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Indigenous Rights in Australia: Between International Recognition and Domestic Limits

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Abstract in italiano

L'obiettivo del presente elaborato è l'analisi giuridica del rapporto fra il riconoscimento internazionale dei diritti degli aborigeni e degli isolani dello Stretto di Torres e la sua attuazione nell'ordinamento australiano.

Dal punto di vista del riconoscimento internazionale, l'Australia ha ratificato nel 1975 la Convenzione internazionale sull'eliminazione di ogni forma di discriminazione razziale (ICERD) e ha sottoscritto nel 2009 la Dichiarazione delle Nazioni Unite sui diritti dei popoli indigeni (UNDRIP). La domanda di ricerca riguarda la misura in cui tali strumenti per il riconoscimento dei diritti degli indigeni australiani hanno prodotto effetti nell'ordinamento australiano.

Al fine di fornire un'analisi chiara e completa, lo studio prende in esame il periodo tra il 1788, anno dell'inizio della colonizzazione britannica in Australia, e il 2026, con particolare attenzione agli sviluppi successivi alla decisione Mabo del 1992. Inoltre, fonti legislative e giurisprudenziali australiane, documenti di organi internazionali, report delle istituzioni australiane e documenti redatti dai rappresentanti delle popolazioni aborigene e degli isolani dello Stretto di Torres sono stati presi in considerazione al fine di fornire un quadro giuridico completo della situazione giuridica australiana.

A livello strutturale, il presente elaborato ricostruisce in primo luogo il quadro internazionale dei diritti umani, con particolare attenzione all'UNDRIP, le fondamenta giuridiche dell'esclusione dei popoli indigeni dall'ordinamento australiano in seguito alla colonizzazione britannica, il riconoscimento dei diritti fondiari a partire dalla decisione *Mabo* e le iniziative governative adottate a partire dagli anni Novanta, di natura giuridica diversa tra loro.

Da questo studio emerge che il riconoscimento dei diritti delle popolazioni indigene e degli isolani dello Stretto di Torres non è assente, tuttavia gli strumenti interni ossia leggi ordinarie, accordi politici possono essere modificati, sospesi o revocati. Gli organi internazionali sono inoltre intervenuti sulla situazione australiana in più occasioni, senza che ne derivassero conseguenze vincolanti per lo Stato. I dati esaminati mostrano persistenti disuguaglianze tra indigeni australiani e non indigeni australiani, che riguardano l'effettività delle forme di riconoscimento e non l'attuazione di una specifica norma internazionale. Il riconoscimento internazionale e quello interno operano su piani distinti: i diritti degli aborigeni e degli isolani dello Stretto di Torres sono riconosciuti su entrambi, ma il riconoscimento interno non è protetto rispetto alla legislazione successiva, e i dati socio-economici ne mostrano i limiti di effettività.

Parole chiave: diritti umani, popolazioni indigene, UNDRIP, Australia, diritti fondiari.

Abstract in English

The aim of this dissertation is the legal analysis of the relationship between the international recognition of the rights of Aboriginal and Torres Strait Islander peoples and its implementation within the Australian legal system.

As regards international recognition, Australia ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1975 and endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2009.

The research question concerns the extent to which these instruments for the recognition of the rights of Indigenous Australians have produced effects within the Australian legal system.

In order to provide a clear and comprehensive analysis, the study examines the period between 1788, the year in which British colonization of Australia began, and 2026, with particular attention to the developments following the Mabo decision of 1992. Australian legislative and judicial sources, documents of international bodies, reports of Australian institutions and documents drafted by representatives of Aboriginal and Torres Strait Islander peoples have also been taken into account, in order to provide a complete legal picture of the Australian situation.

In terms of structure, this dissertation first reconstructs the international human rights framework, with particular attention to the UNDRIP, followed by the legal foundations of the exclusion of Indigenous peoples from the Australian legal system after British colonization, the recognition of land rights from the Mabo decision onwards, and the government initiatives adopted since the 1990s, which are of different legal nature.

This study shows that the recognition of the rights of Aboriginal and Torres Strait Islander peoples is not absent; domestic instruments, namely ordinary legislation and political agreements, can however be amended, suspended or revoked. International bodies have moreover addressed the Australian situation on several occasions, without any binding consequences for the State.

The data examined show persistent inequalities between Indigenous and non-Indigenous Australians, which concern the effectiveness of the forms of recognition and not the implementation of a specific international norm. International and domestic recognition operate on different levels: the rights of Aboriginal and Torres Strait Islander peoples are recognised at both levels, but domestic recognition is not protected against subsequent legislation, and the socio-economic data show the limits of its effectiveness.

Keywords: human rights, Indigenous peoples, UNDRIP, Australia, land rights.

Resumen en español

El objetivo del presente trabajo es el análisis jurídico de la relación entre el reconocimiento internacional de los derechos de los aborígenes y de los isleños del Estrecho de Torres y su aplicación en el ordenamiento jurídico australiano.

Desde el punto de vista del reconocimiento internacional, Australia ratificó en 1975 la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial (ICERD) y suscribió en 2009 la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas (UNDRIP).

La pregunta de investigación se refiere a la medida en que dichos instrumentos para el reconocimiento de los derechos de los indígenas australianos han producido efectos en el ordenamiento jurídico australiano.

Con el fin de ofrecer un análisis claro y completo, el estudio examina el período comprendido entre 1788, año del inicio de la colonización británica en Australia, y 2026, prestando especial atención a los desarrollos posteriores a la decisión Mabo de 1992. Asimismo, se han tenido en cuenta fuentes legislativas y jurisprudenciales australianas, documentos de organismos internacionales, informes de las instituciones australianas y documentos redactados por los representantes de los pueblos aborígenes y de los isleños del Estrecho de Torres, con el fin de ofrecer un marco jurídico completo de la situación australiana.

En cuanto a la estructura, el presente trabajo reconstruye en primer lugar el marco internacional de los derechos humanos, con especial atención a la UNDRIP, seguido de los fundamentos jurídicos de la exclusión de los pueblos indígenas del ordenamiento australiano tras la colonización británica, el reconocimiento de los derechos territoriales a partir de la decisión Mabo y las iniciativas gubernamentales adoptadas desde los años noventa, de distinta naturaleza jurídica.

De este estudio se desprende que el reconocimiento de los derechos de los pueblos aborígenes y de los isleños del Estrecho de Torres no está ausente; sin embargo, los instrumentos internos, es decir, las leyes ordinarias y los acuerdos políticos, pueden ser modificados, suspendidos o revocados. Además, los organismos internacionales han intervenido en la situación australiana en varias ocasiones, sin que se derivaran consecuencias vinculantes para el Estado.

Los datos examinados muestran desigualdades persistentes entre australianos indígenas y no indígenas, que se refieren a la efectividad de las formas de reconocimiento y no a la aplicación de una norma internacional específica. El reconocimiento internacional y el interno operan en planos distintos: los derechos de los pueblos aborígenes y de los isleños del Estrecho de Torres están

reconocidos en ambos, pero el reconocimiento interno no está protegido frente a la legislación posterior, y los datos socioeconómicos muestran los límites de su efectividad.
Palabras clave: derechos humanos, pueblos indígenas, UNDRIP, Australia, derechos territoriales.

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Introduction

The relationship between international human rights standards and their implementation in domestic legal systems can be observed in the Australian case.

On 3 April 2009 the Australian Government endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[1]. In 2026, in the fourth cycle of the Universal Periodic Review (UPR), the Australian Government 'noted' recommendations regarding the development of a national plan for the implementation of the UNDRIP[2].

These elements raise the question of what legal effects the international recognition of Indigenous Australians' rights produces within the Australian legal system.

The analysis covers the period from 1788 to 2026, with a particular focus on the developments following the Mabo case of 1992.

The research question is to what extent international instruments for the recognition of Indigenous Australians' rights produce legal effects within the Australian legal system.

Australia serve as a relevant case study for this analysis due to two distinct factors. Firstly, Australia is the only CANZUS country that did not make any treaties with its Indigenous peoples, as a result, colonial sovereignty was never negotiated[3]. Secondly, the Australian Constitution has no Bill of Rights, "which prevents a legislature from passing laws that infringe basic human rights" (Australian Government Solicitor, Parliamentary Education Office, 2023)[4].

Among the international instruments used as a benchmark, the dissertation examines ICERD and UNDRIP. ICERD is a treaty ratified by Australia in 1975 and incorporated through the *Racial*

[1] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

[2] Australian Human Rights Commission, *Australian Human Rights Commission Disappointed with Australian Government's Response to Major Human Rights Review of Australia*, media release, July 2026, https://humanrights.gov.au/about-us/media-centre/media-releases/rights-and-freedoms/australian-human-rights-commission-disappointed-with-australian-governments-response-to-major-human-rights-review-of-australia (accessed 03/09/2026).

[3] Francesca Merlan, *Anthropology and Change over the 'Land Rights Era': Towards Treaties?*, in «The Australian Journal of Anthropology», 36, 2025, p. 20, https://doi.org/10.1111/taja.12541 (accessed 31/07/2026).

[4] Australian Government Solicitor, *Overview*, in *Australia's Constitution with Overview and Notes by the Australian Government Solicitor*, Parliamentary Education Office e Australian Government Solicitor, Canberra, 2023, p. viii.

Discrimination Act[5], whereas UNDRIP is a declaration endorsed in 2009 that does not automatically produce effects in domestic law[6].

The sectors of Australian law in which their implementation is examined are land rights and native title, non-discrimination, participation and self-determination, and the recognition of Indigenous institutions and law.

The dissertation does not examine the socio-economic inequality as synonymous with lack of legal implementation: socio-economic data are used only at the end, to measure the effectiveness of the recognition identified.

In addition, the present dissertation relies on a range of different sources. The research is based on the analysis of four types of sources: Australian statutory and judicial sources, documents from international bodies, Australian institutional reports and Indigenous Australians sources.

Among the Australian statutory and judicial sources, the most relevant are the *Racial Discrimination Act 1975*, the *Native Title Act 1993*, the *Northern Territory National Emergency Response Act 2007*, the Australian Constitution and the decision in *Mabo v Queensland (No 2)*. Regarding documents from international bodies, Concluding observations of the Committee on the Elimination of Racial Discrimination (CERD) and the Universal Periodic Review (UPR) documents have been taken into account for this analysis. As for the Australian Institutional Reports, the reports of the Human Rights and Equal Opportunity Commission, of the Australian Law Reform Commission, of the Productivity Commission and of the Referendum Council have been essential in this dissertation. Aboriginal and Torres Strait Islander peoples' voices have been incorporated through the Uluru Statement from the Heart, the Coalition of Peaks documents and the open letter published by the First Nations leaders after the 2023 Referendum. The use of Indigenous sources allows the perspective of Aboriginal and Torres Strait Islander peoples to be considered with Australian institutions.

As examined in section 1.1, Aboriginal and Torres Strait Islander peoples generally prefer this expression to the more general term *Indigenous Australians*[7]. This dissertation uses both, following the usage of the institutional and academic sources on which it relies.

The First Chapter reconstructs the international legal framework: the definition of Indigenous Australians from a cultural and a legal perspective, the UNDRIP and its endorsement by Australia,

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[5] Australian Human Rights Commission, The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), https://humanrights.gov.au/resource-hub/by-resource-type/guides/guides-race-discrimination/international-convention-elimination-all-forms-racial-discrimination

[6] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

[7] Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Australians: Aboriginal and Torres Strait Islander People*, AIATSIS, Canberra, 2020, https://aiatsis.gov.au/explore/indigenous-australians-aboriginal-and-torres-strait-islander-people (accessed 18/06/2026).

and establishes the parameters used in the rest of the analysis. The Second Chapter examines the legal foundations of the exclusion of Indigenous peoples from the Australian legal system, with particular focus on the doctrine of *terra nullius*, the protection, segregation and assimilation policies, the recognition of civil and political rights and the enduring legal consequences of the Colonization, which constitutes the starting point against which later developments are measured. The Third Chapter compares the domestic recognition of land rights, the Mabo case, the *Native Title Act 1993*, with the international standards, and examines its limitations. Lastly, the Fourth Chapter examines instruments of different legal nature: ATSIC as a statutory body, the Apology as a political act, the Northern Territory Intervention as emergency legislation, the National Agreement on Closing the Gap as a policy agreement, the Uluru Statement from the Heart as an Indigenous declaration and the 2023 Referendum as a constitutional proposal. Moreover, this chapter assesses the relationship of these instruments with the parameters of participation, self-determination, recognition and non-discrimination; the socio-economic data of the sixth Annual Data Compilation Report are examined separately, as a measure of effectiveness.

Taking international instruments, Australian legislation and case law, institutional reports and Indigenous sources into account, this dissertation aims to discover whether the recognition of Indigenous rights at the international level has produced, corresponding legal effects within the Australian legal system.

1 International Human Rights Framework

1.1 Indigenous Australians: Definition and Legal identity

Before examining the international human rights framework applicable to Indigenous Australians, it is important to define this population and examine how Indigenous Australians are legally recognised within the Australian legal system.

1.1.1 Definition of "Indigenous Australians" from a Cultural Perspective

From a cultural point of view, it is essential to refer to the *Australian Institute of Aboriginal and Torres Strait Islander Studies* (AIATSIS), which is "an Indigenous-led, national institute that celebrates, educates and inspires people from all walks of life to connect with the knowledge, heritage and cultures of Australia's First Peoples" (National Capital Authority, n.d.)[8].

The AIATSIS focuses on different expressions that are used to identify this population, which are Aboriginal, Torres Strait Islander peoples, and Indigenous Australians. Regarding the term "Indigenous Australians", it is used to "encompass both Aboriginal and Torres Strait Islander peoples", however these peoples consider it too generic, thus they prefer to be defined as Aboriginal and Torres Strait Islander peoples, because they reflect their cultural environment (AIATSIS, 2020)[9]. Indeed, Aboriginal identities are linked to their language groups and traditional Country, for instance "the Gunditjamara people are the traditional custodians of western Victoria, the Gadigal people of the Eora nation are from Sydney" (Ibid)[10]. On the other hand, even if Torres Strait Islanders were born and raised in Australia, they still identify themselves with the name of their home island, for instance "Saibai man or woman is from Saibai, or a Meriam person is from Mer" (Ibid)[11].

[8] National Capital Authority, *Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)*, NCA, Canberra, https://www.nca.gov.au/attractions/australian-institute-aboriginal-and-torres-strait-islander-studies-aiatsis (accessed 19/06/2026).

[9] Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Australians: Aboriginal and Torres Strait Islander People*, AIATSIS, Canberra, 2020, https://aiatsis.gov.au/explore/indigenous-australians-aboriginal-and-torres-strait-islander-people (accessed 18/06/2026).

[10] Ibid.

[11] Ibid.

1.1.2 Definition of "Indigenous Australians" from a Legal Perspective

In order to analyse the term from a legal perspective, it is necessary to refer to the Australian Law Reform Commission (ALRC), which is "the Australian Government's independent advisory body on law reform" (ALRC, n.d.a)[12].

In particular, the section on legal definitions of Aboriginality examines how the legal understanding of Aboriginality has been interpreted by Australian judges and courts (ALRC, 2010)[13].

First of all, the legal historian John McCorquodale reported that, since the British settlement, 67 different definitions were used to determine who is an Aboriginal person (Ivi: para 36.11)[14].

The ALRC observed that previous definitions, examined in its report *The Recognition of Aboriginal Customary Laws* (1986)[15] , relied on descent and that criteria based on "quantum of blood" were commonly applied (ALRC, 2010: para 36.12)[16].

Afterwards, the Commonwealth Department of Aboriginal Affairs proposed a three-part definition that remains administratively influential today:

An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives (Ivi: para 36.14)[17].

This definition goes beyond mere biological descent, incorporating a social dimension of identity, because to be considered Aboriginal or Torres Strait Islander, the individual has to be accepted by the community. For this reason, being part of the community is not just related to inheritance, but also being acknowledged by the group. In this sense, Indigenous identity is understood as a collective and relational concept, rooted in social bonds and communal acceptance rather than in descent alone.

However, in *Attorney-General (Cth) v Queensland,* the descent factor was considered sufficient to determine the Aboriginality in the inquiry "into the deaths in custody of Aboriginal and Torres Strait

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[12] Australian Law Reform Commission, *About*, ALRC, Sydney, https://www.alrc.gov.au/about/ (accessed 19/06/2026).

[13] Australian Law Reform Commission, *Legal Definitions of Aboriginality*, in *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96, ALRC, Sydney, 2010, https://www.alrc.gov.au/publication/essentially-yours-the-protection-of-human-genetic-information-in-australia-alrc-report-96/36-kinship-and-identity/legal-definitions-of-aboriginality/ (accessed 18/06/2026).

[14] Ivi, para 36.11.

[15] *The Recognition of Aboriginal Customary Laws (1986) is* a report released by ALRC which examines the interaction between the British Colonization and the customary laws of Aboriginal People in Australia.

[16] Australian Law Reform Commission, *Legal Definitions of Aboriginality*, in *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96, ALRC, Sydney, 2010, para. 36.12 https://www.alrc.gov.au/publication/essentially-yours-the-protection-of-human-genetic-information-in-australia-alrc-report-96/36-kinship-and-identity/legal-definitions-of-aboriginality/ (accessed 18/06/2026).

[17] Department of Aboriginal Affairs, *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders*, Commonwealth of Australia, Canberra, 1981, as cited in J. Gardiner-Garden, *The Definition of Aboriginality*, Research Note 18, 2000-01, Parliament of Australia, 2000, p. 2, as cited in Australian Law Reform Commission, *Legal Definitions of Aboriginality*, cit., para. 36.14.

Islanders" (ALRC, 2010: para 36.20)[18]. In that case, the Queensland government imposed the non-examination of the body of the 17-year-old boy, because he had never identified as Aboriginal and he had never been recognized by the community even if he had Aboriginal descent (Ibid)[19].

Despite the three-part definition, which states that social recognition is a fundamental element for being considered Aboriginal, the Federal Court decided that in light of particular purposes, descent is sufficient proof to establish Aboriginality (Ivi: para 36.21)[20]. Furthermore, Spender and Jenkinson JJ argued that the three-part definition did not actually represent the context, and that descent is enough to determine Aboriginality (Ibid)[21]. Moreover, the judges believed that social recognition should be considered in cases where the Aboriginal descent is uncertain (Ivi: para 36.22)[22].

Drummond J observed that the three-part definition does not "contain an exhaustive description of the meaning in ordinary speech of the term Aboriginal" (Ivi: para 36.24)[23]. Indeed, he believed that "a small degree of Aboriginality descent" combined with social recognition from the aboriginal community is sufficient to determine that a person is Aboriginal. Alternatively, if the degree of descent is considerable, it may be satisfactory as well (Ibid)[24].

In *Shaw v Wolf*, the Federal Court examined the concept of Aboriginality again for the purposes of *Aboriginal and Torres Strait Islander Commission Act 1989*[25] (Cth) (ATSIC Act) (ALRC: para 36.25)[26]. Merkel J declared that in the absence of proof of Aboriginal descent, a "self-identification and communal identification can be probative of descent" (Ibid)[27]. Merkel J justified this position considering the lack of documents and the hesitation of Aboriginal families in admitting their descent because of racism (Ibid)[28]. Moreover, His Honour declared that, given the difficulties in determining Aboriginal descent, it is not possible to give "any single or satisfactory definition" (Ivi: para 36.26)[29].

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[18] Australian Law Reform Commission, *Legal Definitions of Aboriginality*, in *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96, ALRC, Sydney, 2010, para 36.20 https://www.alrc.gov.au/publication/essentially-yours-the-protection-of-human-genetic-information-in-australia-alrc-report-96/36-kinship-and-identity/legal-definitions-of-aboriginality/ (accessed 18/06/2026).

[19] Ibid.

[20] Ivi, para 36.21.

[21] Ibid.

[22] Ivi, para 36.22.

[23] Ivi, para 36.24.

[24] Ibid.

[25] The *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) established ATSIC under the Hawke Government, a body whose purpose was to involve Aboriginal and Torres Strait Islander people in the implementation of programs concerning them. ATSIC was abolished in 2005 by the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth). On the abolition of ATSIC see section 4.1.1.

[26] Australian Law Reform Commission, *Legal Definitions of Aboriginality*, in *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96, ALRC, Sydney, 2010, para 36.25https://www.alrc.gov.au/publication/essentially-yours-the-protection-of-human-genetic-information-in-australia-alrc-report-96/36-kinship-and-identity/legal-definitions-of-aboriginality/ (accessed 18/06/2026).

[27] Ibid.

[28] Ibid.

[29] Ivi, para 36.26.

In conclusion, since the issue involved "an important aspect of Aboriginal self-determination, the decision has to be made by tribunals that are representative of Aboriginal peoples" (Ibid)[30].

In summary, the Commonwealth government appears to apply the three-part test of descent, self-identification and community recognition for determining eligibility for certain programs and benefits (Ivi: para 36.28)[31]. The courts, in interpreting statutory definitions in federal legislation, have emphasized the importance of descent, while recognizing that self-identification and community recognition may be relevant to establishing descent for the purposes of specific legislation (Ibid)[32].

From a legal perspective, the Australian legal system does not provide a universal definition of Aboriginal or Torres Strait Islander person. This uncertainty is determined by the 67 different definitions for Aboriginal peoples and by different approaches implemented by the Commonwealth and the Courts. Indeed, the Commonwealth takes into consideration the three-part definition, however the Courts rely primarily on the descent factor and consider the social recognition factor in case of special purposes. However, the Courts do not define these "special purposes", thus it is not clear when they decide to implement the three-part definition or just the descent element[33].

From a cultural point of view, as previously argued by the AIATSIS, Aboriginal and Torres Straits Islander peoples prefer to be defined with these names and the term "Indigenous Australians" is used to refer to both of them, but the populations involved consider it too generic. Even if "Indigenous Australians" can cause offence, the Australian Government Style Manual states that there may be times when it is impossible to avoid the term due to the fact that "it can come up in discussions with government organizations, in the names of some organizations or in grant applications" (Australian Government, n.d.)[34].

