

The Native Title Story of the Torres Strait Region

FOR THE FIRST NATION PEOPLES OF ZENADTH KES



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This booklet is for all First Nations People in Zenadth Kes.

It explains how **native title has been recognised in the Torres and Endeavours Straits Region** (Torres Strait Region) and what this recognition means for Native Title Holders and those dealing with them. It also explains the **role of Prescribed Bodies Corporate** (or PBCs as they are commonly known) in managing the rights on behalf of the Native Title Holders and how **GBK as the Native Title Service Provider** supports PBCs and Native Title Holders.

The booklet is also a source of information for anyone who wants to learn more about native title – a legal concept that has its origin in the Torres Strait.

GBK Chair Lui Ned David, May 2023

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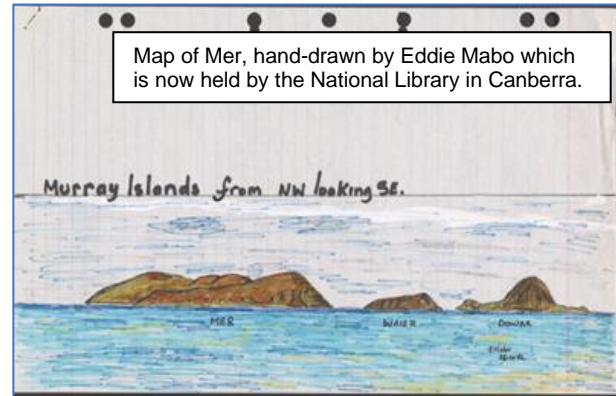
Aboriginal and Torres Strait Islander people should be aware that this website contains images and names of deceased persons.

1. How it all began in the Torres Strait – the Mabo Decision

A small island – a huge impact

On 3 June 1992, the High Court of Australia made a decision that changed the history of Australia. The decision put the Torres Strait Region and Murray Island (Mer) on the map for the rest of the country and the world.

Many Australians had never heard about Mer or the Torres Strait before. Overnight Mer was in the spotlight, with newspapers, radio and TV stations all over Australia and overseas reporting on the iconic victory of a group of Meriam People who had the passion and strength to fight the government all the way to the highest court in the country. And win! For more details on the Mabo story, see pages 26 and 27



Key points

- The Mabo Case is one of the most significant legal cases in Australia's history. It recognised the rights of the Meriam People, the Traditional Owners of Mer, over their island.
- The Mabo Case was successful in overturning the myth that at the time of colonisation Australia was 'terra nullius' or land belonging to no one.
- The High Court recognised the fact that First Nations Peoples had lived in Australia for thousands of years and enjoyed rights to their land according to their own laws and customs.
- The five Meriam People who made the claim were **Eddie Koiki Mabo, Reverend David Passi, Sam Passi, James Rice and Celuia Mapo Salee**. Eddie Koiki Mabo was the first named plaintiff. This is why the case became known as the **Mabo case**.
- Twelve months after the Mabo Decision, the Native Title Act 1993 (Cth) was passed.



From left: Dave Passi, Eddie Mabo, barrister Bryan Keon-Cohen and James Rice outside the Queensland Supreme Court, 1989
Courtesy Trevor Graham and Yarra Bank Films.


Why is the Mabo Decision so important for Australia?

The High Court not only acknowledged the traditional rights of the Meriam People, but it also **introduced the concept of Native Title into the Australian legal system** for all First Nations Australians. The High Court found that Australia was not *terra nullius* when James Cook claimed it for the British Crown in 1770 after he climbed the summit of Possession Island in the Endeavour Strait. Because of the Mabo Decision, First Nations Peoples' laws and customs are able to be recognised across all of Australia.

The decision led the Australian Government to create the *Native Title Act 1993*. Since the law began to operate in 1994, native title has been recognised by the Federal Court over almost **45 % of Australia's land mass. And in the Torres Strait Region over almost every island and most of our sea country.**

When all claims have been resolved, it is expected that **60 % of Australia's land will be covered by native title rights. That is almost 2/3 of the continent. And this all began with Mabo.**

2. What is native title?

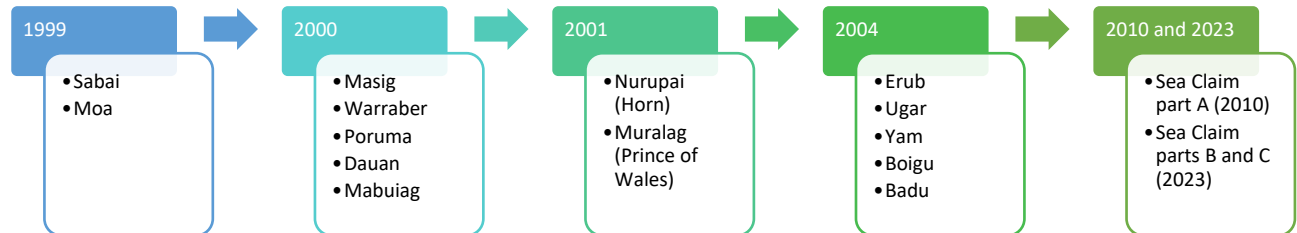
- Native title is the way the Australian legal system recognises (through the Federal Court of Australia) Aboriginal and Torres Strait Islander peoples' traditional rights and interests in their Country based on **Aboriginal lore or Ailan Kastom** (the 'traditional laws and customs').  **FEDERAL COURT OF AUSTRALIA**
- We know Traditional Owners have always had traditional rights in Country under their laws and customs, but those rights are not automatically recognised by the Australian law.
- To have their rights recognised, First Nations People need to make an application to the Federal Court. This is called a '**native title claimant application**' or '**native title claim**'. The First Nations People who make a native title claim are called 'native title claimants'. **In our Region, almost all inhabited and uninhabited islands and the sea country have been claimed.**
- When a claim is made, other people and organisations can become a **respondent party** to the claim. For example the State of Queensland (which is always a party), the local council, the Commonwealth or people with an interest in the area like Telstra, Ergon or commercial fishermen. Sometime other First Nations Peoples become respondent parties. **They have a say in how the claim is determined.**
- To have native title recognised, members of the native title claim group must give **evidence** that shows they are the **right people for the claimed area** and they have **traditional laws and customs** which they have **followed since settlement**. For most of our Region this date is 1872, but for Saibai, Boigu, Mer and Erub it is 1879.
- For most of the **island claims** the claimants provided their evidence in a **connection report**. This report is written by an anthropologist or a historian. It is then given to the State and other respondent parties. When the claimants and the respondent parties **agree on the terms of a determination** and ask the court to make a native title determination, this is called a **Consent Determination**. In the Torres Strait Region, nearly all the inhabited and uninhabited islands had their native title recognised by Consent Determination.
- The **sea claim of 2001** was different. There was no agreement on the evidence. Therefore, the claimants and anthropologists had to give evidence in a trial in the Federal Court and a judge made a decision about the evidence. This is called a **litigated determination**. **Part A** of the sea claim which is recognising the traditional rights of the claimants in their sea Country, was a **litigated determination**. It went all the way to the High Court in 2013. Most of **Parts B and C** were determined in November 2022 by Justice Mortimer. This was done by a **consent determination**. **Have a look at pages 14 and 15 for more information about the sea claim.**

So far, across the **Torres Strait Region** the Federal Court has made **29 native title determinations** (the sea claim was the only litigated determination; the rest were made by consent). **There are 21 native title holding corporations (Prescribed Bodies Corporate) in our Region. Have a look at the map at on page 9 of this booklet which shows all the determinations.** The combined determination areas cover a total of 99 islands, islets, cays and a significant part of the sea country, including

- 15 inhabited islands** (with the court recognising exclusive native title rights and interests over 14 islands and non-exclusive native title over Horn Island); and
- 44000 square kilometres** of non-exclusive native title over sea country (Seas claim Part A, and most of Parts B and C).

On page 9 we explain the difference between exclusive and non-exclusive native title.

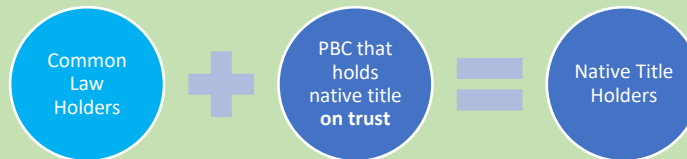
Timeline of native title determinations over inhabited islands and the sea in the Torres Strait Region 1999 - 2022



What is the difference between Native Title Holder and Common Law Holder?

