



Wajina Wunggurr Wilinggin Native Title claimants looking over their traditional lands in the Kimberley of Western Australia. Photo: Kimberley Land Council. All rights remain with the KLC.

MAKING RIGHTS A REALITY

The ongoing struggle for land justice in the Kimberley region, Australia

‘Governments in Australia seem scared to give Aboriginal people full rights to make decisions about their lands. We are a threat because we are vocal and demand our rights be respected. We are determined to keep fighting and to strip away the red tape that government uses to hold us back.’

– Cissy Gore-Birch from the Jaru and Kija Aboriginal Traditional Owner groups

1 INTRODUCTION

The situation for Aboriginal people and land rights in the Kimberley is a case study in the contradictory nature of Indigenous policy in Australia.¹ The most vulnerable Australians have to fight – sometimes for decades – to be formally recognized under law as traditional landowners, only to come up against a wall of red tape, or in some cases outright discrimination, preventing the full utilization of their land rights.

Today, Aboriginal people in the Kimberley region are calling for a full and fair realization of their Native Title rights, to enable them to care for their country, to practise their culture and secure their future.

This paper highlights four examples of how the Western Australian government is actively undermining the rights of Aboriginal landowners in the Kimberley:² from threatening to force communities off hard-won homelands, to denying Aboriginal people the right to make decisions about their sacred sites and cultural heritage; from conservation projects that go against human rights principles and demand landowners surrender their Native Title rights, to actively campaigning against proven and popular traditional land management programmes that create jobs and help tackle climate change. The actions of the Western Australian government serve to deliberately undermine Native Title rights and interests, putting Aboriginal people at further disadvantage.

Taken together, the examples set out below reveal concerning and systemic policies and procedures that undermine Aboriginal land rights in Western Australia, including economic, social and cultural rights protected under international human rights law.

More broadly, they represent a government critically out of step at a time where there is a groundswell of interest from Aboriginal and Torres Strait Islander people and non-Indigenous Australians on how to confront their history and its enduring impacts meaningfully, and create a fairer, more equitable future that embraces, values and nourishes Aboriginal and Torres Strait Islander peoples and cultures.

BACKGROUND: NATIVE TITLE IN AUSTRALIA

From the 1950s, Aboriginal and Torres Strait Islander people began grassroots activism to galvanize a political movement to have their rights to 'country' recognized in Australian law. For example, in the historic 1963 Yirrkala bark petition to the Australian government, Yolgnu people asserted their traditional land rights in protesting against mining on their country.³ However, their subsequent court case failed, with the judge stating that Australian law had never recognized any pre-existing law of 'communal native title'. In 1978, facing state-supported threats to mine sacred sites on Noonkanbah Station, Kimberley Aboriginal people came together to blockade access to the site, sparking national and international attention and support. This led directly to the formation of the Kimberley Land Council. Public petitions and protest, establishing a 'tent embassy' and numerous legal cases are examples of how people asserted their rights in the following decades.⁴

'We continue to ensure that our land, law, language and culture lives on and continues to be vibrant and long-lasting. We do this by getting back our country, looking after our country and securing our future.'

– Kimberley Land Council

Finally, in 1992 the High Court of Australia acknowledged that the British claims to Australia made two centuries before and founded on the British law concept of *terra nullius* (empty land) were false. The Mabo Decision (as the High Court determination is now commonly known in recognition of the claimant Eddie 'Koiki' Mabo) was a landmark step in acknowledging that since the 1700s British colonialists had occupied Aboriginal and Torres Strait Islander peoples' lands without any recognition of pre-existing law or land ownership, and without any agreement or treaty.⁵

In response, in 1993 Australia legislated a new communal property right called Native Title, providing an avenue for Aboriginal and Torres Strait Islander people to have their traditional land rights recognized.⁶ The recognition of Native Title was a historic moment in challenging centuries of dispossession and a testament to the tenacity of people's struggles in defending and caring for country. Today many Australians believe that Native Title has delivered land justice for Aboriginal and Torres Strait Islander people. This is only partly true.