The materials discussed above indicate that the legal and administrative identification of Aboriginal and Torres Strait Islander peoples is context-dependent, while cultural identification may involve more specific relationships with community, Country, language and ancestry.

[30] Ibid.
[31] Ivi, para 36.28.
[32] Ibid.
[33] [3]Australian Law Reform Commission, *Legal Definitions of Aboriginality*, cit., paras 36.11-36.28.
[34] Australian Government, *Aboriginal and Torres Strait Islander Peoples*, in *Australian Government Style Manual*, https://www.stylemanual.gov.au/accessible-and-inclusive-content/inclusive-language/aboriginal-and-torres-strait-islander-peoples (accessed 20/06/2026).

1.2 The United Nations Declaration on the Rights of Indigenous Peoples

1.2.1 Historical Background and Origins

On 13 September 2007 the General Assembly of the United Nations[35] adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[36].

As outlined in the *Historical Overview* section of the United Nations Division for Inclusive Social Development, in order to understand the historical path that led to the adoption of the Declaration, it is important to note that even if it was approved in 2007, the Economic and Social Council (ECOSOC) had been working on it since 1982 and the Council established the Working Group on Indigenous Rights "with the mandate to develop a set of minimum standards that would protect indigenous peoples" (United Nations, n.d-a.)[37]. The Working Group on Indigenous Rights was established on the basis of the study of Jose R. Martinez Cobo, which focused on discrimination, marginalization and exploitation faced by Indigenous peoples (Ibid)[38]. After submitting the first draft copy, it was approved only in 1994, because many States had concerns about some articles and principles, for instance the ones regarding self-determination (Ibid)[39]. This led to revision processes until "29th June 2006, when the United Nations Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples" (Ibid)[40]. Subsequently, on 28 December of the same year, the Third Committee initially moved to adopt the Declaration quickly through a Peru-led resolution, but an amendment proposed by Namibia and other African countries postponed the decision to allow further consultations, while still committing to conclude consideration before the end of the Assembly's sixty-first session (Ibid)[41].

Finally, on 13 September 2007 144 states voted in favour, 4 against of the UNDRIP and there were 11 abstentions. Among the against votes, the countries involved were Australia, Canada, New Zealand and the United States (Ibid)[42].

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[35] The United Nations General Assembly (UNGA) is the main policy-making organ of the Organization. It was founded on 24 October 1945 and currently has 193 member states. See United Nations, *General Assembly*, https://www.un.org/en/ga/ (accessed 07/09/2026).

[36] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, United Nations, New York, 2018, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (accessed 23/06/2026).

[37] United Nations, Department of Economic and Social Affairs, *Historical Overview*, https://social.desa.un.org/issues/indigenous-peoples/historical-overview (accessed 25/06/2026).

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Ibid.

1.2.2 Structure and Core Principles

According to the Australian Human Rights Commission, The UNDRIP consists of 46 articles that can be categorized into four key principles, such as self-determination, participation in decision-making, respect for and protection of culture, equality and non-discrimination" (AHRC, 2012c)[43].

Among the articles of the UNDRIP and considering this academic paper, it is important to rely on the ones related to self-determination and rights to the land.

Regarding self-determination, the most relevant articles are:

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (United Nations, 2007:8) [44].

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (*Ibid*)[45].

According to the Cambridge dictionary, self-determination is "the ability or power to make decisions for yourself, especially the power of a nation to decide how it will be governed"(Cambridge Dictionary, n.d.)[46]. The recognition of self-determination has significant implications for the relationship between Indigenous peoples and States, particularly with regard to participation, autonomy and governance.

Another significant aspect of the Declaration is the articles related to the right to the land, which is expressed in Article 26:

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

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[43] Australian Human Rights Commission, *UN Declaration on the Rights of Indigenous Peoples*, AHRC, Sydney, https://humanrights.gov.au/resource-hub/aboriginal-and-torres-strait-islander-peoples/un-declaration-rights-indigenous-people (accessed 07/09/2026).

[44] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 3, p. 8.

[45] Ibid.

[46] Cambridge University Press, *self-determination*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/self-determination (accessed 27/06/2026).

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. (United Nations, 2007:19)[47]

Article 26 establishes an international normative framework concerning Indigenous peoples' rights to lands, territories and resources traditionally owned, occupied, used or otherwise acquired. It does not, however, automatically provide for the restitution of all lands historically lost through colonisation. Article 26(3) requires that such recognition be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned (Ibid)[48]. The provision therefore establishes a framework for the recognition and protection of Indigenous peoples' relationships with lands, territories and resources, while leaving the precise forms of legal recognition and redress to be determined within the relevant legal and institutional frameworks.

1.2.3 The Legal Status of UNDRIP as Soft Law

Before the adoption of the UNDRIP, there were other two other international instruments focused on Indigenous people's rights, specifically the International Labour Organisation Conventions No 107 (ILO No 107)[49] and No 169 (ILO N 169)[50], which are analysed in the article *The role of soft law in the international legal system: the case of the United Nations declaration on the rights of indigenous peoples* by Mauro Barelli. However, these Conventions had limited effect, because the International Labour Organisation Convention No 107 (ILO No 107) was closed to further ratification when the second one, the No 169 (ILO N 169), was released in 1989, but "it has been ratified by only 20 States, leaving the majority of indigenous peoples unable to rely on its legal framework" (Barelli, 2009:958)[51]. Moreover, ILO No 169 did not address to other fundamental rights for Indigenous peoples, such as self-determination (Ibid)[52].

Other legal instrument were also relevant, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); however they "are not devised specifically to address the historically rooted grievances of indigenous peoples" as stated in the article *Indigenous Peoples in International Law*

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[47] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 26, p. 19.
[48] Ibid.
[49] International Labour Organization, *Indigenous and Tribal Populations Convention*, C107, 26 June 1957. It aims to integrate Indigenous and tribal populations into the broader national society,
[50] International Labour Organization, *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989. It recognizes Indigenous and tribal peoples' right to self-determination, land, and cultural identity.
[51] Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, International & Comparative Law Quarterly, vol. 58, n. 4, 2009, pp. 957–983, p.958 https://www.cambridge.org/core/product/identifier/S0020589309001559/type/journal_article (accessed 24/06/2026).
[52] Ibid.

(Anaya, 2023)[53]. In fact, also these , "despite the important contribution offered by the Human Rights Committee (HRC) and Committee on the Elimination of Racial Discrimination (CERD)", were not designed to protect Indigenous peoples specifically, otherwise they were addressed to the discriminated populations in general (Barelli, 2009:959)[54].

Considering these previous Conventions, a "Declaration is expected to fill a crucial gap, providing universal and comprehensive protection to the rights of the world's indigenous peoples" (Ibid)[55].

UNDRIP is generally characterised as a soft-law instrument rather than a legally binding treaty. Its status does not mean that the Declaration is devoid of legal significance; rather, it means that its provisions do not, by virtue of the General Assembly resolution alone, impose treaty-based obligations on States. In more specific terms, as stated in the official UN website the section *Functions and powers of the General Assembly* outlines:

According to the Charter of the United Nations, the General Assembly may:

Initiate studies and make recommendations to promote international political cooperation, the development and codification of international law, the realization of human rights and fundamental freedoms, and international collaboration in the economic, social, humanitarian, cultural, educational and health fields (United Nations, n.d-b.)[56]

The functions of the General Assembly indicate that this organ can only "make recommendations" (Ibid)[57], which means that it does not have the power to impose legally binding obligations on States. For this reason, the absence of enforcement mechanisms is not specified to the UNDRIP itself but relates to the functions and the powers of the General Assembly.

Considering its nature, the Declaration cannot compel States to enact legislation but can only recommend a course of action. As a result, States can endorse the Declaration, but no sanctions follow if they fail to implement it.

1.2.4 The CANZUS States and the Politics of Endorsement

As argued before, four States, Australia, Canada, New Zealand and the United States, voted against the UNDRIP in 2007. In order to understand their position, the article *Settler–State Political Theory,*

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[53] S. James Anaya, 'Title Pages', in *Indigenous Peoples in International Law*, 2ª ed., New York, Oxford University Press, 2004 (online edn, Oxford Academic, 31 Oct. 2023), https://doi.org/10.1093/oso/9780195173499.001.0001 (accessed 24/06/2026).

[54] Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, International & Comparative Law Quarterly, vol. 58, n. 4, 2009, pp. 957–983, p.959 https://www.cambridge.org/core/product/identifier/S0020589309001559/type/journal_article (accessed 24/06/2026).

[55] Ibid.

[56] United Nationsb, *Functions and Powers of the General Assembly*, General Assembly of the United Nations, n.d., https://www.un.org/en/ga/about/background.shtml (accessed 25/06/2026).

[57] Ibid.

'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples is a relevant reference. First of all, the States mentioned are defined CANZUS, because they were "actively involved in the negotiation of the draft text of the declaration" (Gover, 2015:346)[58]. CANZUS are Western settler States, which means that they are States where colonizers decided to settle permanently and became the majority population, establishing their own government and their own law. This means that these States are not governed by the original population but by the descendants of the colonizers.

This is what Gover means when he speaks of a "defining constitutive flaw": the State exists and governs over a territory that included peoples who never accepted that sovereignty (Ibid)[59]. Considering Article 3 of UNDRIP on self-determination, Indigenous peoples are entitled to implement self-government.

The four States subsequently changed their positions: "Australia changed its position on 3 April 2009, followed by New Zealand on 20 April 2010, Canada on 12 November 2010, and the United States on 16 December 2010" (Ivi: n 3)[60].

The non-binding nature of the Declaration, combined with the interpretative statements expressed by Australia and the other CANZUS states, raises early doubts about how effectively these rights would be translated into domestic law and practice.

[58] Kirsty Gover, *Settler–State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples*, European Journal of International Law, vol. 26, n. 2, 2015, pp. 345–373, p. 346 https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chv019 (accessed 27/06/2026).
[59] Ibid.
[60] Ivi, n 3.

1.3 Australia's endorsement of UNDRIP

1.3.1 Australia's Reversal of Position: From Opposition to Endorsement

As stated in the official speech of Jenny Macklin, who was the Minister for Families, Housing, Community Services and Indigenous Affairs, Australia endorsed the UNDRIP Declaration on the 3 April 2009.

Analysing Macklin's speech, it is important to focus on the following words:

On 17 September 2007, 143 nations voted in support of the Declaration. Australia was one of four countries that voted against the Declaration. Today, Australia changes its position. Today, Australia gives our support to the Declaration. We do this in the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians and building trust. (Macklin, 2009)[61]

Macklin announced Australia's change of position, declaring that Australia would support the Declaration with the aim of rebuilding connections with Indigenous Australians. Moreover, she mentioned that an Aboriginal woman contacted her because of the decision of Australia to endorse the UNDRIP and "she said that Australia's support recognises our common humanity" (Ibid)[62]. In fact, Macklin affirmed that the Endorsement would close the gap between Indigenous and non-Indigenous Australia, because it is based on important principles, such as "equality, partnership, good faith and "mutual benefit" (Ibid)[63].

However, after having praised the UNDRIP declaration for its beneficial merits and its contribution to eliminating discrimination, Macklin subsequently argued that:

Today Australia takes another important step to make sure that the flawed policies of the past will never be re-visited. The Declaration is historic and aspirational. While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to (Ibid)[64].

Macklin declared that the Endorsement is a step forward compared to previous human rights policies and thanks to Australia's decision, the flawed policies of the past would never be repeated. Thereafter, she stated that the Declaration is "not binding and does not affect existing Australian law" (Ibid)[65].

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[61] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Ibid.

Although UNDRIP was adopted after decades of negotiation, States can decide whether or not to implement it within their own domestic legal systems. Australia endorsed the Declaration two years after its adoption and Macklin stated that it does not affect existing Australian law system (Ibid)[66].

1.3.2 The Legal Status of UNDRIP in Australia

From a legal point of view, as stated before, the UNDRIP is a soft-law instrument and does not impose treaty-based obligations on States.

In the article *The Relationship Between Treaties and Domestic Law,* in the section *Department of Foreign Affairs and Trade* in the Australian Government website, it is reported that "a treaty to be transformed into domestic law" needs "an act of Parliament", which means that to become law, treaties need the approval of the Parliament (Australian Government Department of Foreign Affairs and Trade 2003)[67]. However, even if the article mentions treaties and not declarations, this is a relevant point for the analysis. In fact, with respect to declarations, treaties are legally binding documents (Ibid)[68].

However, even if treaties have a legal nature, they need to be approved by the Parliament to be considered law. Considering that declarations are not legally binding documents, there is no legal obligation for the Australian Parliament to incorporate them into domestic legislation. Consequently, the UNDRIP does not produce direct effects within the Australian domestic legal order.

Moreover, Megan Davis in her article *To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On* defined the language used by UNDRIP as "aspirational or persuasive" to "provide a framework to guide states in their relationship with Indigenous peoples" (Davis, 2012: 36)[69]. The adjectives refer to the legal nature of UNDRIP, which conveys important principles for Indigenous peoples, while its practical legal impact is limited because it does not create directly enforceable rights or obligations.

Furthermore, after the 2009 Endorsement, the Australian Government did not enact any legislation to implement the Declaration. The most significant attempt to create constitutional recognition and political participation of Indigenous peoples came in 2023, through the referendum proposing the

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[66] Ibid.

[67] Australian Government Department of Foreign Affairs and Trade (DFAT), *The Relationship Between Treaties and Domestic Law*, 6 November 2003, https://www.dfat.gov.au/news/speeches/Pages/the-relationship-between-treaties-and-domestic-law (accessed 01/07/2026).

[68] Ibid.

[69] Megan Davis, *To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On*, Australian International Law Journal, vol. 19, 2012, pp. 17–48, p.36 https://search.informit.org/doi/epdf/10.3316/informit.329563918658659 (accessed 02/07/2026).

establishment of an Aboriginal and Torres Strait Islander Voice to Parliament, inspired by the Uluru Statement from the Heart. However, it was rejected and it will be analysed in Chapter 4[70].

The endorsement was not accompanied by implementing legislation within the Australian legal system[71]. For this reason, it is relevant to mention that there is a gap between International and Domestic Law. From an international point of view, a Declaration to protect Indigenous rights exists, however its nature is not legally binding. Two years later, Australia endorsed it, however it was not incorporated in the Australian Legal System.

The historical foundations of this situation will be further analysed in Chapter 2, with particular reference to the doctrine of *terra nullius* and its enduring legal and political implications

[70] Parliamentary Education Office, *Aboriginal and Torres Strait Islander Voice Referendum*, Parliament of Australia, Canberra, https://peo.gov.au/understand-our-parliament/history-of-parliament/history-milestones/australian-parliament-history-timeline/events/aboriginal-and-torres-strait-islander-voice-referendum

[71] Megan Davis, *To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On*, Australian International Law Journal, vol. 19, 2012, pp. 17–48, p.36 https://search.informit.org/doi/epdf/10.3316/informit.329563918658659 (accessed 02/07/2026).

1.4 Parameters of the analysis

The parameters that will be used in the following chapters are non-discrimination, land and native title rights, participation and self-determination, recognition of identity and indigenous customary law.

The non-discrimination parameter will be used in order to assess the 1998 amendments to the Native Title Act and the CERD decision of 1999 in the third chapter[72] and the Northern Territory Intervention in the fourth chapter[73]. Land and native title rights are the core of the third chapter, which examines the Mabo case[74] and the Native Title Act 1993. Participation and self-determination parameter will be analysed in the fourth chapter, regarding ATSIC[75], the National Agreement on Closing the Gap[76], the Uluru Statement[77] and the 2023 Referendum[78]. Lastly, the recognition of identity and indigenous customary law will be examined in the following chapter through *R v Murrell and Bummaree* case[79], in *R v Bonjon* case[80] and in the third chapter through Section 223 of the *Native Title Act 1993*[81].

The distinction between ICERD[82] and UNDRIP[83] is one of the cornerstones of this dissertation.

The first one is a treaty ratified by Australia in 1975 incorporated in the domestic law through the Racial Discrimination Act, for this reason, regarding the non-discrimination parameter, the question is whether the internal protection is stable. Instead, the second is a Declaration, that does not automatically produce legal effects in the Australian legal system. Regarding the other three

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[72] Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, in «Melbourne University Law Review», 23, n. 2, 1999, p. 372

[73] Ben Schokman e Alison Vivian, *The Northern Territory Intervention and the Fabrication of 'Special Measures'*, in «Australian Indigenous Law Review», 13, n. 1, 2009, p. 78.

[74] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[75] Parliament of Australia, *The End of ATSIC and the Future Administration of Indigenous Affairs*, Parliamentary Library, Canberra, 2004, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/prspub/FXED6%22

[76] Commonwealth of Australia, *National Agreement on Closing the Gap*, 2020, https://www.closingthegap.gov.au/national-agreement

[77] *Uluru Statement from the Heart*, 2017, https://ulurustatement.org/the-statement/view-the-statement/.

[78] Parliamentary Education Office, *Aboriginal and Torres Strait Islander Voice Referendum*, Parliament of Australia, Canberra, https://peo.gov.au/understand-our-parliament/history-of-parliament/history-milestones/australian-parliament-history-timeline/events/aboriginal-and-torres-strait-islander-voice-referendum.

[79] *R v Murrell and Bummaree* [1836] NSWSupC 35, Supreme Court of New South Wales, https://www.austlii.edu.au/cgi-bin/sinodisp/au/other/NSWSupC/1836/35.html (accessed 15/07/2026).

[80] *R v Bonjon* [1841] NSWSupC 92, Supreme Court of New South Wales, https://www.austlii.edu.au/cgi-bin/sinodisp/au/other/NSWSupC/1841/92.html (accessed 19/07/2026).

[81] *Native Title Act 1993* (Cth), s 223, https://www.legislation.gov.au/C2004A04665/latest (accessed 06/08/2026).

[82] Australian Human Rights Commission, The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), https://humanrights.gov.au/resource-hub/by-resource-type/guides/guides-race-discrimination/international-convention-elimination-all-forms-racial-discrimination

[83] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

parameters, since the UNDRIP was not incorporated into the domestic law, the question is whether the Australian law provides equivalent recognition on its own.

These parameters measure the juridical recognition, the socio-economic data, that will be analysed in chapter 4.4, will measure the effectiveness.

2 From Colonization to Legal Exclusion: The Foundations of Inequality

2.1 The doctrine of *terra nullius* and British sovereignty

2.1.1 The doctrine of terra nullius

Before examining the historical context that led to the British colonization in Australia, it is necessary to explain the concept of *terra nullius*, which is at the base of Australia's foundation. To understand how this concept was applied, it must be noted that the British colonization operated at two distinct levels: international level, which governs the acquisition of sovereignty (who holds governmental authority over a territory), and the common law, which regulates land ownership and property rights (who physically possesses the land).

According to the *Legal Information Institute* at Cornell Law School, *terra nullius* is "a term used in international law to describe a space that can be inhabited but that does not belong to a state, meaning that the land is not owned by anyone" (LII / Legal Information Institute, n.d.)[84]. In fact, when a territory is declared a *terra nullius*, the occupation by a State of that land is legitimized at an international level, because the territory is considered deserted and devoid of a recognizable system of governance (Ibid)[85]. Considering the *Legal Information Institute* at Cornell Law School, the doctrine of discovery "refers to a principle in public international law under which, when a nation discovers land, it directly acquires rights on that land" (LII / Legal Information Institute, n.d-b)[86]. Taking this principle into account is very relevant, because the doctrine of discovery has justified Europeans in acquiring sovereignty rights on undiscovered lands, even though those lands were in fact inhabited, as native people had lived there (Ibid)[87]. In fact, it is possible to define the doctrine of discovery as a tool to legitimize the European colonization (Ibid)[88].

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[84] Legal Information Institute, *Terra Nullius*, Cornell Law School, https://www.law.cornell.edu/wex/terra_nullius (accessed 08/07/2026).
[85] Ibid.
[86] Legal Information Institute, *Doctrine of Discovery*, Cornell Law School, https://www.law.cornell.edu/wex/doctrine_of_discovery (accessed 08/07/2026).
[87] Ibid.
[88] Ibid.

As previously stated, these legal concepts operate in two distinct spheres: the international level and the common law. In the words of *Legal Information Institute* at Cornell Law School, international law "is a set of rules and principles governing the relations and conduct of sovereign states" (LII / Legal Information Institute, n.d.-c)[89]. In the context of the British colonization of Australia, this level of law was used to rely on the justification of the acquisition of sovereignty over the Australian land, as affirmed by Ulla Secher in her article *'The High Court and Recognition of Native Title: Distinguishing Between the Doctrines of Terra Nullius and Desert and Uncultivated'* (Secher, 2007)[90]. As outlined by the *Legal Information Institute* at Cornell Law School, the common law is a system of "law developed through judicial decisions rather than enacted statutes" (LII / Legal Information Institute, n.d-d)[91]. In the light of the British Colonization in Australia, the settlers implemented this law in order to gain rights on private land ownership after having established the sovereignty expressed at the international level (Secher, 2007)[92]. In other words, the common law establishes who physically possessed the land after having determined which State held authority over the territory.

In addition, the author confirms that these two doctrines operate at two distinct levels and affirms that "the doctrine of terra nullius is a well-established concept of international law, it is not a concept of the common law". This means that the *terra nullius* principle is related to international law, which is the acquisition of sovereignty, and it is not related to the common law, determines property rights (Ibid)[93].

Even if the doctrines of international law and common law were originally separated, in order to justify the colonization, the British settlers conflated these two concepts to apply the doctrine of *terra nullius* (Ibid)[94]. In fact, the British declared the state of *terra nullius* in the field of the international law and used this as a bridge to claim that the land was also "desert and uncultivated" in the field of the common law (Ibid)[95]. In this way, the British justified the colonization in Australia, taking both sovereignty and property. However, Australia was not a deserted land, Aboriginal and Torres Strait Islander peoples lived there since millennia, possessing their own traditions, distinct languages, and

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[89] Legal Information Institute, *International Law*, Cornell Law School, https://www.law.cornell.edu/wex/international_law (accessed 08/07/2026)

[90] Ulla Secher, *The High Court and Recognition of Native Title: Distinguishing Between the Doctrines of Terra Nullius and 'Desert and Uncultivated'*, in «University of Western Sydney Law Review», 11, 2007, https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/UWSLawRw/2007/1.html (accessed 06/08/2026).