Many people use 'Native Title Holders' or 'Common Law Holders' when they describe Traditional Owners. The *Native Title Act 1993* gives two specific meanings to these terms:

Common Law Holders are the persons recognised in the native title determination as the persons who hold native title. When the *Native Title Act 1993* uses **Native Title Holders** it refers to the combined group of Common Law Holders and certain PBCs, namely **Trustee PBCs** (as opposed to **Agent PBCs**):

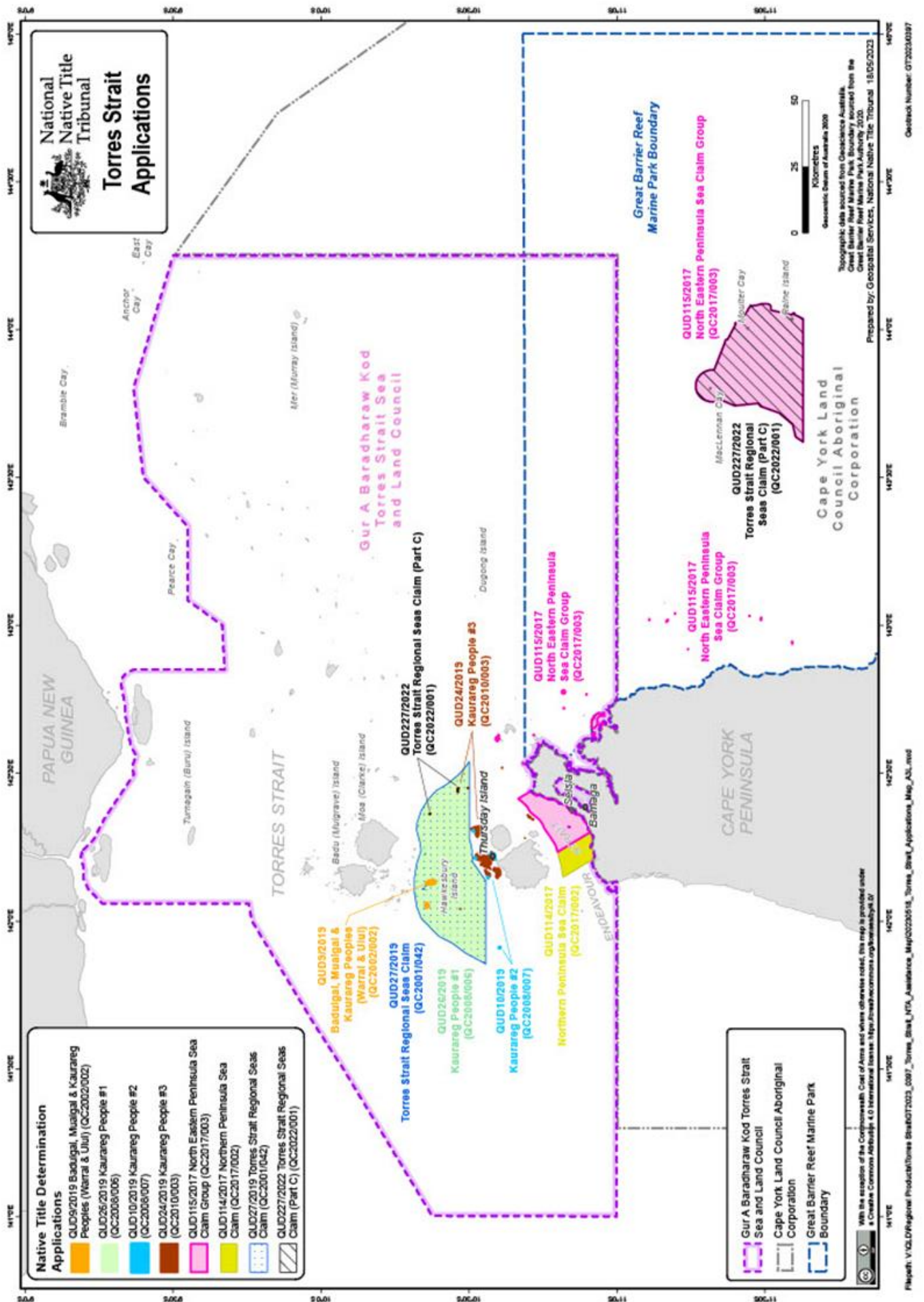


PBCs that hold native title on trust (**Trustee PBCs**), hold it on behalf of the Common Law Holders AND manage the native title rights. PBCs that act as an agent of the Common Law Holders (**Agent PBCs**), only manage the native title. The Common Law Holders hold the native title.

When this booklet was published in May 2023, there were **six remaining native title claims** in GBK's service area – *for more information, see map on page 6*:

- The unresolved parts of the **Torres Strait Regional Seas Claims Parts A, B and Part C**
- The **Kaurareg People's sea claims #1 and 2** and their islands claim which is called **Kaurareg # 3** (which includes sea country and Thursday, Friday, Goods and Hammond Islands); and
- The claim over the uninhabited islands of **Warral & Ului**.





By comparison, **Australia-wide (in May 2023)** there were:

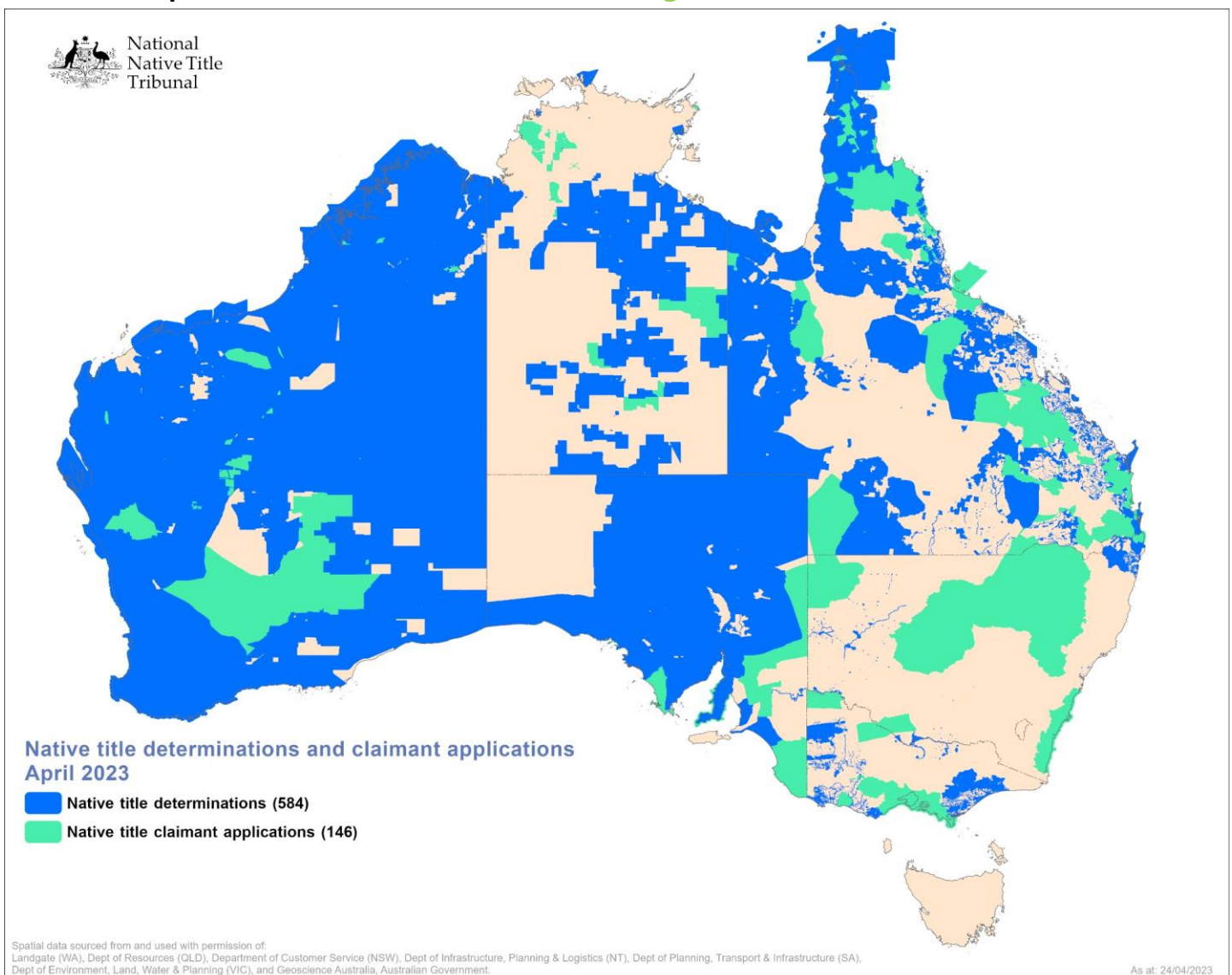
148 native title claims (of which 54 were in Queensland); and

587 native title determinations, covering almost 50 % of the country (177 in Queensland). Of these determinations

- 476 held that **native title exists** in the entire determination area or in part of it.
- 107 held that **native title does not exist** for example because it was extinguished – that means wiped out or taken away - in the entire determination area.

