accused-australian-indigenous-artefacts-dumped-rubbish>.

5 David Chau and Michael Janda, 'Rio Tinto Boss Jean-Sebastien Jacques Quits Over Juukan Gorge Blast' *ABC News* (11 September 2020) <https://www.abc.net.au/news/2020-09-11/rio-tinto-boss-jean-sebastien-jacques-quits-over-juukan-blast/12653950>.

In response, this article first explains the legal ordering that resulted in the lawful destruction of the Juukan Gorge site, with reference to general principles of property law, native title, and cultural heritage. It then identifies the absence in this existing hierarchy of rights over land, of principles of self-determination—a silencing of the underlying interests of First Nations peoples despite their intrinsic interest in the land including as recognised by law. In doing so, it seeks to articulate the public's dismay about the lawful destruction of Indigenous cultural heritage in terms of the law's failure to uphold principles of self-determination.

Before commencing, we acknowledge our standpoint as white lawyers and academics. We do not speak for, or with the authority of, First Nations peoples in presenting our ideas here. Our aim is to analyse the approach of the settler-colonial legal system to First Nations' claims to land.

I. The Legal Ordering of Rights over Land

The Anglo-Australian legal system regulates access to and rights in land via the State. The State's paramount interest is expressed both through real property as well as cultural heritage, albeit in different ways. And while native title law derives its content from 'traditional law and custom',[6] the reality is that this occurs only through the mechanisms of the settler-colonial State.[7]

This part summarises four different species of rights over land: the estate in fee simple, mineral rights, native title, and cultural heritage. In doing so, it explains which rights take precedence, notably where more than one type of right exists over the same land.

A. Estates: Freehold and Leasehold

The estate in fee simple is 'the highest and largest estate that a subject is capable of enjoying'.[8] In common parlance, 'ownership' best fits the extensive nature of the fee simple estate. Although there is no precise or definitive description of rights comprised within the estate, either at law,[9] or theoretically,[10] it is accepted that the estate represents 'plenary' rights.

Inherent in the notion of an estate is the concept of seisin—a legal right to possession of the land.[11] Possession implies a right to exclude, subject to the grant of any lesser rights 'carved out' of the larger interest[12]—such as an easement—where a right to grant lesser interests, or to alienate in full,[13] are themselves a feature of 'ownership'. Although there is little further guidance on enumerated rights, title holders are generally able to deal with the physical land in ways that can only indicate the existence of rights.[14]

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[6] *Western Australia v Ward* (2002) 213 CLR 1, [20].

[7] Following the decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('Mabo'), and the introduction of the *Native Title Act 1993* (Cth).

[8] Blackstone (1765-1769), Book 2, Chapter 11. See also *Gumana v Northern Territory* (2007) 158 FCR 349, [83]; *Commonwealth v New South Wales* (1923) 33 CLR 1, 42.

[9] See, eg, *Yanner v Eaton* (1999) 201 CLR 351, [109].

[10] See, eg, Kate Galloway, 'One Tale of Property, In My Own Words' (2018) 27(1) *Griffith Law Review* 157; Kevin Gray and Susan Francis Gray, 'The Rhetoric of Realty' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths, 2003) 204.

[11] Frederic William Maitland, 'The Mystery of Seisin' in *Select Essays in Anglo-American History* (Little Brown and Company, 1909) 591.

[12] Kevin Gray and Susan Francis Gray, 'The Rhetoric of Realty' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths, 2003) 204, citing Willies-Williams v National Trust (1993) 65 P & CR 359, 361 per Hoffmann LJ and *Ingram v IRC* [2000] 1 AC 293, 303G per Lord Hoffmann, 310C-D per Lord Hutton.

[13] Such a right is 'traceable as far back as the statute *Quia Emptores 1290*': Brendan Edgeworth, *Butt's Land Law* (7th ed, Thomson, 2017) 109.

[14] Enumerated and discussed in: JE Penner 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711. For an application of Penner's theory in the Australian real property context, see Kristy Richardson and Kate Galloway, 'Severing a Joint Tenancy: A Queensland Analysis' (2009) 16 *Australian Property Law Journal* 245.