[91] Legal Information Institute, *Common Law*, Cornell Law School, https://www.law.cornell.edu/wex/common_law (accessed 08/07/2026).

[92] Ulla Secher, *The High Court and Recognition of Native Title: Distinguishing Between the Doctrines of Terra Nullius and 'Desert and Uncultivated'*, in «University of Western Sydney Law Review», 11, 2007, https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/UWSLawRw/2007/1.html (accessed 06/08/2026).

[93] Ibid.

[94] Ibid.

[95] Ibid.

customary legal systems as affirmed Asafa Jalata in his article *The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians* (Jalata, 2013:1)[96].

The legal consequence of the application of *terra nullius* was that Indigenous legal system would be replaced by the British Common Law; this concept will be further discussed in this chapter.

2.1.2 The British Colonization in Australia

In order to deeply understand the context of the British Colonization in Australia, it is fundamental to take into account Asafa Jalata article, who first describes Indigenous Australians communities before colonization, then analyses how the doctrine of *terra nullius* was used to justify the dispossession of Indigenous lands (Ibid)[97].

Firstly, "the indigenous Australians occupied the continent for more than 65,000 years before the arrival of English colonial settlers in 1788" (Ibid)[98] Indigenous Australians were oral communities, which had always "kept their cultural heritage alive by passing their knowledge, arts, rituals and performances from one generation to another, speaking and teaching languages, protecting cultural materials, sacred and significant sites, and objects" (Ivi:2)[99]. However, the cultural heritage that Indigenous Australians had kept for more than 65,000 years was profoundly affected by the arrival of the Europeans from the 17th century.

In fact, from 1606 to 1770, 54 European ships arrived in the Australian continent, among them the first settler was "Willem Janszoon, a Dutchman, with a ship called the Duyfken" in 1606, later, commissioned by Anthony Van Diemen, Governor-General of the Dutch East Indies, "in November 1642 Abel Tasman reached the west coast of Tasmania with two ships known as Heemskerck and Zeehaen" (Ivi: 5)[100]. Subsequently, in 1644 Tasman also explored the coast from Cape York to North West Cape (Ibid)[101].

Afterwards, the first British man that set foot in Australia was Lieutenant James Cook on the 22nd of August 1770. Captain Cook was commissioned by King George III "to claim the possession of the east coast of Australia that was later named New South Wales" (Ibid)[102]. Eighteen years later, as described on the website of the Parliament of New South Wales, the British colony of New South

[96] Asafa Jalata, *The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians*, in «SAGE Open», 3, n. 3, 2013, p.1, https://doi.org/10.1177/2158244013499143 (accessed 11/07/2026).
[97] Ibid.
[98] Ibid.
[99] Ivi, p.2.
[100] Ivi, p.5.
[101] Ibid.
[102] Ibid.

Wales was transformed as a penal colony, in order to respond to the necessity of the British to allocate their convicts after the American War of Independence[103] (Parliament of New South Wales, n.d.)[104]. In particular, the first site decided as a penal colony was Botany Bay; this choice was also supported by "Sir Joseph Banks, the influential Botanist who had accompanied Cook on the voyage" (Ibid)[105]. In January 1788, the "First Fleet" consisting of 9 ships, "led by Governor Arthur Phillip" arrived at Botany Bay (Ibid)[106]. However, the area was not adapted for settlement; for this reason, they moved to Sydney Cove in Port Jackson (Sydney Harbour) on the 26th of January, which date is celebrated as Australian Day (Ibid)[107].

From 1788 to 1792, Arthur Phillip was appointed as Governor of New South Wales and later "was succeeded as Governor by Governors John Hunter, 1795-1800, Philip Gidley King, 1800-06, and William Bligh, 1806-08" (Ibid)[108]. Until 1824, the Governors of the colony of New South Wales held the absolute authority, they were only subjected to the British Parliament at Westminster (Ibid)[109]. However, due to 20,000 kilometers of distance, communications with the British Crown were not so immediate, as a result they almost had the absolute control of the colony (Ibid)[110].

Afterwards, British settlers started to colonize the following state in Australia: Western Australia (1827), Tasmania (between 1803 and 1825), South Australia (between 1836 and 1842), Victoria (1851), Northern Territory (1825) (Jalata, 2023: 5)[111].

In order to colonise the territories mentioned, "England sent to Australia over 162,000 convicts in 806 ships" (Ibid)[112]. As a result, Australia was declared in 1901 as "federation of six English colonies" (Ivi:6)[113].

Apart from not considering the first inhabitants of Australia, the British settlers also "used the doctrine of *terra nullius* to expropriate native lands through violence" (Ibid)[114]. In fact, as previously stated, the British declared Australia as a territory that does not belong to anyone, the British claimed

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[103] The American Independence war (1775–1783) ended with the independence of the thirteen North American colonies from the British Crown. The defeat forced London to radically restructure its penal system, as America would no longer accept British convicts. For this reason, in order to solve the prison crisis, the British government selected Australia as the new destination for penal transportation.

[104] Parliament of New South Wales, *1788 to 1810: Early European Settlement*, Sydney, https://www.parliament.nsw.gov.au/about-parliament/heritage-history/history-democracy-nsw/1788-to-1810-early-european-settlement (accessed 13/07/2026).

[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] Ibid.

[110] Ibid.

[111] Asafa Jalata, *The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians*, in «SAGE Open», 3, n. 3, 2013, p.5, https://doi.org/10.1177/2158244013499143 (accessed 11/07/2026).

[112] Ibid.

[113] Ivi, p.6.

[114] Ibid.

ownership over the land, violating the established principles of both international law and common law[115]

At the base of Australia foundation there is this legal fiction that Australia was not unhabituated, which was also formally affirmed in the 1889 *Privy Council decision of Cooper v Stuart* (French 2004)[116]. Lord Watson declared that New South Wales was "practically unoccupied, without settled inhabitants or settled law" at the time of British Colonization (Ibid)[117]. This statement did not correspond to the documented facts, since Aboriginal and Torres Strait Islande people had lived there for 65,000 years and they had their traditions and their law system (Jalata, 2013:1)[118].

This appropriation affected the Indigenous legal system, replacing it with the British Common Law, which will be further discussed.

This historical development is relevant to the research question because the principle of *terra nullius* establishes the original absence of the recognition of the land rights, which is the parameter of the land and native title rights and will be discussed in the third chapter.

[115] Ulla Secher, *The High Court and Recognition of Native Title: Distinguishing Between the Doctrines of Terra Nullius and 'Desert and Uncultivated'*, in «University of Western Sydney Law Review», 11, 2007, https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/UWSLawRw/2007/1.html (accessed 06/08/2026).

[116] Robert French, *Mabo —Native Title in Australia*, in «Federal Judicial Scholarship», 2004, https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2004/23.html (accessed 13/07/2026).

[117] For further details see: https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2004/23.html#fn5

[118] Asafa Jalata, *The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians*, in «SAGE Open», 3, n. 3, 2013, p.1, https://doi.org/10.1177/2158244013499143 (accessed 11/07/2026).

2.2 Imposition of Common Law and Exclusion of Indigenous Legal System

2.2.1 The Legal Theory of Occupation and the Displacement of Customary Law

The book *Connecting with Law*, written by Michelle Sanson and Thalia Anthony, is essential in order to provide an in-depth analysis of the imposition of the common law in Australia after the British Colonization. As outlined previously, at that time of British settlement, Australia was not a *terra nullius*, it was home to Indigenous peoples for over 65,000 years (Ibid)[119]. Indigenous Australians had their own laws and legal systems, defined as customary law, "used to describe Indigenous laws that regulate relationships within Indigenous communities and with the Country" (Sanson, Anthony 2019)[120]. The name "customary law" refers to the fact that these laws were transmitted orally, passing down through generations (Ivi: 356)[121]. These laws regulated all aspects of life, for instance the person to marry, to speak with and the cultural knowledge that a person must possess (Ibid)[122].

The British colonizers were able to take possession of the Australian land by claiming it through occupation (Ivi: 359)[123]. The eighteenth-century international law considered three methods through which a State could acquire foreign land and sovereignty. First, through cession, which involves the voluntary transfer of the land by Indigenous populations through treaties (Ivi: 354)[124]. Second, conquest, which is referred to the "colonization by military force" (Ibid)[125]. Both cession and conquest do not automatically abolish the pre-existing law system. However, the case is entirely different for occupation, which is "a process of colonization involving the settlement of a vacant land" and "allows for the automatic implementation of the colonizing nation's laws (Ivi:355)[126].

As a result, the British were legally able to colonize Australia by categorizing it as *terra nullius* and claiming it through occupation. By declaring Australia an empty land, the British authorities established both territorial ownership and their own legal system. After having occupied Australia, policies and juridical decisions, that will be further discussed, were enforced in order to replace Indigenous legal system with the British Common Law.

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[119] Ibid.
[120] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 355.
[121] Ivi, p.356.
[122] Ibid.
[123] Ivi, p. 359.
[124] Ivi, p.354
[125] Ibid.
[126] Ivi, p.355.

2.2.2 The Bourke Proclamation

One example of the practical consequences of treating Australia as occupied land is the 1835 Proclamation issued by Governor Richard Bourke, who annulled the only attempt to make treaties between the British authorities and the Indigenous community (Ivi: 361)[127]

In 1835 the farmer John Batman tried to rent the land of "Port Philip District of the colony of New South Wales (which became Victoria in 1851) from the Wurundjeri Elders through a treaty" (Ibid)[128]. However, on the 10 October of 1835, Governor Bourke annulled the treaty "on the basis that the land was *terra nullius*" (Ibid)[129]. In fact, considering that Australia was basically "land of no one" before the British settler's arrival, once they colonized it, they became the absolute owners of the territory. As a result, the British Crown was the only authority "capable of distributing the land"; for this reason, without any permission from the British Government, anyone would have been considered trespassers (Ibid)[130].

The Bourke Proclamation set a precedent whereby anyone wishing to make a treaty had to seek the approval of the Crown.

This episode illustrates a structural pattern that characterized the relationship between Indigenous peoples and the British Crown: the negotiation of laws and treaties was not possible; the terms are dictated by the colonizers.

2.2.3 R v Murrell and Bummaree

Beyond the rejection of treaty-making, the case of *R v Murrell and Bummaree (1836)* illustrates that Indigenous People could be prosecuted in the British legal system without being granted full rights within it (Ivi: 357)[131].

As reported in *R v Murrell and Bummaree (1836*) case, Jack Congo Murrell, an Aboriginal man, was accused of having killed another Aboriginal man, Jabbingee at Windsor ("R v Murrell and Bummaree [1836] NSWSupC 35 (5 February 1836)," n.d.)[132]. In light of this situation, the Murrell's Defence stated that "the natives were not protected by those laws... It therefore followed that they were not bound by laws which did not at the same time afford their protection (Ibid)[133]. The Defence argued that, since Murrell was an Aboriginal man, he was not subjected to British laws.

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[127] Ivi, p.361.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ivi, p. 357.
[132] *R v Murrell and Bummaree* [1836] NSWSupC 35, Supreme Court of New South Wales, https://www.austlii.edu.au/cgi-bin/sinodisp/au/other/NSWSupC/1836/35.html (accessed 15/07/2026).
[133] Ibid.

However, the Supreme Court rejected the Defence statement, in particular Judge Burton declared that "the aboriginal natives of this Colony are amenable to the laws of the Colony for offences committed within it against the persons of each other and against the peace of our Lord the King" (Ibid)[134]. Indeed, the Court condemned Murrell because, even if he was Aboriginal, he had to respect the British laws, because Australia was governed by the British Crown, which had the ownership and the authority on the land. Moreover, the Judge stated that there is "no distinction between Natives and Europeans" (Ibid)[135].

Mr. Windeyer, Murrell's lawyer, tried to call a "native man named McGill" to speak about the Indigenous' customs, however His Honor argued that this evidence had "no influence on the case" (Ibid)[136]. During the trial, Mr. Windeyer declared that he had no witnesses to call, because the only ones available would have been Indigenous People, however they "did not believe in a future state" (Ibid)[137].

Moreover, Indigenous People could not testify in a trial according to the British legal system. Consequently, due to the lack of admissible evidence presented by the prosecution, Murrell was declared not guilty and "was discharged" (Sanson and Anthony, 2019:357)[138].

Even if Murrell was acquitted, this case demonstrates that Aboriginal and Torres Strait Islander people could be subjected to criminal jurisdiction in the British legal system without having been granted full rights in that system. This case shows that Indigenous Australians did not have the possibility to testify in court, even though there should be "no distinction between natives and European people", as the Judge affirmed (Ibid)[139].

2.2.4 R v Bonjon (1841)

As reported in *R v Bonjon (1841)* case, in 1841 Bonjon "an aboriginal within the District of Port Phillip", was accused of having killed another aboriginal man, Yammowing ("R. v. Bonjon [1841] NSWSupC 92 (16 September 1841)," n.d.)[140].

Even if the case seems to be the same as the previous one, Judge Willis expressed another point of view compared to Judge Burton. Judge Willis noted the absence of any "treaty subjecting the

[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 355.
[139] *R v Murrell and Bummaree* [1836] NSWSupC 35, Supreme Court of New South Wales, https://www.austlii.edu.au/cgi-bin/sinodisp/au/other/NSWSupC/1836/35.html (accessed 15/07/2026).
[140] *R v Bonjon* [1841] NSWSupC 92, Supreme Court of New South Wales, https://www.austlii.edu.au/cgi-bin/sinodisp/au/other/NSWSupC/1841/92.html (accessed 19/07/2026).

Aborigines of this colony to the English colonial law", "the Aborigines cannot be considered as Foreigners in a Kingdom which is their own" (Ibid)[141]. As a result, Judge Willis concluded that "the Aborigines must be considered and dealt with... as distinct, though dependent tribes governed among themselves by their own rude laws and customs" (Ibid)[142]. It can be observed that a British Judge acknowledged limitations on colonial jurisdiction over Indigenous Australians, by declaring that they cannot be considered foreigners in their home country and admitting the absence of any treaty between Indigenous Australians and non-Indigenous Australians. Moreover, according to Judge Willis, Indigenous Australians should be considered dependent groups with their laws.

Willis's statements were not considered, because "the Crown Prosecutor declined to proceed immediately with the trial, and the prisoner was remanded until the next sessions" (Ibid)[143]. In fact, Bonjon was never prosecuted and this case was never considered a precedent, because "*R v Murrell 1836* is the only one to be cited with approval in the twentieth century" (Ibid)[144].

This exclusion of the Indigenous legal system had been soon translated into concrete government policies of protection, segregation, and assimilation.

This historical development is relevant to the research question because the imposition of the British Common Law shows the exclusion of indigenous customary law, which is relevant for the parameters of the recognition of identity and the customary law.

[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Ibid.

2.3 Government policies towards Indigenous peoples: Protection, Segregation and Assimilation

Once the British common law was imposed, government policies such as protection, segregation and assimilation were developed. These policies regulated every aspect of Indigenous People's daily life: where they could live and work, who they could marry and even the guardianship of their children.

2.3.1 The Aboriginal Protection Act 1869

As documented by the *Public Record Office Victoria (PROV),* in order to "protect" Indigenous People from the negative consequences of Colonization, the State of Victoria introduced the *Aboriginal Protection Act 1869*, which "required Aboriginal peoples to live on one of six reserves, where rules and regulations shaped their daily life" (PROV, n.d.)[145]. In fact, "the Board for the Protection of Aborigines could decide to move a person from one station to another", however, this procedure separated families (Ibid)[146]. Moreover, this Act instituted the Board for the Protection of Aborigines, who had the authority to control Indigenous People's life (Ibid)[147].

According to the 1997 *Bringing Them Home* report of the Human Rights and Equal Opportunity Commission (HREOC), this system expanded rapidly: while a quarter of Aboriginal Victorians lived on reserves by 1869, this figure had grown to nearly half by 1877 (HREOC, 1997)[148]. Furthermore, in order to "earn their upkeep", men were forced to do manual work and women and children did domestic jobs (PROV, n.d.)[149]. Besides that, they did not have a real salary, because they "were paid with rations" (Ibid)[150].

Therefore, Aboriginal peoples were marginalized by society, because they had to live on one of six reserves. In addition, they did not even receive a proper wage, and they were subjected to forced labour.

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[145] Public Record Office Victoria, *Tell the Story: Mission Life*, PROV, https://prov.vic.gov.au/about-us/our-blog/tell-story-mission-life (accessed 20/07/2026).
[146] Ibid.
[147] Ibid.
[148] Human Rights and Equal Opportunity Commission, *Bringing Them Home*, Part 2, Chapter 4: Victoria, HREOC, Sydney, 1997, https://humanrights.gov.au/bringing-them-home/the-report/part-2-tracing-the-history/chapter-4-victoria.html (accessed 21/07/2026).
[149] Public Record Office Victoria, *Tell the Story: Mission Life*, PROV, https://prov.vic.gov.au/about-us/our-blog/tell-story-mission-life (accessed 20/07/2026).
[150] Public Record Office Victoria, *Tell the Story: Mission Life*, PROV, https://prov.vic.gov.au/about-us/our-blog/tell-story-mission-life (accessed 20/07/2026).

Consequently, the *Aboriginal Protection Act 1869* imposed control on Aboriginal peoples rather than preserving their culture and tradition. In this way, the Act facilitated the State oversight over Indigenous Australians.

2.3.2 From Protection to Segregation: The 1886 Victorian Amendment and the 1897 Queensland Act

The legal framework established by the *Aboriginal Protection Act 1869* was subsequently used to enforce racial segregation, through the creation of the *Aborigines Protection Act 1886*[151] that introduced the legal category of "half-caste" in the State of Victoria.

The 1997 *Bringing Them Home* report of the Human Rights and Equal Opportunity Commission (HREOC) explains that due to the economic crisis in the 1880s of the Aborigines' Protection Board, it decided to invest in the "half-caste" (Indigenous People), because the "full-bloods were thought to be dying" (HREOC, 1997)[152]. This investment, promoted by the Aborigines' Protection Board, relied on the integration of the "half-caste" into the society in order to replace the extinction of the full bloods. In fact, Aborigines under 34 years were forced to leave the stations, in particular boys at the age of 13 were sent to work to rural farms and women into domestic service; once they left the station, they could never come back (Ibid)[153]. The number of half-caste people that were forced to leave the station, were 233, "including 160 children" (Ibid)[154]. Therefore, the Aborigines' Protection Board sent "children of mixed descent, whether orphaned or not, to the Department for Neglected Children or the Department of Reformatory Schools for their 'better care and custody' (Ibid)[155]. Therefore, between 1886 and 1923, the number of Aboriginal stations in Victoria declined from six to just one (Ibid)[156].

Not only the State of Victoria introduced the *Aborigines Protection Act 1886*, but afterwards Queensland also enacted the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897*[157]. The title of the act is not coincidental, as it refers to the problem of opium sale by Chinese people to Aboriginals. As stated in the article *Chinese Australian Perspectives on the 'Protection' of Aboriginal People in the 1890s,* in the Nineteenth Century "there were a number of convictions of Chinese people

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[151] Human Rights and Equal Opportunity Commission, *Bringing Them Home*, Part 2, Chapter 4: Victoria, HREOC, Sydney, 1997, https://humanrights.gov.au/bringing-them-home/the-report/part-2-tracing-the-history/chapter-4-victoria.html (accessed 21/07/2026).
[152] Ibid.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld), https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/IndigLRes/1897/2.html> (accessed 21/07/2026)

who had been charged with supplying Aborigines" (Daozhi, 2022: n 3)[158]. This situation led to the creation of the S*ale and Use of Poisons Act 1891* (Ibid)[159]. Afterwards, in response to this phenomenon, the 1897 Act united the protection for Aboriginal Peoples and the restriction of the opium supply (Ivi:545)[160]. Therefore, for the first time, a law governed two distinct populations: Aboriginals and Chinese people (Ibid)[161].

The *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* is:

"An Act to make Provision for the better Protection and Care of the Aboriginal and Half-caste Inhabitants of the Colony, and to make more effectual Provision for Restricting the Sale and Distribution of Opium" ("Aboriginals Protection and Restriction of the Sale of Opium Act 61 Vic., No. 17 (1897) (Queensland) [1897] IndigLRes 2," n.d.)[162].

By merging "protection" and "opium restriction" into a single Act, the British Government treated Aboriginal Peoples as a single social problem, rather than a population that needed rights to be protected. Regarding discrimination, the Act mentioned the word "half-caste", which is "any person being the offspring of an aboriginal mother and other than an aboriginal father" (Ibid)[163]. The term was already mentioned in the Victoria State legislation in *Aborigines Protection Act 1886*[164], however this time, it juridically defined.

Moreover, the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* introduced the figure of the "Protector of Aboriginals", called by the Governor in Council, who had to "exercise the powers and duties prescribed" (Aboriginals Protection and Restriction of the Sale of Opium Act 61 Vic., No. 17(1897) (Queensland), 1897)[165].

Furthermore, as historian Anna Haebich reports in her book *For their own good: Aborigines and government in the south west of Western Australia, 1900-1940*, the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897*, introduced by Queensland Government, was not an isolated

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[158] Xu Daozhi, *Chinese Australian Perspectives on the 'Protection' of Aboriginal People in the 1890s*, «Australian Historical Studies», 53, 4, 2022, pp. 544-563, https://doi.org/10.1080/1031461X.2021.1999280 n 3 (accessed 24/07/2026).

[159] Ibid.

[160] Ivi, p.545

[161] Ibid.

[162] *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld), in «AustLII», https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/IndigLRes/1897/2.html (accessed 21/07/2026).

[163] Ibid.

[164] Human Rights and Equal Opportunity Commission, *Bringing Them Home*, Part 2, Chapter 4: Victoria, HREOC, Sydney, 1997, https://humanrights.gov.au/bringing-them-home/the-report/part-2-tracing-the-history/chapter-4-victoria.html (accessed 21/07/2026).