Australia-wide there are **256 Registered Native Title Body Corporates (RNTBC)** (also known as PBCs). **Have a look at page 19 for an explanation of the difference between RNTBC and PBC.**

This map shows current native title claims in green and determinations in blue.



3. What native title rights are recognised in the Torres Strait?

What **native title rights** the Federal Court recognises in a **native title determination** depends on the laws and customs of the native title claimants. The laws and customs are different all across Australia.

Each native title determination in our Region is slightly different.

- The native title rights that the Federal Court recognises in a determination depend on the rights the native title claimants have been able to prove when they provided their evidence to the Court and the respondent parties. The claimants have to show that they continue to practice their *Ailan Kastom* or *Aboriginal lore* and have done so since settlement.

Typically, in the Torres Strait, the native title rights include:

‘The rights and interests to possess, occupy, use and enjoy the determination area, in particular to:

- (a) *live on the determination area;*
- (b) *conserve the natural resources of the determination area for the benefit of the Common Law Holders;*
- (c) *maintain, use and manage the determination area for the benefit of the Common Law Holders.*
- (d) *conserve, use and enjoy the natural resources of the determination area for social, cultural, economic, religious, spiritual, customary and traditional purposes; and*
- (e) *make decisions about and to control the access to, and the use and enjoyment of, the determination area and its natural resources.’*

Sometimes determinations say that native title does not exist.

This can either be

- over the entire determination area (this has not happened in the Torres Strait Region but for example for the Yorta Yorta People in Victoria); or
- in parts of the determination area (this has happened in the Torres Strait Region).

How does native title get wiped out or taken away (extinguished)?

There are four ways native title can be extinguished:

1. the claimants have lost their connection with the land because of colonisation (this is what the court said happened with the Yorta Yorta People of Victoria);
2. the claimants have surrendered (i.e. gave away) their the native title to the government;
3. the government has taken native title away for its own use (e.g. for a school or hospital);
4. the government has granted title to the land to someone, and the grant is inconsistent with the existence of native title (e.g. freehold).

In some cases, extinguishment gives the Traditional Owners a right to **compensation**. See page 16, 17 and 18 for more information about compensation and how it can be claimed.





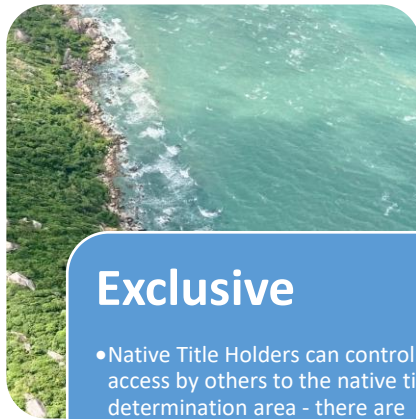
Almost all determinations in the Torres Strait Region say that:

- Over **islands** native title is held exclusively by the Native Title Holders.
- The law calls this 'the native title rights to possession, occupation, use and enjoyment of the determination area to the exclusion of all others' (or '**exclusive native title**').

This is different to mainland Australia.

Most determinations there say that native title is not held exclusively ('**non-exclusive native title**').

What is the difference between Exclusive and Non-exclusive native title?



Exclusive

- Native Title Holders can control access by others to the native title determination area - there are exceptions for example over DOGIT land (Deeds of Grant in Trust) **for more information see page 13**
- But will still need to deal with government and other third parties like mining companies when those third parties want to do something on their land or sea country (Future Act process).

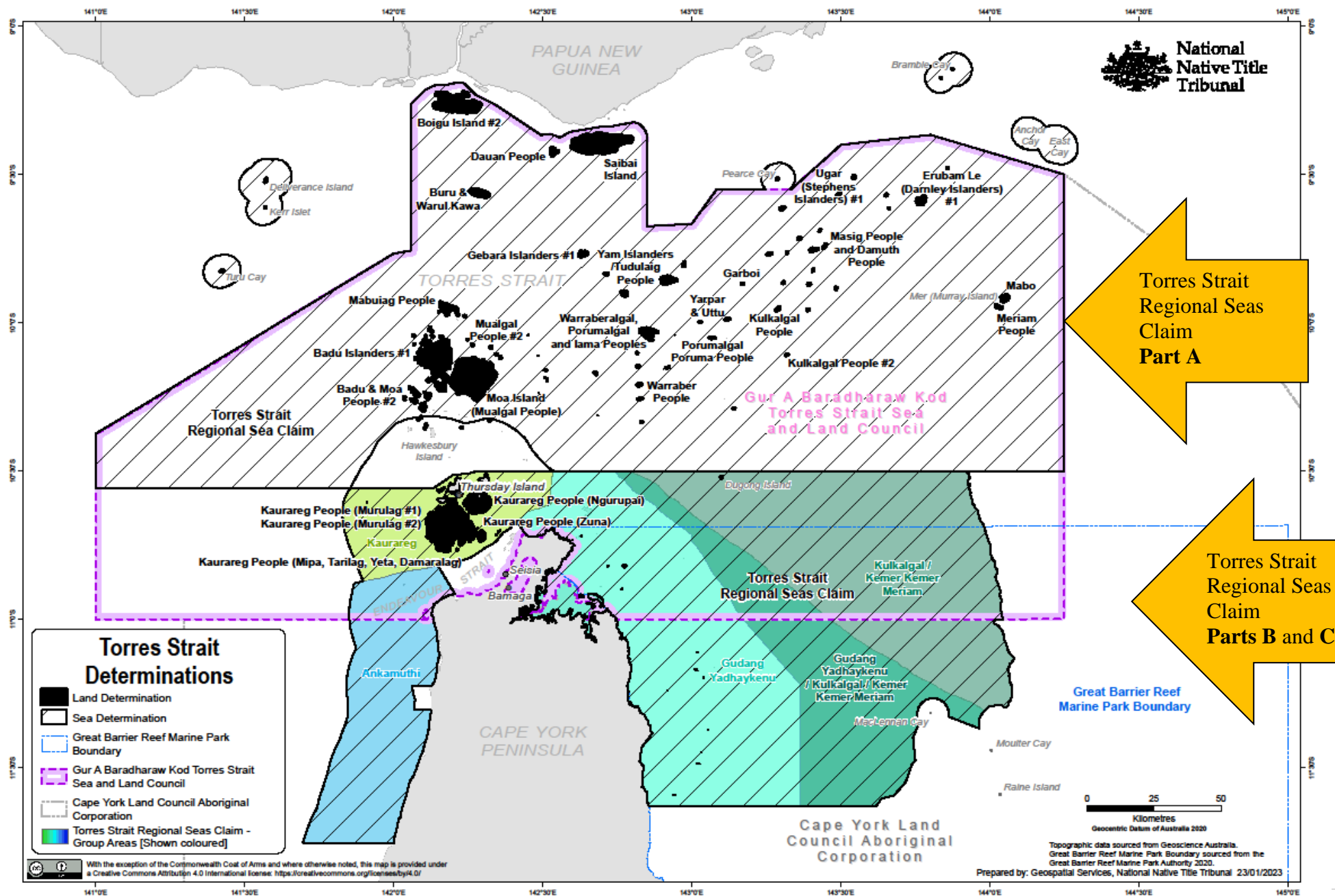


Non-exclusive

- Native Title Holders are not the only ones who have rights in the native title determination area.
- Others, who have been given legal rights by government also have rights in the determination area.
- Native title rights and these other rights co-exist or continue alongside.
- The rights of these other people, who can carry out their activities in a reasonable way, are stronger than the native title rights.

Over the Sea, native title is **always non-exclusive**. This is because the law recognises a right of members of the public to **navigate and fish the sea** which everyone has. There is also an internationally recognised right under maritime law of **innocent passage**. This means the **right of ships to enter and pass through a countries' waters** so long as it is not disturbing the peace or security of the country. These rights **sit side-by-side** with native title rights.





4. How has native title been recognised in the Torres Strait?

All Torres Strait Islander determinations say that the native title holders hold **communal and group rights**. This means native title is recognised as a right that is shared by all members of the community/group.

