

## Article

# Contemporary Indigenous Australian Art and Native Title Land Claim

Marie Geissler

English and Media, Faculty of Law Humanities and the Arts, University of Wollongong,  
School of Arts Wollongong, Wollongong, NSW 2522, Australia; mariegeissler10@gmail.com

**Abstract:** This paper investigates a select number of examples in which largely non-literate First Nation peoples of Australia, like some First Nations peoples around the world, when faced with a judicial challenge to present evidence in court to support their land title claim, have drawn on their cultural materials as supporting evidence. Specifically, the text highlights the effective agency of indigenous visual expression as a communication tool within the Australian legal system. Further, it evaluates this history within an indigenous Australian art context, instancing where of visual art, including drawings and paintings, has been successfully used to support the main evidence in native title land claims. The focus is on three case studies, each differentiated by its distinct medium, commonly used in indigenous contemporary art—namely, ink/watercolours on paper, (Case study 1—the Mabo drawings of 1992), acrylics on canvas (Case study 2—the Ngurrara 11 canvas 1997) and ochre on bark, (Case study 3—The Saltwater Bark Collection 1997 (onwards)). The differentiation in the stylistic character of these visual presentations is evaluated within the context of being either a non-indigenous tradition (e.g., represented as European-like diagrams or sketches to detail areas and boundaries of the claim sites in question) or by an indigenous expressive context (e.g., the evidence of the claim is presented using traditionally inspired indigenous symbols relating to the claimant's lands. These latter images are adaptations of the secret sacred symbols used in ceremonies and painting, but expressed in a form that complies with traditional protocols protecting secret, sacred knowledge). The following text details how such visual presentations in the aforementioned cases were used and accepted as legitimate legal instruments, on which Australian courts based their legal determinations of the native land title.



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## 1. Introduction

In Australia, like Indigenous peoples throughout the world, First Nations Australians have used art to support their land title claims (De Costa 2006, pp. 669–98; Pomedeli 1995, pp. 313–39; Wicken 2002, pp. 89–93; Koch 2013). As a visual and cultural communication tool, while it has proved useful in supporting other evidence in new ways, it was not the critical material on which the determination of the case was made. Such instances include non-indigenous stylistic forms such as cartographic maps or sketches as well as indigenous mark making that was encoded with traditional knowledge and which represented, for the indigenous claimants, ancient, contemporary and cultural history associated with the lands in question. For literate land claimants, the visual expression of their cultural knowledge enables them to interact meaningfully with Western legal systems and successfully provide evidence to courts of vital cultural associations with their lands. A study of three successful legal cases, each relying on differing cultural expression—drawing on paper, acrylic on

canvas and ochre on bark—elucidate the strategies pursued by First Nations Australians in defence of their land claims.

Following an introduction to the traditional culture and the early history of the indigenous art movement, I discuss the three legal studies and highlight the way the visual presentations in the various mediums have been deployed in native title claims. The first study is a review of the way the diagrammatic landscape sketches of Mer (Murray Island) in the Torres Strait, that was associated with the landmark 1992 native title land claim in the Federal Court of Australia, were used. These were the drawings of the claimant Eddie Mabo of that year, and were used within the Federal Court proceedings to support his case.

The second study references the use of acrylic paintings, of the Ngurrara Canvas 1 (1996) and Ngurrara Canvas 2 (1997), which originate from the western desert of Australia. The hearings for this claim were conducted on the desert lands of the claimant Ngurrara peoples. The distinctive acrylic style produced by desert painters at this time was largely devoid of human or animal figuration; instead, the paintings were composed of largely abstract geometric forms that symbolically encoded traditional knowledge related to the artist's relationship and entitlement to the land, referred to in the painting. These paintings were brightly coloured and covered by finely dotted abstract backgrounds, with a conceptual design that has been likened to aerial topography or Cartesian mapping. However, they were not maps in a linear sense, representative of a precise area and distance, but rather mental abstractions related to the artist's understandings of his/her Country ([Anker 2014](#), pp. 153–54).

In the third study, the text investigates where the bark medium was successful in presenting visually encoded traditional knowledge for the 2008 native title claim of the Blue Mud Bay region of eastern Arnhem Land, specifically its use in the Yirrkala Saltwater Collection. Barks were produced from the tropical forests of Arnhem Land in the far north of Australia, and the artwork imagery incorporated traditional knowledge relating to the artists' customary rights to the ownership of their tidal lands. The visual language had been uniquely adapted by the painters for public view such that it contained no secret sacred material. Most of the imagery largely consisted of figures of animals and plants painted in ochre and encoded with various cross-hatched patterns specific to the artist's kinship identity and rights to a particular area of land.

