Land Justice for Indigenous Australians: 
Dealings in native title lands and statutory Aboriginal land rights regimes in Australia and why land tenure reform is critical for the social reconstruction of Aboriginal people and communities

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Introduction

My first duty is always to acknowledge the Traditional Owners on whose country we meet today and to pay my respects to their elders past and present.

My second duty is to express my gratitude to Dr Sharon Harwood of James Cook University for giving me this opportunity to talk to you today.

My third duty is to acknowledge the support of my wife, Kerry, who has tolerated my many absences from home over many years.

Abstract

Research on the land tenure aspirations of Aboriginal people in the Kimberley region in WA in 2011 found that Aboriginal people as native title holders are reluctant to surrender their native title rights and interests in exchange for forms of Crown title. Native title determinations in Australia align the incidents of title with attested 'custom' such as hunting, fishing and gathering. So far, they have excluded 'alienability' as a feature, other than by surrender to the Crown for their permanent extinguishment. While native title rights and interests are considered by the High Court to be a property right, native title holders are unable to use their native title rights and interests to engage in the modern economy in ways that require them to be alienable or as equity to secure finance. Similarly, the statutory Aboriginal land rights regimes that pre-date Mabo (No. 2) impose similar restrictions on alienability and use of the land as equity to secure finance. The Commonwealth believes these arrangements are an obstacle to the

1 Following this presentation, several members of the audience requested a copy of my speaking notes. I have inserted the slides used in my presentation at the end of the paper. I have also inserted several explanatory footnotes for clarification, and references at the end of the paper.
2 The author acknowledges the diversity of cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. Throughout this paper, the term 'Aboriginal people' recognises that Aboriginal and Torres Strait Islander people have a collective, rather than purely individual dimension to their livelihoods.
expansion of government-backed home ownership programs and private economic development and is actively urging the states to undertake land tenure reforms aimed at individuating land titles and facilitating private home ownership.

This presentation:
- begins with some clarification of my position and some personal background about my long involvement with land tenure and land administration;
- includes some background to the ‘Indigenous titling revolution’;
- presents my views about the Commonwealth’s and COAG’s Indigenous land tenure reform agenda;
- discusses dealings with land subject to native title rights and interests and dealings with land held under the various statutory Aboriginal land rights regimes in Australia;
- clarifies land tenures and Crown titles;
- discusses the roles and responsibilities of RNTBCs and Land Trusts;
- makes some pertinent observations about the new 
  *Aboriginal and Torres Strait Islander (Providing Freehold) Land Act*; and
- some concluding observations, especially about where the need for tenure reform should lie and I postulate that it is time to ‘puncture some legal orthodoxies’ relating to property and land tenure.

**Clarifying my position**

I want to make a few things very clear from the outset.

I do not support the kinds of ‘Indigenous land tenure’ reforms being promoted by the likes of the Institute of Public Affairs or the Centre for Independent Studies for reasons that will become clear as my presentation unfolds.

I find the central tenets of their Indigenous land tenure reform arguments quite distasteful and very disrespectful of Indigenous views and values. I am not suggesting for one moment that I know and understand Indigenous views and values. Quite the contrary. I am not speaking on their behalf, nor do I have any authority to do so. I am merely reflecting what I am hearing and seeing based on my engagement with Aboriginal and Torres Strait Islander people over the past 20 years or so. What I am saying is that I come at these issues from a very different perspective and from a very different background. Land tenure and land administration have been an integral part of my professional life since the early 1970s.

**My Canberra experience**

For those of you that don’t know me, I am an urban and regional planner. My professional education is in cartography, surveying and civil engineering followed by Bachelor of Arts in geography with honours in political science. I worked as a town planner and urban designer in Canberra for the first 13 years of my working life. For the past 30 years I have had the good fortune of holding jobs that have involved

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3 See Hughes, Hughes and Hudson 2010 for example.

extensive travel all over Australia and for the past 18 years engaging with Aboriginal and Torres Strait Islander people on native title and land tenure issues, cultural heritage protection, natural resource management, and land use planning. There are not many places in Australia that I have not visited at least once in my life. And this is about my 20th visit to Cairns.

But my experiences with land tenure systems have been a central part of my professional life almost from the very beginning. Canberra is the city that Federation created. And when our forefathers founded the nation’s capital, they were determined to devise a land tenure system that would prevent the rampant speculation in land that had occurred off the back of the gold rushes of the late nineteenth century. Hence, Canberra has a leasehold system of land tenure not freehold. This is quite different to every other capital city in Australia. And the street in Canberra where I lived for most of the first 25 years of my life was Torrens Street, named after Sir Robert Torrens who devised the Torrens system of land titling that is now universally used in Australia and in many other countries around the World.

As a young man I became deeply immersed in defending the Canberra leasehold system. From the early 1970s to the mid-1990s, I led a campaign for its proper enforcement which precipitated several court cases and no fewer than 13 inquiries and culminated in a judicial inquiry into Canberra’s leasehold system in 1995 by Justice Paul Stein from the NSW Land and Environment Court.5

So my interest in land tenure systems goes back to my youth, and my professional career has invariably focussed on land tenure and land administration systems ever since.

‘Indigenous’ land tenure reform?

Let me fast forward to the present and talk about the current Indigenous land tenure reform debate.

In 2011, a study I undertook for the WA Department of Indigenous Affairs (SGS Economics and Planning 20126) on whether the Aboriginal Lands Trust (ALT) estate in WA7 could be transferred to Aboriginal people within the existing land tenure system, found there is:

- a low level of understanding amongst Aboriginal people of what ‘home ownership’ means and the implications of becoming a home owner;
- a high level of misunderstanding amongst Aboriginal people of the Crown’s land tenure system and misapprehension about the need for change; and
- a high level of mistrust amongst Aboriginal people and native title holders because governments are notorious for continually changing their policies and positions.

More significantly, the study also found that native title holders are reluctant to surrender their native title rights and interests in exchange for a form of tenure they have little or no understanding of, and which they regard as being inferior to their customary land rights. But none of this is new, as Aboriginal people have been voicing these concerns for decades through their land rights campaigns.