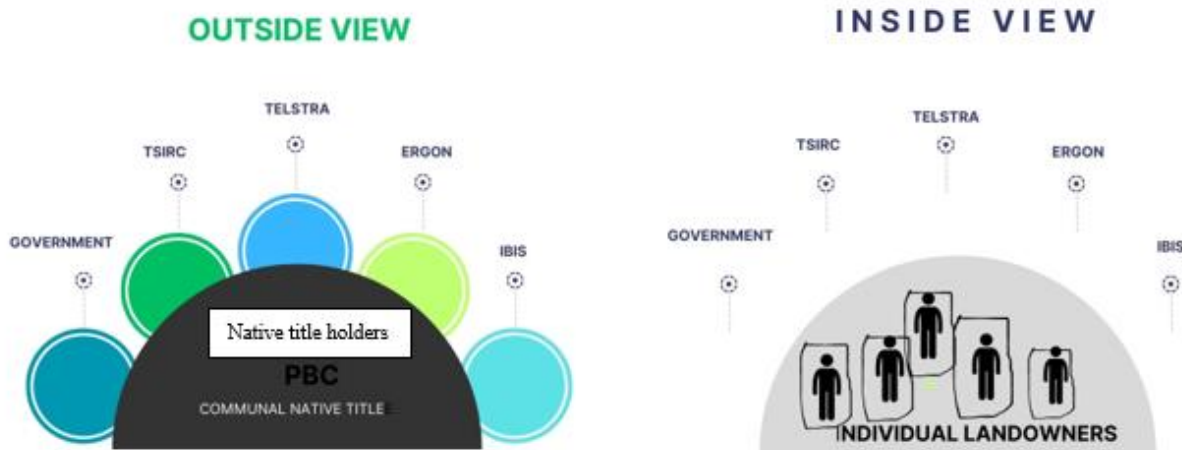
The determination explain that the native title rights and interests of the Common Law Holders are held **in accordance with and subject to their traditional laws and customs**.

This means that the determination does not speak about **individual or family ownership**.

- All the court says in the determination is that the Common Law Holders, as a community, are the people who hold native title over the determination areas. No one else holds native title over the determination area. We call this the **OUTSIDE VIEW**, which is the view that outsiders (like government and others) have when looking at the islands.
- Then there is the **INSIDE VIEW**, which is the view that the native title holders have when they look at the islands from within and among themselves.

The judges for each native title determination in the Torres Strait left it to the native title holders to decide what the **INSIDE VIEW** looks like. This includes who can speak for the lots that make up the determination area.

The native title holders' *Ailan Kastom* tells the native title holders who owns the land, not the Federal Court.



Did you know that ...

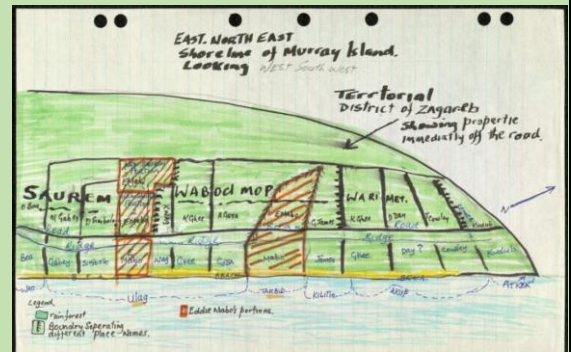
The way the Torres Strait determinations recognise communal native title is the same way as the High Court recognised native title in the *Mabo* claim.

The High Court declared that 'the Meriam People are entitled as **against the whole world** to possession, occupation, use and enjoyment of the lands of the Murray Islands'

The *Mabo* claim started with Eddie Mabo and the other four claimants **claiming their lots under laws and customs**.

As part of Eddie Mabo's evidence, he explained to the court how his grandfather had taken him to the village of Las and shown him his land boundaries and his fish traps. His grandfather explained how *meriba ged* (our land) came to be handed down through five generations to his father. His grandfather told him, 'If your father will get old you will take his land like he did when I get old'.

Eddie Mabo claimed 36 lots and drew a picture for the court (which is now held by the National Library in Canberra).



The High Court's decision of recognising communal native title, **did not change the way the Meriam People own land under their traditional laws and customs**.

5. What are the rules about how the native title rights are to be exercised?

Typically, determinations say that when the native title holders exercise their native title rights:

1. they must **not break the laws** of the Commonwealth and the State of Queensland; and
2. they must **respect the interests of others** which are named in the determination and continue to let them exercise their rights.

Some of those other interests are **mentioned in the determinations**. They include for example the rights of:

- TSIRC (formerly the Island Councils), as the trustee, so that it can do what it must do as local government for the Deed of Grant in Trust (DOGIT) area.
- Telstra, so that it can continue to operate telecommunication facilities.
- Indigenous inhabitants of PNG, so that they can enter, live on and use the determination area in accordance with and subject to prior permission under *Ailan Kastom* recognised under the Treaty.

The determinations typically say that the native title rights are **exercisable concurrently** (this means at the same time and side by side) with these other interests.

The determinations go on to say that '*in those circumstances where they cannot be so exercised, the entitlements of the holders of the other interests may regulate, control, curtail, restrict, suspend or postpone the exercise of those native title rights and interests*'.

This means when there is a clash between the native title rights and the other interests, the native title rights are weaker and need to 'take a step back' and cannot be exercised until the clash is no longer there.

Let's look at examples to show how native title works in the Torres Strait:

Exclusive and non-exclusive native title rights

In the Kaurareg People's determinations over Murulag (Prince of Wales Island) in 2001:

- Exclusive native title was recognised over most of the island which means the Kaurareg People have the right to exclude people from those areas.
- Non-exclusive rights were recognised over a Camping and Recreation Reserve for part of the island to the North-West. Non-Kaurareg People can use these areas for camping and recreation without seeking permission from Kaurareg People.
- Native title is extinguished in those areas where people own freehold.



Native title and local councils

- Native Title and Deeds of Grants in Trust (DOGITs) sit side by side.
- When Council does its work, it must speak to the Native Title Holders when doing things that affect native title (these acts are called 'Future Acts').
- For example, Council building a house on a lot of land may be an act that affects native title and Council will have to talk to the PBC to identify and get the permission of the landowner.



Native title is subject to the laws of the Commonwealth, State and local government

In the Torres Strait Regional Seas claim determination of 2010:

- The court recognised non-exclusive native title rights to the sea country.
- The rights are subject the public right to navigate the sea and to fish and the international right of passage.
- The rights are also subject to the Commonwealth's *Fisheries Act 1984*. This

act established the Torres Strait Protected Zone over the Torres Strait. It also established the Protected Zone Joint Authority which is responsible for the management of commercial and traditional fishing zones.

- Native title must also co-exist with the rights of non-Traditional Owner fishing licences.
- In practice this means that while the determination held that the native title holders have the native title right to fish for any purpose, including for commercial purposes, they can only undertake **commercial fishing** if they obtain a licence, as required by the law. **Non-commercial** fishing can be undertaken without a licence because the *Native Title Act 1993* says so.



6. The Torres Strait Regional Seas Claims

There are **three Torres Strait Regional Seas Claims**: Part A, B and C. **See map on page 10**

For the **Part A determination**, the native title claimants and the State of Queensland and the Commonwealth could not reach an agreement on the types of rights over the sea country that the Federal Court should recognise. This means they could not agree to a Consent Determination. The issues that they could not agree on were ultimately decided by the Federal Court and then challenged all the way to the High Court.



The High Court handed down its decision in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* 10 years ago - on **7 August 2013**.

The decision recognises that native title rights to the sea, including rights to fish commercially, are not extinguished by a legislative regime that otherwise requires a permit for commercial fishing, as argued by the government. **This was the first time in Australia that commercial rights were recognised as native title rights.**

The court decided in relation to **Part A**:

The native title holders have the following rights in relation to their **sea country**.

(a) the **rights to access, to remain in and to use the native title areas**; and

(b) the **right to access resources and to take for any purpose resources** in the native title areas (however, excluding minerals and petroleum).

Again, these rights are subject to the laws of the government. For example, the right to sell marine produce commercially is subject to native title holders first getting a State and Commonwealth commercial fisheries license.

They are also subject to the traditional laws and customs of the Common Law Holders.



Background to Torres Strait Regional Seas Claims Parts A, B and C

A claim to the sea country in the Torres Strait had been a long time coming. The original Mabo claim in 1982 included a sea claim, but the portion of the claim relating to the sea was not included in the case that was appealed to the High Court. This was for technical legal reasons. The replacement claim, brought by all Torres Strait Islander communities, is known as the **Torres Strait Regional Seas Claim**. It was made in 2001. In September 2008, the Federal Court split the claim into Parts A and Parts B.