## 2. The Dreaming and the Law

Unlike Europeans who own land, in the minds of First Nations Australians who live their lives closely associated with their ancient traditions and belief systems, land is not owned by them. They see themselves as intricately connected to their lands or Country, the latter being a highly complex cultural term that embodies associations with kinship, sacred purposes, religious beliefs and aboriginal cultures' inherited connections to their lands ([Australian Government 2016](#)). Such understandings are aligned to their dynamic, sacred cosmology, variously called the Dreaming, Tjukurrpa or Creation Time, that acts as a potent agency, informing traditionally inspired paintings like Arnhem Land barks and desert acrylics ([Rumsey 2001](#), pp. 22–24; [Stanner 1998](#)). This is profoundly important to the culture and informs traditional law and the way people think, feel and live. Critically, the Dreaming determines the people's relationship to their lands or Country ([Ginibi 1994](#), p. 8).<sup>1</sup> First Nations Australians believe the entire Australian continent was shaped by the travels of spirit ancestors who created their laws in this process. Their epic journeys were passed down in narratives known as Dreamings, which are referred to in ceremonies,

<sup>1</sup> Aboriginal laws were encoded in each group's religious tradition and handed down from generation to generation, by word of mouth. They were a part of the oral tradition, passed on by the guardians of that tradition, who gained access to it as they were initiated. All aboriginal peoples and Torres Strait islanders were familiar with their own laws and with the daily rights and obligations that were imposed on them by these. From early childhood, they learnt what the law allowed and what it forbade. They knew both the spiritual dangers and the punishments that threatened the law-breaker. They witnessed the process by which offenders were punished and the cases argued and decided ([Ginibi 1994](#), p. 8).

body painting, song, dance, sand sculptures, artifact design and rock art.<sup>2</sup> Traditionally, each aborigine inherits the responsibility for particular Dreaming story/ies and the area of land/s on which the ancient narrative/s took place.

These mythologies, which referred to traditional knowledge, were represented in symbolic form, in a range of visual forms. Dr. Raymattja Marika (c.1959–2008), a Yolngu aboriginal leader of the Rirratjingu people, explains:

The deepest knowledge is abstract—we know it is there, but it cannot be put into words. It cannot be seen, but it is there and contains teachings given by the ancestors, and still carries on down to the present, to contemporary Yolngu society. When old people paint, it is as if they are meditating; it is not just a man painting a design, but the design is a real meaningful and alive totem that somehow communicates with the painter. When a person does a painting it actually increases their knowledge of Yolngu law. There is communication going on. (Marika 1990, p. 70)<sup>3</sup>

Indigenous sacred knowledge was expressed symbolically in ceremonial designs that were painted in ochre onto the body in preparation for dancing and ceremonial performances that were undertaken to reinvigorate tribal culture. Moreover, traditional knowledge informed the design of collaboratively created, visually spectacular ground paintings or sand sculptures that were used in ceremonies and danced over. In the making of these masterworks, the sand-filled ground was decorated with drawings or sculptures by indigenous ceremonial participants, using traditionally inspired symbols referring to the sacred knowledge associated with their lands (Myers 1994, p. 37; Isaacs 1987; Sutton 1988a, 1988b). Such culturally important images became the source material or informing designs that were refined and adapted for use in the first Papunya paintings about the land or Country in 1971. They became foundational to the content expressed later in the dotted acrylic paintings of the Papunya-led, contemporary desert art movement of the 1970s, in paintings of the Ngurrara 1976 and 1977 canvases (Anker 2014, p. 148; Bardon and James 2007; Johnson 2010a, pp. 29–41), and then in different ways in the symbols used on bark paintings such as the Saltwater Collection 2008.

Within traditional sacred law, the specific area of land or Country to which a design applies may be owned by a number of individuals and is inherited by the artist/s from family members.<sup>4</sup> In protecting it, they take on the role of a lifelong shared custodianship to look after it. This means being responsible for protecting the land to ensure its ecological and spiritual sustainability for future generations. The process of using these designs, adapting them and painting them on artworks for sale to outsiders invoked ancestral memories associated with lands the artist no longer lived on, but yearned to return to. Nonetheless, within this context, it was seen as a mode of cultural renewal in the present, and the places the artist paints were acknowledged by the peoples as those over which he/she had traditional entitlements (Myers 1994, p. 37; Isaacs 1987; Sutton 1988a, 1988b). Later, these understandings were more widely recognised by outsiders, after they had been fully explained. Paintings with such encoding were used as legal instruments to prove the artists' long-term, enduring cultural connection to their lands. In the early years of the painting movement, a pioneering Papunya Tula artist of the Pintupi peoples, artist Charlie Tarawa Tjungurrayi, succinctly summarised his people's and other Papunya Tula artists' motivation for painting their lands in the title description of his painting of 1987. It read: *If*

<sup>2</sup> These sacred Dreamings are referred to using different names, dependent on what region of Australia and what specific language group the individual belongs to.

<sup>3</sup> All Yolngu peoples in northeast Arnhem Land belong to one of two basic divisions or moiety, called Dhuwa and Yirritja. Children belong to the same moiety as their father; their mother belongs to the other moiety. All things in the Yolngu world, including Spirit Beings, clan groups, plant and animal species and areas of land or water, belong to one of the two moieties. The Dhuwa categorisation is given to the Djang'kawu Sisters, the morning star, the water goanna, the stringy bark tree and the land in and around Yirrkala. The Yirritja identity, by contrast, is given to the evening star, stingray, cycad palm and members of the Mangalili clan (Dhimurru Aboriginal Corporation, Yolngu-culture, *Dhirurru Website*. <http://www.dhimurru.com.au/yolngu-culture.html> (accessed on 18 August 2020)).