While plenary rights in the estate permit a freehold owner to carve out lesser rights, so too does the State have the power to create estates less than freehold. In Australia, these take a variety of forms including leasehold estates. In the Australian context the leasehold estate is granted pursuant to legislation and as observed in the *Wik case*,[15] these are sui generis interests dependent upon achieving a legislative purpose, rather than reflecting the common law hallmarks of a lease.[16]

As a consequence of the sui generis nature of a State leasehold, the High Court of Australia determined that a leasehold, depending on its particular incidents, might co-exist with native title. In an expression of the State's determination to afford paramountcy to its own interests, the notorious 'Ten-Point Plan' following the *Wik* decision gave primacy to the leasehold estate through amendment to the *Native Title Act 1993* (Cth).[17] The amendments aligned with the widely accepted understanding of leasehold land in jurisdictions such as Queensland, whereby a leasehold estate was considered 'as good as freehold'.[18] The implications of native title following the *Wik* decision—namely that a leasehold may as a question of law be subject to other interests—therefore came as a shock to Queensland pastoralists.

Despite the extensive connotations of the estate, other sources of law might constrain the rights comprising the estate.[19] Relevantly, the extent to which the estate itself attaches to the physical land is limited by law.

B. Minerals

Independent of the rights comprised in the estate is the question of what is physically owned. This is no academic question, as it is the source of other substantive rights over the very same physical space.

The estate is attached to an area geolocated on the earth's surface.[20] The geological features of the land are, however, cleaved from the object of ownership by various means. Water and other resources otherwise inherently connected with land are reserved to the State,[21] as are minerals. Historically, gold and silver were excluded from the fee simple estate in favour of the State.[22] More recently, the State has reserved all minerals from grants of freehold,[23] encroaching further into the plenary nature of the fee simple.

Because all minerals within a state vest in the State, it is not only the fee simple that is subject to mineral rights over the same area. Indeed, the nature of mining means that it is highly unlikely for mining interests to be exercised within metropolitan areas—where most freehold interests in Australia are located. Given this reality, the fee simple estate is effectively prioritised over mining rights. This leaves mining rights to compete with other property rights beyond the metropolitan fringe as when the State grants any interest in land, it reserves mineral rights to the Crown.[24]

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[15] *Wik Peoples v Queensland* (1996) 187 CLR 1.
[16] Ibid 115–17.
[17] *Native Title Amendment Act 1998* (Cth), sch 1, s 23B.
[18] This arose from past policies on the grant of State leasehold. See, eg, Productivity Commission, *Pastoral Leases and Non-Pastoral Land Use* Commission Research Paper (AusInfo, 2002) 7.
[19] See, eg, Brendan Edgeworth, *Butt's Land Law* (7th ed, Thomson, 2017) 108–9.
[20] What comprises 'land' as the object owned are established both by common law and by statute. See, eg, Kate Galloway, 'Landowners' vs Miners' Property Interests: The Unsustainability of Property as Dominion' (2012) 37 (2) *Alternative Law Journal* 77.
[21] *Water Act 2000* (Qld) s 26; *Land Act 1994* (Qld) ch 2 pt 2; *Greenhouse Gas Storage Act 2009* (Qld) s 28; *Geothermal Energy Act 2010* (Qld) s 29.
[22] *Case of Mines* (1567) 75 ER 472.
[23] See, eg, *Mineral Resources Act 1989* (Qld) s 8; *Petroleum Act 1923* (Qld) s 9.
[24] See eg *Mineral Resources Act 1989* (Qld) s 8; *Land Act 1994* (Qld) s 21.

As the (self-declared) owner of all minerals, the State grants what might broadly be described as mineral rights[25] regardless of any other interest in that land.[26] Although mineral rights attach only to the minerals, they encompass an implicit right of access and the right, necessarily, to lay waste to the land itself. Destroying the land obviously materially affects the object of the landowner's interest despite the subsistence of ownership rights even in the face of remediation requirements.

In addition, and relevant to this analysis, although mineral rights are far more circumscribed than the broader fee simple estate, or those of most leasehold interests, they are implicitly given priority over the more extensive interests in land, because they operate in spite of landholder's rights. Although there may be compensation provisions for damage to land, money payment does not directly address the incursion into the loss of the land itself, and the rights attendant on ownership. It fails, in short, to engage with the underlying tension between competing property interests.[27]

The less extensive nature of mineral rights is evidenced by the requirement (generally speaking) for holders of mineral rights to notify, or negotiate with, landowners before entering private land.[28] In terms of entering into agreements with landowners, the *Land Access Code 2016* (Qld)[29] illustrates that their purpose is to facilitate mining—that is, a prioritisation of mining over landowners' interests. Although ostensibly working through a process of agreement making, the pre-determined outcome is implementation of the State's reservation of minerals from grants of land.