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5 Stein 1995.
6 The author was the lead researcher on this study, SGS economics and Planning 2012.
7 Comprising over 11% of the land mass of WA.
Two important questions

Toward the end of the Study, two native title holding communities posed the following two questions:

- Why do native title holders have to surrender and agree to the permanent extinguishment of their customary rights and interests in order to participate in the modern economy?
- Why is it not possible for customary rights and interests to be accommodated in conventional land tenure systems in such a way that would enable the customary rights holders to engage in the modern economy on their lands, on their terms and without having to surrender and extinguish their native title rights and interests forever?

These two questions made me think about these matters and they are in fact the focus of my PhD research.

The reality is that the current basis for admitting Aboriginal land rights into the Anglo-Australian framework of land law and tenure continues the dispossession of colonialism, only this time under the guise of inalienability giving the Crown a monopoly power to extinguish customary land rights and interests. I will return to this point in a few moments.

The ‘Indigenous titling revolution’

However, I want to put this debate into a wider context and take a look at what Jon Altman calls the ‘Indigenous titling revolution’ (Altman 2014).

Figure 1 shows what happened across the Australian continent around Indigenous and non-Indigenous land titling from 1788 to the present.

Altman (2014: 3) notes that “In 1788 Indigenous nations possessed the entire continent. Then during a prolonged period of land grab from 1788 to the late 1960s Indigenous peoples were dispossessed. But then, from the late 1960s, there has been an extraordinary period of rapid legal repossession and restitution that is ongoing. This has not occurred as part of some coherent policy framework, but rather as a somewhat ad hoc land titling ‘revolution’ driven intermittently by political, social justice and judicial imperatives.”

This restitution that Altman talks of includes a range of land rights grants, purchases, native title determinations, areas subject to indigenous land use agreements, areas subject to joint management, Indigenous Protected Areas and a mix of other joint management or conservation arrangements.

Altman has mapped these land titles (Altman 2014) and they total around 2.5 million square kilometres or roughly 33 per cent of terrestrial Australia. Figure 2 provides information on land titling under three tenures:

- land claimed or automatically scheduled under land rights law (an estimated 969,000 sq kms);
- 92 determinations of exclusive possession under native title law totalling 752,000 sq kms; and
- 142 determinations of non-exclusive possession under native title law totalling 825,000 sq kms.

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8 Gover 2012.
The last category often provides a weak form of property right that needs to be shared with other interests, most commonly commercial rangeland pastoralism.

Altman (2014: 7) also highlights the fact that most Indigenous Australians do not live on Indigenous titled land (Figure 3), estimating that less than 100,000 of a total Indigenous population of 660,000 people live on those lands and notes that it is not clear how many of these are traditional owners⁹ or how many traditional owners live off their lands.

Altman (2014: 7) concludes that what is clear, is that by correlating population with land title and where there is land rights or exclusive possession native title, over eight per cent of the population in these locations is Indigenous compared with a national proportion of just on three per cent.

The point of these maps is to show the extent of the land titling ‘revolution’ as Altman calls it, that has been taking place, and the extent of coverage, which I believe underscores my arguments that land use and environmental planners can no longer ignore the reality of these rights and interests.¹⁰

Let me turn to the Commonwealth’s Indigenous land tenure reforms before I focus on the ‘dealings’ with land subject to native title and dealings with land under the statutory Aboriginal land rights regimes around Australia.

The Commonwealth’s Indigenous land tenure reform agenda

Since the mid-2000’s the Commonwealth has been promoting reform of the various statutory Aboriginal land rights regimes in the States and the NT¹¹. These reforms are targeted at changing the way these lands can be held and ‘owned’ so that the land can become a tradable asset or can be used as equity to raise finance for a private or commercial loan.

These reforms have come about in the context of promoting individual home ownership for Aboriginal and Torres Strait Islander people and enabling Aboriginal communally owned lands to be made available for economic development. I have written elsewhere about this debate.¹² I am not opposed to private home ownership, I am a home owner myself, but I do not support the erosion of communally owned lands in remote locations for the sake of individuating land titles where there is little or no real prospect of a market that will enable the accumulation of private or communal wealth. Burdening low to moderate income households with debts they are never likely to pay off just does not make any sense to me, and particularly not where there already is a communal form of ownership which already provide many of the same features of home ownership through forms of community or social housing, such as security of tenure, affordability and in many cases inheritability also.

COAG revealed their hand when they agreed to the National Partnership Agreement on Remote Indigenous Housing in 2009 (COAG 2009). With respect to Indigenous land tenure reforms, the objectives are:

- To provide asset security for government investments;

⁹ as defined in the statutory sense – see Edelman 2009.
¹⁰ Wensing 2011.
¹¹ See COAG 2008a and b, 2009.
To facilitate home ownership and enable land to be used as security against a debt; and
To facilitate the attraction of private investment.

The Commonwealth has not been so clear about its objectives, but some indication was disclosed in correspondence between the then Federal Minister with responsibility for Indigenous Affairs and Housing, Jenny Macklin, and her state and territory counterparts in 2009-10. The correspondence set out three conditions for land tenure reforms before the Commonwealth would provide funding for capital works programs in remote Indigenous communities. The three conditions were:

1. The state/territory governments must have access to and control of the land on which construction will proceed for a minimum period of 40 years. A longer period has additional advantages.
2. Tenure arrangements must support the implementation of tenancy management reforms including the issue of individual tenancy management agreements between the state housing authority and the tenant without requiring further consent from the underlying land owner. This capacity must also permit replacement of the housing service provider if required.
3. Native title issues must also have been resolved, in that any applicable process required by the Native Title Act 1993 (Cth) has been conducted.

Since that time there has been a change in government at the federal level (September 2013), and while the Coalition Government is yet to clarify its policies with respect to Indigenous land tenure reforms, there are plenty of indications that the Abbott Government will continue to apply the measures outlined above, although the Department of Prime Minister and Cabinet’s website remains silent on these matters, as does the Terms of Reference for the Prime Minister’s Indigenous Advisory Council. The recently released Forrest Review continues along the same veins of promoting the individuation and freeholding of communally owned lands.