<sup>4</sup> Within indigenous traditions, ownership or the entitlement to use lands is often shared amongst individuals.

*I don't paint this story, some whitefella might come and steal my country* (Johnson 2008, p. 57). Because of the aforementioned contexts, the relationship that governs indigenous people's behaviour towards their entitlement to their land or Country is complex (Weir et al. 2011, pp. 1–17).

### 3. Indigenous Activism—1973 Yirrkala Bark Petition—1988 Barunga Agreement

Informing this behaviour and how it operates today within the land title debate are the outcomes of indigenous-led civil rights campaigns that had their origins in the late nineteenth century (Owen 2016, p. 303), and which gained significant momentum in the early twentieth century (McGregor 1993, pp. 555–68). These initiatives triggered the moves towards native land title claims and, within the terms of Australian law, the successful reinstatement of land rights to indigenous peoples all over the nation. This was land stolen by Europeans over the two hundred and thirty years of British settlement.

One of the key motivations for this Indigenous activism was “to affirm and promote their [First Nation peoples] relationships with country” (Weir 2012, p. 1), and the desire to be back on the lands from which they had been coercively displaced (Sutton 1995, pp. 49–50; Foley and Anderson 2006).<sup>5</sup> First Nation peoples wanted to take care of their land, as the generations of their ancestors before them. They aspired to live traditionally and enjoy the benefits of eating and using traditional bush foods for healing. They also desired to undertake traditional ceremonies to empower their culture (Sillitoe 2016; Griffiths and Kinnane 2011).

An early instance of cultural activism in Australia where artwork was used to advance issues of self-determination occurred in 1963 at Yirrkala, in the Northern Territory. The traditional owners of the lands in question used two signed bark paintings which they had painted collaboratively to convince the Federal Government in Canberra that the mining of their tribal lands by the Pechiney mining company was illegal (Museum of Australia Democracy 2005). These barks bore paintings with the sacred imagery of the claimants, related to the lands in question (Pasco Gaymarani 2011). The presentation included a typed statement, in both English and Yolngu (the local language). It requested that no lease be granted to the French mining company Pechiney over Yolngu lands until the concerns of the Yolngu peoples had been addressed. Pechiney intended to mine large deposits on Groote Eylandt and the Gove Peninsula, where Yirrkala is located. The petition stated that the Yolngu had used the land from time immemorial; it sustained their life and contained many sacred sites (Australian Government n.d.), (Morphy 2008, pp. 66–67). While the Bark Petition established a precedent for art to be used as a means by which First Nations peoples in Australia could pictorially and conceptually communicate their cultural issues to government agencies, the litigation was not successful. This first native title case in Australia, namely *Milirrpum and Others v Nabalco and the Commonwealth of Australia* (1971), was held in the Supreme Court of the Northern Territory from 1970 to 1971. Justice Blackburn's ruling questioned “the plaintiff's descent from the people who had owned the contested lands in the name of the British Crown on 26 January 1788” (Williams 1989, pp. 9, 42–43) and determined “that Yolngu proprietary interests in land could not be recognised under Australian law” (Corn and Gulumba 2004, p. 105; Williams 1989, pp. 109–203).

A decade later, the Aboriginal Land Rights Commission was formed, and by 1975 the development of a process to enable First Nations Australians to claim freehold titles to land in the Northern Territory had taken place. The first successful land claim in this jurisdiction was lodged in 1976. Many others followed, such that today over fifty percent of the Northern Territory has been granted to traditional owners. The establishment of the Northern and the Central Land Councils in 1976 assisted indigenous peoples with

<sup>5</sup> The word country is often used to describe indigenous lands. It evokes complex associations, meanings and forms. While one country might have many peoples affiliated with it, one individual might have many countries. A dynamic, multi-interconnected system, the nature of these relationships is negotiated over an individual's lifetime (Weir 2012, p. 2). Foley and Anderson “explain Australian Aboriginal land rights as a just claim of a long historical movement, driven by Aboriginal voices of resistance to dispossession”, pointing out that “Native Title offers weak form of title to some communities, but the ‘extinguishment’ of claims for the vast majority”. (Foley and Anderson 2006, p. 830).

the process of land claims within the territory and helped maintain the land once it was granted to them (Koch 1996).

A follow-up to the Yirrkala Petition was the painted canvas The Barunga Agreement, of 1988 (AIATSIS 2021) presented to the then Prime Minister Bob Hawke (Central Land Council 1995; Council for Aboriginal Reconciliation 1995). It was a Memorandum of Understanding to support the development of a framework for negotiating a Treaty with the First Nations of the Northern Territory of Australia (Northern Land Council 2018).<sup>6</sup> The statement was composed as an English text that was pasted within a collage of paintings from Arnhem Land and the Central Desert area. The paintings represented a diversity of kinship identities and rights to particular areas of lands related to the authors of the painting. It called on the Australian nation-state to recognise a range of collective indigenous rights and individual human rights, including self-determination and sovereignty. It urged the negotiation of a treaty between the Indigenous peoples and the state that would recognise prior indigenous “ownership, continued occupation, sovereignty and human rights and freedom” of Australia (Tickner 2001, pp. 40–41). It also proposed that the Commonwealth Government pass laws for a “national system of land rights” (Council for Aboriginal Reconciliation).