[165] *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld), in «AustLII», https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/IndigLRes/1897/2.html (accessed 21/07/2026).

case, on the contrary it “was to provide the model for legislation passed in Western Australia (1905), South Australia (1910) and the Northern Territory (1911)” (Haebich, 1992:58)[166].

Although the Acts were designed to safeguard Indigenous peoples, they were implemented as mechanisms of control on them. This framework of racial segregation established the foundation of the next phase of the colony policies, namely assimilation.

2.3.3 The Assimilation policies and the Stolen Generations

While protection and segregation policies controlled the daily life of Indigenous Australians, the assimilation policy directly targeted their most intimate sphere: the family. In fact, from the early 1900s to the late 1960s, First Nations children were forcibly removed from their families as reported by the author Anne Maree Payne, in her article *'Never again'? Resonances of the Past in Contemporary Aboriginal and Torres Strait Islander Child Removal* (Payne, 2024:106)[167].These children came to be known in history as the Stolen Generations (Ibid)[168].

In her article, the author describes two phases of this discriminatory removal process. The first, from 1900 to 1950, addressed the problem of "half-caste" children in some states; in others, these efforts were instead focused “on controlling the sexuality and reproduction of First Nations women and girls” (Ibid)[169]. The second phase, from the 1950s onwards, relied on the "assimilation of Aboriginal and Torres Strait Islander people into the wider community", meaning the integration of Indigenous children into mainstream society, white foster families, and state institutions (Ibid)[170].

In light of these child removals, Indigenous Australian parents were completely powerless to resist, because they "were stripped of their parental rights in Western Australia from 1905–1963; the Northern Territory from 1910–1964; South Australia from 1911–1962; and in Queensland from 1939–1965" (Ivi:108)[171].

Apart from being deprived of their parental rights, parents did not have any authority on their children, because a Protector had the legal guardianship over First Nations children (Ibid)[172]. Consequently, from 1890 in Victoria and from 1915 in New South Wales, the Aboriginal Protection Board held the authority to remove Indigenous children without Court permission (Ibid)[173].

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[166] Anna Haebich, *For Their Own Good: Aborigines and Government in the South West of Western Australia 1900-1940*, Nedlands, UWA Publishing, 1992, p.58.
[167] Anne Maree Payne, *'Never Again'? Resonances of the Past in Contemporary Aboriginal and Torres Strait Islander Child Removal*, in «Cosmopolitan Civil Societies: An Interdisciplinary Journal», 16, n. 3, 2024, p. 106, https://doi.org/10.5130/ccs.v16.i3.9294 (accessed 25/07/2026).
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ivi, p.108.
[172] Ibid.
[173] Ibid.

Consequently, as stated in the article *Searching for Justice for Australia's Stolen Generations*, it is argued that "genocidal intent in the Stolen Generations context may be strongly inferred"(Mayberry, 2022)[174]. Indeed, during the 1930s, Australian officials responsible for implementing Aboriginal welfare policy declared that this population had to be "bred out" of society (Ibid)[175].

The Australian governments implemented protection, segregation and assimilation policies in order to protect and integrate First Nations people. However, as examined, these policies exercised control over Indigenous Australians. Moreover, the assimilation policy through the removal of children affected the transmission of cultural knowledge between generations.

Due to these policies that claimed to protect and integrate Indigenous Australians, this population continued to be treated unequally compared to non-Indigenous Australians.

It was only in the 1960s that a gradual recognition of their civil and political rights began and it will be analysed in the following section.

This historical development is relevant to the research question because protection, segregation and assimilations policies show the exclusion from the participation and from the administrative control for Indigenous Australians, which is related to the parameters of participation and of self-determination.

[174] Keila Mayberry, *Searching for Justice: Australia's Stolen Generations*, in «Chicago Journal of International Law», 2022, https://cjil.uchicago.edu/print-archive/searching-justice-australias-stolen-generations (accessed 25/07/2026).
[175] Ibid.

2.4 Recognition of Civil and Political Rights

2.4.1 The Commonwealth Franchise Act 1902

While Protection, Segregation and Assimilation policies controlled every aspect of Indigenous Australians' life until the 1960s, this population was excluded from civil and political rights.

The *Commonwealth Franchise Act 1902* determined, according to the Australian Electoral Commission (AEC), "who had the right to be represented in the Parliament of Australia" (AEC, n.d.)[176]. In order to have this right, voters had to be British subjects aged 21 or over; however, British citizenship was not established until 1948, thus before that date people who were considered British subjects had to be born in the British Empire or had been naturalized (Ibid)[177].

The *Commonwealth Franchise Act 1902* stated that "no aboriginal native of Australia, Asia, Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution" (Ibid)[178]. Therefore, this Act explicitly denied the right to vote to Indigenous Australians, except if they were already enrolled on the state electoral rolls prior to that date. British women, by contrast, were granted the right to vote in the same year, exercising it for the first time in the 1903 federal election (Ibid)[179].

Until the 1960s, Indigenous Australians “were still denied the right to freedom of movement, vote, marry without permission, eat in restaurants, swim in a public pool and have access to public education” (Sanson, Anthony, 2019: 355)[180]. This discrimination varied from state to state; for instance, in New South Wales, Aboriginal children were not admitted to schools (Ivi: n 9)[181].

This section will examine how and when, gradually, Indigenous Australians' rights began to be recognized.

2.4.2 The 1962 Commonwealth Electoral Act

As outlined by the AIATSIS, throughout the first half of the twentieth century, Aboriginal and Torres Strait Islander peoples fought to gain the right to vote. Firstly, in 1949, the federal vote was extended "to Aboriginal and Torres Strait Islander peoples who had served in the armed forces" (AIATSIS,

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[176] Australian Electoral Commission, *Federation Fact Sheet 3 - Voting in the federal election 1903*, in «AEC», 18/05/2011, https://www.aec.gov.au/about_aec/Publications/Fact_Sheets/factsheet3.htm (accessed 28/07/2026).
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] [180] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 355.
[181] Ivi, n 9.

2022b)[182]. Later, thanks to sustained campaigning by activist groups, among them the Federal Council for Aboriginal Advancement, the Federal Government wrote a report, which stated that "approximately 30,000 people living in the Northern Territory, Queensland and Western Australia were excluded from the vote" (Ibid)[183]

This situation gave rise to the *Commonwealth Electoral Act 1962*, which allowed Aboriginal and Torres Strait Islander adults to vote in federal elections, although being enrolled in an electoral list was not compulsory (Ibid)[184]. The reason why exercising this right to vote was not mandatory is related to the fact that legislators believed that Indigenous Australians would not have voted and this would have penalized them (Ibid)[185].

The Act allowed Aboriginal and Torres Strait Islander peoples to vote in federal elections, however, voting for Indigenous Australians was not compulsory until 1984 (Ibid)[186].

2.4.3 The 1967 Referendum

"When the Australian Commonwealth Constitution was enacted in 1900", it included provisions excluding Aboriginal and Torres Strait Islander peoples (Sanson, Anthony, 2019: 386)[187]. In particular, Section 127 excluded Indigenous Australians from the State or Commonwealth census; moreover, "Section 51 gave the Commonwealth Parliament the power to make laws with respect to the people of any race […] other than the Aboriginal race in any State" (Ibid)[188]. This meant that any State could decide its own laws for Indigenous Australians, and the Federal Government could not intervene.

Years of exclusion come to an end, because "in 1967 a referendum with popular support (90.8 per cent) removed the Aboriginal exclusion clause from the race power and completely repealed s 127" (Ivi: 387)[189].

Afterwards, it was believed that Aboriginal and Torres Strait Islander peoples would finally be considered equal to other Australian citizens and would obtain civil and political rights (Ibid)[190]. Moreover, the words of the Sydney Daily Mirror suggested a sense of remorse from the Australian

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[182] Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Right to vote*, in «AIATSIS», https://aiatsis.gov.au/explore/right-vote (accessed 28/07/2026).
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 386
[188] Ibid.
[189] Ivi, p.387
[190] Ibid.

population and recognition for having conquered and exploited the native people of that territory for almost two hundred years (Ibid)[191].

In fact, on the 22nd of May 1967, the Daily Mirror reported:

"We've taken his lands, decimated his tribes, degraded his women, taken away his dignity and forced him to live in squalor. This is our chance to make some sort of amends" (Ibid)[192].

Some politicians, among them Prime Minister Gough Whitlam, believed that the modification of Section 51 would be a step towards equality and rights-based legislation for Indigenous Australians. In fact, the Prime Minister affirmed that the will of the people, as expressed in the Referendum, gave Parliament the opportunity "to see that Aborigines have a right to the land" (Ibid)[193].

The amendment of Section 51 failed to produce the desired outcomes, because this modification was not intended to guarantee civil and political rights for Indigenous Australians, because it gave Parliament the power to enact laws to "be used to the benefit or to the detriment" of this population (Ibid)[194]. This means that the Parliament had the power to create laws benefiting them, but equally to discriminate against them. Consequently, when parliaments tried to use "race power to discriminate against Indigenous people, the court have permitted such usage (Ibid)[195].

A concrete example of the consequences of the amendment of Section 51 is the case *Kartinyeri v Commonwealth* (1998) *195 CLR 337*, where the High Court established that "the race power is not limited to legislation that benefits Indigenous people", because "it can be used to discriminate against or violate the rights of Indigenous people" (Ibid)[196]. From a critical perspective, Kartinyeri illustrates the limitations of relying on the race power as a mechanism for protecting Indigenous rights, since the constitutional power is not confined to beneficial legislation.

Indeed, through this case, the High Court confirmed that legislation could also be enacted to discriminate against Indigenous people. In this case, Justice Kirby was the only one who dissented, suggesting that "constitutional power cannot be invoked to discriminate [against] Indigenous people" (Ibid)[197].

Kartinyeri v Commonwealth case thus demonstrates that the popular support of 90.8 per cent achieved in the 1967 Referendum was not translated into a binding legal guarantee. In fact, after the 1967

[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Ibid.

Referendum, the situation for Indigenous Australians did not improve, because they remained "subjected to unfair laws, such as child removal policies", which lasted until the 1980s (Ivi: p.383)[198]. Taking everything into account, the 1962 Act allowed Aboriginal and Torres Strait Islander peoples to vote in federal elections, though voting only became compulsory for them in 1984[199]. Thanks to the 1967 Referendum, Indigenous Australians were finally counted in the national census, and for the first time were formally considered part of Australian society[200]. However, the amendment of Section 51 also gave the Parliament the power to legislate against them, which means that they remained exposed to discrimination and exclusion[201].

This partial recognition of civil and political rights did not resolve the structural contradictions of the Australian legal system. The next and final subchapter will analyse the lasting legal consequences of the British Colonization.

This historical development is relevant to the research question because the inclusion of Indigenous Australians in civil and political rights was made through ordinary legislation and through referendum. These elements are relevant to the parameters of participation and non-discrimination.

[198] Ivi, p. 383.
[199] Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Right to vote*, in «AIATSIS», https://aiatsis.gov.au/explore/right-vote (accessed 28/07/2026).
[200] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 387.
[201] Ibid.

2.5 The enduring legal consequences of Colonization

2.5.1 From Historical Exploitation to Legal Legacy

As outlined in the article *The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians* written by Asafa Jalata, British settlers moved to the Australian continent in the eighteenth century due to the expansion of capitalism in Western Europe (Jalata 2013:4)[202]. In fact, due to "the need for raw materials", the discovery of a new market where it was possible to reduce "the cost of production", where they could expand their empire (Ibid)[203]. Therefore, British colonization in Australia was a response to the need of looking for materials in order to develop their market. However, what they found was a society with their customary laws and traditions. Despite that, the British settlers started colonizing the territory though genocide and terrorism, justifying "them with a racist discourse" (Ibid:8)[204]. Among several mechanisms, British colonizers relied on "shooting, burning, disease, rape, ethnocide, or cultural destruction" (Ibid)[205]. In fact, "the settlers and their descents attempted to totally eradicate the culture of the surviving of indigenous people" (Ivi: 10)[206]. As a result, according to Jalata, the British colonizers aimed to dismantle Indigenous society and to impose their Common Law system.

2.5.2 A Recurring Pattern: Formal Recognition Without Structural Change

The entire process of colonization was justified through legal fictions and recurring pattern that led to profound consequences.

Firstly, when the British settlers arrived in Australia, they were able to colonize the territory by declaring it was a *terra nullius,* however Aboriginals and Torres Strait Islander peoples had lived there for 65,000 years, thus the land was not empty (Ivi:1)[207].

When a territory is declared a *terra nullius*, it means that it is uninhabited and if a State wants to acquire sovereignty on that land, it is allowed to do that through the process of occupation according to the international law of the Eighteen century (Sanson, Anthony, 2019: 359)[208].

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[202] Asafa Jalata, *The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians*, in «SAGE Open», 3, n. 3, 2013, p.4, https://doi.org/10.1177/2158244013499143 (accessed 11/07/2026).
[203] Asafa Jalata, *The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians*, in «SAGE Open», 3, n. 3, 2013, p.4, https://doi.org/10.1177/2158244013499143 (accessed 11/07/2026).
[204] Ivi, p.8
[205] Ibid.
[206] Ivi, p.10
[207] Ivi, p.1.
[208] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 359.

Through occupation, the colonized land acquired the law system of the colonizer State (Ivi: 355)[209]. For this reason, the British were able to colonize Australia without making any treaties with Indigenous peoples and were able to establish their own legal system.

In the British Common Law system, Indigenous People were not treated as equal as non-Indigenous Australians: examples of this are the cases *R v Bonjon (1841)*[210] and R *v Murrell and Bummaree*[211] where Aboriginal men were accused of murder of other Aboriginals. Although Aboriginal peoples were not recognized in the British common law system, they were prosecuted under it.

Considering the *terra nullius* and the enforcement of the Common Law, the British colonial framework relied on a profound structural contradiction: it excluded Indigenous Australians presence in order to justify the acquisition of the land by occupation declaring the territory a *terra nullius*, and at the same time it subjected Indigenous Australians to the British Common Law without granting them rights within it.

The measures examined in this chapter share a recurrent pattern: rights were granted to Indigenous Australians without changing their legal position in the society and in the legal system.

This pattern is shown by the establishment of the protection[212], segregation[213] and assimilation policies[214], which aimed to protect and integrate Indigenous Australians, however they were instruments of control; and by the concession of the right to vote in the federal elections, where enrolment for Aboriginals and Torres Strait Islander peoples was not compulsory until 1984[215].

2.5.3 The Absence of Treaty: Unresolved Sovereignty

The British colonization produced legal consequences that still persist nowadays.

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[209] Ivi, p.355.

[210] *R v Bonjon* [1841] NSWSupC 92, Supreme Court of New South Wales, https://www.austlii.edu.au/cgi-bin/sinodisp/au/other/NSWSupC/1841/92.html (accessed 19/07/2026).

[211] *R v Murrell and Bummaree* [1836] NSWSupC 35, Supreme Court of New South Wales, https://www.austlii.edu.au/cgi-bin/sinodisp/au/other/NSWSupC/1836/35.html (accessed 15/07/2026).

[212] Public Record Office Victoria, *Tell the Story: Mission Life*, PROV, https://prov.vic.gov.au/about-us/our-blog/tell-story-mission-life (accessed 20/07/2026).

[213] Human Rights and Equal Opportunity Commission, *Bringing Them Home*, Part 2, Chapter 4: Victoria, HREOC, Sydney, 1997, https://humanrights.gov.au/bringing-them-home/the-report/part-2-tracing-the-history/chapter-4-victoria.html (accessed 21/07/2026).

[214] Anne Maree Payne, *'Never Again'? Resonances of the Past in Contemporary Aboriginal and Torres Strait Islander Child Removal*, in «Cosmopolitan Civil Societies: An Interdisciplinary Journal», 16, n. 3, 2024, p. 106, https://doi.org/10.5130/ccs.v16.i3.9294 (accessed 25/07/2026).

[215] Australian Institute of Aboriginal and Torres Strait Islander Studies, *The Right to Vote*, AIATSIS, Canberra, https://aiatsis.gov.au/explore/right-vote (accessed 28/07/2026).

The first legal consequence of Colonization is the absence of a Treaty with Indigenous Australians, because since the land was acquired by occupation, there was no need to negotiate a treaty (Sanson, Anthony, 2019: 359)[216].

As reported by Francesca Merlan in her article *Anthropology and change over the 'land rights era': Towards treaties?,* Australia is the only one settler colony state that has never " made treaties with its Indigenous peoples" (Merlan 2025)[217]. In fact, the other CANZUS countries (USA, Canada, New Zealand) signed a treaty with their own Indigenous People (Ibid)[218].

The absence of a treaty with their native people makes Australia an anomaly among the colonial settler states, according to Professor Marcia Langton:

"This denial has accorded Australia the status of an anomaly among the settler colonial states — such as New Zealand where the Treaty of Waitangi has considerable force, and Canada and the United States of America where treaties are the bedrock of relations between the state and Aboriginal peoples" (Langton 2019)[219].

Professor Marcia Langton defined treaties as the foundations for recognizing Indigenous peoples legal state, however, since Australia did not make any treaties with them, it left the colonial sovereignty issue unsolved.

2.5.4 The Continuing Exclusion of Indigenous Customary Law

Another legal consequence of the British Colonization in Australia is the exclusion of the Indigenous Customary Law when the British Common law was imposed. In fact, as described in the paragraph 2.2.3, the *R v Murrell and Bummaree* case is an example of the rejection of the Indigenous law system, because the Aboriginal Murrell was accused by legal system where he was not recognized a citizen and he did not have any civil and political rights[220].

However, this was not a temporary choice during the colonial period, this exclusion of the Indigenous Customary Law is present also nowadays.

As described by the ALRC in the report *Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133),* "the racially defined carceral

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[216] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 359.

[217] Francesca Merlan, *Anthropology and Change over the 'Land Rights Era': Towards Treaties?*, in «The Australian Journal of Anthropology», 36, 2025, p. 20, https://doi.org/10.1111/taja.12541 (accessed 31/07/2026).

[218] Ibid.

[219] Marcia Langton, *Australia's moral legitimacy depends on recognising Indigenous sovereignty* ABC Religion & Ethics, 2019, https://www.abc.net.au/religion/marcia-langton-australia-moral-legitimacy-and-indigenous-sovere/11287908 (accessed 31/07/2026).

[220] *R v Murrell and Bummaree* [1836] NSWSupC 35, Supreme Court of New South Wales, https://www.austlii.edu.au/cgi-bin/sinodisp/au/other/NSWSupC/1836/35.html (accessed 15/07/2026).

regime of missions and reserves was increasingly replaced by the mainstream mechanisms of the criminal justice system (ALRC, n.d.-b.)[221]. This means that due to the gradual dismantling of the system of reserves during the twentieth century, State control over Indigenous Australians did not disappear, but gradually shifted to the ordinary criminal justice system.

Despite decades of legal debate, Australian criminal law does not recognize Aboriginal customary law. In 1986 the ALRC published a report dedicated specifically to this issue (ALRC Report 31), but, as Wood noticed in his article *Why Australia won't recognise Indigenous customary law,* published in the Conversation, "although 30 years have passed since the report's publication, its recommendations have been largely ignored" and "the consequences of terra nullius seem to have prevailed, to the extent that the report has largely been shelved" (Wood, 2016)[222]. This means that, even today, the legal system governing Indigenous Australians remains fundamentally the one imposed in 1788, not a system negotiated with Indigenous communities.

This persistent exclusion of Indigenous rights produced consequences in the daily lives of Aboriginal and Torres Strait Islander peoples that can be observed on the imprisonment below.

2.5.5 The Overrepresentation of Indigenous Australians in the Criminal Justice System

The consequences of this exclusion are reflected in the data on imprisonment: Aboriginal and Torres Strait Islander peoples are incarcerated at a rate significantly higher than that of the rest of the Australian population.

It was not until 1982, with the introduction of the first national prison census, that it became possible to measure this overrepresentation, which varied from State to State, as shown in the ALRC report *Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples.* In fact, it stated that "the ratio of Indigenous to non-Indigenous imprisonment rates per head ranged from 3.3 in Tasmania to 29.0 in Victoria" (ALRC, n.d.-b.)[223].

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[221] Australian Law Reform Commission (ALRC), *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133), *History of contact with the criminal justice system*, 2018,https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/2-context/history-of-contact-with-the-criminal-justice-system/ (accessed 02/08/2026).

[222] Aj Wood, *Why Australia Won't Recognise Indigenous Customary Law*, in «The Conversation», 9 June 2016, https://theconversation.com/why-australia-wont-recognise-indigenous-customary-law-60370 (accessed 02/08/2026)

[223] Australian Law Reform Commission (ALRC), *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133), *History of contact with the criminal justice system*, in «ALRC», 28/03/2018,https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/2-context/history-of-contact-with-the-criminal-justice-system/ (accessed 02/08/2026).

Compared to the other CANZUS countries, Australia has one of the highest incarceration rates of overrepresentation of Indigenous People compared to non-Indigenous Australians This data is represented in the article *Colonization and Its Legacy: The Correlates of Indigenous Arrest,* where Weatherburn et al. stated that "the Aboriginal imprisonment rate in Australia is 15 times the non-Aboriginal rate", which is confirmed also by the Australian Bureau of Statistics(Weatherburn et al., 2026:590)[224]. With respect to the other countries, in Canada it is nine times higher and in New Zealand it is "17.3 percent of the population but over half of all prisoners" (Ibid)[225]. This distinction highlights the severity of the Australian context: while the high percentage of Māori prisoners reflects their larger demographic presence in New Zealand, Australia's 15-fold disparity demonstrates an even more disproportionate per capita incarceration rate, considering that Indigenous Australians constitute only 3.8 percent of the national population (Australian Bureau of Statistics, 2023)[226].

This data will be deeply analysed in Chapter 4, where the persistent inequalities that affect Indigenous Australians will be examined.

Taking these enduring legal consequences into account, that are the absence of a treaty, the persistent exclusion of Indigenous customary law, and the measurable overrepresentation of Indigenous Australians in the criminal justice system, the legal foundations established through colonization were not fully dismantled.