The reality is that it can take 20 years and millions of dollars fighting through the court system to have Native Title recognized. Cases are often unsuccessful and many people have found that they cannot secure Native Title rights – as they have been legally extinguished by competing interests, or claimants cannot meet the burdensome evidentiary requirements.⁷ Additionally, the 1993 Native Title Act has been repeatedly amended and consequently weakened, perpetuating uncertainty for Native Title landowners.

Box 1: Connection to country

In Australia, Aboriginal and Torres Strait Islander people refer to their traditional lands as 'country'. Kimberley Aboriginal people maintain a relationship to country in accordance with traditional laws and customs which dictate how decisions that affect land must be made. The concept of country includes the physical landscape, fresh water and salt water, mythological manifestations in the land, and personal and familial connections based on historical events. Simply put, the Kimberley is a cultural landscape – every part of country is alive, occupied and cared for in accordance with traditional obligations.

For those who have achieved Native Title recognition, the battle is now to have their Native Title rights fully realized under the law. This is proving a disappointingly difficult task as Native Title holders face a range of challenges. In Western Australian, the government continues to hinder the rights of Aboriginal people through laws and policy that undermine Native Title rights and interests and obstruct opportunities for Aboriginal people to use these rights to improve their lives and well-being.

THE KIMBERLEY

The Kimberley region in Australia's northwest is a vast, wild and ancient place. Aboriginal people and culture date back more than 50,000 years to time immemorial, and are embedded in the landscape with its rugged coastline, rocky outcrops, sandy deserts, rushing tides, deep gorges, waterfalls and rivers.

At approximately 423,517 square kilometres – or about the size of California – the Kimberley is one of the most sparsely populated regions in the world, home to 46,000 people, of which some 43 percent are Aboriginal. The wet season runs from October to March, when tropical rains with high humidity produce heavy rainfall, causing widespread flooding which makes movement around the region challenging. The dry season is cooler and less humid, bringing an influx of tourists.

The area is rich in biodiversity, with the North Kimberley listed as one of Australia's biodiversity hotspots – unique in its diversity of endemic species and intact natural ecosystem. In 2011 parts of the region were included on Australia's National Heritage List⁸ – the first such listing to occur with the full, free, prior and informed consent of Aboriginal people. The region has eight Indigenous Protected Areas⁹ (IPAs) covering more than 90,000 square kilometres (roughly the size of Portugal). These IPAs are managed by Aboriginal Traditional Owners, using traditional knowledge to conserve sacred cultural sites and ecosystems, and resulting in an interconnected habitat corridor.¹⁰

Much of the region's economic drivers are land-related industries – such as mining, tourism, conservation reserves, pastoralism and agriculture. While this signals potential for Native Title holders to direct economic development on their land in accordance with their priorities and values,

it also represents potential competition for land.

SECURING THE FUTURE

Today over 70 percent of the Kimberley is recognized as subject to Native Title.¹¹ This is in spite of the Western Australian government's initial, unsuccessful constitutional challenge to Native Title in 1995.

On closer examination, however, it becomes clear that the Western Australian government is systematically and consistently seeking to erode and undermine existing Native Title landholder rights.

This section brings together four examples that show how the government is implementing policies to undermine the realization of Native Title holders' rights in the Kimberley.

Whether intentional or not, these efforts have the effect of undermining Aboriginal peoples' ability to make decisions about the use and management of their country. They in turn undermine opportunities for Aboriginal people to secure a just and fair future and enjoy equality alongside other Australians. These actions reveal a Western Australian government which is out of touch and which views Native Title as a hindrance to development – rather than as a more meaningful, enduring and solid foundation on which to build and deepen the Kimberley economy, ecology and culture.

Example 1: Aboriginal people should decide the future of sacred sites and other cultural heritage on their land.