#### 4. Mabo Drawings—Murray Island Torres Strait—1992 High Court Ruling

A watershed moment in the history of Australian native title law occurred in 1992. It was marked by the legal success of the Meriam people of Mer (Murray Island) in the Torres Strait, in the now famous Mabo land title case (French 2002, pp. 143–51; Weir 2012, p. 6). The claimants proved they had a continuing connection with the land in question and rights and interests in the land under aboriginal and Torres Strait islanders’ traditional law and custom. Their native title was recognised in the 1992 High Court *Mabo* decision (*Mabo v Queensland [No 2]*, 1992). Notwithstanding this, the court had previously acknowledged the distinct legal rights of indigenous peoples in the country.<sup>7</sup> Following *Mabo*, the native title was enacted in Federal legislation as the *Native Title Act 1993* (Cth) (NTA).<sup>8</sup>

The NTA establishes a system for recognising native title, making native title applications, forming native title agreements, and for holding and managing native title rights. Native title rights and interests are unique for each native title holding group, as based in their laws and customs, and reflecting the diversity of Indigenous peoples’ cultural, legal and political traditions. However, native title is not the same as those laws and customs, rather it is the recognition of them. In this recognition, native title brings with it a sweep of intercultural interactions, intricacies and ideologies around the law, Indigenous peoples’ cultures and traditions, and separation thinking and connectivity thinking. (Weir 2012, p. 6)

As evidence of the legal determination of these land rights, the claimant, Eddie Koiki Mabo (1936–1992), submitted a series of maps of the blocks of lands he held on Mer Island. The maps were executed using coloured markers, black ink pen and watercolour paint on notepaper, and represented cartographic diagrams, indicating where the borders of his lands were. They were outlined using a herringbone outline, or marked with a diagonal stripe (National Library of Australia 2009a, 2009b). The sketch concerning Mabo’s “Portion of Baugered on the hill site towards Tall end of Gelan paser (Hill)” was signed E. Mabo.<sup>9</sup>

<sup>6</sup> The signatories of the Barunga Agreement were the Chief Minister of the Northern Territory, on behalf of the Northern Territory of Australia, the Chair of the Northern Land Council, the Chair of the Anindilyakwa Land Council and the Chair of the Tiwi Land Council. The Barunga Agreement of 1988 was a painted declaration on canvas that referred to the aspirations of the “Indigenous owners and occupiers of Australia”. It was produced by Indigenous leaders in the Northern Territory as a political gesture of self-determination to the Australian Government. Stylistically, it combined both the cross hatched painting form, from Arnhem Land, and the dotted-style painting from the desert (AIATSIS) (Tickner 2001, pp. 40–41).

<sup>7</sup> This was in respect to Gunditjmara people. See *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 (Weir 2012, p. 13).

<sup>8</sup> “The Mabo Litigation Records arise from the litigation conducted in both the Supreme Court of Queensland and the High Court of Australia. They comprise a Statement of Facts by the Plaintiffs, wills, land transactions, court transcripts, exhibits, pleadings, applications, witness statements, submissions, correspondence, memoranda and research material. They have been arranged into volumes in broad chronological order. Many of the papers are in copy format, especially the research materials” (National Library of Australia (b)).

<sup>9</sup> Maps included references to cardinal points, local roads, vegetation, topography, shoreline, beaches, villages, airport and clan lands.



These sketches were presented in support of other critical material presented to the court, and the claimant proved he had a continuing connection with the land in question and had rights and interests in the land under aboriginal and Torres Strait islanders' traditional law and custom. This evidence also supported his claim that he had continued to observe laws and customs which defined his ownership of rights and interests in the land.

The proof that established the indigenous ownership of the island and supported the claims for the continuity of indigenous occupation and the maintenance of their traditional customs and laws on the island also included archival materials—wax cylinder recordings, photographs and films that had been made by the Cambridge Expedition to the Torres Strait in 1898 (Koch 1996). The consequences of the Mabo decision were revolutionary, with the delineation of a new type of land right known as native title. It was recognised throughout Australia and triggered the lodging of First Nation peoples land title claims all over the nation.<sup>10</sup>

However, the strict requirements within the Native Title Act have made it difficult for the majority of indigenous Australians to successfully apply for land rights (Weir 2012, p. 1). The test for a claimant registration is often too onerous in many respects and may deny worthy native title claims. Often, a situation arises where claims must be registered within a set notice period, and it is difficult for some claimants to provide the details required within this period (particularly where a court order is required). Similarly, the strict terms required by the court for providing proof of a physical connection to the land can be difficult for some (Australian Human Rights Commission 2000; Keon-Cohen 2013). When the court favours propositional logic, the indigenous lack of literacy and skills to communicate effectively in English has been problematic, as well as the fact that in some indigenous communities there is little concern for the apparent contradictions in the information that they present (Neale 2003; Eades 2015). Further, the court bias towards favouring written as against that given orally has presented difficulties, as has its ability to access key information from indigenous claimants. Unlike Western culture, which values a prompt access to information, within indigenous culture knowledge is not easily accessible, but governed in highly selective ways, according to age, spiritual affiliation and sex. In particular, the focus of proof in native titles is on the details of peoples' connections to places—the facts that are most likely to be restricted knowledge or “secret business” (Anker 2005, p. 97).