The doctrine of terra nullius may have been formally challenged decades later, but its underlying logic of exclusion continued to shape the relationship between Indigenous Australians and the Australian legal system well into the twentieth century, and arguably still does today.

The following chapter will examine the recognition of native title, beginning with the landmark decision of *Mabo v Queensland.*

This historical development is relevant to the research question the absence of a treaty and the exclusion of the indigenous customary law show the original legal structure of the exclusion of the Indigenous Australians, regarding the parameter of self-determination and recognition of indigenous customary law. This constitutes the legal context in which international human rights law and domestic reforms would later intervene.

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[224] Weatherburn et al., *Colonization and Its Legacy: The Correlates of Indigenous Arrest*, *The British Journal of Criminology,* vol.66, 2026, p. 590.

[225] Ibid.

[226] Australian Bureau of Statistics, *Recorded Crime – Offenders*, ABS, Canberra,2026, https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release (accessed 02/09/2026).

3 Recognition of Indigenous Land Rights

3.1 Mabo v Queensland (No2) (1992) 175 CLR 1

Mabo v Queensland (No 2) (1992) and the *Native Title Act 1993* predate the UNDRIP by almost fifteen years and cannot be presented as its implementation. The Mabo decision shows rather that a profound transformation of the Australian law that was already under way before the UNDRIP.

3.1.1 Background: The Meriam People and the Origins of the Case

Mabo v Queensland (No 2) (1992)[227] is a pivotal case in Australian legal history that marked a turning point in the recognition of Indigenous land rights and Native Title.

The case owes its name to Eddie Mabo, an inhabitant of "the island of Mer (Murray Island) in the Torres Strait (between Queensland and Papua New Guinea)" (Sanson, Anthony 2019)[228]. Due to his exile from Mer and to the discovery that the territory belonged to the Crown and not to his family, Mabo began to have an interest in land rights (Ivi: 392)[229]. This interest led him to give a speech "about land ownership and inheritance of Mer" at James Cook University in 1981 (Ibid)[230]. Afterwards, he with four other members of Mer, "Sam Passi, Father Dave Passi, James Rice and Celuia Mapo Salee", decided "to take the Meriam people's land case to the High Court" (Ibid.)[231]. On 20 May 1982 the case was brought before the High Court, which remitted the determination of the facts to the Supreme Court of Queensland (Ibid)[232]. Firstly, in 1985 the Queensland Government, through the *Queensland Coast Islands Declaratory Act 1985* (*Qld*) tried to cancel Native Title in the Torres Strait without paying any compensation (Ibid)[233]. As reported by the National Archives of Australia, the *Queensland Coast Islands Declaratory Act 1985* "asserted that, upon being annexed by the Queensland Government in 1879, the islands were vested in the Crown … freed from all other rights, interests and claims" (National Archives of Australia, n.d.)[234]. In 1988 the Court declared that

[227] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[228] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 391.
[229] Ivi, p.392.
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] National Archives of Australia, *Eddie Koiki Mabo and the Mabo Case*, NAA, Canberra, https://www.naa.gov.au/explore-collection/first-australians/eddie-koiki-mabo-and-mabo-case (accessed 09/09/2026).

the Queensland Act was against the *Racial Discrimination Act 1975* (*Cth*)[235], "because the failure to pay compensation for land acquisition discriminated against Indigenous people" (Sanson, Anthony 2019)[236]."This ruling is known as *Mabo v Queensland (No 1)* (1988) 166 CLR 186" (Ibid.)[237].

Therefore, in 1992 the High Court ruled on *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and after more than two centuries "the legal doctrine of *terra nullius* was overturned in Australia" (Ibid)[238]. The Court recognized "the Indigenous land ownership before colonization" and established that "in certain cases, such as this one, Indigenous land ownership survived because it was not extinguished by the Crown" (Ibid.)[239].

Eddie Mabo died a few months before the ruling of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (Ibid)[240].

Even though in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 the legal principle of terra nullius was overturned and Indigenous land ownership before colonization was recognised, the decision presents some limitations that will be analysed in this chapter (Ibid)[241].

3.1.2 The High Court's Decision

On 3 June 1992 the High Court ruled on *Mabo v Queensland (No 2)* (1992)[242]. As affirmed in the report of the case, six members of the Court (Dawson J. dissenting) agreed that the common law of Australia recognizes a form of native title, which refers to the land rights that Indigenous peoples derive from their own traditional laws and customs, in cases where such rights have not been extinguished (Ibid)[243].

Among the judges of the High Court, Brennan J declared that "an unjust and discriminatory doctrine of that kind can no longer be accepted" (Ibid)[244]. In fact, in his judgment, Brennan J affirmed that this doctrine, which denies any land rights to the Indigenous inhabitants of colonized territories, is "unjust and discriminatory", and can no more be tolerated under contemporary Australian law (Ibid)[245].

Moreover, Brennan J stated that:

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[235] *Racial Discrimination Act 1975* (Cth), https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/rda1975202/ (accessed 09/09/2026). On Racial Discrimination Act 1975 see Chapter 4.
[236] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 392.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Ibid.
[241] Ibid.
[242] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[243] Ibid.
[244] Ibid.
[245] Ibid.

But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land (Ibid)[246]. With this declaration, Brennan J referred to the fact that British Crown sovereignty over the Australian land did not automatically entail full ownership of the land: if the territory was occupied by indigenous peoples whose rights are recognized under the common law, the title acquired through sovereignty cannot imply absolute ownership of the occupied land. As analysed in the previous chapter, these two spheres: sovereignty, which operates at an international level, and ownership, which operates at a common law level, have to be separated. However, as Secher stated in her article, the British settlers conflated these two concepts in order to justify their colonization (Secher, 2007)[247]. In Brennan J's decision, these two concepts are treated as separated.

Another important declaration made by Brennan J is the following:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory (Ibid)[248].

This means that the Court did not create the Native Title, but recognized it. Native title has its origin in the traditional laws and customs of Indigenous peoples, and the common law only acknowledges its existence.

Native title has its origin outside the Australian legal system, because it is part of Indigenous Australians' culture and law system, however its recognition and its extinguishment are determined by the Australian legal system, which will be further discuss in this chapter.

This situation is not different from the Bourke Proclamation discussed in paragraph 2.2.2, where making treaties was possible only with the Crown authorization (Sanson, Anthony 2019)[249].

3.1.3 What Mabo Left Untouched: Sovereignty and the Limits of Recognition

Mabo v Queensland (No 2) (1992) is the first decision in Australian legal history that rejected the common law doctrine according to which Australia could have been treated as territory deprived of Indigenous recognizable property rights.

However, it presents limits and constraints.

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[246] Ibid.

[247] Ulla Secher, *The High Court and Recognition of Native Title: Distinguishing Between the Doctrines of Terra Nullius and 'Desert and Uncultivated'*, in «University of Western Sydney Law Review», 11, 2007, https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/UWSLawRw/2007/1.html (accessed 06/08/2026).

[248] Ibid.

[249] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 361

Firstly, *Mabo v Queensland (No 2)* (1992) left the sovereignty untouched, and this concept is expressed in Brennan J statement:

The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state (*Mabo v Queensland (No 2)*, 1992)[250]

When a State acquires territory for the first time, the courts of that same State cannot contest that action. In fact, in *Mabo v Queensland (No 2)* (1992) the legal principle of *terra nullius* was overturned in terms of property, not in terms of sovereignty. For this reason, based on Brennan J's declaration, Indigenous Australians are owners of the land, but not sovereigns, because sovereignty is determined by the State, which in this case, is Australia. The decision did not consider the issue of Indigenous sovereignty.

This concept is amplified by the absence of a treaty with Indigenous peoples, which was previously discussed in paragraph 2.5.3. Without a treaty, colonial sovereignty remains a fact that has never been negotiated [251].

Moreover, Brennan J stated that the Court; in declaring Australian Common Law, cannot take rules that are consistent with contemporary notions of justice and human rights, because this "would fracture the skeleton of principle", "which gives the body of our law its shape and internal consistency" (*Mabo v Queensland (No 2)*, 1992)[252]. This means that the Court itself can recognize rights and principles only up to the point at which they do not threaten the structure established by colonization.

In the second chapter, the Bourke Proclamation, *R v Murrell* and the Protection Acts denied rights to Indigenous Australians. Even after the 1967 Referendum, legal limitations persist. These limitations culminated in *Mabo v Queensland (No 2)* (1992), where Brennan J declared that the doctrine that denies land rights to Indigenous Australians is "unjust", but at the same time the acquisition of sovereignty remained outside juridical review (Ibid)[253].

Secondly, its recognition is fragmented. *Mabo v Queensland (No 2)* (1992) is a court ruling, not a general law. It resolves a specific case but leaves a significant legal "gap" in the rest of Australia. In fact, it does not explain in detail how the ruling is to be applied. As mentioned before, this case owes

[250] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[251] Marcia Langton, *Australia's moral legitimacy depends on recognising Indigenous sovereignty* ABC Religion & Ethics, 2019, https://www.abc.net.au/religion/marcia-langton-australia-moral-legitimacy-and-indigenous-sovere/11287908 (accessed 31/07/2026).
[252] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[253] Ibid.

its name to Eddie Mabo, an inhabitant of Murray Island, the Mabo decision was taken with respect to that territory without giving instructions about how to apply it in the rest of the continent[254].
For this reason, *Mabo v Queensland (No 2)* (1992) leaves many uncertainties unresolved, that will be analysed in the next section, which examines the *Native Title Act 1993*.
The Mabo decision recognizes the native title before and independently from the UNDRIP, however it left sovereignty untouched. Compared with the international standards, the decision concerns rights in relation to the land to Indigenous Australians, however it is not addressed to the political status of Indigenous peoples, which Article 3 of UNDRIP connects to self-determination[255].

[254] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, pp. 391-392
[255] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 3, p. 8.

3.2 The Native Title Act 1993

3.2.1 From the Court to Parliament

In 1992, the Australian High Court, in *Mabo v Queensland (No 2)* (1992) case, rejected the common-law doctrine of *terra nullius,* recognizing for the first time that Aboriginal peoples and Torres Strait Islanders had traditional rights to their lands before colonization (Ibid)[256].

Afterwards, practical questions remained unanswered: how native title could be proven, what would happen to the titles already granted to settlers and what would happen to concessions granted after 1975 that may be discriminatory (Ivi: 393)[257]. For this reason, a law was needed.

As outlined on the Australian Government website, specifically in the *Attorney-General's Department* section, "the Government enacted the *Native Title Act 1993*, which commenced on 1 January 1994" (Australian Government, n.d.-c)[258]. This Act presented several provisions and explained how the native title could be recognized, protected and extinguished. Moreover, section 10 of this Act states that "Native title is recognised, and protected, in accordance with this Act" (*Native Title Act 1993 (Cth)*, s 10)[259].

However, it was not a law designed to enforce a right, but rather a political compromise resulting from "heated negotiations between the Commonwealth Government and miners, pastoralists, various other primary production industries, the states and Indigenous representatives" (Sanson, Anthony , 2019: 395)[260].

It can be noticed that Indigenous representatives were included in the negotiations. As analysed in the second chapter, Australia was the only CANZUS country that did not make any treaties with its Indigenous peoples[261]. With the establishment of the *Native Title Act 1993*, Indigenous peoples are part of the legislative process rather than its object.

3.2.2 The Definition of Native Title: Section 223

According to its definition, under section 223 of *Native Title Act 1993 (Cth)*:

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[256] Ibid.
[257] Ivi, p.393.
[258] Attorney-General's Department, *Native Title*, Australian Government, Canberra, https://www.ag.gov.au/legal-system/native-title (accessed 06/08/2026).
[259] *Native Title Act 1993* (Cth), s 10, https://www.legislation.gov.au/C2004A04665/latest (accessed 09/09/2026).
[260] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 395
[261] Francesca Merlan, *Anthropology and Change over the 'Land Rights Era': Towards Treaties?*, in «The Australian Journal of Anthropology», 36, 2025, p. 20, https://doi.org/10.1111/taja.12541 (accessed 31/07/2026).

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

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

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

(c) the rights and interests are recognised by the common law of Australia (Native Title Act 1993 (Cth), s 223)[262]

This Section clarifies that, in order to obtain the recognition of the native title, being Aboriginal or Torres Strait Islander peoples by birth is not sufficient. To claim native title, Aboriginal peoples and Torres Strait Islanders peoples must meet three conditions: the acknowledgment of the traditional Aboriginal laws, the demonstration of having a continuous connection with land or waters according to Aboriginal traditions and customs, and have these rights recognized by the Common Law of Australia. In fact, "proof of connection is wholly defined by the Australian legal system" (Sanson, Anthony 2019)[263].

In order to claim native title, Section 223 of the Native Title Act 1993 (Cth) requires Aboriginal and Torres Strait Islander peoples to possess "rights and interest under traditional laws acknowledged and traditional customs observed", and to show "a connection with the land or waters" under those "laws and customs" (*Native Title Act 1993 (Cth*), s 223)[264]. However, it will be further analysed that is difficult to show this connection due to the effects and consequences left by protection, segregation and assimilation policies (Sanson, Anthony, 2019:398)[265].

From an international perspective, as mentioned in the first chapter Article 26 of UNDRIP recognizes the right of Indigenous peoples to the lands, they have traditionally owned, occupied or otherwise used[266]. Moreover, unlike the *Native Title Act 1993 (Cth)*, it contains no requirement to prove cultural connection with the land and the waters.

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[262] *Native Title Act 1993* (Cth), s 223, https://www.legislation.gov.au/C2004A04665/latest (accessed 06/08/2026).
[263] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 398
[264] *Native Title Act 1993* (Cth), s 223, https://www.legislation.gov.au/C2004A04665/latest (accessed 06/08/2026).
[265] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 398
[266] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 26, p. 19.

The Native Title Act, which predates the UNDRIP, does not fully coincide with the provisions set out in Article 26: unlike the Declaration, it requires proof of a continuing connection with the land.
As analysed in the first chapter, the Declaration is not a binding document, and therefore a State that endorses it, is under no obligation to incorporate its articles into domestic law[267].
The following section will take into account the validation and extinguishment regarding the *Native Title Act 1993 (Cth)*.

3.2.3 Validation and Extinguishment

As explained by AIATSIS in the section *About the Native Title*, "the legal uncertainty that followed the Mabo decision prompted a legislative response", and as a result the Native Title Act 1993 (Cth) was enacted (AIATSIS, 2022a)[268]. The Act aimed to recognize and to protect the native title, determine future dealings about the native title and a process for claiming it, and allow the validation of the past acts that were "invalidated because of the existence of the native title" (Ibid)[269].
The issue regarding the validation of the territories is explained by Sanson and Anthony, who reported that "native title holders would have a limited right to negotiate with mining companies and governments that sought to acquire their land" and "could receive some compensation"(Sanson and Anthony, 2019:395)[270]. The source highlights the "limited right" of Indigenous people to negotiate and it shows that this right was subjected to certain conditions without describing these conditions. What is specified is when the compensation is payable, that is "on or after the 31 October 1975 when the Racial Discrimination Act 1975 came into effect" (AIATSIS, 2022a)[271].
As regards the extinguishment, the *Wik Peoples v Queensland (1996) 187 CLR 1* must be taken into account. In 1996 the High Court delivered its decision in *Wik Peoples v Queensland (1996) 187 CLR 1*, which "determined that native title is not necessarily extinguished by the grant of a pastoral lease, and that native title can coexist with other interests in land" (Sanson, Anthony, 2019:396)[272]. However, when native title holders' rights and pastoralists' interests "are in conflict", the pastoralists' interests would prevail over those of native title holders (Ibid)[273]. Due to this case, pastoralists were

[267] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf
[268] Australian Institute of Aboriginal and Torres Strait Islander Studies, *About Native Title*, AIATSIS, Canberra, https://aiatsis.gov.au/about-native-title (accessed 12/08/2026).
[269] Ibid.
[270] [270] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 395.
[271] Australian Institute of Aboriginal and Torres Strait Islander Studies, *About Native Title*, AIATSIS, Canberra, https://aiatsis.gov.au/about-native-title (accessed 12/08/2026).
[272] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 396.
[273] Ibid.

uncertain about the status of their leaseholds, since it was not clear whether native title would be extinguished or not (Ibid)[274].

The *Native Title Act 1993 (Cth)* was enacted in order to solve the uncertainty left by the Mabo decision; however, the validation of the territories is limited by certain conditions that the source does not specify and the native title can coexist with other interests in land, but the pastoralists' interest prevail over the native title holders' rights.

Comparing to the international standards, Article 26(3) of the UNDRIP requires the recognition and the protection of the lands[275], however the validation of the past acts confirms the extinguishment of the native title that those acts had produced.

3.2.4 The 1998 Amendments and the CERD Decision

Following the *Wik Peoples v Queensland (1996)* 187 CLR 1, the Federal Parliament passed the *Native Title Amendment Act 1998 (Cth),* which clarified provisions regarding the *Native Title Act 1993* (Sanson, Anthony: 396)[276]. *Native Title Amendment Act 1998 (Cth)* limited Indigenous Australians native title rights, and on the other hand, it amplified activities on pastoral lease, making it more difficult for Indigenous Australians "to submit customary evidence", restricting the right to negotiate future acts (Ibid)[277]. Furthermore, the Act stated that "once the native title was extinguished", there was no possibility of reviving it (Ibid)[278].

When *Native Title Amendment Act 1998 (Cth)* was enacted, the *Racial Discrimination Act 1975*[279] was suspended and "this removal of judicial scrutiny created sustained controversy" (Sanson, Anthony: 396)[280]. In fact, the provisions established by the amendment of 1998 limited Aboriginal and Torres Strait Islander peoples native title rights (Ibid)[281].

Consequently, the Australian Human Rights Commission, the Aboriginal and Torres Strait Islander Commission reported to the United Nations Committee on the Elimination of All Forms of Racial Discrimination that the *Native Title Amendment Act 1998* violated the *Convention on the Elimination*

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[274] Ibid.
[275] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 26, p. 19.
[276] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 396.
[277] Ibid.
[278] Ibid.
[279] The *Racial Discrimination Act 1975* will be suspended in 2007 due to the *Northern Territory Emergency Act 2007,* that will be analyzed in Chapter 4.
[280] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 396.
[281] Ibid.

of All Forms of Racial Discrimination 1966 (CERD) (Ivi:397)[282]. In the article *The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),* published by the Australian Human Rights Commission, it is explained that "The *Convention on the Elimination of All Forms of Racial Discrimination 1966 (CERD)* was one of the first human rights treaties to be adopted by the United Nations" and that, in order to assist this Convention, a committee, "the Committee on the Elimination of Racial Discrimination (CERD Committee)", was created (AHRC, 2012b)[283]. In addition, more than 156 countries signed the Convention and Australia ratified it "on 30 September 1975", which was almost one month before the *Racial Discrimination Act 1975* came into effect (Ibid)[284].

The CERD decided to take action against the *Native Title Amendment Act 1998 (Cth)* in 1999. In fact, as reported by Triggs in the article *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)* the CERD on 18 March 1999:

"that the *Native Title Amendment Act 1998* (Cth) discriminates against indigenous title holders by validating past acts, extinguishing native title, upgrading primary production and restricting the right to negotiate" (Triggs, 1999:372)[285]

Moreover, the Committee asked Australia to "reopen discussions with the representatives of Aboriginal and Torres Strait Islander peoples" (Ibid)[286], but the amendments remained in force (*Native Title Amendment Act 1998* (Cth))[287].

In the first chapter, it was demonstrated that the UNDRIP was not a legally binding document[288], instead, the ICERD is a treaty that "Australia ratified in 1975"(AHRC, 2012b)[289]. Since the ICERD is a treaty, it is a legally binding document and if a State did not respect provisions established by a treaty, it may be subjected to sanctions. In addition, the Committee highlighted that Australia

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[282] Ivi, p.397.

[283] Australian Human Rights Commission, The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), https://humanrights.gov.au/resource-hub/by-resource-type/guides/guides-race-discrimination/international-convention-elimination-all-forms-racial-discrimination (accessed 12/08/2026).

[284] Ibid.

[285] Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, in «Melbourne University Law Review», 23, n. 2, 1999, p. 372.

[286] Ibid.

[287] *Native Title Amendment Act 1998* (Cth), No. 97, 1998.

[288] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

[289] Australian Human Rights Commission, The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), https://humanrights.gov.au/resource-hub/by-resource-type/guides/guides-race-discrimination/international-convention-elimination-all-forms-racial-discrimination (accessed 12/08/2026).

"restricted right to negotiate" the *Native Title Amendment Act 1998 (Cth)* with Indigenous Australians" (Triggs, 1999:372)[290].

The *Native Title Amendment Act 1998 (Cth*) raised a problem regarding the parameter of non-discrimination. In order to pass it, the government had to suspend the *Racial Discrimination Act 1975*[291]. Unlike the UNDRIP, the ICERD is a treaty, which Australia ratified in 1975 and incorporated into domestic law through the *Racial Discrimination Act 1975*[292]. Therefore, the domestic protection derived from a binding treaty was suspended by ordinary legislation.

In this section was examined how Parliament has limited the native title, in the following section, the Courts interpretation regarding the native title will be taken into account.

[290] Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, in «Melbourne University Law Review», 23, n. 2, 1999, p. 372.

[291] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 396.

[292] Australian Human Rights Commission, The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), https://humanrights.gov.au/resource-hub/by-resource-type/guides/guides-race-discrimination/international-convention-elimination-all-forms-racial-discrimination (accessed 12/08/2026).

3.3 Limits and challenges of Native Title Act

3.3.1 Yorta Yorta and the "Tide of History"

The *Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422* case illustrates how difficult it was for Indigenous Australians to claim the native title, because it established that "native title is unlikely to be recognized in the areas of eastern and southern Australia", because they "had been the most affected by European colonization" (Sanson, Anthony: 397)[293].In particular, in 1998 Justice Olney declared that it was not possible to claim the native title in the Murray River area in New South Wales and Victoria (Ibid)[294]. Moreover, Justice Olney justified his statement by affirming that "the tide of history had washed away the Yorta Yorta community's traditional laws, languages and customs" (Ibid)[295]. Afterwards, in 2002 the High Court declared that native title ceased to exist because of the eradication of Indigenous society due to colonization (Ibid)[296].