- In July 2010, **non-exclusive** native title was recognised in relation to part of **Part A**.

In July 2022, a further sea claim (**Part C**) was lodged south of the Parts A and B.

Most of the areas covered by **Parts B** and C were determined by consent in November 2022, together with most of the Kaurareg People's claim over the sea and some uninhabited islands and the Northern Peninsula Sea Claim (brought by Ankamuthi People) and North Eastern Peninsula Sea Claim (brought by Gudang Yadheykenu People) which are represented by Cape York Land Council. Justice Mortimer of the Federal Court came to Thursday Island to hand down her decision to the native title claimants at a big celebration on 30 November 2022.



You can see the determination areas for Part A, B and C on the map on page 10

Who manages the native title rights over the determined sea claim areas?

Sea claim Part A

- **Malu Lamar (Torres Strait Islander) Corporation RNTBC** manages the native title rights over Part A for the 13 community island PBCs, jointly with the uninhabited Island PBCs for the following groups:
 - Kemer Kemer Meriam, Eastern Islanders;
 - Kulkalgal, Central Islanders;
 - Maluilgal, Western Islanders;
 - Gudamalulgal, Top Western Islanders.

Sea claim Parts B + C

- **Northern Cape and Torres Strait United Indigenous Corporation RNTBC** manages the native title rights over Parts B and C for the following groups:
 - Kemer Kemer Meriam and Kulkalgal
 - Badugal and Mualgal
 - Kaurareg
 - Gudang Yadhaykenu
 - Anthamuthi

7. Native Title Compensation

Compensation claims will be the ‘**second generation claims**’ in Australia, after native title claims have been determined. Australia-wide Traditional Owners are only at the beginning of this new claims phase. **Only 9 compensation claims** are currently before the Federal Court (in May 2023).

Compensation entitlements will vary across Australia, depending on how much native title has been extinguished (wiped out), if any. **For more information about how native title can be extinguished see text box on page 8 - How does native title get wiped out or taken away?**

- In some parts of Australia because of European settlement, native title has been severely impacted with **very little land left that can be claimed** in a native title claim. Compensation may be available there.
- In other parts, native title claimants are able to **secure exclusive native title rights** which means there is limited or no extinguishment that may require compensation. The majority of the Torres Strait region falls into this category.

GBK’s approach to compensation claims is consistent with a broad agreement within the other Native Title Representative Bodies and Service Providers. That is to **wait until test cases** currently before the Federal Court **establish a better understanding** in areas of compensation law that have not yet been explored and need clarity.

This is because:

- The *Native Title Act 1993* does not say how native title compensation is to be calculated. This is left to the courts or parties to a compensation claim to determine.
- So far (in May 2023), only one compensation case has been decided by the High Court: the ***Northern Territory v Griffiths case***, also known as the **Timber Creek case**. This case provides **some guidance** about the value of native title compensation and the evidence required to be provided by the claimants to support a successful compensation claim.
- There are **many legal issues that were not considered** by the High Court in Timber Creek. It is hoped that in the near future other cases will clarify some of these legal issues and provide a better understanding of the value of native title compensation.

What is compensation?

Generally speaking, compensation is money for the loss or pain a person has suffered because of something another person has done. Even though money might not bring a lost thing back, it is meant to help the person recover from their loss. For example, if a person is hit by a car and ends up in hospital, they can get compensation to help fix their car and pay their medical bills.

Compensation is much harder with native title because it is difficult to put a value on native title rights and the impact of their loss on past, current and future generations.

How is compensation worked out?

The *Native Title Act 1993* gives some limited guidance about compensation:

1. There cannot be **multiple compensation** for the same act. If compensation is received under State or Territory law, or under another Commonwealth law, that must be considered when determining compensation under the *Native Title Act 1993*.

2. Compensation is an entitlement to be compensated on 'just terms' for 'any loss, diminution, impairment or other effect of an act on native title rights and interests'; 'just terms' is language used in the Australian Constitution; the *Native Title Act 1993* does not say how to assess what is 'just terms'. **The Timber Creek decision is the only guide we have so far.** The court said that the compensation value should be what is '**considered fair and just in the Australian community**'.
3. Compensation consists of **money** unless the Traditional Owners instead request the **transfer of property or the provision of goods or services**.
4. The total compensation for full (ie complete) extinguishment of native title **must not be more than** the money that would be payable if it had been the **compulsory acquisition of the freehold** interest in the same area.
5. Compensation is payable for compensable **acts after 31 October 1975**, the date the Racial Discrimination Act 1975 (Cth) began operating.

In the Timber Creek compensation case, the High Court explained for the first time how compensation for loss, extinguishment or impairment of native title rights is to be worked out.

The High Court considered the importance of country and the impacts on culture, Dreamings, song lines and sacred sites and decided that there are **two things that need to be looked at to work out how much compensation should be paid** for loss of native title:

- **economic loss**; and
- **cultural loss**.

The court also said that **interest** had to be paid on the economic loss from the time of the extinguishment or impairment of native title rights. **Interest is additional money that reflects the change in the value of money over time.** In Timber Creek this interest was **three times the economic loss part** of the compensation because a lot of time has passed since 1980-1996 when the compensation acts were done by the Northern Territory government, and 2016 when the court case was won.

The Timber Creek case



The town of Timber Creek is located 600 kms south-west of Darwin in the Northern Territory. In 2006, the Ngalirwurru and Nungali People had their non-exclusive native title rights recognised by the Federal Court. Their compensation claim related to **53 acts** by the Northern Territory government that had extinguished their native title rights (ie they were not able to be recognised in their determination, including their right to hold native title exclusively). These acts included the **building of roads and infrastructure** like a concrete bridge and a water tank, some of which interfered with sacred Dreaming sites and story lines. The Traditional Owners argued that these caused them, amongst other things, hurt, embarrassment and bad omens among their people.

Compensation for economic loss

- The High Court said that compensation for economic loss is worked out by **comparing native title to freehold title**. **Freehold is the strongest type of land ownership under the Australian legal system.** It allows people to exclude others from their land and to sell it.
- The High Court said that compensation for loss of **exclusive native title** could be worked out as **100% of the value of the freehold title**.
- The High Court said that compensation for **non-exclusive native title** is worked out by reducing the value of freehold title depending on what kind of native title was lost. For example, if you had rights to hunt but the government built a road through your hunting ground, the Court would have to think about the value of the lost right to hunt based on the freehold value of the land.
- For the Ngalirwurru and Nungali People, compensation for economic loss of non-exclusive native title

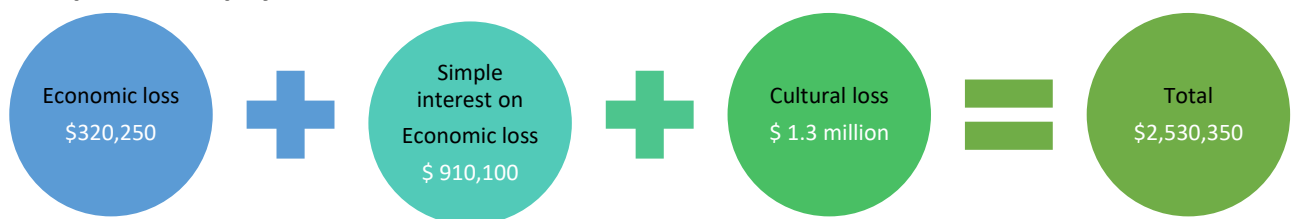
worked out to be 50% of the value of the freehold title - which was \$320,250.

- The interest was \$910,000.

Compensation for cultural loss (ie cultural impacts)

- The High Court also looked at how compensation can be worked out for the **impacts of the loss of native title rights on cultural matters**. Such as loss of Dreamings, song lines and sacred sites. **The High Court called this 'cultural loss'**. Importantly this does not mean that people have 'lost' their culture. **'Loss' is the label used in compensation law to identify the different things that someone might be compensated for.**
- The High Court said that **cultural loss is very different from economic loss** and it is often the most important part of the harm caused by extinguishment, impairment, or other impacts on native title from government activities.
- For the Ngaliwurru and Nungali People, the High Court looked at how the government's activities had impacted their Dreamings and sites and what that meant for Common Law Holders.
- The High Court awarded compensation for cultural loss of \$1.3 million.

Compensation payment in Timber Creek case



Who pays compensation and to whom?

Generally, a **State or Territory government or the Commonwealth government would be responsible to pay compensation** because they are the ones that are doing the activities that extinguish or impair native title like granting a lease or permit to build something on the land.