Aboriginal and Torres Strait Islander peoples are custodians of a tangible cultural heritage – such as rock art or occupation sites that date back more than 50,000 years to time immemorial. This is a vital part of Australia's, and the world's, collective heritage.

Rather than valuing these unique riches, in 2014 the Western Australian government proposed changes to the state's already weak Aboriginal Heritage Act. These changes would arguably sanction and legitimize the destruction, damage or compromising of sacred and culturally important places – for example, by mining companies or other developers. This could occur with little or no input from Aboriginal people entrusted to preserve this heritage under traditional law and custom.

Kimberley traditional owners and many other Indigenous groups and allies have strongly protested this move.¹²

Shockingly, the legislative changes would authorize a single person, the Chief Executive Officer of the government's Department of Aboriginal Affairs, to decide on what is Aboriginal heritage.¹³ The CEO would be able to determine that 'there is no Aboriginal site on the land' at 'the CEO's own initiative'.¹⁴ While mining companies (or others) could appeal to a State Administrative Tribunal against a decision to protect Aboriginal

heritage, Aboriginal people would have no recourse to appeal a decision leading to the destruction of sacred places or objects. This is a brazen attack on Aboriginal land and heritage, with the state government claiming that the legislation was ‘no longer fit for purpose’ given ‘the pace of rapid economic development in recent years, particularly within the mining and construction sectors’.¹⁵

Example 2: Aboriginal people should have access to economic development that supports traditional land management and helps the climate,

For thousands of years Aboriginal people have used a particular form of deliberate burning during the cooler months to maintain biodiversity and enable hunting of animals which visit the area after burning. This practice of burning savannah lands is continued today by Aboriginal rangers and elders.

More recently, this deliberate burning has been recognized as a significant contributor to lowering greenhouse gas emissions in Australia – a fire prone country. Low intensity, low impact burning prevents or contains wildfires by reducing available fuel.¹⁶ This reduces the likelihood of high intensity, high impact fires, and in turn reduces greenhouse gas emissions.

This merging of a traditional cultural practice with tackling a modern problem has seen Aboriginal landowners initiate a large number of fire management projects in recent years. In 2013, four Aboriginal groups in the Kimberley – the Dambimangari, Wilinggin, Wunambal Gaambera and Balangarra – registered Australia’s first Native Title carbon offset projects.¹⁷ This followed the national Carbon Credits (Carbon Farming Initiative) Act 2011, which enables Native Title holders to participate equally in the scheme alongside other land holders.¹⁸

While there is national leadership to engage Aboriginal landowners in this emerging economic opportunity, the Western Australian government is actively opposing Aboriginal-led carbon offset projects.

In the Kimberley, carbon offset projects involve generating ‘carbon credits’ based on controlled fire management activities that are undertaken on Native Title lands.¹⁹ This provides an opportunity to sustain livelihoods and maintain cultural links to the land, and delivers environmental benefits such as improved biodiversity and weed reduction. The success of the Kimberley carbon offset projects is an example of the pathway for Native Title landowners to support traditional land management, and an example of how good government policy can help to achieve this. The project even features on an Australian government website, noting the national and international importance of the project.²⁰

In response to this innovative approach, the Western Australian government has:

- lobbied local shires in the west and east Kimberley not to issue permits to Aboriginal landowners to legally burn on their lands as part of a carbon offset project;
- urged the Australian Senate to create laws that require state consent for carbon offset projects on Native Title land;
- requested the Australian government to cease funding for start-up carbon offset projects by Aboriginal landowners;
- and required Native Title holders to enter into onerous legal contracts with the state in relation to the projects – something other landowners are not required to do.

Example 3: Kimberley landowners should be able to support conservation without relinquishing their land rights.