To justify his decision, Justice Olney used as evidence "the diary of colonial pastoralist Edward Curr", who "had written that he acquired the land in exchange for a stick of tobacco" (Ivi: 398)[297]. This evidence was privileged by the judge, because it was a written colonial document; in fact, he preferred these kinds of documents compared to Indigenous oral evidence (Ibid)[298].

Moreover, as before mentioned, Justice Olney used the metaphor of the 'tide of history' in the *Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422.* The usage of this metaphor was analysed in the *The Judgement of the World: The Yorta Yorta Case and the 'Tide of History* written by David Ritter, who observes that the expression "is highly ambiguous given the broader system of values and ideological heritages that the phrase imports" (Ritter, 2004: 110). According to Ritter, the "tide of history" is not neutral, because it carries a whole system of values. In Justice Olney's judgment, the metaphor of the 'tide of history' represents "colonization, settlement and assimilation policies" that had dismantled tradition and customs of the Indigenous Australians (Sanson, Anthony: 397)[299]. This did not make it easy to claim native title for Indigenous peoples, because "massacres, forced removal from Country and the Stolen Generations works in favour of the State in extinguishing claims to native title" (Ivi: 398). In fact, according to Section 223 of the Native

[293] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 397.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Ivi, p.398
[298] Ibid.
[299] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 397.

Title Act, they had to demonstrate continuous connection with the land and the waters under Aboriginal law and customs (Native Title Act 1993 (Cth), s 223)[300].

According to Justice Olney, these elements "had been washed away by the tide of history" (Sanson, Anthony: 397)[301].

3.3.2 The Burden of Proof

The burden of proof on native title claimants, according to the Australian Law Reform Commission in its report *Connection to Country: Review of the Native Title Act 1993 (Cth) (ALRC Report 126)* is the acknowledgment and continuous observation from sovereignty of traditional Aboriginal laws and customs (ALRC, 2015: para 5.58)[302].

However, as discussed above, it is very difficult for Indigenous Australians to demonstrate this connection due to the colonization.

In addition, the ALRC affirmed that the requirement of continuous and uninterrupted acknowledging and observation of Indigenous laws and customs since sovereignty is unnecessary "on the recognition of the native title" (Ivi: para 5.77)[303]. Moreover, the ALRC stated that "the extent of evidence required to establish native title is in tension with the object of the Native Title Act to recognise and protect native title" (Ibid)[304]. The ALRC therefore noticed that this requirement is not necessary and the evidence to establish if the native title can be recognized are in contradiction with the *Native Title Act 1993*, which aimed to recognize and protect the native title according to Section 10 *Native Title Act 1993 (Cth)*, s 10)[305].

In another report, which is *Review of the Native Title Act 1993 (IP 45),* the ALRC reported that, from an international level, neither the United Nations Committee on the Elimination of Racial Discrimination agreed about this burden of proof of "continuous observance and acknowledgement of the laws and customs of Indigenous peoples since the British acquisition of sovereignty"

[300] *Native Title Act 1993* (Cth), s 223, https://www.legislation.gov.au/C2004A04665/latest (accessed 06/08/2026).
[301] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 397.
[302] Australian Law Reform Commission. *Connection to Country: Review of the Native Title Act 1993 (Cth)* ALRC Report 126 (2015) https://www.alrc.gov.au/publication/connection-to-country-review-of-the-native-title-act-1993-cth-alrc-report-126/5-traditional-laws-and-customs-2/continuity-of-acknowledgment-of-traditional-laws-and-customs/ para 5.58 (accessed 13/08/2026).
[303] Ivi, para 5.77.
[304] Ibid.
[305] *Native Title Act 1993* (Cth), s 10, https://www.legislation.gov.au/C2004A04665/latest (accessed 09/09/2026).

(ALRC,2014: para 73)[306]. For this reason, the Committee asked to Australia to review this requirement and consider "the nature of the relationship of Indigenous peoples to their land" (Ibid)[307]. As previously analysed, the CERD also condemned Australia for the *Native Title Amendment Act 1998 (Cth)*[308].

This burden of proof is also inconsistent with Article 27 of the UNDRIP, which requires States to establish fair processes in order to recognize Indigenous people's laws, traditions and customs and "Indigenous People shall have the right to participate" (United Nations, 2007: 20)[309]

As argued by the ICERD and by the ALRC, the burden of proof of showing continuous and uninterrupted acknowledging and observation of Indigenous laws and customs since sovereignty is unnecessary to determine the native title. However, the State continues to ask to Indigenous Australians to prove this continuous connection, even if it is in contradiction with the *Native Title Act 1993 (Cth)* (Section 10) and even if the CERD and the ALRC expressed concern about this burden of proof.

3.3.3 Fragmented Recognition

As outlined by Sanson and Anthony, "when a native title is recognised, Indigenous People as groups acquire a non-exclusive right to land possession" (Sanson and Anthony, 2019:398)[310]. This means that, even if the native title is recognized, this is not a definitive decision, because the Crown negotiates with the native title claimants and, if and once this right had been recognized, Indigenous Australians cannot sell the land or "use it for exclusive purposes" (Ibid)[311]. In *Western Australia v Ward* (2002) the High Court established that native title "is not equivalent to full private ownership" (Ibid)[312]. Therefore, the recognition is fragmented, because if native title is recognized, Indigenous peoples do not have an exclusive right to the land.

As reported by the NSW Crown Lands on 14 August 2024, recent native title determinations "regarding the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People" have showed that these rights were "non-exclusive native title rights" in "some areas of Crown land in the north-western

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[306] Australian Law Reform Commission (ALRC), *Review of the Native Title Act 1993*, Issues Paper No. 45, 2014, Cap. 3, «Presumption of continuity» para 73 https://www.alrc.gov.au/publication/review-of-the-native-title-act-1993-ip-45/issues-paper-3/presumption-of-continuity/ (accessed 13/08/2026).
[307] Ibid.
[308] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 397.
[309] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 27, p. 19
[310] Sanson, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p.398
[311] Ibid.
[312] Ibid.

NSW" (Crown Lands NSW, 2026)[313]. This means that, also nowadays, Indigenous Australians do not have full ownership on their lands, they can just access the land on a non-permanent basis, organize cultural activities and campsites (Ibid)[314]. This example shows that native title does not guarantee full private ownership of the land, because Indigenous Australians have to negotiate with the Crown and, if the Crown agrees, they are subjected to some limitations.

Mabo v Queensland (No2) (1992) 175 CLR 1 rejected the common-law doctrine according to which Australia would have been treated as a territory without recognizable Indigenous property rights[315]. However, the Mabo decision left some issues unsolved, for this reason the *Native Title Act 1993 (Cth)* was enacted. However, validation and extinguishment of native title present contradictions. In order to claim the native title, article 223 requires Aboriginal and Torres Strait Islander peoples to possess rights and interest according to acknowledged traditional laws and observed traditional customs and to have a connection with the land or waters according to those laws and customs[316]. However, due to the colonization and the twentieth century policies it is difficult to prove acknowledgment and continuous observation of traditional Aboriginal laws and customs from sovereignty[317]. Therefore, the CERD and the ALRC expressed their concern and disagreement about this burden of proof[318][319].

Comparing to the international standards, Article 26(2) establishes that "Indigenous peoples have the right to own, use, develop and control the lands", however, as analysed before, the native title does not guarantee an exclusive rights on the land (United Nations, 2007:19)[320].

In conclusion, a domestic recognition of the land rights exists, but it is limited, fragmented and does not fully correspond to international framework outlined in the first chapter.

The following chapter will examine instruments of different legal nature in relation to parameters expressed in the first chapter.

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[313] Crown Lands – NSW Government, *Recent native title determinations*, New South Wales Government, 2024, https://www.crownland.nsw.gov.au/about-crown-lands/aboriginal-land-rights-and-native-title/recent-native-title-determinations (accessed 13/08/2026).

[314] Ibid.

[315] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[316] *Native Title Act 1993* (Cth), s. 223 https://www.legislation.gov.au/C2004A04665/latest (accessed 06/08/2026).

[317] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 398

[318] Australian Law Reform ommission (ALRC), *Review of the Native Title Act 1993*, Issues Paper No. 45, 2014, Cap. 3, «Presumption of continuity» para 73 https://www.alrc.gov.au/publication/review-of-the-native-title-act-1993-ip-45/issues-paper-3/presumption-of-continuity/ (accessed 13/08/2026).

[319] Australian Law Reform Commission. *Connection to Country: Review of the Native Title Act 1993 (Cth)* ALRC Report 126 (2015) https://www.alrc.gov.au/publication/connection-to-country-review-of-the-native-title-act-1993-cth-alrc-report-126/5-traditional-laws-and-customs-2/continuity-of-acknowledgment-of-traditional-laws-and-customs/ para 5.77 (accessed 13/08/2026).

[320] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 26, p. 19.

4. The limits of fully implement Indigenous Rights in Australia

4.1 Government Initiatives and Their Structural Limitations

4.1.1 The Abolition of ATSIC and the End of Elected Representation

As reported by the Parliament of Australia in its publication *The end of ATSIC and the future administration of Indigenous affairs,* under the Hawke Government, the Aboriginal and Torres Strait Islander Commission (ATSIC) was established; it was a statutory body which aimed "to combine both representative and executive roles through an organization of regional councils and a national board elected by Indigenous people" (Parliament of Australia, 2004)[321]. This body was created in 1990 by the *Aboriginal and Torres Strait Islander Commission Act 1989 (Cth).* Thanks to ATSIC, Aboriginal and Torres Strait Islander peoples were represented in the federal administration of Indigenous affairs, because this body was designed to "ensure maximum participation", develop "economic, social and cultural" policies in favour of Indigenous Australians and to "promote Indigenous self-management and self-sufficiency" (Ibid)[322].

However, as observed in the Press Conference dated 15 April 2004, Prime Minister John Howard announced that ATSIC would be abolished "by the 30 June 2005" (Australian Government Department of the Prime Minister and Cabinet, 2004)[323]. In addition, the Prime Minister declared that there would not be established an alternative body to replace ATSIC, but there would be appointed a group of Indigenous peoples aimed to advise the Government "in relation to aboriginal affairs" (Ibid)[324]. Afterwards, Howard stated that the solutions implemented by ATSIC were not effective. Their goal was to assure "indigenous people a greater opportunity to share in the wealth and success and the bounty of this country", but the ATSIC did not accomplish that (Ibid)[325].

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[321] Parliament of Australia, *The End of ATSIC and the Future Administration of Indigenous Affairs*, Parliamentary Library, Canberra, 2004, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/prspub/FXED6%22

[322] Ibid.

[323] Australian Government, Department of the Prime Minister and Cabinet, *Press Conference*, 15 April 2004, https://pmtranscripts.pmc.gov.au/release/transcript-21205

[324] Ibid.

[325] Ibid.

ATSIC had been created by an ordinary Act of Parliament, and it was abolished by another ordinary Act of Parliament, the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth) (Aboriginal and Torres Strait Islander Commission Amendment Act, 2005)[326]. Its establishment and its abolition were therefore both effected by ordinary legislation, without any constitutional guarantee.

Australia voted against the UNDRIP in 2007 and endorsed it in 2009, four years after the abolition of ATSIC, at a time when Indigenous Australians no longer had an elected national body representing them in international forums.

The abolition of ATSIC opened a crucial question: was separate Indigenous political representation still justified?

"Former Liberal Minister for the Environment, Aborigines and the Arts (1971-2), Peter Howson, claims that elected Indigenous representation is no longer justified", because Indigenous Australians and non-Indigenous Australians should be treated the same (Parliament of Australia, 2004)[327].

The question of whether dedicated institutions constitute a privilege or a means of ensuring equality has been addressed at a normative level. Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination* provides that special measures taken to secure the adequate advancement of certain racial or ethnic groups "shall not be deemed racial discrimination" (United Nations, 1965, art.1(4))[328]. Moreover, Australia gave effect to this principle in section 8 of the *Racial Discrimination Act 1975* (Cth), which excludes special measures from the prohibition of racial discrimination established by the Act (Racial Discrimination Act, 1975, s 8)[329]. In addition, the previous question concerns the parameter of non-discrimination.

Regarding the parameter of participation, ATSIC was the only national body in which members were elected by Aboriginal and Torres Strait Islander peoples. This is a form of participation, which is the core principle of Article 18 of the UNDRIP[330]. When the ATSIC was abolished, no alternative electoral body was established[331].

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[326] *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth), Sch 1.

[327] Parliament of Australia, *The End of ATSIC and the Future Administration of Indigenous Affairs*, Parliamentary Library, Canberra, 2004, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/prspub/FXED6%22

[328] United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination*, General Assembly Resolution 2106 (XX), 21 December 1965, art. 1(4)

[329] *Racial Discrimination Act 1975* (Cth), s 8.

[330] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 18, p. 15.

[331] Australian Government, Department of the Prime Minister and Cabinet, *Press Conference*, 15 April 2004, https://pmtranscripts.pmc.gov.au/release/transcript-21205

4.1.2 The 2008 Apology: Recognition Without Reparation

As documented by the Parliament of Australia, on 13 February 2008 Prime Minister Kevin Rudd delivered the *Apology to Australia's Indigenous Peoples* in the House of Representatives, "particularly the Stolen Generations" (Parliament of Australia, 2008)[332]. The Apology was a political act of the Parliament, not legislation.

As analysed in the second chapter, the Stolen Generations were Aboriginal and Torres Strait Islander people's children who were forcibly removed from their families and placed in institutions or fostered by non-Indigenous Australians. This was part of the assimilation policies, however children "experienced sexual abuse and exploitative labour, and were denied contact with their families" (Ibid)[333].

Before the *Apology to Australia's Indigenous Peoples*, in 1995 "a National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was established by then Attorney-General, Michael Lavarch" and two years later its findings were published in a report, namely *Bringing Them Home*, which "was tabled in Parliament" (Ibid)[334]. The *Bringing Them Home* report documented the atrocities suffered by Aboriginal children during those years and the suffering of their families.

Consequently, the Australian Government decided to offer a formal Apology and Prime Minister Kevin Rudd's speech was "considered a milestone step toward reconciliation between Indigenous and non-Indigenous Australians" (Ibid)[335].

Afterwards, Aunty Lorraine Peeters[336] gifted a "glass coolamon to the Prime Minister Kevin Rudd and the Leader of the Opposition, Brendan Nelson", which contained an important message: "On behalf of Aboriginal and Torres Strait Islander peoples, thank you for saying sorry" (Ibid)[337].

As documented by the National Museum of Australia, coolamons made of wood were among a woman's most important possessions in the desert: deeper bowls were used for carrying water and food and for soaking medicinal plants, while shallower dishes were used for separating seed and "as cradles for newborn babies" (National Museum of Australia, n.d.)[338]. The choice of this object was not accidental: it was presented by a woman who had been removed from her family as a child. The

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[332] Parliament of Australia, *Apology to Australia's Indigenous Peoples*, Canberra, 2008, https://www.aph.gov.au/Visit_Parliament/Art/Collections/Apology_to_Australias_Indigenous_Peoples

[333] Ibid.

[334] Ibid.

[335] Ibid.

[336] Aunty Lorraine Peeters is a nationally respected Elder, Stolen Generations Survivor, and the founder of the Marumali Program, developed for Stolen Generations survivors, their families and communities.

[337] Ibid.

[338] National Museum of Australia, *Creating Culture*, Yiwarra Kuju: The Canning Stock Route, https://www.nma.gov.au/exhibitions/yiwarra-kuju-canning-stock-route/artworks/creating-culture

gift was received as a symbol of hope for a new relationship between Indigenous and non-Indigenous Australians.

Even though the Prime Minister's speech received the Aboriginal and Torres Strait Islander people's forgiveness, from a practical point of view, no national compensation programme or structural changes was implemented. However, the *Bringing them Home* report recommended five forms of reparation, including "monetary compensation", thus it must be stated that there was recognition without reparation (Human Rights and Equal Opportunity Commission, 1997)[339].

As in the Preamble of the *Native Title Act 1993*, examined in section 3.2.3, past injustices were formally recognized, but no legal measure was established to repair them.

The Apology was therefore delivered three years after the abolition of the only national body of elected Indigenous representation, and it was not accompanied by the reparation measures recommended by the *Bringing Them Home* report.

Considering the nature of the Apology, that is a political act, it does not fall within the legal parameters established in section 1.4. The Apology expressed a political recognition of past injustices, but it did not create rights or obligations.

4.1.3 The National Agreement on Closing the Gap

The National Agreement on Closing the Gap was a policy agreement between Australian governments and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations (the Coalition of Peaks)[340].

As documented on the official Closing the Gap website of the Australian Government, in 2007 the Council of Australian Governments (COAG) tried to close the gap between Indigenous Australians and non-Indigenous Australians. "In November COAG approved the National Indigenous Reform Agreement (NIRA) which set out six Closing the Gap targets", which regarded the life expectancy, the mortality rates, the access to early childhood education and employment (Australian Government, n.d.-b)[341].

As stated on the Coalition of Peaks website, the NIRA "was always considered to be an initiative of governments", only a few Aboriginal and Torres Strait Islander peoples were involved, "but there was never full ownership" (Coalition of Peaks, n.d.)[342]. The Coalition of Peaks reports that progress on

[339] Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, HREOC, Sydney, 1997, Recommendation 3.

[340] Commonwealth of Australia, *National Agreement on Closing the Gap*, 2020, https://www.closingthegap.gov.au/national-agreement

[341] Commonwealth of Australia, *History of Closing the Gap*, https://www.closingthegap.gov.au/resources/history

[342] Coalition of Peaks, *Our Story*, https://www.coalitionofpeaks.org.au/our-story

the targets was limited by partial implementation, by a lack of effort from governments to work together and by a lack of ongoing funding and by inadequate community involvement (Ibid)[343].

In December 2018 fourteen Representatives of the Aboriginal and Torres Strait Islander communities asked the Prime Minister to establish a new Closing the Gap policy and a formal partnership between them and the COAG. The proposal was approved and in January 2019 the Coalition of Peaks was formed, with forty initial members from Aboriginal and Torres Strait Islander communities, then in March 2019 "a formal Partnership Agreement on Closing the Gap between the Coalition of Peaks and COAG came into effect" (Ibid)[344]. Afterwards, on 27 July 2020, the National Agreement on Closing the Gap was "signed by the Coalition of Peaks, the Prime Minister, Premiers, Chief Ministers and the President of the Australian Local Government Association" (Ibid)[345]. As set out on the official Closing the Gap website of the Australian Government, the National Agreement on Closing the Gap establishes nineteen national socio-economic targets across seventeen outcome areas, together with four Priority Reforms focused on changing the way governments work with Aboriginal and Torres Strait Islander peoples (Commonwealth of Australia, 2020)[346].

The Coalition of Peaks describes the National Agreement as the first intergovernmental agreement of this kind to have been developed and negotiated between governments and Aboriginal and Torres Strait Islander representatives (Ibid)[347].

As stated on the Australian Government website in the *Productivity Commission* section, Commissioner Selwyn Button affirmed that "the governments had not taken enough meaningful action to meet their commitments under the National Agreement on Closing the Gap" (Australian Government Productivity Commission, 2025)[348].

Regarding the parameters, the National Agreement on Closing the Gap is related to the participation, because it was negotiated with Aboriginal and Torres Strait Islander representatives. However, since it is an agreement between governments and Indigenous organisations, it is not an Act of Parliament; this form of participation therefore establishes political commitments rather than legal obligations enforceable before a court.

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[343] Ibid.
[344] Ibid.
[345] Ibid.
[346] Commonwealth of Australia, *National Agreement on Closing the Gap*, 2020, https://www.closingthegap.gov.au/national-agreement
[347] Ibid.
[348] Productivity Commission, "New Closing the Gap Data Shows Focus on Priority Reforms by Governments Needed to See Real Improvement," media release, 13 March 2025, https://www.pc.gov.au/closing-the-gap-data/media-releases/new-closing-the-gap-data-march-2025/ (accessed 18/08/2026)

4.2 The Northern Territory Intervention and its legal implications

The Northern Territory Emergency Response was an emergency legislation: a package of measures enacted by the Commonwealth Parliament through the *Northern Territory National Emergency Response Act 2007* (Cth)[349].

4.2.1 The Little Children are Sacred Report

On 8 August 2006 the Chief Minister of the Northern Territory commissioned a Board of Inquiry into instances of sexual abuse in Aboriginal communities. Its report, *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'*, "involved extensive research and community consultation by members of the Board of Inquiry" (AHRC, 2012a)[350].

The report analysed the different causes of sexual abuse of Aboriginal children and provided recommendations for the future. Firstly, the report showed that this violence against Aboriginal children is a "reflection of the past, current and continuing social problems" (Ibid)[351]. Moreover, this abuse has its roots in different areas, such as: "health, alcohol and drug abuse, unemployment, poor education, gambling" (Ibid)[352].

The Little Children are Sacred report was "presented to the Chief Minister of the Northern Territory on 30 April 2007" (Ibid)[353]. It revealed that "child sexual abuse is serious, widespread and often unreported" and for this reason it provided 97 recommendations. Among them, the first concerned about the importance "of genuine consultation with Aboriginal peoples in the designing of community initiatives", in fact this underline, again, the lack of dialogue with Indigenous Australians (Wild and Anderson, 2007:7)[354]. The second relies on the "responsibility for the protection of all children", because the Government must consider Aboriginal children in its policies, because of their "special disadvantage" (Ibid)[355].

The report also recommended that "education is the key to helping children" (AHRC 2012)[356].

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[349] *Northern Territory National Emergency Response Act 2007* (Cth), s 132.

[350] Australian Human Rights Commission, *Social Justice Report 2007*, ch. 3, HREOC, Sydney, 2012, https://humanrights.gov.au/resource-hub/by-resource-type/publications/aboriginal-and-torres-strait-islander-peoples/first-nations/social-justice-report-2007-chapter-3-the-northern-territory-emergency-response-intervention (accessed 23/08/2026)

[351] Ibid.

[352] Ibid.

[353] Ibid.