In Timber Creek the compensation was paid to the PBC to deal with the compensation as directed (that means told) by the relevant Common Law Holders entitled to the compensation under their traditional laws and customs.

Alternative to making a compensation claim

- Instead of going through the process of making a compensation claim in the Federal Court, a native title group may decide to approach the Commonwealth or their State or Territory government to negotiate a settlement of its compensation entitlements.
- **Settlements are the preferred option for the Commonwealth and the State and Territories.** In October 2021, they jointly published **National Guiding Principles for Native Title Compensation Agreement Making** that they committed to.
- These principles include the statement that '[w]hile litigation may in some cases be necessary and appropriate, governments will use their best efforts to settle native title compensation matters by agreement where possible.'
- The Queensland government's Department of Resources has published information on native title compensation on its website: <https://www.qld.gov.au/firstnations/environment-land-use-native-title/native-title/compensation>

8. The Torres Strait Region Prescribed Bodies Corporate (PBCs)

For each determination native title is managed by a PBC.

What is the difference between a RNTBC or PBC?

Many people are confused about the difference between Registered Native Title Bodies Corporate (RNTBC) and Prescribed Bodies Corporate (PBC). Most people call the corporations that manage native title on behalf of the Common Law Holders 'PBCs'.

The difference is:

- When the Federal Court makes a native title determination, it asks the Native Title Holders to tell the court which corporation is to manage their native title. (It must be a corporation set up under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). The corporation must have the purpose/objective of managing the Native Title Holders' native title.)
- PBCs must be set up and registered with the Office of the Registrar of Indigenous Corporations (ORIC) before the determination is made. **At this point the corporations are called 'PBCs'.**
- After the determination is made, the Federal Court gives a copy of the determination documents to the National Native Title Tribunal (NNTT). The NNTT puts a summary of the information about the determination on its National Native Title Register (including a map of the determination area, a description of the Native Title Holders, a list of the native title rights and interests recognised and the details of the PBC). **This is when the PBC is registered, and becomes the 'RNTBC'.**



Masigalgal PBC, Masig

- A PBC is the **first point of contact** for government and other parties who wish to do something on native title land (e.g. Future Acts).
- It **links stakeholders with the Common Law Holders.**
- The PBC represents the Common Law Holders and **manages their native title rights and interests on their behalf.**



All PBCs have **three functions**:

- **CORPORATE FUNCTIONS** – These are the obligations the CATSI Act says the PBC has.

These include holding Annual General Meeting (AGMs), maintaining a Register of Members, submitting a general report to Office of the Registrar of Indigenous Corporations (ORIC).

- PBCs, like every other corporation, make decisions about the corporation: its strategic plan, budget, operations (for example leasing an office building, employing staff).
- PBC directors make these decisions (or delegate the decision to staff) in line with the CATSI Act and the PBC's rule book.
- The directors are accountable to the corporation and its members.
- Members can ask questions about the corporation's operations and financial management and decide who should be a director and whether directors should be paid, changing the rule book.

- **NATIVE TITLE FUNCTIONS** – These are obligations that the *Native Title Act* and the PBC Regulations say the PBC has.

These include:

- Looking after **Future Acts Notices** (ie proposals for work that will affect native title)
- Entering into **Indigenous Land Usage Agreements** (including negotiations between governments, companies and the PBC about future developments on the land; called **ILUAs**)
- Negotiating, implementing and monitoring native title agreements
- Consulting with Native Title Holders and documenting evidence of consultation and consent
- Bringing native title compensation applications in the Federal Court
- Holding money in trust for Native Title Holders (such as from compensation payments or mining agreements) which they invest or use as told by the relevant Native Title Holders.

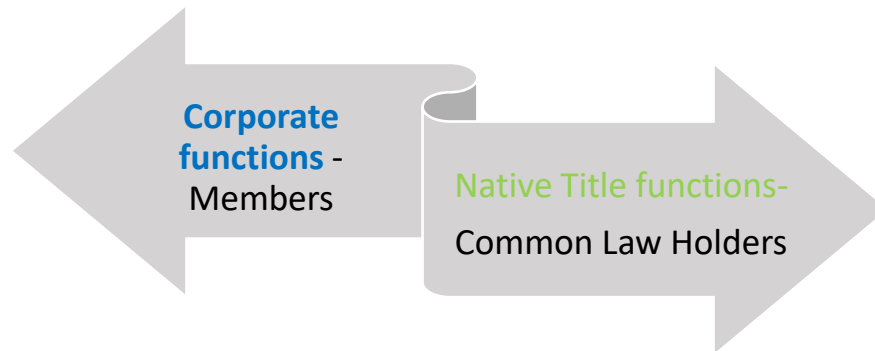
- **CULTURAL HERITAGE FUNCTIONS** – These are obligations that the *Torres Strait Islander Cultural Heritage Act 2003(Qld)* says the PBC has.

These include:

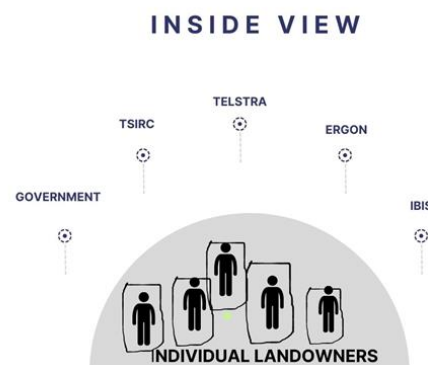
- The *Torres Strait Islander Cultural Heritage Act* says that the PBCs must be involved in the assessment and management of cultural heritage.
- These responsibilities say that the PBC must make sure that culturally important places or areas are protected.
- Any person doing any activity that could harm culturally important places or things must consult with the PBC to avoid any damage to cultural heritage.

All PBCs are accountable to their:

- **Members** (in relation to their **corporate functions**); and
- **Common Law Holders** (in relation to their **native title functions**).



- Every Common Law Holder **can** become a member of their PBC if they want to.
- But there is **no legal requirement** for a Common Law Holder to become a member of their PBC.
- PBCs **must** look after the rights and interests of all Common Law Holders **even if they are not members**.
- **PBCs cannot make decisions about native title without consulting with, and seeking the consent of, the relevant Common Law Holders.**
 - This must happen even if the Common Law Holder is not a member of the PBC.
 - This means the PBC must identify who they need to consult with.
 - This is the **INSIDE PROCESS** done by the PBC in accordance with their **laws and customs**.



Who the relevant native title holders are **for a consultation and consent process** **is described in the Native Title Determination and the PBC Regulations.**

9. GBK - Your Native Title Service Provider

Gur A Baradharaw Kod Torres Strait Sea and Land Council (GBK) is a not-for-profit organisation.

- GBK was registered with the Office of the Registrar of Indigenous Corporations (ORIC) in 2012.
- GBK is also registered as a charitable organisation.

Membership for GBK is open to PBCs and Land Trusts under the *Torres Strait Islander Land Act/Aboriginal Land Act 1991* in our Region.

GBK currently has one Land Trust member: the Urapun Tubudal Gal Land Trust.



All 21 PBCs within **the 5 nation groups** of the Torres Strait Region (Kemer Kemer Meriam, Gudamalualgal, Maluilgal, Kulkalgal and Kaiwalagal) **are a member of GBK**:

Kemer Kemer Meriam

Mer Gedkem Le (Torres Strait Islanders) Corporation RNTBC

Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation RNTBC

Ugar Ged Kem Le Zeuber Er Kep Le (Torres Strait Islanders) Corporation RNTBC

Guda Maluilgal

Dauanalgal (Torres Strait Islanders) Corporation RNTBC

Malu Kiäi (Torres Strait Islanders) Corporation RNTBC

Saibai Mura Buway (Torres Strait Islanders) Corporation RNTBC

Maluilgal

Mura Badulgal (Torres Strait Islanders) Corporation RNTBC

Mer Gedkem Le (Torres Strait Islanders) Corporation RNTBC

Goemulgaw (Torres Strait Islanders) Corporation RNTBC

Badu Ar Mua Migi Lagal (Torres Strait Islanders) Corporation RNTBC

Maluilgal (Torres Strait Islanders) Corporation RNTBC

Kulkalgal

Garboi (Torres Strait Islanders) Corporation RNTBC

Gebaralgal (Torres Strait Islanders) Corporation RNTBC

Kulkalgal Torres Strait Islanders) Corporation RNTBC

Magani Lagaugal Torres Strait Islanders) Corporation RNTBC

Urapun Tubudal Gal Land Trust

Masigalgal Torres Strait Islanders) Corporation RNTBC

Porumalgall Torres Strait Islanders) Corporation RNTBC

Wakeyama Torres Strait Islanders) Corporation RNTBC

Warraberalgal Torres Strait Islanders) Corporation RNTBC

Kaiwalagal

Kaurareg Native Title Aboriginal Corporation RNTBC



Each PBC and Trust nominates from their directors a director for the GBK board. There are **22 directors** on the GBK board.