C. Native Title

The two principal forms of the Indigenous estate are statutory Indigenous tenures[30] and native title. Both depend upon the exercise of State authority to come into being. This part focuses on native title, a creation of the common law despite arising from the fact of Aboriginal and Torres Strait Islander peoples' prior possession of their lands[31] and otherwise depending on the relevant claimant group's laws and customs for its content.[32] To be clear: native title is not 'Indigenous law' but instead embodies the principles of property according to the common law.[33]

Unlike the fee simple estate, native title rights are not necessarily plenary[34]—although they may be co-extensive with the rights contemplated by a fee simple estate[35]—and they are certainly not ambiguous. It is a requirement of native title that each component interest be expressly cited,[36] along with proof of its source 'pre-sovereignty' and its ongoing expression even in the face of a concerted colonial dispossession.[37]

The inferiority of native title relative to common law interests is built into its very fabric. In the first place, the nature of native title was called into question, and its classification of as proprietary

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[25] See, eg, discussion in John Southalan, *Mining Law & Policy: International Perspectives* (Federation Press, 2012) 43.
[26] *Mineral Resources Act 1989* (Qld) ss 9-10.
[27] See discussion in Lael K Weis, 'Resources and the Property Rights Curse' (2015) 28 *Canadian Journal of Law and Jurisprudence* 209, 222.
[28] Different regimes have different types of rights, and different requirements for each type of rights. See, eg, *Mineral Resources Act 1989* (Qld), sch 1.
[29] *Mineral and Energy Resources (Common Provisions) Regulation 2016* (Qld), sch 1.
[30] In Queensland, for example, see *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld).
[31] See Kent Macneil, *Common Law Aboriginal Title* (Claredon Press, 1989).
[32] *Western Australia v Ward* (2002) 213 CLR 1, [20].
[33] Kent McNeil, 'Aboriginal Title and Aboriginal Rights: What's the Connection?' (1997) *Alberta Law Review* 117, 142. See also, generally, McNeil, *Common Law Aboriginal Title* (n 31).
[34] As discussed in *Wik Peoples v Queensland* (1996) 187 CLR 1.
[35] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 61.
[36] Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 259; Paul Finn, 'Mabo into the Future: Native Title Jurisprudence' (2012) 8 Indigenous Law Bulletin 5.
[37] As illustrated by *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

was a question for the common law and a matter left open by Brennan J in the lead judgment.[38] Scholarly debate ensued for some years,[39] before native title came to be accepted within the family of 'property' rights.

In the second place, native title is necessarily inferior to the freehold estate by virtue of the High Court's navigation through the doctrines of tenure and estates that comprise the 'skeleton of principle which gives the body of our law its shape and internal consistency.'[40] Thus, native title will be extinguished by the grant of an estate in fee simple: the two cannot co-exist.[41] While it may have originally been possible for native title to exist alongside crown leasehold, that possibility was itself extinguished by amendments to the *Native Title Act*.[42]

The susceptibility of native title to extinguishment either through a loss of the requisite connection by claimants with their law and custom[43] or by way of a 'clear and plain intention' evinced by the State,[44] differentiates native title from property more broadly. By contrast, Blackstone asserted that the only way to dispose of property was by an express disavowal of title.[45] Given ongoing assertions of sovereignty by First Nations peoples in Australia,[46] that has not occurred. Yet within the hierarchy of interests, the estate prevails.

An example of the paramountcy of interests other than native title lies in the so-called Future Acts regime of the *Native Title Act*.[47] Where a party intends to undertake activities on land the subject of a native title determination or a claim, they must engage in negotiation with the relevant claimant group to validate such 'future acts'. Claimant groups therefore hold a right to negotiate in respect of such acts. The right is a slim one, affording authority to 'sit at the table' and yet no authority to veto activity. The process can afford claimant groups concessions including payments, employment opportunities, and the chance to engage fruitfully concerning the appropriate use of land. However, the regime cannot be said to comprise substantive rights—property rights—over the land concerned.

Despite the native title process demanding that each component right in a native title claim be particularised, and that at least some of these rights will encompass cultural heritage, cultural heritage does not form part of native title.[48] Instead, cultural heritage comprises rights derived from a different framework again.