To be clear about the implications of these objectives for native title holders, it is important to understand what COAG and the Commonwealth are trying to achieve here.

On the one hand, the reforms are aimed at cleaning up years of neglect with respect to public investments in essential facilities and services (including roads, water, power, sewerage, health and education, and housing) in remote Aboriginal communities on Aboriginal owned or controlled land by not undertaking cadastral surveys and creating the relevant cadastral boundaries around such facilities and allocating responsibilities for ownership and operational management for these facilities. Sorting out these arrangements might be a good thing because governments failed to do things properly in the first place, although some of the sorting out may have adverse consequences for some Aboriginal communities in terms of shifting responsibilities for ongoing operational ownership, management and maintenance onto community organisations and/or local government without the appropriate levels of funding or revenue.

On the other hand, the objectives of the land tenure reforms are also aimed at creating opportunities for individual land ownership to facilitate private home ownership and opportunities for other forms of private or corporate economic development on what is currently Aboriginal or Torres Strait Islander

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13 Macklin 2009a and b.
owned land by removing the communal ownership and creating individual titles. In other words, removing the land from communal ownership arrangements in favour of private individual or private corporate ownership arrangements.

This latter objective has its application in circumstances where there is a strong local and regional economy supported by people in well-paying jobs and with good economic prospects.

However, it is very unlikely to work successfully in circumstances where there is a weak or non-existent local or regional economy to sustain high employment and strong land values.

The fact is that in remote (and in many not so remote) Aboriginal communities there is no underlying local or regional economy that would under-write the land’s economic value and provide secure long term employment outcomes for the local population. Local economies in remote locations are extremely weak and susceptible to changing economic circumstances and influences at much larger scales (i.e. global, national and regional).

This is not unique to remote Aboriginal communities. You only need to look at what is happening in Queenstown on the west coast of Tasmania with the closure of the Mount Lyell mine.

If fully implemented, these land tenure reforms are essentially aimed at ‘privatising’ what is currently communally owned and controlled land in remote Aboriginal communities, and could potentially have some disastrous long term consequences, not only for native title holders, but also for Aboriginal communities as a whole.

It is important to understand that native title holders are not able to use their property rights to participate in the modern economy in the same way as other property holders are. Native title holders must first agree to surrender and permanently extinguish their native title rights and interests before the Crown will issue an exclusive possession freehold or leasehold title.

Without careful consideration about surrendering and agreeing to the permanent extinguishment of native title rights and interests and losing communal control over the land and access to its natural resources, there is a very real danger that the individuation of communally owned lands or the revocation of reserve lands in the case of WA, would in the long term result in the loss of that land from Aboriginal ownership and control.

If that were to happen, it would be irrecoverable and would have disastrous consequences for Aboriginal people and communities and their cultural connections to and responsibilities for country.

‘Dealings’ in native title lands

Land granted or reserved for the benefit of Aboriginal and Torres Strait Islander people under statutory land rights regimes is deemed not to have extinguished native title rights and interests (Pareroultja v Tickner 1993). Therefore, any dealings in communally owned land or land reserved for the use and

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16 Dealing is the legal processes through which land is bought and sold or otherwise transferred, also known as conveyancing. This involves the preparation of hard copy documents as evidence of a land transaction between parties.
benefit of Aboriginal people, must also take into account the native title rights and interests for the dealings to be valid.

Land subject to native title rights and interests is inalienable and under the *Native Title Act 1993* (Cth), the native title rights and interests can only be surrendered to the Crown. A native title determination does not give native title holders any power or authority to grant subsidiary interests including leases, and is statutorily protected from debt recovery processes. It is therefore unusable as security against a loan\(^{17}\).

The extent to which a prescribed body corporate (PBC) or Registered Native Title Body Corporate (RNTBC) is able to assign leases over land still subject to native title rights and interests may also be constrained by s 56(5) of the *Native Title Act 1993* (Cth), which states that the native title rights and interests held by a body corporate are not able to be ‘assigned, restrained, garnisheed, seized or sold’ or ‘made subject to any charge or interest…as a result of the incurring, creation or enforcement of any debt or other liability of the body corporate’, including ‘any act done by the body corporate’.

Section 56(5) of the Act is effectively a detailed reflection of what is regarded as the common law position on native title set out in *Mabo [No. 2]*. It provides that since native title is a form of property that exists subject to the Crown’s radical title and therefore outside the real property system originating from the Crown, it cannot be given by native title holders to anybody but the Crown. If that is the position, at common law a native title cannot subsist with the creation of a freehold title, lease or any sublease exercised pursuant to a lease (by native title holders or otherwise).

While, the argument remains that the *Native Title Act 1993* (Cth) alters the common law by enacting the non-extinguishment principle and applying it to specified future acts, the reality is that in striking contrast to other citizens, native title holders cannot enter the market to realise the value of the property rights by leasing, mortgaging or selling them, because the Crown has a monopoly over the acquisition and extinguishment of those rights (Gover, 2012). Nevertheless, Gover (2012) asserts that governments have a moral obligation, if not a fiduciary duty, “to act ‘reasonably, honourably and in good faith’ in dealings with Indigenous peoples and to make ‘informed decisions’ where their interests are at stake”.

The complexity of the issues at stake here should not be under-estimated and are discussed in more detail elsewhere\(^{18}\).

‘Dealings’ in statutory Aboriginal and Torres Strait Islander land rights lands

There are 24 different Aboriginal and Torres Strait Islander land rights statutes operating across Australia (excluding the *Native Title Act 1993* (Cth)), that provide Aboriginal and Torres Strait Islander communities with dedicated statutory interests in land. Most of these land rights systems can be classified as ‘acts of grace or favour’ by the respective governments because their origins lie in government responses to the Aboriginal land rights campaigns of the 1960s and 1970s.

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\(^{17}\) Wensing and Taylor 2012, Wensing 2013.

The form of title for grants made under these statutory Aboriginal land rights regimes differs within and between jurisdictions, but titles are generally an estate in fee simple or freehold.