The emphasis on “tradition” plays a large role the recognition of native titles and indigenous peoples' rights. Here, the narrow frames of the law recognise only certain contemporary practices as being “traditional enough” and demonstrating a continuity with the past (Otto and Pederson 2005). The Yorta Yorta's claim for their river Country on the Murray River, on the southern border of New South Wales and Victoria (*Yorta Yorta Aboriginal Community vs. State of Victoria and Ors* 1998), highlighted this issue. Their contemporary practices of resource management and environmental conservation of the Country were rejected by Justice Olney as valid evidence of them continuing to engage in their traditional land practices. Further, their adoption of commercial farming was seen as untraditional and antithetical to their status as traditional owners because they were seeking to make a commercial livelihood from the Country. Olney ruled they had “abandoned” their native title traditions and that these practices were not part of the Yorta Yorta culture (pars. 126, 128) (Weir 2012, p. 7; Strelein 2001, p. 95).

## 5. 1971 Launch of Desert Acrylic Paintings at Papunya

As regards the use of dotted acrylic paintings on canvas as legal instruments to claim native titles, the year 1971 is significant. The desert art movement was founded at this time at Papunya, in the Northern Territory, through the collaboration of the local school teacher Geoffrey Bardon with local artists and elders. Papunya was a settlement which

<sup>10</sup> The presentation of an indigenous native title claim can take over six years to finalise.

had been set up in 1959 by the government to administer a number of central desert tribes. The scholar Ulli Beier noted:

Papunya was established by the government in the early 1960s as a settlement for tribal Aboriginals, who had been persuaded, cajoled, pressured even forced to abandon their own way of life in the desert and accept the ‘security’, the monotony, and the bleakness of the life in a collection of jerry-built shacks, with few jobs, no opportunities and often only the dole to keep them alive. (Beier n.d., p. 34)

During this period of scarce resources, the desert men, when introduced to the opportunity to create paintings for sale, immediately saw the economic benefits that would follow. They were aware of the local commercial success of the Arnhem Land bark artists and the widespread acclaim that had been accorded to the watercolour painting of the indigenous central desert artist Albert Namatjira.<sup>11</sup> They also recognised that this collaborative initiative would give them the chance to reinvigorate their culture and record traditional knowledge for later generations. They were concerned that their traditional ceremonies and practices were increasingly being abandoned because the people could no longer easily access their lands to conduct such important cultural activities. Furthermore, they saw the opportunity of using the Western medium of acrylic on canvas as a vehicle to promote their culture to wider audiences. Their paintings deployed sacred symbology that encoded ceremonial values and sand drawings in culturally appropriate ways while referring to their cultural connections to their lands. What appealed to them was the possibility to advance their cultural self-determination. This transcultural aesthetic process gave them the means to take control of their culture for political purposes, as had the bark artists at Yirrkala before them, and to use the paintings as evidence of their traditional entitlements in land title claims (Myers 2002, pp. 169–71).

The founding of the aboriginal-owned Papunya Tula Artists Cooperative by the Aboriginal men, in 1972, was seminal to advance this cause. It facilitated the production, administration, distribution and sale of their traditionally inspired acrylic paintings. In the following decades, while the bark painting sales continued in Arnhem Land, acrylic art production spread to other communities in the desert. There, it was taken up by women and has continued to flourish since. During the 1970s and early 1980s, this practice was promoted by two government-funded bodies: the administrative, aboriginal-controlled Aboriginal Arts Board and the retail art-sales organisation Aboriginal Arts and Crafts Pty Ltd. (Johnson 2007; Peterson 1983; Geissler 2017, pp. 170–72; Geissler 2020; Geissler 2021). These organisations facilitated the promotion, sale and exhibition of indigenous artworks. Apart from providing a welcome source of income, the economic success facilitated a “tremendous resurgence of interest in culture on the part of the Aborigines” (Canberra Times 1975), sparking a cultural renewal. Furthermore, it fostered confidence in the artists and the strength of their culture and encouraged the use of paintings in land title tribunals.

They were accepted in these legal forums as living evidence of the reality of the artists’ traditional tribal sovereignty over particular areas of land.<sup>12</sup> The concept of such

<sup>11</sup> Papunya’s early painters, Clifford Possum Tjapaltjarri, Tim Leura Tjapaltjarri and Kaapa Tjampitjinpa, had worked as artists prior to coming to Papunya, and some men were actively painting with Kaapa Tjampitjinpa at Papunya (Johnson 2010b, pp. 11–43).