Another example of discrimination is the approach of the Western Australian government to supporting conservation.²¹

Currently, the Western Australian government is negotiating with several Aboriginal groups to create a series of new conservation reserves. Conservation is a popular land use option for Kimberley Native Title holders, as it aligns with people's strong interest in protecting and taking care of country as well as delivering a broader public benefit for Australia's environment. However, despite the fact that proposed areas are often already managed for conservation in existing Indigenous Protected Areas, the Western Australian government has made clear that conservation reserves may be conditional on Aboriginal people agreeing to limit their rights to make decisions about the management and future use of their lands. The Western Australian government has informed some Native Title landholders that they will only fund Aboriginal rangers and their environmental work if landholders first agree to the creation of a new Conservation Reserve and enter a joint management arrangement with the government.²² This means giving up their land rights and handing management control back to the state. Both of these options undermine the rights of Native Title landholders to make decisions about their land.

What is important to note is that similar requirements to surrender rights to land are not applied to other groups providing similar ecosystem services with the support of the government.

Box 2: The fight for fairness, justice and equality

Cissy Gore-Birch is an Aboriginal woman from the Jaru and Kija Aboriginal Traditional Owner groups, who was born and raised in the East Kimberley region of Western Australia. She grew up seeing her elders fighting for the rights of Aboriginal people – and she is now leading this fight.

Proposals to declare new conservation areas that will remove Native Title rights on these areas is just one example Aboriginal people in the Kimberley are currently resisting. Cissy explains, 'For Aboriginal people we must negotiate these issues with little or no funding from government for our organizations. We can sometimes feel like we are on our own'.

But Cissy and her community will continue to fight for fairness, justice and equality for Aboriginal people. 'We are determined to keep fighting and to get more of what belongs to us: our rights to land.'

Example 4: Communities should not be forced off their homelands

In November 2014, the Premier of Western Australia declared an intention to close up to 150 of the 274 Aboriginal homeland communities in remote areas of the state. The plan would be to withdraw government services and by virtue of not having basic services, forcibly require communities to disband and move into larger townships. This announcement came without any consultation with Aboriginal people, failed to consider the benefits of living on homelands and did not engage with the real dynamics of economies in remote areas – where efforts need to be made to ensure Aboriginal people have access to the jobs that are available.²³ In March 2015 the then Prime Minister of Australia, Tony Abbott, infamously described Aboriginal people living in remote communities on their traditional lands as a 'lifestyle choice'. It sparked a series of national demonstrations by Australians in support of people's rights to live on country.

The decision to forcibly close homeland communities undermines Aboriginal culture, governance and self-determination. It is interpreted against the backdrop of Australia's brutal legacy of forcibly removing people from land and community, through policies enacted by both state and federal governments. Less than 100 years ago, Aboriginal and Torres Strait Islander people were forced onto central missions and reserves. Less than 50 years ago, there were explicit policies to take children from their families and communities, with more than 100,000 children placed into institutional care from 1910 to 1970, creating a stolen generation.²⁴ Many Aboriginal people live with this legacy and are concerned about the alarmingly high rates of children put into care or custody today.

Living on traditional lands is a way to maintain connection to country and culture. Many homeland communities have gained Native Title after fighting for decades for legal recognition of their land rights – which are undermined if they are denied access to basic services. The right to live on lands associated with one's people and heritage fosters social,

'... sometimes we must look back in order to see the best way forward. Look back at the government policy that separated our old people from their land. Look back at government policy that dumped our people on the fringes of towns. Look back at the absence of policy that allowed our middle generation to be almost lost to welfare, grog and poor health. And also look back at policy that allowed us a voice and an active role in returning to country.'

– Anthony Watson, Chairperson, Kimberley Land Council, March 2015.

spiritual, cultural, health and even economic well-being. While service provision to remote areas is complex, the government has failed to engage in any meaningful way with homeland communities to discuss options or opportunities to improve the economic sustainability of remote communities or to explore how Aboriginal people could transition, if they choose, to larger townships.