But to what extent do these different statutory forms of title enable the landholder to sell, lease, mortgage or dispose of their land?

Table 1 is a comparative analysis of the statutory Aboriginal and Torres Strait Islander land rights regimes which lists the different statutes and includes details of the landowner, form of title, and whether private sale, leasing or sub-leasing, or mortgaging is permitted.

The ability of title holders to deal in the land also varies within and between jurisdictions. In some cases the land is inalienable and cannot be sold, transferred or otherwise dealt with, except in accordance with the provisions of the relevant legislation. In very few cases there are no express statutory restrictions on dealing with the land.

What the comparative analysis shows is that in most cases land is not able to be alienated but a legislative basis already exists in all jurisdictions (with conditions attached) that enables leasehold interests to be created on Aboriginal or Torres Strait Islander land including the ability to use the leasehold interest as security for a mortgage.

In response to the Commonwealth’s (and COAG’s) Indigenous land tenure reform agenda that emerged in the last decade, only Queensland has enacted specific legislation that enables Aboriginal and Torres Strait Islander lands to be freeholded and then traded in the open market. South Australia has gone in the opposite direction. In SA the existing Aboriginal Lands Trust (the first Aboriginal Land Holding Authority in Australia) has been strengthened with greater independence and the ability to buy additional land on the open market and to undertake economic development on Trust land for the benefit of Aboriginal people.

**Land Tenures and Crown Titles in Australia**

It might help if I explain what land tenures and land titling mean.

The term ‘title’ has two distinct senses in Australian land law. Primarily, it denotes ‘ownership’ – to the extent that ‘ownership’ of land is possible, consistent with the notion that land is held ‘of the Crown’. When a person has ‘title’ to land, the accepted meaning is that the person ‘owns’ the land. Secondly, and in a looser sense, ‘title’ denotes the various acts and events, which go towards proving ownership. The instruments and events are sometimes referred to cumulatively as ‘the title’ to the land: hence the term ‘title deed’, meaning a document that is ‘proof of ownership’.

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19 The original source for this analysis was the Aboriginal and Torres Strait Islander Social Justice Commissioner’s Native Title Report 2005. However, since that time several jurisdictions have made significant amendments to their legislation or introduced new legislation. As stated in the Aboriginal and Torres Strait Islander Social Justice Commissioner’s Native Title Report, to ascertain particular details in the different jurisdictions, a closer analysis of the strengths, weaknesses and workability of the existing arrangements is required. I gave a presentation on my analysis of these 24 statutes to a CAEPR conference that was held at the ANU in September 2014, which will be published in early 2015 among the other presentations to this conference. The full list of statutes is included in the References.
The English law of real property and conveyancing, which became part of the law of the Australian colonies, was not entirely suited to the conditions of the new settlements. In the 1850s Robert Torrens, who later became the first Registrar-General for South Australia, devised the Torrens system of conveyancing. The Torrens system of ‘title by registration’ provides that the matter of title to land is a government responsibility. A ‘certificate of title’ represents ownership of each piece of land that is guaranteed by the State. In each State and Territory, the Registrar-General maintains a register that includes a record of (amongst other things):

- a description of the land and of the estate or interest in the land in question;
- a description of the ‘proprietor’ of the estate or interest; and
- the particulars of any other estates or interests affecting the land.

The folio is allocated a ‘distinctive reference’, which is quoted in all transactions affecting the land. Under this system, all rights and interests in land, except Indigenous rights and interests, are ‘held of the Crown’. Although there is new research disputing the validity of this term\(^\text{20}\).

Nevertheless, a Torrens Title does two things:

- It guarantees the priority of interests in the title; and
- It provides security of title because it is backed by the Crown.

Over the past 150 years the eight States and two Territories have developed their own statutes governing rights and interests in land and waters. As a result, across Australia there is a bewildering array of tenures.\(^\text{21}\) After all, whether customary or western, land tenure systems are social constructs.\(^\text{22}\)

There is a hierarchy in the different types of tenurial rights and interests in land that have been created or reserved by governments.

Table 2 shows a hierarchy of Australian tenures or tenurial interests, starting with Crown land and cascading down to private freehold or absolute fee simple at the bottom of the Table.

Crown land is land that is owned the Crown, as represented by the States and Territory Governments (and only in certain locations, the Commonwealth i.e. the whole of the ACT), and it is not allocated to someone else.

The rights and interests in land can be grouped into various categories. From the top of the table under Crown land, they include:

- Co-exising public and private rights and interests;
- Communal rights and interests;
- Public rights (for present and future generations); and
- Private rights and interests.

In this last category, the tenures include permits, licences, leases and private freehold. Private Freehold or absolute fee simple is where a private person(s) or private corporations own the land. Private freehold, or an estate in fee simple, is regarded as the most secure form of tenure and the closest thing

\(^{20}\) For example, see Secher 2014.

\(^{21}\) Fry 1947.

\(^{22}\) Boydell and Holzknecht 2003: 205.
to absolute ownership that exists in the Australian system of land tenure\textsuperscript{23}.

The information in Table 2 is atypical and highly generalised and the land tenure systems in each State and Territory are far more complex than this table portrays. However, what this Table demonstrates is that there are several forms of land tenure between the two extremes at the top and bottom of the Table, and that the type of land tenure generally determines how much say the title holder has in the land and what they can do with the land.

Of course, this Table ignores native title because that is not a form of land title issued by the Crown.

The roles and responsibilities of RNTBCs and Land Trusts

Let me turn now to the roles and responsibilities of Registered Native Title Bodies Corporate (RNTBCs) and Land Trusts in Queensland.

RNTBCs are created under Commonwealth legislation, while Land Trusts are created under Queensland legislation. Their roles and responsibilities are quite different, and it is important to understand this distinction.

RNTBCs

Registered Native Title Bodies Corporate (RNTBC) are currently governed by a complex legislative framework which includes a series of functions and powers prescribed by the \textit{Native Title Act 1993} (Cth) and the \textit{Native Title (Prescribed Body Corporate) Regulations 1999} (Cth), as well as a number of corporate governance requirements under the \textit{Corporations (Aboriginal and Torres Strait Islander) Act 2006} (Cth) (the CATSI Act).