<sup>12</sup> The aboriginal contemporary art movement, from which this practice has its direct origins, is typically traced to Papunya and its art centre in the central desert, in 1971. It was founded on the commercial success of Arnhem land bark paintings in the art market, earlier in the twentieth century (Geissler 2017, 2019, 2021). In Papunya, however, the content and the medium were quite different. Instead of bark painting and ochre, canvas and acrylic were used. The enthusiasm for this movement is due to the local teacher Geoffrey Bardon, and desert artists were motivated to reinvigorate their culture through painting. This resulted in the innovative adaption of traditional imagery in culturally appropriate ways. These new versions of cultural design not only promoted the sophistication of the culture and the individuality of the artists but also new and compelling aesthetic forms and indigenous ideas that would become foundational to shape the identity discourses of the nation (Myers 2002, pp. 5–6, 64, 284, 289; Morphy 1998, pp. 16–20; Anker 2014, p. 160; Smith 1980; McLean 1998, p. 114). Papunya paintings were map-like renderings of Dreaming stories, aerial maps of cultural heritage. They were informed by the pictorial vocabulary of ceremonial body design and ground paintings which, in this new expression, saw their transference from ochres to acrylics and the deployment of graphic symbols that were encoded with multiple meanings. Concentric circles represented sacred rocks, campsites or campfires. U-shapes signified both human and spiritual beings. Wavy lines referred to water and strait lines to ancestral journey or travelling routes. The highpoint of this art occurred in *Possum Spirit Dreaming through Napperby Country*, the spectacular, map-like canvas covering thousands of kilometres in the desert. It was painted by Clifford Possum and Tim Leura Tjapaltjarri and consisted of multiple Dreaming narratives, namely Possum, Old Man, Yam, Sun and Moon, depicted in one painting (Sutton 1988a, p. 112).

group ownership as evident in traditional indigenous law finds resonance in the Western tradition of nationhood (Bleiker and Butler 2016, p. 64). As Australian historian Henry Reynolds explained:

Aboriginal tribes were, in effect small nations which had long traditions of complex 'international' relations. They made war and peace, negotiated treaties, settled conflicts, arranged marriages and organised access to resources and right of way across territories (Reynolds 1995, p. 149)

This traditional connection to the land and its expression in acrylic painting were passionately explained in the comment by Kuntjil Cooper, a Pitjantjatjara desert elder and artist from Irrunytju, in central Australia.

When I am gone my grandchildren will be able to understand their culture when they see my [acrylic] paintings. I want whitefellas to respect anangu [Pitjantjatjara people's] culture. When they see these important paintings, they will know that tjukurpa [Dreaming] is strong, that anangu {Aboriginal peoples} are strong. (Knights 2006, p. 43)

#### 6. *Ngurrara 1* (1996) and *Ngurrara 11* (1997) Canvas—Great Sandy Desert of Western Australia—2007 Federal Court Ruling

An example of the successful use of acrylic paintings as evidence in a land title claim is exemplified in 1997 for "Determination Area 'A'", for the Ngurrara peoples.<sup>13</sup> On this occasion, the *Ngurrara 11* acrylic canvas was successfully used as a legal instrument for the determination of a land title in the Great Sandy Desert, in northwestern Australia. It was a collaborative artwork by over fifty artists. The presentation of this painted solution as evidence to the land title tribunal was agreed to by the claimants, because they were not fluent in English. They saw the familiar medium of painting as a way to graphically present their ideas to the tribunal, namely, the relevant geographic and traditional information concerning their traditional ownership of the lands in question.

This claim, which began in 1996, was a two-stage process. The initial painting was *Ngurrara 1* canvas (Figure 1). It occurred at Pirnirni, a clay pan site in the Great Sandy Desert, where the recording of artists' stories from the site were painted onto canvas (National Museum of Australia n.d.). They were represented by a series of abstract symbols—concentric circles, dots, arcs and lines which the claimants identified with specific physical locations in their lands. It was decided that each person would paint the section of land for which they were responsible within their law. The canvas measured eight by five meters and asserted facts that related to the basis of the artists' entitlements and traditional relationships to their lands and to each other (Anker 2014, pp. 143–44).

The following year, as the claimants decided that the original lacked appropriate integration and scale, another painting, the *Ngurrara 11* canvas, was produced (National Museum of Australia n.d.). In the new canvas, with ten by eight metres, the designs and patterning of the related areas addressed the issues raised by the first but departed from its more geometric, divided compositional structure. It was more organically conceived, using a blend of flowing colours and forms and illustrating the spirit of the interconnection between peoples and lands that the artists wished to express (Lowe et al. 2011, p. 30). Importantly to the claimants, the painting represented both their land and its traditional law. Commenting on the aerial, map-like cultural presentation of the painting, anthropologist Kirsten Anker, while referring to its aerial view, stated that it is

far more significant for positioning people in relation to, and because of the landscape. Such land could never be a possession. It is more like family. The relationship is one of care, stewardship. The map of country that it paints is full

<sup>13</sup> Determination Area "A" is communally held by the Ngurrara people—the Walmajarri, Mangala, Juwaliny, Wangkajunga and Manjilarra peoples living in and around Fitzroy Crossing. Determination Area "B" was a separate claim. The determination of "A" that was sought covers some 77,810 square kilometres and is located in the vicinity of the Great Sandy Desert, between the southern extent of the Kimberley pastoral leases and the Percival Lakes. This is land from which native peoples had been expelled in the 1950s and 1960s (Mangkaja Arts Resource Agency 2021).



of people, history, law, stories, connections, allusions and symbolism. (Anker 2014, p. 156)

The individual claimants reinforced this passionate connection to their lands by giving a powerful display of oratory in their address to Justice Gilmore at a plenary session of the Native Title Tribunal in 1997. Each stood on the traditional encoded section of the canvas, with painted symbols that represented their lands, and presented their evidence to the tribunal in their traditional language—the closest thing to being on the land in question.<sup>14</sup>