D. Cultural Heritage

Native title rights—property rights—are derived from the fact of possession of land prior to colonisation, and the laws that supported that possession and gave it form. Cultural heritage, by contrast, is not a property right and is not reflective of First Nations law. It is an administrative

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[38] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70.
[39] See, eg, Lisa Strelein, 'Conceptualising Native Title' (2001) 23(1) *Sydney Law Review* 95; Sean Brennan et al, (eds) *Native title from Mabo to Akiba: A vehicle for change and empowerment?* (Federation Press, 2015).
[40] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 9.
[41] Ibid 29–30.
[42] *Native Title Act 1993* (Cth), s 23B.
[43] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
[44] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 64.
[45] Sir William Blackstone *Commentaries on the Laws of England* (1765-1769) Book 2, ch 1 <http://www.lonang.com/exlibris/blackstone/bla-201.htm>.
[46] See, eg: Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003); Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) 30(2) *Bond University Law Review* 335.
[47] *Native Title Act 1993* (Cth) pt 2 div 3.
[48] For an overview, see Galloway, 'Legal Lacuna' (n 1).

right of the State that has been described as a significant national responsibility'[49] yet not one that is designed to benefit Aboriginal and Torres Strait Islander peoples themselves. Thus, the Court found in *Bropho v Western Australia*[50] that the cultural heritage existed 'for the benefit of the community – all Western Australians – with a view to the preservation of objects and places' regarded by that community as 'being of significance in the context of the traditional cultural life' of Indigenous people.

In some jurisdictions, cultural heritage is protected through vesting property in the protected object or place. Aboriginal and Torres Strait Islander people might be afforded property in human remains or objects, however where sites comprise property, it vests in the State.[51]

Objects situated on land, and protected sites, might be located upon places that themselves are subject to property rights—an estate or native title—or to mining rights. And all three, cultural heritage, property, and mining rights, might exist in the same space. Thus, in Queensland for example, where the State has property in protected objects, that is separate from the land itself. [52] In these circumstances, the landowner's property rights subsist but they must not be exercised so as to unlawfully damage or destroy the object.[53]

Given that there are provisions that may permit the damage or destruction of such objects,[54] the ordering of rights over cultural heritage works in two ways to prioritise an estate, or a mining interest. First, cultural heritage does not vest any substantive interest in First Nations people who are necessarily connected with the declared object or site. The rights vest in the State to protect the heritage,[55] leaving First Nations without substantive remedies, despite various other procedural rights under the legislation. Secondly, cultural heritage law leaves the State itself as the arbiter of whether to permit destruction or not. Where all of the competing rights necessarily emanate from the State—estates, native title, mining, and cultural heritage—the State is left to juggle those rights according to its own priorities.

And these priorities have, to date, omitted consideration of self-determination—a legal concept that might support reorganisation of priorities to provide a more sustainable approach to cultural heritage.

II. SELF-DETERMINATION

Before the High Court decision in *Mabo*,[56] First Nations' claims to land were framed as land rights.[57] Understanding such claims as land rights is to encompass a claim broader than property as conceived by the Australian system.[58] Further, and beyond Western framings of law altogether,

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[49] Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (AGPS, 1996) [3.2].
[50] (1990) 171 CLR 1.
[51] See, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) s 20.
[52] *Aboriginal Cultural Heritage Act 2003* (Qld) s 20(4); *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 20(4).
[53] *Aboriginal Cultural Heritage Act 2003* (Qld) s 21; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 21.
[54] See, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) s 105, that provides that a cultural heritage management plan for a project may provide for 'whether Aboriginal cultural heritage is to be damaged, relocated or taken away, and how this is to be managed'. A project, under Schedule 2, includes 'a development or proposed development; and an action or proposed action; and a use or proposed use of land.' In the case of the Juukan Gorge, the mining company had permission under s 18 of the *Aboriginal Heritage Act 1972* (WA).
[55] See, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) s 20(2).
[56] (1992) 182 CLR 1.
[57] See, eg, David Mercer, 'Terra Nullius, Aboriginal Sovereignty and Land Rights in Australia: The Debate Continues' (1993 12(4) *Political Geography* 299; Ronald Paul Hill, 'Blackfellas and Whitefellas: Aboriginal Land Rights, the *Mabo* Decision, and the Meaning of Land' (1995) 17 *Human Rights Quarterly* 303.
[58] Gaetano Pentassuglia, 'Towards A Jurisprudential Articulation Of Indigenous Land Rights' (2011) 22(1) *European Journal of International Law* 165; Damien Short, 'The Social Construction of Indigenous Native Title Land Rights in