The functions for RNTBCs set out in the \textit{Native Title Act 1993} (Cth) include:
\begin{itemize}
\item receiving future act notices, as well as possibly advising native title holders about, or providing them with a copy of, such notices;
\item exercising procedural rights afforded to native title holders under the Act, including commenting on, objecting to and negotiating about proposed future acts;
\item preparing submissions to the NNTT or other arbitral bodies about right to negotiate matters, including whether negotiations have occurred in good faith and objecting to the application of the expedited procedure;
\item negotiating, implementing and monitoring native title agreements;
\item considering compensation matters and bringing native title compensation applications in the Federal Court; and
\item bringing revised or further native title determination applications cases in the Federal Court.
\end{itemize}

The functions set out in the \textit{Native Title (Prescribed Body Corporate) Regulations 1999} (Cth) include:
\begin{itemize}
\item managing the native title holders’ native title rights and interests;
\item holding money (including payments received as compensation or otherwise related to the native title rights and interests) in trust;
\end{itemize}

\textsuperscript{23} \textit{Commonwealth v. NSW} (1923) 33 CLR 1, 42 per Isaacs J.
• investing or otherwise applying money held in trust as directed by the native title holders;
• consulting with the native title holders about decisions that would affect native title and preparing and maintaining documentation as evidence of consultation and consent
• consulting and considering the views of the relevant NTRB for an area about a proposed native title decision; and
• performing any other function relating to the native title rights and interests as directed by the native title holders.

The Native Title Act 1993 (Cth) (NTA) and the Native Title (Prescribed Bodies Corporate) Regulations (1999) Cth require corporations to register under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) if they are determined by the Federal Court to hold and manage native title rights and interests.

The CATSI Act has tailored provisions for native title and RNTBCs to ensure there is appropriate interaction between the two laws and that obligations under each law don’t conflict. The Office of the Registrar of Aboriginal Corporations (ORIC) has produced a guide on the interaction between the CATSI Act and the NTA (ORIC 2010). The Guide contains useful information on the obligations of Aboriginal and Torres Strait Islander corporations under the CATSI Act, the objects of the CATSI Act and ongoing governance requirements, and more particularly that the duty of RNTBCs under the CATSI Act and the Corporations Act 2001 (Cth) not to trade while insolvent is to prevail over conflicting native title legislation obligations.

Land Trusts

In Queensland, Aboriginal and Torres Strait Islander peoples may get ownership of land through land transfers. In the past, land trusts were established to hold this land for the benefit of Aboriginal and Torres Strait Islander peoples. New land trusts are no longer being established, and land is now granted to corporations registered under the Australian Government’s Corporations (Aboriginal and Torres Strait Islander) Act 2006 or existing land trusts.

Existing land trusts continue to function as usual, and are administered under the Queensland Government’s Aboriginal Land Act 1991 or Torres Strait Islander Land Act 1991.

Existing land trusts have the option of establishing a corporation and transferring all land and assets to the corporation.

Trustees manage land trusts to ensure it:
• functions under a constitution
• has an executive committee with a chairperson
• maintains appropriate records of decisions and transactions
• holds regular meetings in accordance with the Aboriginal Land Act 1991 and Torres Strait Islander Land Act 1991 and its constitution
• provides compliance documents to the Chief Executive at the end of each financial year.

Also, a land trust can:

- acquire, hold or dispose of property
- borrow, receive and spend money
- sue and be sued in its corporate name
- employ staff and engage consultants.

Land trusts are subject to ordinary local and state government laws relating to development and land taxes. However, trust land is exempt from local government rates if the land is not being used for residential or commercial purposes.

The roles of RNTBCs and Land Trusts could not be more different. I understand there are instances where Land Trusts established under Queensland legislation are also the RNTBCs for native title determinations over those lands. I am not sure how that might work, because the different roles and responsibilities could on occasion come into conflict and separating the decision making might be rather difficult. This is where good governance skills become paramount.

**Providing freehold in Aboriginal and Torres Strait Islander communities and its effect on native title rights and interests**

I have several concerns with the *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014* (Qld).

The implications of moving Aboriginal and Torres Strait Islander land to ordinary freehold are quite profound, for five reasons.

**Firstly,** while the Explanatory Memorandum states, rightly, that Queensland cannot cause the extinguishment of native title or otherwise affect native title unless the outcome is provided for under the Commonwealth’s *Native Title Act 1993*, and that the Qld legislation does not need to deal with compensation matters because they are also included in the Commonwealth’s NTA, and that native title parties are free to bring a compensation action to the Federal Court ‘unless agreement is otherwise reached in the form of an Indigenous Land Use Agreement (ILUA) under the NTA’.

While this information may be factually correct, it is misleading because it is only stating part of the truth and not the whole truth. Other important bits of information are missing. For example, that under s.32Z of the Act, ‘native title over the available land has been, or will be, surrendered or extinguished’.

This might be OK, provided the relevant native title holders have been adequately consulted and agree to the surrender and permanent extinguishment of their native title rights and interests on the basis of free, prior and informed consent.25

My question therefore is, are the consultation provisions in the Queensland Act and the agreement provisions in the Commonwealth Act sufficient to comply with Article 19 of the UNDRIP?

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Secondly, while the freeholding provisions may be well intentioned, the provisions in the Act could have long term detrimental impacts through the loss of land in Aboriginal or Torres Strait Islander ownership.

As Greg Marks\textsuperscript{26} said in his submission to the Queensland Government on the Bill:

\begin{quote}
It must be borne in mind that the extent of disposssession of Indigenous people in Queensland as a result of colonialism and settlement has been massive. Relatively little of Queensland is left in any form of Indigenous ownership and responsibility.

In these circumstances it is incumbent on Government to ensure the remaining land held by or on behalf of Indigenous Queenslanders is protected from further loss. Any additional erosion of the greatly diminished land base of Indigenous Queenslanders would be contrary to basic principles of justice, inconsistent with Australia’s commitments and obligations under international law and practice, including the UN Declaration on the Rights of Indigenous Peoples, and would fail to meet such fiduciary and other obligations that are owed to the Indigenous peoples of Queensland by its Government.