Although this eloquent performative display and the aesthetic impact made by the special traditionally encoded configurations of dots, circles and lines painted onto the monumental canvas were indecipherable to the non-indigenous observers, they were received by the tribunal as evidence derived directly from indigenous law (Gilmore 2007; Anker 2005, p. 54). The presentation of their art as cultural evidence, while not “a title deed” and representing something quite different to property, communicated in ways supplementary to the proper facts of the case, by its appeal to the senses through its colour and rhythms, its sense of space, the traditional narratives of the material provided by the artists to the court and the sense of authenticity that the presence and performative actions of the claimants were able to generate at the desert hearing (Anker 2005, p. 106).

In the logic of native titles, the frame of reference which gives a painting value as evidence is the use of traditional designs which are intricately bound up with the land, its boundaries and the Dreaming stories and law related to it (Anker 2005, p. 34). These presentations are understood by indigenous claimants as proof that they hold the requisite knowledge of their Country and continue to practice it as law. Because of the need to translate the encoded material in the paintings and to understand what indigenous law is, non-indigenous judicial authorities have to not only to suspend their disbelief and put to one side their knowledge of how the mainstream world works, but also interpret it through other principles, while accepting the authenticity of the evidence presented.



**Figure 1.** Ngurrara artists painting Ngurrara Canvas II at Pirnini Great Sandy Desert, May 1997. Photography K. Dayman (Used with permission from Ngurrara Artists and Mangkaja Arts Resource Agency). Copyright Ngurrara Artists and Mangkaja Arts Resource Agency.

<sup>14</sup> This innovative evidential framework and meaningful cultural context could not have been reproduced in a conventional courtroom.

The case was only decided in the artists' favour in 2007 ([National Museum of Australia n.d.](#)), when Justice Gilmore justified it in the determination of the *Native Title Act 1993* (Cth) s.87 A(4) 94A, by noting in her statement the vital nature of the additional evidence provided to the court for the case by the claimants. Significant in the evidence was the acknowledgement by the tribunal of the importance of "the overarching existence of *jila* law" as a unique system that was shared by all members of the Ngurrara claim, and which was recognised as such by neighbouring indigenous groups and also actively practiced by the claimants to demonstrate their connection to the lands of the "Application area". The judgement also noted that the artists demonstrated their connection to the lands in question by "painting country" and the places "where they were born/found and grew up." *Native Title Act 1993* (Cth) s.87A(4) 94A ([Gilmore 2007](#)).

## 7. Yirrkala Saltwater Bark Collection—Blue Mud Bay—2008 High Court Ruling

By contrast to the two former case studies, an example in the bark medium where map-like painted representations of indigenous lands were used as visual evidence is the Yirrkala Saltwater Bark Collection land title claim of 2008. The Yolŋu indigenous rights at issue were those related to the intertidal zones of the coast, specifically the lands of Blue Mud Bay, near Yirrkala, in east Arnhem Land ([Stubbs 2013](#); [Marawili 2013](#), p. 117).

The legal instruments in question were the eighty bark paintings now in the collections of the National Maritime Museum in Sydney, which were painted c. 1997 (onwards) by forty-seven artists (Figure 2). The Chairman of the Northern Lands Council, Wali Wanungmurra, explained the traditional knowledge encoded within the paintings to Raymattja Marika in the following way.

By painting these designs we are telling you a story. From time immemorial we have painted just like you use a pencil to write with. Yes, we use our knowledge to paint from the ancient homelands to the bottom of the sea. ([Marika 1990](#), p. 10)

The paintings represented the visual and living traditions of the Yolŋu interacting with their saltwater countries ([Buku-Larrngay Mulka Centre, in Association with Jennifer Isaacs and Associates 2014](#); [Dhimurru Aboriginal Corporation 2021](#)) Their traditional knowledge was there in the individualistic representations of the figures of fish, sharks, turtles, crocodiles, fire, spears, rocks, clouds and cross-hatched traditional designs used by the artists to infill the painted forms.<sup>15</sup>

The artworks refer to the traditional narratives relating to ancestral beings and their actions, as well as the relations between the peoples, places, the sea and water ([Pasco Gaymarani 2011](#)). Art Centre manager Andrew Blake explained:

These paintings represent the Saltwater Country of the Yolŋu. They reveal saltwater in many states, show qualities of depth, surface, and the mix which shroud the secrets: the sacred and often dangerous land just below the surface, the totemic life forms that inhabit these waters and the profound fronts in the deepest waters. The surface depicts the Ancestral Beings—instigators and adventurers in canoes. Their presence and their deeds are also shown as icons that float from clan estate to clan estate, thus connecting people in organised systems of ownership, ceremonies and rights to country. When this connection is established, the giant clouds on the horizon take up the waters, to return as fresh water (rain) over the sea, over the coast, over the land, into the rivers that run to meet the coast, to meet the tides before mixing with the currents to complete the cycle. All the water—both fresh and salt, both in the land and saltwater country is sacred. The movement of these waters is enacted in ritual dance and narrated in the sacred song cycles. ([Blake 2014](#), p. 8)

<sup>15</sup> For each there is a transcript in traditional language and English of the traditional stories associated with the Country depicted.