The GBK board elects an **Executive** of five directors. Each of the **5 nation groups** is represented in the Executive.

You find information about GBK's board of directors on GBK's website:
<https://www.gbk.org.au/our-story/>.



GBK is the peak body of the RNTBCs of the Torres Strait Region. GBK is also the native title service provider. It provides native title services to native title holders, including RNTBCs and native title claimants in the Torres Strait region.

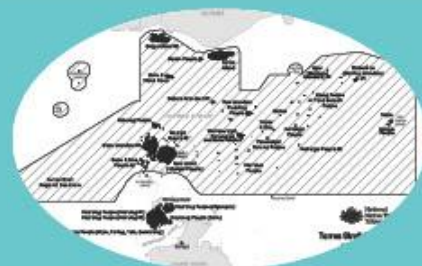
As a native title holder or member of your PBC, you are represented by your PBC. Your PBC manages your native title rights on behalf of all native title holders.

All PBCs in the Torres Strait Region are members of GBK. Therefore, all native title holders in the Torres Strait Region are represented, through their PBC, by GBK.

Your PBC membership or status as a native title holder, represented by a PBC, gives you a voice in the Torres Strait Region. Regardless of whether you live in the Torres Strait Region or outside of it.



Membership is open to all RNTBCs and Land Trusts. Members can attend AGMs/General Meetings, vote on Rule Book changes, receive reports (Directors, financial, general)



EACH RNTBC & LAND TRUST NOMINATES ONE PERSON AS THEIR DIRECTOR.

GBK DIRECTORS (BOARD)



The 22 Directors make up the "GBK Board". Each Director has a 4 year term on the Board.



DIRECTORS JOIN WITH OTHER DIRECTORS FROM THEIR NATION GROUP TO ELECT ONE MEMBER OF THE GBK EXECUTIVE

GBK EXECUTIVE



Each Nation Group has one representative on the "GBK Executive".

The Members of the Executive nominate the Chair and Deputy Chair from the Executive and make a recommendation to the Directors for endorsement.

GBK became the **Native Title Service Provider (NTSP)** for the Torres Strait region on 1 July 2022.

- Before this transition, the Torres Strait Regional Authority (TSRA) was the Native Title Representative Body for 26 years.
- The TSRA stopped providing native title services on 30 June 2022.

There are 14 Native Title Representative Bodies and Native Title Service Providers (NTRB/SPs) across Australia. They are responsible for providing native title services in their regions, a little bit like a legal aid service for native title.

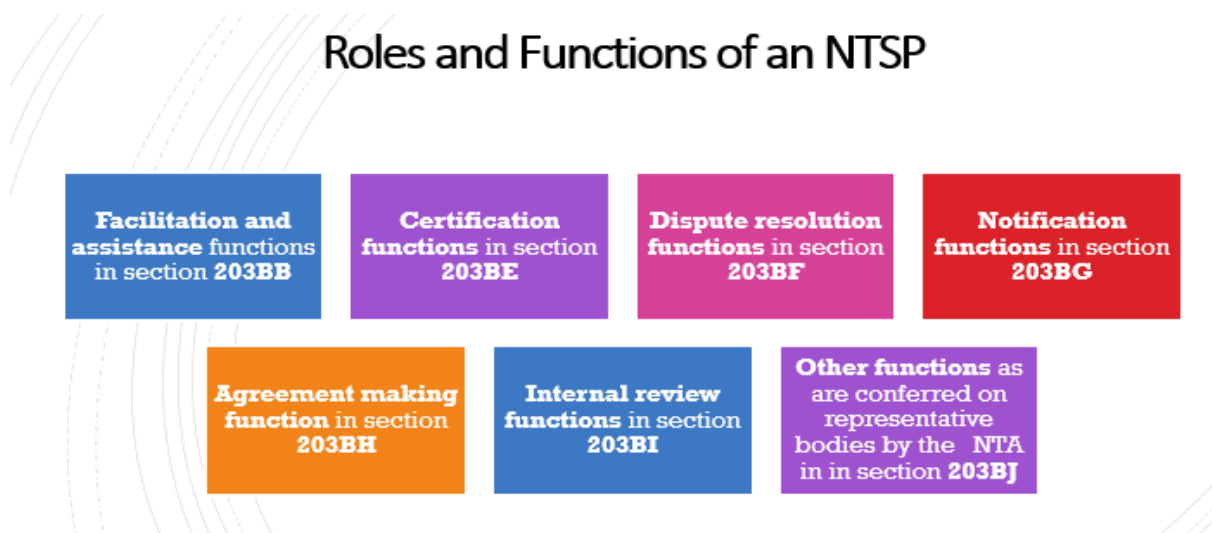
NTRB/SPs are funded by the National Indigenous Australians Agency (NIAA) to provide their native title services in their regions to

- All **native title claimants** and persons who wish to lodge a native title claim.
- All **native title holders**.
- All **PBCs**

The services include:

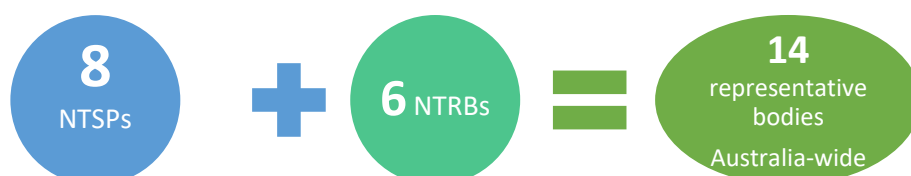
- preparing and lodging native title claims;
- preparing and lodging compensation claims;
- responding to future act notices and negotiating future act agreements and ILUAs;
- assisting with dispute resolution;
- native title education;
- servicing and supporting PBCs and building their capacity.

Roles and Functions of an NTSP

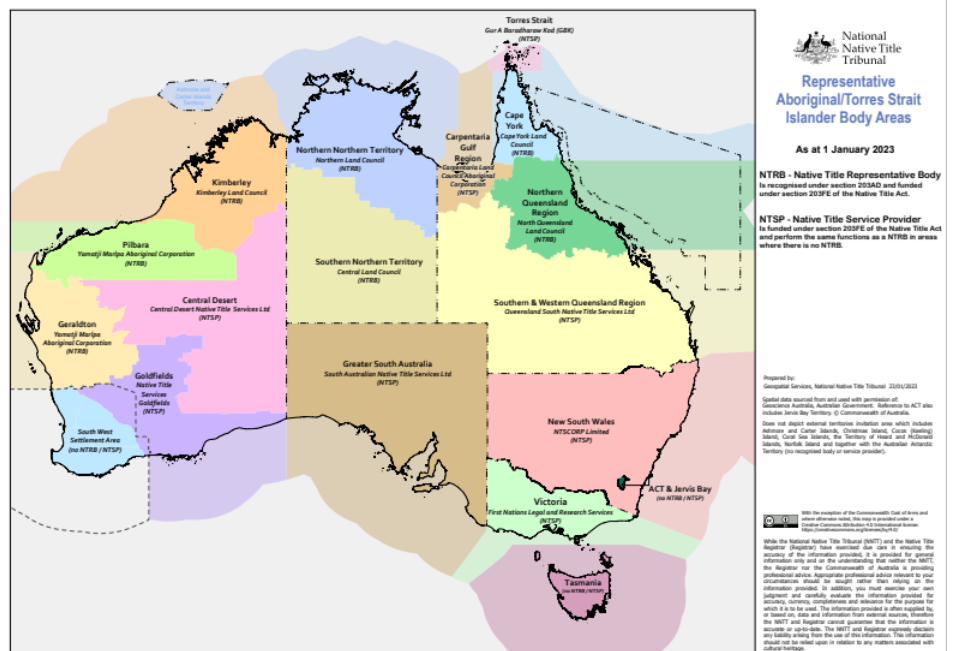


What is the difference between NTRB and NTSP?

- NTRBs are appointed by the Minister of Indigenous Australians. NTSPs are recognised by NIAA.
- Of the 14 representative bodies, 8 are NTSPs like GBK and 6 are NTRBs – *see map on page 25*
- Both, NTRBs and NTSPs provide the same functions under the *Native Title Act 1993*.
- Both are funded by the National Indigenous Australians Agency (NIAA) to perform these functions.