The prevailing concern must therefore be to ensure the integrity of the remaining Indigenous land base, and especially that it be available for the benefit of future generations of Indigenous Queenslanders and in particular discrete Aboriginal and Torres Strait Islander communities. Loss of title for these communities would lead to greater pauperisation.
\end{quote}

Despite its good intentions, the Act will almost certainly, over time, lead to a significant loss of land in Aboriginal and Torres Strait Islander ownership in Queensland. This will help no-one, certainly not the Indigenous communities that have managed to persist to this day on a communal land base.

My question therefore is, have we not learnt from the mistakes made in the USA,\textsuperscript{27} and if so, why not?

Thirdly, the absence of controls over subsequent land dealings after the initial purchase of the land from the Crown could be open to exploitation and abuse. While I accept there is a process set out in the Act for consultation with the relevant parties and that the process is only voluntary, I am not sure that the process is sufficiently robust enough to prevent exploitation.

I don’t like putting ideas into people’s heads, but unfortunately, I don’t see anything in the Act that gives me enough confidence to prevent this from happening.

My questions therefore is, are the checks and balances in the Act governing the initial transfer of the land into freehold sufficient to prevent this from happening, and if not, then what steps will the Queensland government take to prevent this kind of exploitation from occurring?

Fourthly, under the \textit{Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014 (Qld)}, eligibility for the grant of freehold is restricted to individuals. I have no difficulty with restricting eligibility to Aboriginal or Torres Strait islander people, but there are no

\textsuperscript{26} Marks 2013.

\textsuperscript{27} For a discussion of the freeholding on native lands in the USA see Stephenson 2010.
provisions allowing Aboriginal and Torres Strait Islander organisations or corporations from being considered as eligible recipients of freehold land.

Was this an administrative oversight or a deliberate omission? If it was the latter, then it is a glaring example of the neo-liberal agenda of privatising land for individuals only and denying Aboriginal and Torres Strait Islander people the opportunity to hold such grants of freehold land communally through either community organisations or a company limited by guarantee established under the Corporations Act 2000 (Cth) or an Aboriginal Corporation established under the CATSI Act (2006).

Fifthly, compensation for the permanent extinguishment of native title rights and interests.

When native title rights and interests are compulsorily acquired, they must be acquired on just terms for any loss, diminution, impairment or other effect of that act on the native title rights and interests (Native Title Act 1993 (Cth) s 51). The just terms may comprise compensation in a form other than money (Native Title Act 1993 (Cth) s 24MD(2)(d)).

When native title rights and interests are surrendered by an agreement that includes a statement that the surrender is intended to extinguish the native title rights and interests (in whole or in part), those native title rights and interests are surrendered without any right to compensation (other than what may be included in the agreement by negotiation).

While compensation for the extinguishment of native title rights and interests is intended to reflect the loss in perpetuity to the native title holders of those rights and interests, the reality is that compensation flowing on to benefit future generations of native title holders carries significant risks.

While a package of benefits may be available, compensation is likely to include a tenure swap, and that form of tenure may be freehold or leasehold. The merits of granting freehold or leasehold tenure will depend to a large degree on the statutory regime in the relevant jurisdiction and the extent to which the recipients of the land transfer are able to maximise the long-term benefits of holding the land.

Freehold title(s) may present the potential for Aboriginal people to gain from the development of the land, since the land may be sold, mortgaged or leased by the relevant land-holding entity in order to generate capital or rents. As a means of compensation, however, the freehold value of the land at the time of development will not necessarily reflect the value of the land into the future for future generations. Freehold title also presents the significant risk that former native title holders will not realise future benefits if the estate is lost through imprudent sales or foreclosure.

If the native title rights and interests are surrendered to the Crown on condition that they are replaced by a fee simple title, a loss to future generations may occur if (a) the land has some intrinsic cultural value to future generations of (former) native title holders that is put at risk by the potential for future development, or (b) the economic value of the land is diminished or lost to future generations either because of a decline in its intrinsic value or because an imprudent sale or other transaction means the opportunity costs from any increase in value fail to be recouped.

As one would expect, only if the land is of some intrinsic economic value can the potential for increasing capital value be realised, either through (increasing) rents from leases, through borrowing against the
asset to invest in other commercial opportunities, or through some alternative investment of the funds obtained from the land’s sale. Upon sale it may be that the funds are invested in alternative real estate or otherwise invested in a broad ranging portfolio with similar or greater returns to that of real estate.

While the Queensland and Commonwealth statutes are necessarily silent on these matters, these are nonetheless important matters for native title holders to contemplate as they consider the surrender and permanent extinguishment of their native title rights and interests.

Hence, my conclusion that the current debate on ‘Indigenous land tenure reform’ is skewed toward the neo-liberal agenda of private capital accumulation at the expense of communal forms of tenure.

**So where are the reforms really required??**

As a consequence of the High Court’s decision in *Mabo v the State of Queensland (No. 2)*, there are now effectively two systems of law and custom in Australia. One deriving from colonisation, the other deriving from the prior traditional ownership of Australia by Aboriginal and Torres Strait Islander people. Many lawyers will disagree with me on my next point, but then I am not a lawyer and I am always willing to question legal orthodoxies, especially when they continue to discriminate on the basis of race.

I have long stated that I believe there are two elements to the High Court’s decision in *Mabo (No. 2)*. There is the substance and the essence.

In substance, the High Court’s *Mabo (No. 2)* judgement recognised that Eddie Mabo and others on behalf of the Meriam People of Murray Islands in the Torres Strait had prior and continuing occupation and ownership of the Murray Islands. *Mabo (No. 2)* removed forever the myth that Australia was ‘terra nullius’ (meaning ‘land belonging to no one’, ‘vacant land’, or ‘land without a sovereign’).

