

INTELLIGENCE DOSSIER

Aboriginal and Torres Strait Islander Peoples: Legal Status, Sovereignty, and the Imperative of Voice

I. EXECUTIVE SYNOPSIS

Aboriginal and Torres Strait Islander peoples constitute the **First Nations of the Australian continent**, possessing **inherent sovereignty, pre-existing legal orders**, and **cultural continuity** extending beyond 65,000 years. Their rights are grounded in:

- **Domestic law** (statute and common law)
- **International human rights law**
- **International criminal law principles**
- **Customary international law**
- **Foundational High Court jurisprudence**

Their voices are not merely desirable—they are **legally indispensable** to the legitimacy of the Australian state, the integrity of its constitutional order, and its compliance with international obligations.

II. HISTORICAL AND LEGAL FOUNDATIONS OF FIRST NATIONS SOVEREIGNTY

1. Pre-existing Sovereignty and Legal Orders

Prior to colonisation, Aboriginal and Torres Strait Islander nations possessed:

- Distinct **sovereign polities**
- Complex **laws, customs, and governance systems**
- Defined **territorial boundaries**
- Sophisticated **trade, diplomacy, and kinship structures**

These systems were **not extinguished** by British arrival. No treaty, cession, or lawful conquest occurred.

2. The Doctrine of *Terra Nullius* and Its Judicial Rejection

For over a century, the Crown relied on the fiction of *terra nullius*. This was **repudiated** in:

Mabo v Queensland (No 2) (1992) 175 CLR 1

The High Court held that:

- Indigenous peoples possess **native title** derived from traditional laws and customs.
- The common law must not be frozen in the “discriminatory fiction” of *terra nullius*.

- Indigenous rights survived sovereignty and continue unless extinguished by valid governmental act.

This decision is the **constitutional watershed** of Indigenous rights in Australia.

III. DOMESTIC LEGISLATIVE ARCHITECTURE

1. Native Title Act 1993 (Cth)

Codifies the Mabo principles and establishes:

- Recognition and protection of native title
- The National Native Title Tribunal
- Procedures for determination, compensation, and negotiation
- The “right to negotiate” for land use agreements

2. Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Provides emergency protection for significant cultural sites.

3. Racial Discrimination Act 1975 (Cth)

Implements the **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)** domestically.

3. Racial Discrimination Act 1975 (Cth)

Requires compatibility statements for legislation affecting Indigenous rights.

5. State and Territory Legislation

Including but not limited to:

- Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
- Traditional Owner Settlement Act 2010 (Vic)
- Torres Strait Islander Land Act 1991 (Qld)
- Aboriginal Land Act 1991 (Qld)

IV. KEY HIGH COURT AND FEDERAL COURT JURISPRUDENCE

1. Mabo (No 2) (1992)

Recognition of native title; rejection of terra nullius.

2. Wik Peoples v Queensland (1996) 187 CLR 1

Pastoral leases **do not necessarily extinguish** native title.

3. Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422

Clarified continuity of traditional laws and customs.

4. Love v Commonwealth; Thoms v Commonwealth (2020) 270 CLR 152

The High Court held that Aboriginal Australians **cannot be considered “aliens”** under s 51(xix) of the Constitution.

5. Coe v Commonwealth (1979 & 1993)

Although sovereignty claims were not upheld, the Court acknowledged the **complexity and unresolved nature** of Indigenous sovereignty.

6. Northern Territory v Griffiths (2019) 364 ALR 208 (“Timber Creek”)

Landmark compensation case recognising:

- Economic loss
- Cultural loss
- Spiritual connection to land

V. INTERNATIONAL LAW FRAMEWORK

Australia is bound by **seven core human rights treaties**, all applicable to First Nations peoples:

1. UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

Affirms rights to:

- Self-determination
- Land, territories, and resources
- Culture, language, and heritage
- Free, prior, and informed consent (FPIC)
- Participation in decision-making

2. International Covenant on Civil and Political Rights (ICCPR)

Protects:

- Equality before the law
- Cultural rights (Article 27)
- Political participation

3. International Covenant on Economic, Social and Cultural Rights (ICESCR)

Protects:

- Cultural practice
- Education
- Health
- Adequate standard of living

4. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

5. Convention on the Rights of the Child (CRC)

4. Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

Protects Indigenous children's cultural identity.

6. International Labour Organization Convention 169 (not ratified)

Although not ratified, it informs **customary international law** on Indigenous rights.

VI. INTERNATIONAL CRIMINAL LAW PRINCIPLES

International criminal law recognises that states may incur responsibility for:

- Systematic discrimination
- Forced assimilation
- Cultural destruction
- Unlawful removal of children
- Denial of identity
- Suppression of language and culture

These principles are relevant to historical policies such as:

- The Stolen Generations
- Protection Acts
- Forced removals
- Prohibitions on language and ceremony

VII. WHY ABORIGINAL AND TORRES STRAIT ISLANDER VOICES MUST BE HEARD

1. Legal Imperative

International law requires **free, prior, and informed consent** for decisions affecting Indigenous peoples.

2. Constitutional Legitimacy

A modern democratic state cannot claim legitimacy while excluding its First Peoples from structural decision-making.

3. Rectification of Historical Injustice

Truth-telling, treaty, and structural reform are essential to remedy:

- Dispossession

- Discrimination
- Cultural suppression
- Intergenerational trauma

4. National Enrichment

Indigenous knowledge systems contribute to:

- Environmental stewardship
- Fire management
- Water governance
- Biodiversity protection
- Cultural identity and national unity

5. Compliance with International Obligations

Failure to include Indigenous voices risks:

- UN scrutiny
- Treaty body criticism
- Reputational harm
- Breach of international commitments

VIII. STRATEGIC CONCLUSION

Aboriginal and Torres Strait Islander peoples are not merely communities within the state—they are **sovereign First Nations** whose rights pre-exist the Commonwealth and whose voices are essential to:

- Constitutional integrity
- Legal legitimacy
- International compliance
- National unity
- Moral justice

Their recognition is not an act of generosity but a **legal, ethical, and civilisational obligation**.