First Nations' claims to land are grounded in First Nations' laws.[59] However, given the domination of the settler-colonial state these claims necessarily coincide with various common law frameworks. Thus, claims under First Nations' law might equate with property,[60] that is rights of user and exclusive possession, with sovereignty,[61] and with cultural heritage.[62] Common law framing of First Nations' claims thus reorients their nature from an assertion of self-determination to a matter for consideration by the State apparatus according to its own sovereign status.[63]

Following the *Mabo* decision and in particular the legislative response of the *Native Title Act 1994* (Cth), First Nations' claims to land have been conducted within the realm of native title, rather than the more expansive frame of land rights. Not only does native title dispense with the broader scope of land rights, it does so by compartmentalising claims to land within a property framework and exclusive of other types of claims, such as cultural heritage.[64]

Despite the common law's categorisation of First Nations' rights and interests in land according to different legal constructs, we suggest that there is a common underlying principle from the standpoint of Western law: the principle of self-determination. Thus, what might appear to be a battle over property rights in the form of native title remains at its heart a test of human rights—land rights in its broadest sense.

The source of the right to self-determination lies in Australia's international treaty obligations. Both the *International Covenant on Civil and Political Rights*[65] and the *International Covenant on Economic, Social and Cultural Rights*,[66] provide for self-determination in their first article. The principle was subsequently entrenched within the 2007 United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'), endorsed by Australia in 2009.[67]

The right of self-determination is well known to the law, particularly as it applies to indigenous peoples.[68] Its principal, uncontroversial, import is that people should have control over, and be empowered to make, decisions over their lives as a collective. In Australia, as elsewhere, self-determination embraces a spectrum of expression from self-government to land rights.

Self-determination for indigenous peoples might manifest in two ways. The first is 'constitutive'.[69] In this iteration, the governing institutional order is to be 'guided by the will of the peoples who are governed.'[70] To represent constitutive self-determination, the political order must reflect 'the

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Australia' (2007) 55(6) *Current Sociology* 857; David Mercer, 'Patterns Of Protest: Native Land Rights and Claims in Australia' (1987) 6(2) *Political Geography Quarterly* 171.

[59] See, eg, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2014).

[60] *Milirrpum v Nabalco* (1971) 17 FLR 141.

[61] *Coe v Commonwealth* (1993) 118 ALR 193.

[62] *Bropho v Western Australia* (1990) 171 CLR 1.

[63] See, eg, Larkin and Galloway (n 46).

[64] *Western Australia v Ward* (2002) 213 CLR 1, 209.

[65] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[66] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[67] Australia announced its support of the UNDRIP on 3 April 2009: see, eg, Jenny Macklin, 'Statement on the United Nations Declaration of Indigenous Peoples' (Media Release, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>.

[68] See, eg, Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 *New York University Journal of International Law and Politics* 189; Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2005); S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009); Megan Davis, 'Indigenous Struggles in Standard-setting: the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439.

[69] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) 104–5.

[70] Ibid.

collective will of the peoples concerned'. It requires that those governed participate in and consent to the institutions and processes of governance, particularly in times of institutional development and reform.[71]

Although First Nations peoples were excluded from the establishment of Australia's colonial constitutional governance—and therefore precluded from exercising constitutive self-determination in the founding of the Australian state—self-determination also has an on-going aspect. Regardless of the means of creation of the nation state, to fulfil their right of self-determination indigenous peoples must be able to 'live and develop freely on a continuous basis.'[72] This necessarily requires the establishment and maintenance of institutions 'under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis'.[73] In addition to these foundational rights of self-determination, the UNDRIP and a range of other international instruments provide for the right vested in indigenous peoples to exercise free, prior, and informed consent on matters affecting them and their communities.[74]

The United Nations' Expert Mechanism on the Rights of Indigenous Peoples provides detailed examination of the meaning of the four elements contained in 'free, prior and informed consent'.[75] 'Free' relates to the absence of 'coercion, intimidation or manipulation'. 'Prior' entails obtaining consent before commencing the relevant activity yet with ample time for the people concerned to engage in appropriate decision-making themselves. 'Informed' relates to the provision of relevant information relating to the decision to be made. The information must be 'objective, accurate and presented in a manner and form understandable to indigenous peoples.'[76] Lastly, 'consent' signifies that the people concerned agree to the relevant action.