In essence, the High Court’s *Mabo (No. 2)* judgement found that Aboriginal and Torres Strait Islander law and culture (specifically the Murray Islanders’ interests in land and waters) is recognised by the common law of Australia. This was a return to the position that British common law and policy had held since before the colonisation of Australia in 1788.

I believe these conceptions flag some critical changes to the way we need to think about land.

Aboriginal people have never ceded their lands. Australia has never signed a treaty and never dealt fairly with the Indigenous people of Australia about the loss of their lands. The way the native title system has evolved is not delivering many results that benefit Aboriginal people. As Toni Bauman says, native title claimants ‘face a miasma of complex legal and political issues, competing demands, a lack of resources, and a great deal of uncertainty’ (Bauman et al 2013: 1), and for native title holders, the ‘recognition of traditional rights in country is often hard won, euphoric and highly symbolic’.

Graham Ring\(^{28}\), a columnist writing for the National Indigenous Times in 2006, said he believes native title to be a ‘dodgy conveyance’ and likens it to a dodgy car. He says:

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\(^{28}\) Ring 2006.
‘If native title was a car, it would be a late 80’s family sedan, belching black smoke, and struggling to exceed 50kph going downhill. The recalcitrant wreck would refuse to start on cold winter mornings, and spend more time in the mechanics shop than on the road. People would look at it and say “that car is cactus” and things even more vulgar. It would be stating the bleeding obvious to observe that the machine was moribund.

But native title isn’t a car. It’s an impossibly tortuous set of court cases, pieces of legislation, courts, bureaucracies, lawyers, anthropologists and assorted hangers-on. Sometimes the Indigenous claimants themselves get a look-in. Now the legislators are at it again, tinkering with the carburettor on a car whose engine has given up the ghost’.

Ring was talking about the Howard Government’s proposals to change the Native Title Act 1993 (Cth) following the release of a report on the review of the native title claims resolution process in 2006. By this stage the Commonwealth, according to Ring, had already spent more than $900 million on native title, that’s over $11 million per claim, let alone what each of the States and the Northern Territory have also spent.

While the native title processes may be costing a lot of money, it is a reasonable to ask whether native title holders are feeling somewhat frustrated or disillusioned because they are not able to use their property rights to engage in the modern economy with their land on their terms when opportunities arise without having to surrender and permanently extinguish their hard won native title rights and interests. Di Smith likens this to replacing ‘the historical fiction of terra nullius with the legal fiction of extinguishment’.

To put the question another way: Is native title a ‘dodgy conveyance’? If so, can it be fixed?

We can no longer deny that, as Valerie Kerruish and Jeannine Purdy put it, the root of all property in land for non-Aboriginal Australians was acts of dispossession of Aboriginal people – acts of theft – and for which no-one has ever been held responsible.

From the standpoint of Aboriginal and Torres Strait Islander people, these acts of theft were never in doubt, but once Australia enacted the Racial Discrimination Act in 1976, the legal denial of the existence of prior Aboriginal ownership of Australia became an international embarrassment.

I agree with Kerruish and Purdy it is intolerable that we continue construct legal orthodoxies that suit the settler state.

For example, declarations by government that the extinguishment of native title has occurred (partly or wholly) will not make the laws and customs of Aboriginal and Torres Strait Islander People disappear.

As Justice Robert French (as he then was) and Graeme Neate (then President of the National Native Title Tribunal) have both stated, the term ‘extinguishment’ is just a metaphor for placing limits upon the extent to which recognition will be accorded to Aboriginal and Torres Strait Islander People under...
Australian law.\(^{31}\) Regardless of judicial or legislative status, Aboriginal and Torres Strait Islander people will always retain their special relationship with and responsibility for land and sea country.\(^{32}\)

It is time to ‘puncture some legal orthodoxies’ in relation to property and land tenure, as PG McHugh puts it.

Let me make two suggestions.

Firstly, the real change has to happen inside the Crown’s land tenure system. Let’s turn the legal principles of property relations, inalienability and extinguishment on their proverbial heads. Let’s develop a form of leasehold tenure which allows the native title holders to determine the terms and conditions for development on their lands. Let’s make sure they also share in the risks and benefits from land development and resource exploitation.

Secondly, there is real legitimacy for native title holding groups applying their unique system of law and custom for making decisions within their registered native title bodies corporate established under the *CATSI Act 2006* (Cth) and registered under the *Native Title Act 1993* (Cth).

There are lots of good reasons why native title holders should continue using their law and custom within their RNTBC in relation to how decisions about land administration, land use and land management are made. And indeed the UN Declaration on the Rights of Indigenous Peoples endorsed by the UN General Assembly in 2007 includes a number of Articles to this effect.\(^{33}\)

At the AIATSIS Native Title Conference in Coffs Harbour in June 2014, Tony McAvoy SC gave a presentation titled ‘An Assembly of Nations and a Treaty’. In this presentation Tony McAvoy said that:

“All Aboriginal and Torres Strait Islander people should aspire to ownership of our lands, planning control, self-determination; economic independence; and full compensation”.

My advice to native title holding groups is to make the most of the circumstances before you with respect to reforming the State’s land tenure system, otherwise the opportunity will be lost for many decades and possibly generations to come.

Use this opportunity wisely to:
- make the most of being able to revive your law and custom;
- take ownership of your land in the strongest form of tenure possible from the State (land ownership);
- be in control of land uses on your lands (land use planning control);
- be in control of your own future and destiny (self-determination);
- become economically independent on your own terms (economic independence); and
- seek full compensation for any loss, diminution or extinguishment of native title rights and interests (full compensation).

\(^{31}\) French J in The Lardill case; Neate, 2002: 118
\(^{32}\) Rose, 1996; Dodson, 1998: 209
\(^{33}\) Articles 3, 4, 5, 9, 11, 12, 13, 18, 19, 20, 25, 26, 29, 31, 32, 33, 34. UN 2007.
I trust I have challenged you to think differently about these issues, and allow me to leave you with the following two quotes.

“Two different timelines, two different cultures, and two different laws.”
Mrs Margaret Iselin, Quandamooka Elder, at the signing of the Native Title Process Agreement between Redland Shire Council and the Quandamooka Land Council Aboriginal Corporation in August 1997.