**Figure 2.** (Australian National Maritime Museum 2018), Djambawa Marawili, *Mangalili Yindiwirryun* 1988, 159 × 75 cm, ochre on eucalyptus bark, Australian National Maritime Museum Seawater Collection, purchased with the assistance of Stephen Grant of GrantPirrie Gallery © Djambawa Marawili. Courtesy Buku-Larrnggay Mulka.<sup>16</sup>

The paintings were deployed as a form of collaborative community action. They were used as cultural material supporting the key evidence on 30 July 2008, when the determination of the Australian High Court was made—the Blue Mud Bay Case (Brennan 2008). The paintings were accepted as title deeds of the artists' rights, associated with the coastal intertidal zones. The paintings presented “an argument that the coastal waters between the low and high-tide mark involved sacred sites both in the physical and spiritual planes”

<sup>16</sup> “This bark painting could be described as portraying the cross sections of the Mangalili Saltwater country. The miny'tji (sacred clan design) represents the saltwater surrounding the ancestral sacred fish spear that was thrown at Yindiwirryun, a sacred rock. This bark shows the turtle Yinipunayi swimming around the base of Yindiwirryun and the Wanupini (storm clouds) gathering on the horizon. The Burrkun, an X shaped configuration on the painting is linked to the ancestral mother Nyapalinu and her characteristics of womanhood and fertility.” Australian National Maritime Museum 2018, ‘Mangalili Yindiwirryun 1998, Djambawa Marawili’, ANMM website, <http://collections.anmm.gov.au/objects/14497/mangalili-yindiwirryun?ctx=66ddafbe-fe3f-42d0-947f-a5879d49cf40&idx=0> (accessed on 12 April 2021).

(Anu 2017). The High Court's decision gave aboriginal ownership to eighty percent of the Northern Territory's coastline, a ruling that included a precedence over any commercial interests or fishing (Anu 2017).

## 8. Conclusions

The elucidation of the strategies used in three successful land title cases within the Australian legal system, each relying on different visual artistic expressions—drawings on paper, acrylic on canvas, and ochre on bark—highlighted the legal agency of visual art as a mode of indigenous Australian cultural expression, and demonstrated how they acted as cultural evidence in establishing sovereignty over traditional lands. The three mediums that were chosen reflected their popular status within contemporary art practice.

For the Mabo drawings on paper, the land entitlements of the Meriam peoples were successfully prosecuted by the claimant Eddie Mabo, by presenting a series of colourful map-like sketches (some using watercolours, others coloured inks) of his various land allocations on Mer Island, his homeland in the Torres Strait. These were presented to the Federal Court in 1992 in conjunction with other cultural materials and led to the 1992 Land Title Act.

By contrast, the successful large-scale Ngurrara 11 canvas of 1997, painted in acrylic as a collaborative cultural production by the Ngurrara peoples and presented as legal evidence to a tribunal set up on their desert lands, allowed for a platform for multi-stakeholder entitlements to be presented in one painting. Though the symbolic encoding of the paintings and spoken oratory of the claimants as evidence was indecipherable to the viewers and the court, the compelling visual and spoken modes of presentation were understood and recognised by the court to be representative of authentic indigenous testimonies. These findings led to changes to the Native Title Act in 2007.

For the bark medium study, the visual evidence presented in the eighty paintings of the Saltwater Bark Collection proved critical as support evidence for the 2008 saltwater intertidal law claim of Blue Mud Bay. While not a single collaborative work, like Ngurrara 11, the paintings were received by the court as representative of the individual claimants' cultural links to their tidal lands. As a body of work, they contributed to the success of their land title claim.

In the aforementioned discussion, while the visual elements of the artworks were not the determining factors in the native title determinations, but only part of them, they were nonetheless recognised as effective communication tools. They added new cultural context to the evidence and were seen as legitimately authored legal instruments of the First Nation claimants. These findings point to the importance of indigenous Australian visual art as a mode of legitimate legal evidence within the Australian legal system. It demonstrates that visual art comprehensively presents First Nation Australians' cultural knowledge and histories associated with their long-standing and enduring connections to their land. Further, it provides an effective tool for meaningful intercultural engagement.

The author acknowledges the traditional owners of Country throughout Australia. She recognises their continuing connection to lands, waters and culture and pays respect to the elders' past, present and future.

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**Acknowledgments:** **Figure 1.** Ngurrara artists painting Ngurrara Canvas II at Pirrini Great Sandy Desert, May 1997. Photography K. Dayman. Used with permission from Ngurrara Artists and Mangkaja Arts Resource Agency. Copyright Ngurrara Artists and Mangkaja Arts Resource Agency. **Figure 2.** (Australian National Maritime Museum 2018), Djambawa Marawili, *Mangalili Yindiwirryun* 1988, 159 × 75 cm, ochre on eucalyptus bark, Australian National Maritime Museum Seawater Collection, purchased with the assistance of Stephen Grant of GrantPirrie Gallery © Djambawa

Marawili. Courtesy Buku-Larrnggay Mulka. Image used with permission from Djambawa Marawili and the photography from the Australian National Maritime Museum, Sydney.

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