What the NTRB/SPs do in their region depends on where they are at in the native title claims process. Some regions (like the Torres Strait and the Pilbara and Kimberley regions in Western Australia) have had most of their claims determined (which means they are in the ‘**post-determination phase**’). Others, like New South Wales are still in the ‘**claims resolution phase**’ where they progress claims to determination or settlement.



See map on 7 For current claims and determinations in the different NTRB and NTSP regions.

Each year, NTRB/SPs are required to submit to NIAA a proposed **operational plan** indicating which matters the representative body is intending to progress in the next financial year. Once approved, funding received from NIAA cannot be expended on a matter not included in the operational plan without formal application and approval by NIAA to amend the operational plan. That means GBK’s workplan is largely set for one year at the beginning of each financial year.

It is important to understand that GBK cannot tell PBCs what to do.

GBK can provide a service to PBCs. For example, GBK can assist:

- PBCs and Common Law Holders with the resolution of disputes.
- PBCs to build their capacity.
- PBCs and Common Law Holders with negotiating agreements or responding to Future Act notices.

GBK has *Policies and Procedures Relating to the Performance of its representative body functions* which explain the types of assistance GBK provides and how to apply for it. They can be downloaded from GBK’s website: www.gbk.org.au.

GBK’s native title service is delivered by its **Native Title Section** and an **PBC Support Section**.

You find information about the work we do on our website: www.gbk.org.au



10. The detailed story of the Mabo case – the long journey through the courts

- **20 May 1982:** The Mabo case begins in the High Court of Australia, the **highest court in the country**. The five plaintiffs (claimants) bring their case against the State of Queensland and the Commonwealth of Australia (the Commonwealth later withdrew from the case), claiming 'native title' to the Murray Islands (Mer, Dauar and Waier).
- **27 February 1986:** The High Court's Chief Justice, Sir Harry Gibbs, sends the case to Justice Moynihan of the Supreme Court of Queensland, the **highest court in the State**. He is to hear and determine the facts of the claim which means whether the claimants hold the rights to the islands under their law, as they claim. This is because hearing evidence is not the role of the High Court of Australia.
- But before Justice Moynihan can even hear all the evidence, **the case is put on hold**. This is because the claimants bring a second case to the High Court of Australia. They are forced to do so because:
 - In 1985, while the Mabo claim is still in the High Court of Australia, the Queensland Parliament passes the *Torres Strait Islands Coastal Islands Act 1985*. The aim of this new law is to stop the *Mabo* case. This new law tried to legislate the very thing that was in question in the Mabo case: that the annexation of Mer by the Queensland government in 1879 had wiped out the Meriam People's rights. Not only that, but their rights were also legislated to have been extinguished without compensation. The claimants had no choice but to challenge this law if they wanted to continue the Mabo claim.
 - The question was put to the High Court of Australia whether the Queensland law was valid.
 - On 8 December 1988, the High Court of Australia found it was not because the law was in conflict with a law of the Commonwealth, the *Racial Discrimination Act 1975* which prohibits discrimination. The High Court of Australia said the Queensland law was racially discriminatory because it took away the rights of the Meriam People without compensation, while leaving untouched similar rights of non-Islanders, who, if their rights were to be taken away, would receive compensation. This decision by the High Court of Australia is known as *Mabo v. Queensland (No. 1)* and the outcome meant that the original case, the Mabo claim, could continue. The original Mabo case became *Mabo No. 2*.
- **May 1989:** After that unsuccessful attempt by the Queensland Government to undermine the Mabo claim, Justice Moynihan was able again to hear the Mabo evidence. The claimants told the court that the eight clans of Mer have occupied clearly defined parcels of land and sea for hundreds of years. They also had to prove that they continued to exercise their ancestors' traditional laws and customs.
- **16 November 1990:** Justice Moynihan handed down his decision about the evidence (the facts), confirming that some of the plaintiffs have rights to the lots they claimed, under their traditional laws and customs. This means the High Court can begin its hearing of



Justice Martin Moynihan opens Supreme Court of Queensland hearings on Murray Island, May 1989 – Courtesy: MAAS Collection

the legal issues in the case. The High Court had to decide whether the Australian law can recognise the Meriam People's rights and interests held under their traditional laws and customs.

- Justice Moynihan considered the evidence given by 44 witnesses (some called by the Queensland government to oppose the plaintiffs' evidence) at 50 hearings some of which were held on Murray Island and Thursday Island. That meant looking through a total of 330 documents submitted by the parties to the court and the 3464 pages of transcripts which were generated during the trial. Justice Moynihan's task was enormous.
- Justice Moynihan's decision is handed down almost four years after the claimants entered the witness box. It is 400 pages long.
- The decision states that the **Meriam People have a strong system of customary land rights which had existed prior to European settlement and continues to the present.**
- In relation to Eddie Mabo's claim Justice Moynihan decides that he is not prepared to find that Eddie Mabo was traditionally adopted (as opposed to having been brought up) by Benny and Maiga Mabo and inherited the parcels of land he claimed to own as Benny and Maiga's heir.
 - In a film about the decision, Barrister Bryan Keon-Cohen, when interviewed by film maker Trevor Graham in 1996, remembers Eddie Mabo's reaction to the decision:

'One of the important decisions was - did Eddie Mabo wish to appeal those findings by the trial judge? And we gave Eddie certain advice about the way he should proceed. And our advice was, in the interests of the community and in the interests of expediting the final conclusion of this litigation, bearing in mind the enormous pressures of limited resources we were under, we advised him not to appeal. And he thought about it and he accepted that advice.'

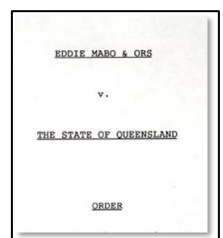
'And I consider that a very selfless decision and a decision to his very great credit. And an indication of his ability to see the wood for the trees.'

'The great irony of this case is that in the end Eddie Mabo had nothing to do with it in terms of argument put before the full High Court at the ultimate hearing. He took it on the chin, accepted advice not to appeal and proceeded into the full court with a case which was fought over areas of land found on behalf of the other plaintiffs, not him.'

For more information about the film: <https://www.nfsa.gov.au/latest/remembering-eddie-mabo>

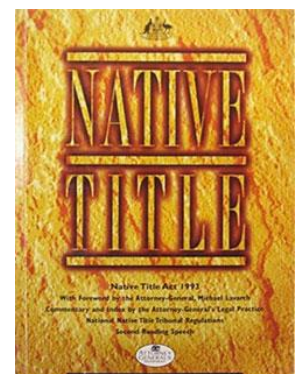
- **3 June 1992:** The High Court handed down its decision in *Mabo v. Queensland (No. 2)*, upholding the Meriam People's claim to native title over Mer. Significantly, the judges overturn the legal fiction of *terra nullius* (i.e. Australia being no- man's land).

- The High Court finds that Britain was wrong to claim possession of Australia on the basis that its First Nations Peoples had no law that was governing the occupation and use of the lands.
- It **recognised that First Nations Peoples had lived in Australia for thousands of years** and exercised native title rights according to their own laws and customs.
- The Court found that those rights survived colonisation, and they are now **recognised and protected by the Australian legal system.**



Sadly, three of the plaintiffs Sam Passi, Celuia Mapo Salee and Edward Koiki Mabo had died before the High Court handed down the landmark judgement.

- **1 January 1994:** The *Native Title Act 1993* commences. It establishes a **process for claiming and recognising native title lands and waters** in Australia. The Act aims to balance Indigenous and non-Indigenous peoples' rights to land and sets out how native title rights and interests fit within Australian law. To have native title recognised Aboriginal and Torres Strait Islander peoples must go to court to **prove that they have continually kept their traditional links with the land.**





GBK has an office in Cairns (15 Lake Street) and on Thursday Island (Level 1, 82 Douglas Street). Please feel free to visit us.

GBK has recently relocated to a new office space in **Cairns** - located in the heart of the CBD: **Cairns Corporate Tower, 15 Lake Street.**

Once renovations are completed, GBK will occupy two office spaces - one on the Ground floor and another on Level 15. Together, these areas will provide space for our teams as well as multiple meeting rooms for our work with stakeholders.



On **Thursday Island** you find our office **above Col Jones** at 82 Douglas Street (Level 1).

If you have any questions about GBK's role and support, please contact us:

07 4083 1000 | nativetitle@gbk.org.au



Gur A Baradharaw Kod Torres Strait Sea and Land Council acknowledges the traditional owners of the lands we live and meet on. We extend our respect to the elders, past, present and future of all Torres Strait Islander and Aboriginal people in our nation.