[354] Rex Wild e Patricia Anderson, *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'*, Northern Territory Government, Darwin, 2007, p. 7.

[355] Ibid.

[356] Australian Human Rights Commission, *Social Justice Report 2007*, ch. 3, HREOC, Sydney, 2012, https://humanrights.gov.au/resource-hub/by-resource-type/publications/aboriginal-and-torres-strait-islander-

The Little Children are Sacred report was "publicly released on 15 June 2007", six days later, on the 21 June, the Federal Government announced the Intervention (Ibid)[357].

4.2.2 The Emergency Response and the Suspension of the Racial Discrimination Act

On 21 June 2007 "the Australian Government announced a national emergency response", which has been named 'Northern Territory Intervention'(Ibid)[358]. The Northern Territory Intervention was an emergency legislation which aimed to protect Aboriginal children in the Northern Territory (Ibid)[359]. Among its previsions, are relevant the ones related to "alcohol restrictions on Northern Territory Aboriginal land", "welfare reforms", "enforcing school attendance", "compulsory health checks", the Commonwealth's acquisition of five-year leases on townships and a ban on pornography (Ibid)[360].

These measures are contained in the *Northern Territory National Emergency Response Act 2007*. Section 132 of this Act establishes that the measures adopted under the law are "special measures" for the purposes of the *Racial Discrimination Act 1975*, and that the provisions of Part II of that Act, which are those prohibiting racial discrimination, do not apply (Northern Territory National Emergency Response Act 2007, Section 132)[361]. The practical consequence was that no complaint could be made against the discriminatory aspects of the measures.

As mentioned in the previous section, section 8 of the *Racial Discrimination Act 1975* already excludes special measures from the prohibition on racial discrimination, in accordance with Article 1(4) of the ICERD. The classification adopted by the legislation has been examined by legal scholarship, as will be shown in section 4.2.4.

The problematic nature of the suspension was highlighted in Parliament: the Senate Standing Committee that reviewed the bills recommended that "the provisions in the bills suspending the operation of the Racial Discrimination Act should be opposed" (HREOC, 2012)[362].

As examined in section 3.2.4, to pass the *Native Title Amendment Act 1998*, the government had to suspend the *Racial Discrimination Act 1975*[363]. Section 132 of the *Northern Territory National*

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peoples/first-nations/social-justice-report-2007-chapter-3-the-northern-territory-emergency-response-intervention (accessed 23/08/2026)

[357] Ibid.

[358] Ibid.

[359] Ibid.

[360] Ibid.

[361] *Northern Territory National Emergency Response Act 2007* (Cth), s 132.

[362] Human Rights and Equal Opportunity Commission, *Social Justice Report 2007*, ch. 3, HREOC, Sydney, 2007, https://humanrights.gov.au/resource-hub/by-resource-type/publications/aboriginal-and-torres-strait-islander-peoples/first-nations/social-justice-report-2007-chapter-3-the-northern-territory-emergency-response-intervention

[363] Michelle Sanson and Thalia Anthony, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p. 396.

Emergency Response Act 2007 excluded the application of Part II of the same statute, which is the part prohibiting racial discrimination, to the Intervention measures[364]

As examined in section 3.2.4, Australia incorporated the ICERD into its legal system through the *Racial Discrimination Act 1975*. Section 7 of that Act, entitled *Ratification of Convention*, gives effect to the Convention in Australian law[365]. The operation of the Act in relation to the Intervention measures was excluded by an ordinary Act of Parliament [366].

In 2000 the Committee on the Elimination of Racial Discrimination had expressed concern about "the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, states and territories" (Committee on the Elimination of Racial Discrimination, 2000)[367]

The *Racial Discrimination Act 1975* is an ordinary Act of Parliament, as was the *Aboriginal and Torres Strait Islander Commission Act 1989* examined in section 4.1.1[368]

The demand for a guarantee enshrined in the Constitution rather than in ordinary legislation will be examined in section 4.3.

4.2.3 The 2008 Review and the Reinstatement of the Racial Discrimination Act

As stated in the *Report of the NTER Review Board*, on 21 June 2007 the Australian Government announced The Northern Territory Emergency Response (NTER), whose measures aimed to protect children and to "create a better future for Aboriginal communities" (Yu, Duncan, Gray, 2008)[369].

On 6 June 2008, the Australian Government conducted "an independent and transparent review of the first 12 months of the NTER", which was named Review Board (Ibid)[370]. During these 12 months, the life conditions of Aboriginal children in the Northern Territory areas were analysed, in particular the Board visited 31 Aboriginal communities and spoke with 56 communities' representatives (Ibid)[371]. As a result, "200 public submissions were received" (Ibid)[372]. In this research, directly consulting Aboriginal peoples was prioritized in order to understand "the impacts of the various NTER measures" (Ibid)[373].

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[364] *Northern Territory National Emergency Response Act 2007* (Cth), s 132.
[365] *Racial Discrimination Act 1975* (Cth), s 7
[366] *Northern Territory National Emergency Response Act 2007* (Cth), s 132.
[367] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, UN Doc CERD/C/304/Add.101, 24 March 2000, para 6, https://hrlibrary.umn.edu/country/australia2000.html
[368] *Racial Discrimination Act 1975* (Cth); *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).
[369] Peter Yu, Marcia Ella Duncan e Bill Gray, *Northern Territory Emergency Response: Report of the NTER Review Board*, Northern Territory Emergency Response Review Board, Canberra, 2008, p. 9
[370] Ibid.
[371] Ibid.
[372] Ibid.
[373] Ibid.

However, the Board noticed that Aboriginal peoples were hostile towards the Australian Government, because of "experiences of racial discrimination and humiliation as a result of the NTER" (Ivi:10)[374]. For this reason, the Board reported it to the Minister for Indigenous Affair, because this resentment on the part of Aboriginal peoples toward the Australian Government was extremely severe.

Aboriginal peoples felt isolated because of their race and "subjected to collective measures that would never be applied to other Australians" (Ibid)[375]. As a result, the Intervention was perceived "with a sense of betrayal and disbelief" (Ibid)[376].

In the light of this situation, the crises that prompted the NTER was real and, it must remain a "national priority", but that the path forward must be based on a new relationship, which is not based on just words, "it requires decisive action" (Ibid)[377].

As mentioned by the Australian Government in its reply to the C*oncluding observations of the Committee on the Elimination of Racial Discrimination: Australia,* a decisive action was taken on 21 June 2010: "The Australian Government has fully reinstated people's rights and protections under the *Racial Discrimination Act 1975* (RDA) in relation to the Northern Territory Emergency Response (NTER)" (Australian Government, 2011: para 16)[378]. Moreover, on the 31 December 2010, special measures, such as "income management, five-year leases and alcohol and pornography restrictions" have been removed (Ibid)[379].

On the 29 June 2012 the Australian Parliament enacted the *Stronger Futures in the Northern Territory Act 2012,* which aimed to "build stronger futures for Aboriginal peoples in the Northern Territory", extended a number of measures, including alcohol restrictions and income management (Stronger Futures in the Northern Territory Act 2012 (No.100, 2012), 2012)[380]. These measures were also examined at the international level, as will be shown in the following section.

4.2.4 The International Response

The classification of the Intervention measures as "special measures" has been examined by legal scholarship. Schokman and Vivian observe that the *Racial Discrimination Act 1975* (Cth) is "the instrument that enacts Australia's obligations" under the ICERD, and that the former Government

[374] Ivi p.10.
[375] Ibid.
[376] Ibid.
[377] Ibid.
[378] Australian Government, *Information Received from the Government of Australia on the Implementation of the Concluding Observations*, CERD/C/AUS/CO/15-17/Add.1, 29 August 2011, para. 16.
[379] Ibid.
[380] *Stronger Futures in the Northern Territory Act 2012* (Cth), No. 100, 2012.

excluded its application to the Intervention (Schokman, Vivian, 2009: 78)[381]. They further note that the Government adopted "the device of declaring" that all the measures constituting the Intervention were special measures for the purposes of the Act, and that a provision to that effect was included in each of the three legislative instruments of the Intervention (Ibid)[382].

As examined in the previous section, section 8 of the *Racial Discrimination Act 1975* already excludes special measures from the prohibition of racial discrimination. Genuine special measures would therefore have been lawful without any need to exclude the operation of the Act.

As analysed by Jenna Gruenstein in the article *Australia's Northern Territory National Emergency Response Act: Addressing Indigenous and Non-Indigenous Inequities at the Expense of International Human Rights?*, "the NT Emergency Response Act likely violates Australia's obligations under the United Nations ("U.N.") International Convention on the Elimination of All Forms of Racial Discrimination ("Racial Discrimination Convention")" (Gruenstein, 2008: 467)[383]. The author affirms that because this Act passed without consent or participation of Indigenous peoples (Ibid)[384].

On the 24 August 2010, the UN Committee on the Elimination of Racial Discrimination adopted its concluding observations on Australia. In paragraph 16, it expressed concern that the NTER legislative package continued "to discriminate on the basis of race, including through the use of so-called special measures" (Committee on the Elimination of Racial Discrimination, 2010: para 16)[385].

The Committee expressed regret over the discriminatory impact of the measures on the affected communities, including restrictions on the rights to "land, property, social security, an adequate standard of living, cultural development, work, and remedies" (Ibid)[386].

In addition, as early in 2000 the Committee expressed concern about the absence in Australian law of a well-established guarantee against racial discrimination that would take precedence over subsequent legislation enacted by the Commonwealth, the states, and the territories (Committee on the Elimination of Racial Discrimination, 2000, para 6)[387].

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[381] Ben Schokman e Alison Vivian, *The Northern Territory Intervention and the Fabrication of 'Special Measures'*, in «Australian Indigenous Law Review», 13, n. 1, 2009, p. 78.
[382] Ibid.
[383] Jenna Gruenstein, *Australia's Northern Territory National Emergency Response Act*, in «Pacific Rim Law & Policy Journal», 17, n. 2, 2008, p. 467.
[384] Ibid.
[385] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, UN Doc CERD/C/AUS/CO/15-17, 27 August 2010, para. 16.
[386] Ibid.
[387] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, UN Doc CERD/C/304/Add.101, 24 March 2000, par. 6.

The Committee had previously examined the situation in Australia in 1999, in relation to the amendments to the *Native Title Act 1993*[388], and in 2005, in relation to the standard of proof required for the recognition of native title[389]. In both cases the measures concerned remained in force [390].

The measures examined in this section were contained in ordinary legislation; the proposal examined in the following section concerned an amendment to the Constitution.

The Northern Territory Intervention is related to the parameter of non-discrimination, with a specific issue regarding the *Racial Discrimination Act 1975.* In fact, Section 132 of the Northern Territory Emergency Response 2007 excluded the application of Part II, which was related to the prohibition of racial discrimination[391]. This is the same situation examined in section 3.2.4 regarding the 1998 amendments, when domestic protection derived from a binding treaty was excluded by ordinary legislation

[388] Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, in «Melbourne University Law Review», 23, n. 2, 1999, p. 372.

[389] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, UN Doc CERD/C/AUS/CO/14, 14 April 2005, par. 17, as cited in Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper 45, ALRC, Sydney, 2014, par. 73.

[390] *Native Title Amendment Act 1998* (Cth); Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, ALRC Report 126, ALRC, Sydney, 2015.

[391] *Northern Territory National Emergency Response Act 2007* (Cth), s 132.

4.3 The Uluru Statement from the Heart and the 2023 Referendum

The Uluru Statement from the Heart is a declaration adopted by Aboriginal and Torres Strait Islander delegates at the National Constitutional Convention held at Uluru in May 2017[392]. It is not a legal instrument, but a document formulated by Indigenous peoples.

4.3.1 Voice, Treaty, Truth: The 2017 Convention

After having examined the legislative measures in the previous section, this one analyses a constitutional amendment proposed by Indigenous Australians.

As stated in the *Final Report of the Referendum Council* (2017), "Aboriginal and Torres Strait Islander peoples have long struggled for constitutional recognition" and many Prime Ministers, such as the Hon Gough Whitlam, the Rt Hon Malcolm Fraser, the Hon Bob Hawke, the Hon John Howard spoke of the need for Aboriginal and Torres Strait Islander peoples to take "their rightful place in this nation" (Referendum Council, 2017)[393]. However, these intentions did not result in any constitutional change (Ibid)[394].

From 2010 onwards, further steps were taken: "Prime Minister the Hon Julia Gillard established the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander peoples in the Constitution" and "Prime Minister the Hon Tony Abbott established a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples" (Ibid)[395]. Later, in 2015 Prime Minister the Hon Malcolm Turnbull and Opposition Leader Hon Bill Shorten established the Referendum Council, which incorporates previous reports and "the views of Aboriginal and Torres Strait Islander peoples and the general public" (Ibid)[396].

In October 2016 the Council published a Discussion Paper on its website, which included detail on each of the "five proposed options for constitutional reform and posed a number of questions to gauge the public response" (Ivi: 7)[397]. Moreover, for the first time information about options for constitutional reform was made available in the First Nations languages (Ibid)[398].

Between December 2016 and May 2017, the Prime Minister and the Leader of the Opposition implemented a plan for the Referendum Council: conducting a "series of First Nations Regional

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[392] Parliamentary Education Office, *Uluru Statement from the Heart*, Parliament of Australia, Canberra, https://peo.gov.au/understand-our-parliament/history-of-parliament/history-milestones/australian-parliament-history-timeline/events/uluru-statement-from-the-heart.

[393] Referendum Council, *Final Report of the Referendum Council*, Commonwealth of Australia, Canberra, 30 June 2017, p. iii.

[394] Ibid.

[395] Ibid.

[396] Ibid.

[397] Ivi, p.7.

[398] Ibid.

Dialogues culminating in a national constitutional convention at Uluru" (Ivi: 9)[399]. Never before in Australian history has such a process been undertaken and it can be considered as "a significant response to the historical exclusion of Aboriginal and Torres Strait Islander peoples" (Ibid)[400]. Approximately 1200 Aboriginal and Torres Strait Islander delegates were consulted, "out of a population of approximately 600,000 people nationally" (Ibid).

The Dialogues were based on "of each of the proposals set out in the Council's Discussion Paper" and during the process delegates examined them (Ivi: 11)[401]. Thanks to their informed participation, it was possible to reach the consensus at Uluru and "that the outcome captured in the Uluru Statement from the Heart was a testament to the efficacy of the structured process" (Ibid)[402].

The National First Nations Constitutional Convention was held at Uluru from 23 to 26 May 2017. As documented by the Parliamentary Education Office, over 250 Aboriginal and Torres Strait Islander delegates gathered at Mutitjulu, and they wrote and endorsed the *Uluru Statement from the Heart* (Parliamentary Education Office, 2017)[403].

The Statement calls for the establishment of "a First Nations Voice enshrined in the Constitution" and for a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about Australian history (Uluru Statement from the Heart, 2017)[404].

In its Final Report the Council recommended that a referendum be held to provide in the Australian Constitution for a representative body giving Aboriginal and Torres Strait Islander First Nations "a Voice to the Commonwealth Parliament" (Referendum Council, 2017: 2)[405]. The Council specified that the structure and functions of the body would be defined by Parliament, and that one of its specific functions, to be set out in legislation outside the Constitution, should be to monitor the use of the heads of power in section 51(xxvi) and section 122 of the Constitution (Ibid)[406].

The Uluru Statement is related to the parameter of self-determination, because it was formulated through dialogues and national conventions of Aboriginal and Torres Strait Islander delegates. Moreover, since the Uluru Statement calls for a possibility for Indigenous peoples to establish a First Nations voice in the Constitution and being, in this way, part in the decisions affecting them, it is

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[399] Ivi, p. 9.
[400] Ibid.
[401] Ivi, p.11
[402] Ibid.
[403] Parliamentary Education Office, *Uluru Statement from the Heart*, Parliament of Australia, Canberra, https://peo.gov.au/understand-our-parliament/history-of-parliament/history-milestones/australian-parliament-history-timeline/events/uluru-statement-from-the-heart.
[404] *Uluru Statement from the Heart*, 2017, https://ulurustatement.org/the-statement/view-the-statement/.
[405] Referendum Council, *Final Report of the Referendum Council*, Commonwealth of Australia, Canberra, 30 June 2017, p. 2.
[406] Ibid.

related to Article 3 of the UNDRIP, which establishes their right to “freely determine their political status"[407].

4.3.2 The 2023 Referendum and Its Outcome

The 2023 Referendum was a proposal for constitutional amendment to establish an Aboriginal and Torres Strait Islander Voice (Parliamentary Education Office, 2023)[408].

The recommendation of the Referendum Council was not taken forward at the time. As mentioned by the Parliamentary Education Office, the Australian Labor Party promised to progress the *Uluru Statement from the Heart* during the 2022 Federal Election; and “after winning the election Prime Minister Anthony Albanese stated that he would "answer the call for a Voice to be enshrined in the Constitution” (Ibid)[409].

On the 14 October 2023 Australians voted to “recognize the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice” (Ibid)[410]. This was the first referendum in the 21st century in Australia and, as being a referendum, it needed a “national majority of voters and the majority of voters in more than half of the states” to pass (Ibid)[411]. However, the outcome was not successful, because “39.9 per cent of formal votes were in favour of this change, and no state had a majority which approved the proposal” (Ibid)[412].

After the 2023 Referendum, a group of First Nations leaders published an open letter to the Prime Minister and to the Members of the House of Representatives and the Senate of the Commonwealth Parliament. In the letter they wrote that “Aboriginal and Torres Strait Islander peoples have observed a week of silence across Australia since the outcome of the Referendum on Saturday 14 October 2023” (A Statement for Our First Nations People and Our Country, 2023)[413]. The letter states that the Constitution still belongs to those for whom the Founding Fathers had conceived it and “remains unchanged” in its exclusion of indigenous peoples (Ibid)[414]. Moreover, they had sought to be recognized more than a decade earlier, and to be "included in a meaningful way", but that request

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[407] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 3, p. 8.

[408] Parliamentary Education Office, *Aboriginal and Torres Strait Islander Voice Referendum*, Parliament of Australia, Canberra, https://peo.gov.au/understand-our-parliament/history-of-parliament/history-milestones/australian-parliament-history-timeline/events/aboriginal-and-torres-strait-islander-voice-referendum.

[409] Ibid.

[410] Ibid.

[411] Ibid.

[412] Ibid.

[413] A Statement for Our First Nations People and Our Country, open letter to the Prime Minister and the Members of the House of Representatives and the Senate of the Commonwealth Parliament, 2023, https://ulurustatement.org/statement-for-our-people-and-country/

[414] Ibid

"has been rejected" (Ibid)[415]. Even though the proposal was rejected, and Australia "chose to make itself less liberal and less democratic", their rights continue to exist as a democratic imperative and as their right of self-determination, Australia "can deny the former but not the latter" (Ibid)[416].

4.3.3 The Constitutional Procedure and the Outcome

According to the Australian Constitution, in order to be modified, it requires a mechanism, which is called referendum (Australian Government Solicitor and Parliamentary Education Office, 2023)[417]. As also aforementioned, in order to make any change to the Constitution, "a majority of electors must vote in favour of the change", also a majority of States is necessary, "that is four out of the six States" (Ibid)[418]. Moreover, before this process, the House of Representatives and the Senate must approve "the proposed law containing the suggested amendment of the Constitution (section 128)" (Ibid)[419]. Regarding the 2023 Referendum mentioned before, the majority of voters and States was not reached and Aboriginal and Torres Strait Islander peoples were not recognized in the Constitution (Parliamentary Education Office," 2023)[420].

In order to understand why the majority of Australians voted against the 2023 Referendum, it is relevant to refer to the article *Voters rejected Voice due to fears of division: ANU study* published by the Australian National University (ANU). ANU stated that the reason why 66,1 per cent who voted 'no' was related to the fear of that constitutional change would have divided Australia (ANU, 2023)[421]. During its analysis, the ANU discovered that "very few people switched from voting 'no' to 'yes' during the referendum campaign" and also that young people were more likely to vote 'yes' (Ibid)[422]. One of the most relevant factors found in the ANU analysis was that many Australians decided to vote 'no' because they believed that "special rights for Aboriginal and Torres Strait Islander Australians are unfair" and the disadvantage faced by Indigenous Australians is caused by "lack of effort" (Ibid)[423].

According to the study, 87.2% of voters believe that Aboriginal and Torres Strait Islander peoples should be able to decide for themselves how they live, and about three-quarters of those who voted

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[415] Ibid.
[416] Ibid.
[417] Australian Government Solicitor, *Overview*, in *Australia's Constitution with Overview and Notes by the Australian Government Solicitor*, Parliamentary Education Office e Australian Government Solicitor, Canberra, 2023, p. viii.
[418] Ibid.
[419] Ibid.
[420] Parliamentary Education Office, *Aboriginal and Torres Strait Islander Voice Referendum*, Parliament of Australia, Canberra, https://peo.gov.au/understand-our-parliament/history-of-parliament/history-milestones/australian-parliament-history-timeline/events/aboriginal-and-torres-strait-islander-voice-referendum.
[421] Australian National University, *Voters Rejected Voice Due to Fears of Division: ANU Study*, ANU, Canberra, 2023, https://www.anu.edu.au/news/all-news/voters-rejected-voice-due-to-fears-of-division-anu-study
[422] Ibid.
[423] Ibid.

"No" believe it is important for Indigenous peoples to have a say in matters that affect them (Ibid)[424]. Professor Biddle describes this outcome as "one of the biggest paradoxes of the referendum result" (Ibid)[425].

The international standards concerning the participation of Indigenous peoples in decisions affecting them will be examined in the following section.

4.3.4 The Referendum and International Standards

As examined in section 1.2.2, Article 3 of the UNDRIP recognizes the right of Indigenous peoples to self-determination (United Nations, 2007:8)[426].

Other relevant articles are Article 18 and Article 19 of the UNDRIP. Article 18 states that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights", which means that they have to be included and consulted in the whenever measures affecting them are adopted and that this participation must take place "through representatives chosen by themselves in accordance with their own procedures" (Ivi: 15)[427]. Article 19 requires States to consult Indigenous peoples through their representative institutions and to obtain their consent before adopting measures that may affect them (Ivi:16)[428]. Indigenous Australians had been consulted in the Dialogue process of the Referendum Council promoted by Prime Minister the Hon Malcolm Turnbull and Opposition Leader the Hon Bill Shorten (Referendum Council, 2017)[429].