KIMBERLEY TRADITIONAL OWNERS CALL FOR LAND JUSTICE

As things stand, the current tactics and actions of the Western Australian government indicate that full recognition of land rights for Aboriginal people is something to be opposed, dismantled and undermined. This gradual erosion of Native Title rights and interests – fought for in various forms for centuries – must be halted.

In early 2017, Western Australia will hold a state election. So now is a critical time for Australians, Indigenous allies and the international community to call for Western Australia's major political parties to commit to strengthen, and respect, land rights for Aboriginal people.

The Kimberley Land Council, the peak organization supporting traditional landowners in the Kimberley, is calling for all major parties to commit to land justice, including:

1. respecting and protecting the rights of Indigenous people to live on country, and committing to provide communities access to essential services that will facilitate Aboriginal people remaining on their homelands;
2. within the first 12 months of a new parliament, the government should introduce new cultural heritage legislation that complies with international human rights law, in particular the rights of Indigenous peoples; incorporates clear processes and authority for Indigenous decision making; and operates on a default principle of protecting cultural heritage. This must be done in consultation with Aboriginal people;
3. ceasing practices and policies that require or encourage Aboriginal people to partially or fully relinquish their Native Title rights in order to access government support or leverage economic opportunities. Aboriginal people must be able to determine how to use their land for economic, environmental or cultural purposes without being asked to forgo their hard-won Native Title rights, and the government must support this outcome;
4. ceasing practices that attempt to deny Native Title landowners equal opportunity in relation to other land holders with comparable rights;
5. within the first six months of a new parliament, committing to meeting with Native Title holders to discuss how best to enable Aboriginal people to leverage their land rights to access economic opportunities, particularly in the emerging green economy.

NOTES

- 1 At the time of colonization, the territory today claimed as Australia comprised hundreds of existing nations on the continent, the Torres Strait and other islands. We respectfully acknowledge that people have the right to the terminology and language that they feel accurately reflects their identity and that there are diverse views and preferences. We apologize for any unintended offence.
- 2 The state of Western Australia comprises roughly one-third of Australia's landmass.
- 3 Australian Government. *Bark Petitions: Indigenous art and reform for the rights of Indigenous Australians*. Australian Stories at: <http://www.australia.gov.au/about-australia/australian-story/bark-petitions-indigenous-art>
- 4 National Museum Australia. *Aboriginal Embassy, 1972*. Collaborating for Indigenous Rights at: http://indigenousrights.net.au/land_rights/aboriginal_embassy_1972
- 5 See the Mabo Decision at: *Mabo and Others v. Queensland (No.2)*. [1992] HCA 23. (1992) 175 CLR 1 (3 June 1992). Accessible via the Australian Legal Information Institute at: <http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html>
- A brief introduction to Eddie 'Koiki' Mabo can be found at the Australian Institute of Aboriginal and Torres Strait Islander studies at: <http://aiatsis.gov.au/explore/articles/eddie-koiki-mabo>
- 6 It is beyond the scope of this paper to describe the complex approach to rights within Native Title.
- 7 Native Title legislation has not only been a tool to recognize the rights of Aboriginal and Torres Strait Islander peoples, but also describes the state's right to 'extinguish' Native Title rights. For a brief timeline of Native Title law see SBS *Timeline: Native title in Australia* at: <http://www.sbs.com.au/news/article/2012/06/03/timeline-native-title-australia>
- 8 Australian Government: Department of the Environment and Energy. National Heritage Places – West Kimberley. <https://www.environment.gov.au/heritage/places/national/west-kimberley>
- 9 Australian Government: Department of the Prime Minister and Cabinet. *Indigenous Protected Areas – IPAs*. <https://www.dpmpc.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas>
- 10 In Australia the term 'Traditional Owner' refers to members of a claimant group that is able to demonstrate that they are the 'traditional owners' of the country or area in question under the Native Title Act. It is a term which expresses the understanding that they are the right people to make decisions and speak for that country.
- 11 Kimberley Land Council. *Native Title Map*. Available at: <http://www.klc.org.au/native-title/native-title-map>
- 12 Tod Jones. *Separate but Unequal: The sad fate of Aboriginal heritage in Western Australia*. *The Conversation*. 6 December 2015. Available at: <https://theconversation.com/separate-but-unequal-the-sad-fate-of-aboriginal-heritage-in-western-australia-51561>
- 13 Jacob Kagi. *WA government to proceed with controversial changes to Aboriginal heritage legislation*. ABC News. 19 Feb 2016. Available at: <https://www.abc.net.au/news/2016-02-19/wa-government-to-proceed-with-controversial-changes-to-aborigin/7182280>
- 14 As cited by Thor Kerr and Shaphan Cox. *Frustration rises over changes to the WA Aboriginal Heritage Act*. *The Conversation*. 21 August 2014. Available at: <http://theconversation.com/frustration-rises-over-changes-to-the-wa-aboriginal-heritage-act-30308>
- 15 Government of Western Australia. *Changes to protect State's Aboriginal heritage*. Media Statement. 11 June 2014. Available at: <https://www.mediastatements.wa.gov.au/Pages/Barnett/2014/06/Changes-to-protect-State's-Aboriginal-heritage.aspx>
- 16 Owen Price. *Huge fires are burning northern Australia every year: it's time to get them under control*. *The Conversation*. 22 October 2015. Available at:

<https://theconversation.com/huge-fires-are-burning-northern-australia-every-year-its-time-to-get-them-under-control-49431>

- 17 Indigenous.gov.au. *Managing fire in the Kimberley and sharing that knowledge with the world*. 8 May 2016. Available at: <http://www.indigenous.gov.au/news-and-media/stories/managing-fire-kimberley-and-sharing-knowledge-world>
- 18 See for example *Indigenous Carbon Farming Fund*. Australian Government: Department of Environment and Energy. <http://www.environment.gov.au/climate-change/emissions-reduction-fund/cfi/indigenous-australians/icffrd>
- 19 For example, see *Qantas backs north Kimberley carbon project*. Kimberley Land Council Newsletter. December 2014. Available at: <http://www.klc.org.au/docs/default-source/Print-Newsletters/2014-print-newsletters/klc-newsletter-december-2014?sfvrsn=0>
- 20 Indigenous.gov.au. *Managing fire in the Kimberley and sharing that knowledge with the world*.
- 21 Kimberley Aboriginal people are managing various environmental threats on their country through conservation and land management programmes. This is done through the Kimberley Ranger Network – 14 individual ranger groups responsible for protecting natural and cultural heritage values on Aboriginal lands as well as National Parks and other lands. The Network employs more than 200 full-time and casual Indigenous rangers and cultural advisers annually. The establishment of eight Indigenous Protected Areas, covering an area approximately the size of Portugal, produces not only positive environmental outcomes but also strong cultural and social results. The Kimberley Ranger Network has empowered Aboriginal people to be leaders in managing their country.
- 22 Sean Kérins. *Kimberley conservation threatens to take a step back on Indigenous rights*. *The Conversation*. 19 November 2015. Available at: <http://theconversation.com/kimberley-conservation-threatens-to-take-a-step-back-on-indigenous-rights-50778>
- 23 Batchelor Institute. *Research sheds new light on Indigenous employment in remote Australia*. 13 July 2016: <http://www.batchelor.edu.au/portfolio/research-sheds-new-light-on-indigenous-employment-in-remote-australia/>
- 24 SBS. *Timeline: Stolen Generations*. 26 February 2015: <http://www.sbs.com.au/news/article/2012/05/25/timeline-stolen-generations>. See also National Sorry Day Committee. *Stolen Generations History*. 24 May 2015. <http://www.nsdcc.org.au/stolen-generations-history/>

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