“There are two laws. Our covenant and white man’s covenant, and we want these two to be recognised... We are saying we do not want one on top and one underneath. We are saying that we want them to be equal.”
David Mowaljarlai, Elder, Ngarinyin people, Western Australia, 1997
Jon Altman’s maps – 2014

Figure 1: A snapshot of Indigenous held land from 1788 to 2013.
Figure 2: Indigenous land titling under three tenures
Figure 3: Distribution of Indigenous population from the 2011 Census and Indigenous land titles (2013)
Table 1: Comparative summary of dealing provisions in the Aboriginal and Torres Strait Islander land rights statutes in Australia as at September 2014.

<table>
<thead>
<tr>
<th>Statute</th>
<th>Landowner</th>
<th>Form of Title</th>
<th>Is private sale permitted?</th>
<th>Is Leasing or sub- leasing permitted?</th>
<th>Is Mortgaging permitted?</th>
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<td>ACT</td>
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<td>Vested in the Council &amp; compulsory lease back to Clh as National Park</td>
<td>No</td>
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<td>Yes</td>
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<td>NSW</td>
<td>Local Aboriginal Land Councils or NSW Aboriginal Land Council (NSWALC)</td>
<td>Freehold (except in Western Division – leasehold)</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
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<td>Local Aboriginal Land Councils or NSW Aboriginal Land Council (NSWALC)</td>
<td>Freehold &amp; compulsory lease to NSW Govt as NP</td>
<td>No</td>
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<td>NT</td>
<td>Aboriginal Land Trusts-consisting of Aboriginal people resident in the regional Land Council area</td>
<td>Inalienable Freehold Title</td>
<td>No</td>
<td>Yes of leasehold interest</td>
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<td>NT</td>
<td>Aboriginal Association</td>
<td>Restricted freehold</td>
<td>No</td>
<td>Yes, with restrictions</td>
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<td>QLD</td>
<td>Specified Aboriginal or Torres Strait Islander people</td>
<td>Freehold</td>
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<td>QLD</td>
<td>RNTBG, Trustees or Aboriginal people</td>
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<td>Yes</td>
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<td>Trustee</td>
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<td>SA</td>
<td>Aboriginal Lands Trust</td>
<td>Freehold</td>
<td>Yes</td>
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<td>SA</td>
<td>Aboriginal Lands Trust</td>
<td>Freehold or leasehold or any other title it purchases</td>
<td>Yes, must have support of Parliament</td>
<td>Yes, subject to conditions</td>
<td>Yes, subject to conditions</td>
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<td>Anangu Pitjantatjarra Yankunytatjara Land Rights Act 1981 (SA)</td>
<td>Inalienable freehold–vested in perpetuity</td>
<td>No</td>
<td>Yes, subject to conditions</td>
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<td>Maralinga Yaritji Land Rights Act 1984 (SA)</td>
<td>Inalienable freehold–vested in perpetuity</td>
<td>No</td>
<td>Yes, subject to conditions</td>
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<td>TAS</td>
<td>State-wide Aboriginal Land Council</td>
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<td>Yes</td>
<td>Yes on lease or licence</td>
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<td>VIC</td>
<td>Aboriginal Trust</td>
<td>Inalienable freehold – vested in perpetuity</td>
<td>No</td>
<td>Yes</td>
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<td>Aboriginal Lands (Aboriginals’ Advancement League) (Watt Street, Northcote) Act 1982 (Vic)</td>
<td>Crown grant, unspecified</td>
<td>No</td>
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<td>VIC</td>
<td>Aboriginal Lands Act 1991 (Vic)</td>
<td>Specified Aboriginal corporations</td>
<td>Conditional Free Simple</td>
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<td>Aboriginal Land (Northcote Land) Act 1889 (Vic)</td>
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<td>VIC</td>
<td>Traditional Owner Settlement Act 2010 (Vic)</td>
<td>Traditional Owner groups</td>
<td>Inalienable fee simple</td>
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<td>Aboriginal Affairs Planning Authority Act 1972 (WA)</td>
<td>Aboriginal Lands Trust</td>
<td>Conditional Freehold or lease, &amp; Crown reserves for the ‘use and benefit of Aboriginal inhabitants’</td>
<td>No</td>
<td>Yes, subject to conditions</td>
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<td>Land Administration Act 1997 (WA)</td>
<td>Aboriginal person or approved Aboriginal corporation</td>
<td>Conditional Freehold or lease, &amp; Crown reserves for the ‘use and benefit of Aboriginal inhabitants’.</td>
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<td>Table 2</td>
<td>Hierarchy of Australian tenurial interests</td>
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<td><strong>Crown land</strong></td>
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<td></td>
<td>• Unallocated Crown land</td>
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<td></td>
<td><strong>Public rights (for present and future generations)</strong></td>
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<td>• National Parks or World Heritage Areas</td>
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<td>• Conservation reserves, other reserves</td>
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<td>• State Forests</td>
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<td><strong>Co-existing public and private rights and interests</strong></td>
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<td>• Crown-to-Crown tenures (e.g. railways, educational institutions, health facilities)</td>
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<td></td>
<td>• Roads</td>
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<td>• Stock routes</td>
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<td>• Public access, rights of way</td>
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<td></td>
<td>• Parks or reserves (e.g. town parks and gardens, botanical gardens, public playing fields)</td>
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<td></td>
<td>• Easements (e.g. electricity and telecommunications access, water, sewer and stormwater)</td>
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<td></td>
<td><strong>Communal rights and interests</strong></td>
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<td>• Community titles</td>
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<td><strong>Private rights and interests</strong></td>
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<td>• Licences (e.g. exploration, mining activity)</td>
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<td>• Leasehold – lesser rights (e.g. pastoral, mining)</td>
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<td>• Leasehold – exclusive possession (e.g. residential, commercial, conditional purchase)</td>
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<td>• Conditional purchase private freehold or fee simple</td>
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<td></td>
<td>• Private freehold or fee simple</td>
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</table>

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Aboriginal Land (Northcote Land) Act 1989 (Vic)
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