As analysed in the previous section, even though Indigenous Australians had been consulted, the proposal to constitutionally establish an Indigenous representative body was submitted to the entire electorate and failed to pass (Parliamentary Education Office," 2023)[430].

The 2023 Referendum is related to the parameter of participation, because this referendum aimed to amend the Constitution establishing a First Nations Voice, which would have entrenched Indigenous participation, however it failed to pass.

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[424] Ibid.
[425] Ibid.
[426] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007, art. 3, p. 8.
[427] Ivi p.15.
[428] Ivi p.16.
[429] Referendum Council, *Final Report of the Referendum Council*, Commonwealth of Australia, Canberra, 30 June2017, p. iii.
[430] Parliamentary Education Office, *Aboriginal and Torres Strait Islander Voice Referendum*, Parliament of Australia, Canberra, https://peo.gov.au/understand-our-parliament/history-of-parliament/history-milestones/australian-parliament-history-timeline/events/aboriginal-and-torres-strait-islander-voice-referendum.

4.4 Persistent Inequalities and the Effectiveness of Recognition

The following data do not show whether a specific international rule has been implemented. They show how effective the forms of recognition examined in the previous chapters have been in practice.

4.4.1 The sixth Annual Data Compilation Report (ADCR)

The Productivity Commission, which is the Australian Government's independent research and advisory body that analyses economic, social and environmental issues regarding Australians' welfare, published in July 2026 "the sixth Annual Data Compilation Report (ADCR) since the commencement of the National Agreement on Closing the Gap (the Agreement)" (Productivity Commission, 2026: vi)[431]. The ADCR examines socio-economic targets of the Agreement, if they have improved, worsened and provides practical advice to the Government (Ibid)[432]. In addition, these targets should be met before 2031 (Ibid)[433].

This year, the ADCR furnished data for 18 of the 19 socio-economic targets with progress assessed for 15" (Ivi: 2)[434]. In particular, three targets showed improvement, five are improving, but are not on track for 2031, four are worsening, two did not change from the baseline and the last three have available data but cannot be analysed (Ibid)[435].

The ADCR declared that just one target was met, that is education and training, because 95% of "Aboriginal and Torres Strait Islander children enrolled in Year Before Full-time Schooling (YBFS) early childhood education" (Ivi: 15)[436]. This data has extremely increased since 2016, because at that time just "61,3% of Aboriginal and Torres Strait Islander children were enrolled in preschool program" (Ivi: 67)[437].

Among the on-track targets, the ADCR identified economic participation, stating that "55,7% of people aged 25-64 were employed in 2021", land with 4,421,946 km² and waters of 113,496 km² of sea subjected to Indigenous Australians (Ivi:3)[438]. Therefore, the target concerning land and sea rights is among those on track. As examined in Chapter 3, native title determinations recognize in most cases a non-exclusive right to land possession[439].

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[431] Productivity Commission, *Closing the Gap Annual Data Compilation Report, July 2026*, Productivity Commission, Canberra, 2026, p. vi, https://www.pc.gov.au/closing-the-gap-data/annual-data-report (accessed 02/09/2026).
[432] Ibid.
[433] Ibid.
[434] Ivi. p.2
[435] Ibid.
[436] Ivi. p.15
[437] Ivi. p.67
[438] Ivi. p.3
[439] Sanson, *Connecting with Law*, Oxford University Press Australia & New Zealand, 2019, p.398.

The targets that are improving but are far from reaching the target by 2031 are long and healthy lives, student learning potential, further education pathways, young engagement and housing (Ivi:4)[440].
Targets that are worsening are "childhood development, out-of-home care, suicide rates and imprisonment", which will be discussed in the further section (Ivi: vi)[441].

4.4.2 Imprisonment

The overrepresentation of Indigenous Australians in prison was already examined in section 2.5.5, where Weatherburn et al. reported that the Aboriginal imprisonment rate in Australia is "fifteen times the non-Aboriginal rate", which is also confirmed by the Australian Bureau of Statistics (Weatherburn et al., 2026: 590; Australian Bureau of Statistics, 2026)[442][443].
The ADCR reports that among the socio-economic targets, the imprisonment is worsening in all jurisdictions except Victoria, where the only worsening socio-economic target is children in out-of home care (Productivity Commission, 2026: 5)[444].
The report examines the rates of Aboriginal and Torres Strait Islander peoples in prison in every jurisdiction. In particular, the number of imprisonments "per 100,000 adults have increased across most jurisdictions since the baseline year (2019)" (Ivi: 114)[445]. In two jurisdictions the number of Indigenous Australians in prison has decreased: in Victoria, from 2019 to 2025 "by 101.3 per 100,000 adults" and in the Australian Capital Territory from 2024 to 2025 "by 11.9 per 100,000 adults" (Ibid)[446]. Among all jurisdictions, the Northern Territory recorded the largest increase: from 2019 to 2025, it "increased by 1,609.7 per 100,000 adults" (Ibid)[447].
This data has also been considered at the international level, as will be examined in the following section.

[440] Ivi. p.4
[441] Ivi. p. vi
[442] Weatherburn et al., *Colonization and Its Legacy: The Correlates of Indigenous Arrest*, *The British Journal of Criminology,* vol.66, 2026, p. 590.
[443] Australian Bureau of Statistics, *Recorded Crime – Offenders*, ABS, Canberra,2026, https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release (accessed 02/09/2026).
[444] Productivity Commission, *Closing the Gap Annual Data Compilation Report, July 2026*, Productivity Commission, Canberra, 2026, p. 5.
[445] Ivi.p.114.
[446] Ibid.
[447] Ibid.

4.4.3 International Monitoring and Domestic Outcomes

As stated in the official website of the Office of the High Commissioner for Human Rights (OHCHR), "the Universal Periodic Review (UPR) is a unique process which involves a periodic review of the human rights records of all 193 UN Member States" (OHCHR, n.d.)[448].

The UPR was founded with the Human Rights Council on 15 March 2006 by the General Assembly Resolution 60/251, which asked the Council to "undertake a universal periodic review, based on objective and reliable information" about the human rights obligations and commitments by each State (Ibid)[449]. Therefore, the principal goal of the UPR is to improve the human right situation in every country by expanding, promoting and protecting the human rights (Ibid)[450]. In order to achieve it, the UPR evaluates human rights situation in every State and intervenes when violations occur (Ibid)[451].

The reviews are managed by the UPR Working Group, "which consists of the 47 members of the Council", and in the process, any UN Member State can participate in the dialogue with the review State (Ibid)[452]. During the review process, the State involved is controlled by three States, named "troikas", which are the rapporteurs. The "troikas" are selected "through a drawing of lots" after the elections of the members of the Council in the General Assembly. The reviews are based on some documents, that are: "national report", "special procedures", "human rights treaty bodies" and information from "national human rights institutions and non-governmental organizations" (Ibid)[453]. Moreover, UPR controls whenever any State "respect their human rights obligations set out in the UN Charter, the Universal Declaration of Human Rights", "human rights treaties ratified by the State concerned", "human rights programmes and policies" and "applicable international humanitarian law" (Ibid)[454].

Afterwards, the troika prepared a report, which includes a summary of the discussion and recommendations. The State involved may choose to accept or note to recommendations. Subsequently, the State must adopt the "recommendations contained in the final outcome", and UPR "ensures that all countries are accountable for progress or failure in implementing these recommendations" (Ibid)[455]. In case that a State decide to not to implement these recommendations, "the Human Rights Council will decide on the measures it would need to take in case of persistent

[448] Office of the High Commissioner for Human Rights (OHCHR), *Basic Facts about the UPR*, https://www.ohchr.org/en/hr-bodies/upr/basic-facts (accessed 03/09/2026).
[449] Ibid.
[450] Ibid.
[451] Ibid.
[452] Ibid.
[453] Ibid.
[454] Ibid.
[455] Ibid.

non-co-operation", however the Council does not explicitly mention what are the consequences for not adopting the recommendations (Ibid)[456].

Regarding Australia, in the Attorney-General's Department webpage, it can be observed that Australia was reviewed by the Human Rights Council in 2011, 2015 and 2021 (Attorney-General's Department, n.d.)[457]. In the third cycle in 2021, 122 Member States "made recommendations regarding Australia's human rights record" and "Australia received 344 recommendations" (Ibid)[458].

In the Australian Human Right Commission webpage in the publication *Australian Human Rights Commission disappointed with Australian Government's response to major human rights review of Australia,* it is stated that in the fourth cycle in Geneva, the Australian Government responded to 332 recommendations, however it accepted 128 of these recommendations, that is about 39%, which is "the lowest rate of acceptance by an Australian Government since the UPR process began 20 years ago" (AHRC, 2026)[459]. After the UPR report, Australian Government may "to 'accept', 'note for further consideration' or 'note' each of the UPR recommendations" (Ibid)[460]. However, the recommendations that are "noted" refer to the fact that there is no intention by the Australian Government to take any action (Ibid)[461].

Among the recommendations that Australian Government accepted there are: "continue to close the gap for Indigenous peoples (recs: 249-250, 252-53, 255, 258-63, 271, 274-75, 279-81, 290) and to address over-representation in criminal justice processes (recs: 264-68, 288, 291)" (Ibid)[462]. In addition, Australian Government consented "to promote reconciliation and to protect the rights of indigenous peoples (recs: 276-78, 282, 285) but not by developing a national plan to implement UNDRIP (recs: 272-73, 283-4, 286-7)" (Ibid)[463]. As examined in the first chapter, Australia endorsed the UNDRIP in 2009[464]. In the fourth cycle of the Universal Periodic Review, the Australian Government accepted the recommendations concerning reconciliation and the protection of

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[456] Ibid.

[457] Attorney-General's Department, *Australia's Universal Periodic Review*, Australian Government, Canberra, https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/united-nations-human-rights-reporting/australias-universal-periodic-review#australias-fourth-universal-periodic-review (accessed 03/09/2026)

[458] Ibid.

[459] Australian Human Rights Commission, *Australian Human Rights Commission Disappointed with Australian Government's Response to Major Human Rights Review of Australia*, media release, July 2026, https://humanrights.gov.au/about-us/media-centre/media-releases/rights-and-freedoms/australian-human-rights-commission-disappointed-with-australian-governments-response-to-major-human-rights-review-of-australia (accessed 03/09/2026).

[460] Ibid.

[461] Ibid.

[462] Ibid.

[463] Ibid.

[464] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

Indigenous rights but noted those concerning the development of a national plan to implement the UNDRIP " (AHRC, 2026)[465].

Among the recommendations 'noted' by the Australian Government there are the "raise of the age of criminal responsibility (recs 190-215)" and the reduction of pretrial detention and the adoption of alternatives to detention (rec 77) (Ibid)[466]

As examined in section 4.4.2, the rate of Aboriginal and Torres Strait Islander peoples imprisoned has increased across most jurisdictions since 2019 (Productivity Commission, 2026)[467].

These data concern the effectiveness of domestic measures; in fact they do not in demonstrate whether the specific recommendations accepted by Australia have been implemented.

4.4.4 Conclusion

This chapter examined instruments of different legal nature, which produced different outcomes.

ATSIC was a statutory body in which the representatives were elected by Indigenous peoples, was established in 1990 by the *Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)*[468]. However, in 2005 the ATSIC was abolished by the Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth)[469] and no alternative electoral body was established.

The *Apology to Australia's Indigenous Peoples* pronounced by Prime Minister Kevin Rudd on 13 February 2008[470] was a political act. It did not provide any national compensation programme or structural change for Indigenous Australians, even if the *Bringing them Home* report recommended five forms of reparation[471].

The National Agreement on Closing the Gap, signed in 2020 by the Coalition of Peaks, the Prime Minister, Premiers, Chief Ministers and the President of the Australian Local Government Association is a policy agreement which establishes nineteen targets aimed to reform institutional

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[465] Australian Human Rights Commission, *Australian Human Rights Commission Disappointed with Australian Government's Response to Major Human Rights Review of Australia*, media release, July 2026, https://humanrights.gov.au/about-us/media-centre/media-releases/rights-and-freedoms/australian-human-rights-commission-disappointed-with-australian-governments-response-to-major-human-rights-review-of-australia (accessed 03/09/2026).

[466] Ibid.

[467] Productivity Commission, *Closing the Gap Annual Data Compilation Report, July 2026*, Productivity Commission, Canberra, 2026, p. 114.

[468] Parliament of Australia, *The End of ATSIC and the Future Administration of Indigenous Affairs*, Parliamentary Library, Canberra, 2004, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/prspub/FXED6%22

[469] *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth), Sch 1.

[470] Parliament of Australia, *Apology to Australia's Indigenous Peoples*, Canberra, 2008, https://www.aph.gov.au/Visit_Parliament/Art/Collections/Apology_to_Australias_Indigenous_Peoples

[471] Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, HREOC, Sydney, 1997, Recommendation 3.

practices concerning Aboriginal and Torres Strait Islander peoples[472]. However, the Productivity Commission revealed that the governments did not take sufficient concrete action[473].

The Northern Territory Intervention was emergency legislation. In 2007 Section 132 of the Northern Territory National Emergency Response Act excluded the provisions expressed in Part II of the Racial Discrimination Act 1975, which were the ones that prohibit racial discrimination[474]. Afterwards, the *Racial Discrimination Act 1975* was reinstated in 2010, however in 2012, due to the *Stronger Futures in the Northern Territory Act 2012* there were restrictions in alcohol consumption and income management[475].

The 2023 Referendum concerned a proposal for constitutional amendment. On 14 October 2023 the majority of Australians voted against the proposal to alter the Constitution "to recognize the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice" (Parliamentary Education Office, 2023)[476].

In the fourth cycle of the Universal Periodic Review, the Australian Government accepted recommendations regarding the protection of Aboriginal and Torres Strait Islander peoples, however it 'noted' the ones regarding the development of a national plan for the implementation of UNDRIP[477].

Finally, the data showed that four of the nineteen socio-economic targets were worsening, including adult imprisonment[478]. These data concern the effectiveness of the forms of recognition examined.

These elements will be considered in the Conclusion of this thesis.

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[472] Commonwealth of Australia, *National Agreement on Closing the Gap*, 2020, https://www.closingthegap.gov.au/national-agreement

[473] Productivity Commission, "New Closing the Gap Data Shows Focus on Priority Reforms by Governments Needed to See Real Improvement," media release, 13 March 2025, https://www.pc.gov.au/closing-the-gap-data/media-releases/new-closing-the-gap-data-march-2025/ (accessed 18/09/2026)

[474] *Northern Territory National Emergency Response Act 2007* (Cth), s 132.

[475] Australian Government, *Information Received from the Government of Australia on the Implementation of the Concluding Observations*, CERD/C/AUS/CO/15-17/Add.1, 29 August 2011, para. 16.

[476] Parliamentary Education Office, *Aboriginal and Torres Strait Islander Voice Referendum*, Parliament of Australia, Canberra, https://peo.gov.au/understand-our-parliament/history-of-parliament/history-milestones/australian-parliament-history-timeline/events/aboriginal-and-torres-strait-islander-voice-referendum.

[477] Australian Human Rights Commission, *Australian Human Rights Commission Disappointed with Australian Government's Response to Major Human Rights Review of Australia*, media release, July 2026,

[478] Productivity Commission, *Closing the Gap Annual Data Compilation Report, July 2026*, Productivity Commission, Canberra, 2026, p. 5.

Conclusion

The dissertation has examined the relationship between the international recognition of Indigenous peoples' rights and its implementation within the Australian legal system. In the light of the analysis carried out in the four chapters, it is now possible to answer the research question: to what extent do international instruments for the recognition of Indigenous Australians' rights produce legal effects within the Australian legal system?

The analysis undertaken in four chapters leads to four findings.

First, the UNDRIP, adopted by the General Assembly of the United Nations on 13 September 2007[479] does not produce any legal effect in the Australian legal system after its endorsement on 3 April 2009[480]. In fact, Australia's endorsement of the UNDRIP was an act of international policy: unlike the ICERD, which was ratified in 1975 and incorporated into domestic law through the *Racial Discrimination Act*[481], the Declaration was not incorporated by any Act of Parliament, and the Government stated that it "is not binding and does not affect existing Australian law"[482].

Second, other forms of domestic recognition have been examined, however some of them predate the UNDRIP and therefore cannot be attributed to its provisions. These include *Mabo v Queensland (No 2)* (1992) 175 CLR 1[483], the *Native Title Act 1993*[484], the establishment of the ATSIC in 1990[485], the *Apology to Australia's Indigenous Peoples* pronounced by Prime Minister Kevin Rudd on 13 February 2008[486] and the creation of the National Agreement on Closing the Gap in 2020[487].

Third, these forms of recognition have different legal force, and some of them can be modified or repealed by ordinary legislation or by subsequent political decisions. ATSIC was abolished in 2005

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[479] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295, 13 September 2007.

[480] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

[481] Australian Human Rights Commission, The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), https://humanrights.gov.au/resource-hub/by-resource-type/guides/guides-race-discrimination/international-convention-elimination-all-forms-racial-discrimination (accessed 12/08/2026).

[482] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

[483] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[484] *Native Title Act 1993* (Cth)

[485] Parliament of Australia, *The End of ATSIC and the Future Administration of Indigenous Affairs*, Parliamentary Library, Canberra, 2004, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/prspub/FXED6%22 (accessed 14/08/2026).

[486] Parliament of Australia, *Apology to Australia's Indigenous Peoples*, Canberra, 2008, https://www.aph.gov.au/Visit_Parliament/Art/Collections/Apology_to_Australias_Indigenous_Peoples

[487] Commonwealth of Australia, *National Agreement on Closing the Gap*, 2020, https://www.closingthegap.gov.au/national-agreement

by the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth)[488], the application of the *Racial Discrimination Act 1975* to the Intervention measures was excluded by section 132 of the *Northern Territory National Emergency Response Act 2007 (Cth)*[489]and since the National Agreement on Closing the Gap is not an Act of Parliament, rather an agreement between the Australian Government and Indigenous Australians organisations, it establishes political commitments and not legal obligations[490]. In 1999 The United Nations Committee on the Elimination of Racial Discrimination (CERD) found that the *Native Title Amendment Act 1998 (Cth)* discriminated against native title holders[491] and the amendments remained in force [492]. One year later, in 2000 the Committee declared that the lack of an entrenched guarantee in Australian law allows subsequent legislation to override protections against racial discrimination[493]. The 2023 Referendum, which would have established an Aboriginal and Torres Strait Islander Voice, did not pass[494].

Lastly, the socio-economic data show that legal recognition did not eliminate inequalities between Indigenous Australians and non-Indigenous Australians. According to the Productivity Commission, the socio-economic targets of the National Agreement such as long and healthy lives, student learning outcomes, further education pathways, youth engagement and housing are far from being met by 2031[495]. Moreover, it also reported that Aboriginal and Torres Strait Islander people's imprisonment rate has increased across the majority of jurisdictions since 2019[496]. These data measure the effectiveness of the forms of recognition examined in this dissertation, not the implementation of a specific international norm.

Regarding the research limitations, this dissertation focuses on a federal level and takes into account the Annual Data Compilation Report (ADCR) of 2026, omitting reports from previous years. The study adopts a document-based approach, which means that no interviews were conducted.

Some of the issues examined in this dissertation remain unresolved. The recommendations made by the Australian Law Reform Commission in 1986 on the recognition of Indigenous customary law

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[488] *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth), Sch 1.
[489] *Northern Territory National Emergency Response Act 2007* (Cth), s 132.
[490] Commonwealth of Australia, *National Agreement on Closing the Gap*, 2020, https://www.closingthegap.gov.au/national-agreement (accessed 18/08/2026).
[491] Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, in «Melbourne University Law Review», 23, n. 2, 1999, p. 372.
[492] *Native Title Amendment Act 1998* (Cth), No. 97, 1998.
[493] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, UN Doc CERD/C/304/Add.101, 24 March 2000, para 6, https://hrlibrary.umn.edu/country/australia2000.html (accessed 01/09/2026).
[494] Parliamentary Education Office, *Aboriginal and Torres Strait Islander Voice Referendum*, Parliament of Australia, Canberra, https://peo.gov.au/understand-our-parliament/history-of-parliament/history-milestones/australian-parliament-history-timeline/events/aboriginal-and-torres-strait-islander-voice-referendum (accessed 14/08/2026).
[495] Productivity Commission, *Closing the Gap Annual Data Compilation Report, July 2026*, Productivity Commission, Canberra, 2026, p. 4, https://www.pc.gov.au/closing-the-gap-data/annual-data-report (accessed 02/09/2026).
[496]Ivi, p. 5.

have not been implemented[497]. Likewise, the recommendations made in 2015 regarding the burden of proof required for the recognition of native title have not been implemented[498].

In conclusion, the international recognition of Indigenous peoples' rights is established: Australia ratified the ICERD in 1975[499], endorsed the UNDRIP in 2009[500] and has been examined by the international bodies several times. At the domestic level, forms of recognition exist, but there are instruments of different legal force and some of them have been revoked or modified.

The sources examined in this dissertation indicate that international and domestic recognition operate on different levels. Aboriginal and Torres Strait Islander peoples' rights are recognized at both levels, but domestic recognition is not protected against subsequent legislation, and the socio-economic data show the limits of its effectiveness.

[497] Aj Wood, *Why Australia Won't Recognise Indigenous Customary Law*, in «The Conversation», 9 June 2016, https://theconversation.com/why-australia-wont-recognise-indigenous-customary-law-60370 (accessed 02/08/2026).

[498] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, ALRC Report 126 (2015), https://www.alrc.gov.au/publication/connection-to-country-review-of-the-native-title-act-1993-cth-alrc-report-126/5-traditional-laws-and-customs-2/continuity-of-acknowledgment-of-traditional-laws-and-customs/, para 5.77 (accessed 13/08/2026).

[499] United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination*, General Assembly Resolution 2106 (XX), 21 December 1965; Australian Human Rights Commission, *The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, AHRC, 2012.

[500] Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009.

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