Free, prior, informed consent is no merely procedural construct. As the Expert Mechanism on the Rights of Indigenous Peoples points out, the State's responsibility to secure such consent 'entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes.' [77]

On the basis that free, prior, informed consent is a feature of self-determination, and that self-determination involves control over decisions affecting First Nations peoples' collective lives, rights vested in Indigenous people concerning land fail to meet the threshold for self-determination. And yet as recent events have highlighted, speaking for land is of deep concern to Aboriginal and Torres Islander peoples.

As Watson explains:

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[71] As would be represented by the Voice to Parliament proposal contained in the *Uluru Statement from the Heart* (2017).
[72] Anaya (n 69) 106.
[73] Ibid.
[74] See, eg, Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 8(j); International Labour Organisation Indigenous and Tribunal Peoples Convention 1989 (No 169), opened for signature 27 June 1989 (entered into force 5 September 1991); United Nations Conference on Environment and Development, Rio Declaration, UN Doc A/CONF.151/26 (Vol 1) (28 September 1992); United Nations Conference on Environment and Development, Agenda 21 (1992); Human Rights Committee, General Comment No 23: Article 27 (Rights of Minorities), 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).
[75] Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, 'Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making', 18th sess, Agenda Item 5, UN Doc A/HRC/18/42 (17 August 2011) 27.
[76] Ibid.
[77] Ibid 26.

> To own the land is a remote idea. The indigenous relationship to ruwe, is more complex. In Western capitalist thought, ruwe becomes known as property, a consumable which can be traded or sold. We live as a part of the natural world; we are it also. The natural world is our mirror. We take no more than necessary to sustain life; we nurture ruwe as we do our self, for we are one. Westerners live on the land taking more than needed, depleting ruwe and depleting self. So self can be no more tomorrow. Westerners are separate and alien to ruwe and are unable to understand how it is we communicate with the natural world. We are talking to relations and our family, for we are one.[78]

III. Recalibrating the Hierarchy of Rights in Land

The current hierarchy of rights in land represents rights derived in every case from the State. The State's radical title empowers it to create rights in land, invoking the Australian doctrine of tenure[79] leaving room for the State's own determination, through its courts, of the existence of native title. Dependence upon the State's courts to determine Indigenous interests in land contradicts First Nations' laws, highlighting the erosion of the expression of self-determination.

> Seeking a declaration from the coloniser and the granting of title to land has never been my ancestors' journey or mine. We know the land is belonging to the ancestors and us in their place. We are both owners and carers during our short time on earth. It is the frog who is in need of legitimacy. Native title is a way of giving the frog what it does not have. We have never consented.[80]

The State's other rights over minerals and its interest in the 'patrimony of the nation' empower it to provide for mining and cultural heritage. In the case of native title, mining, and cultural heritage, there is recognition of the necessary link between First Nations peoples and land. However, except for the native title determination process, there is little by way of substance in the rights involved. This disempowers First Nations people in relation to their lands, relative to other interest holders. Thus, self-determination within the suite of rights and interests in and over land is lacking.

One consequence of precluding First Nations peoples from self-determination accorded through substantive rights is the kind of damage seen through the recent high-profile example of Juukan Gorge. The response of the wider public to this tragic loss is recognition of the need to recalibrate the hierarchy of interests, giving voice to the First Nations communities.

We suggest that to provide for sustainable land use demands a balance between the rights of stakeholders in the land. The interests of First Nations peoples underpin all other interests and, in alignment with the State's obligations of self-determination, should be afforded primacy within the framework of interests in and over land. While complex given jurisdictional differences, a coherent approach to recognising the underlying beneficial title held by First Nations peoples, and the necessary connection with land that gives rise to a declaration of Indigenous cultural heritage, lies at the foundation of a sustainable—and just—system of land rights.

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[78] Irene Watson, 'Kaldowinyeri—Munaintya—In the Beginning' (2000) 4 *Flinders Journal of Law Reform* 3, 6.
[79] As provided for in *Mabo* (n 7).
[80] Watson (n 78) [27].