

Unsettling Planning's Paradigms: Toward a Just Accommodation of Indigenous rights and interests in Australian urban planning?

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Abstract

Cities and urban settlements in Australia exist on lands that are the traditional lands of Australia's Aboriginal peoples¹. Yet the fact of continued Aboriginal presence, ownership and stewardship of Australian territory remains unrecognised in Australian planning. As a result, the profession is yet to grapple in a just and meaningful way with the fact of Aboriginality in Australian cities. Indeed, planning persistently renders Aboriginal people invisible, and perpetuates colonial dispossession. In this paper, we argue that planning in Australia must urgently shift to appreciate these issues, and begin to make amends. This involves understanding how Australian cities and towns can be understood as Aboriginal places, and the contemporary ways in which Aboriginal people are seeking recognition of their rights in cities and towns through processes like native title claims and determinations. We analyse urban native title applications as a key example of the challenges of recognition and the responsibility this lays down to planning and we make some suggestions for how the planning profession, practitioners, scholars and educators might proceed.

Key Words

Aboriginality, native title, urban planning practice, planning education

Introduction

Australia is one of the most highly urbanised nations in the world, a pattern of settlement that has existed since colonisation (Major Cities Unit 2010: 1). The fact of Australia as a settler-colonial state means that the very existence of urban settlements in Australia, along with their planning, cannot be divorced from their origins as colonial settlements. That history saw settlements being built on the stolen lands of the Aboriginal people of Australia. The early set of practices that constituted a nascent planning practice were centrally important to the colonial dispossession of lands through surveying, naming and town-building. This historical fact holds important implications for contemporary planning and its relations with Aboriginal people who have continuously sought to secure a future based on their continuing relationships with their country. In response to those assertions, the last 40 years has seen a land titling revolution underway in Australia (Altman 2014). Approximately 33 per cent of Australia's land mass has been returned to the control of Aboriginal and Torres Strait Islander

¹ The focus of this article is on Aboriginal land claims in our capital cities and regional centres on mainland Australia rather than the Torres Strait, and consequently the term Aboriginal is used throughout except where the context makes it necessary to refer to Aboriginal and Torres Strait Islander or Indigenous.

people (Altman 2014: 5)² giving those people a crucial and legitimate stake in planning processes affecting their lands and waters (SAMLIV 2003:15).

Yet two interesting points stand out concerning the import of this revolution for Australian planning. First, is that cities and urban settlements are proving a much more difficult context for Aboriginal people to gain access to a land base: not only are there both very limited opportunities through legislative land grants as well as very limited chance of success for native title recognition, but many of the Aboriginal people who live in Australian cities and urban settlements have kinship and traditional affiliations elsewhere. This makes the relationship between Aboriginal and Torres Strait Islander land justice, urban contexts and planning extremely complex. Second, is that planning in Australia remains largely silent on all of these issues. Planning Institute of Australia accredited tertiary programs that produce future planning professionals tend not to include content dedicated to the complexities of these issues. Most professional practising planners will have little or no contact with Aboriginal people on planning matters. While minor gestures exist toward acknowledging the prior existence and ongoing stewardship of the Aboriginal peoples of Australian lands and waters (often tokenistically on the inside front covers of plans and policy documents or in the preface or introductory paragraphs but not in the content), the planning system is largely silent on the historical and contemporary context of urban Australia as places of Aboriginal responsibility, connection and law. Planning in Australia, then, is yet to grapple in a meaningful way with its responsibilities toward Aboriginal and Torres Strait Islander land justice, and this is particularly so in cities where the fact of Aboriginal dispossession and the lack of a land base is most intense (see also Porter 2013).

This silence has not gone unremarked: many scholars and practitioners (Jackson 1997a; Howitt and Lunkapis 2010; Oakley and Johnson 2012), ourselves included (Wensing and Sheehan 1997; Sheehan and Wensing 1998; Wensing 1999, 2007, 2012; Wensing and Small 2012; Wensing 2014; Porter 2006, 2010, 2013, 2014) have been pointing out, over many years, the complicity of planning in colonial processes and the urgent need to take seriously Aboriginal and Torres Strait Islander land justice claims. How, then, can this silence have persisted for so long? Planning is a collective decision-making system that governs and directs our land base in our common interests. How could a profession that is so fundamentally about the relationship between people and their land base simply not see the importance of Aboriginal and Torres Strait Islander people's intrinsic connection to and responsibility for their land?

This paper addresses these questions by showing some of the complexities within which planning is operating in relation to questions of urban Aboriginality. We focus particularly on cities, where the silence on Aboriginal land justice is deepest and the questions most difficult.

² This includes land claimed or automatically scheduled under Aboriginal or Torres Strait Islander land rights law and determinations of exclusive possession and non-exclusive possession under native title law.

The paper begins, in the next section, by presenting lenses through which Australian cities can be understood as Aboriginal places and as sites where planning has been integrally involved in the dispossession of Aboriginal people in Australia. To make this claim, we briefly trace and summarise the existing scholarship on the colonial urban history of Australian settlements to indicate planning's own 'colonial complicity' (Byrne 1996: 82). Understanding the role of early planning techniques in the theft of lands from Aboriginal people is the departure point of our argument: it is no longer tenable for the planning profession in Australia to treat Aboriginal and Torres Strait islander questions as a tangential policy concern. We then focus on the contemporary ways that Aboriginal people are seeking recognition of their rights and interests in cities and towns, particularly through processes like native title claims and determinations. These present special challenges for planning, not least because cities are proving to be particularly difficult places for Aboriginal people to have their native title recognised. Planning must respond to this challenging situation, and in the concluding section we present suggestions for what this response might look like.

Cities, planning and settler-colonialism

By the time Governor Phillip was sent to Australia in the late eighteenth century to establish the first British colony on Australian soil, the British legal system had accepted that Indigenous peoples had legally well-established rights to their land and that 'British colonisation could only proceed after title had been acquired through conquest or cession' (Borch 2001: 228). The Aboriginal owners of what are now Australian cities never ceded their land, and no treaty or agreement with Australia's Aboriginal and Torres Strait Islander people was ever reached. Australian colonisation proceeded, as Reynolds (1992) has shown, outside accepted international law at the time. Moreover, in every location that is now a major Australian city or urban settlement, colonists were met with resistance by local Aboriginal people (Statham 1989: 2, 31), the histories of which are well documented (cf. Statham 1989; Boyce 2011).

Cities and urban settlements were a tool of colonial dispossession and widely used in the marginalisation and oppression of Indigenous peoples (and not only in Australia). There is a well-established international literature that has amply made this point (see for example Jacobs 1996; Sandercock 2003; Porter 2010; Edmonds 2010; Stanger-Ross 2008; Blomley 2003 and 2004; Coulthard 2014). Founding and growing cities and human settlements was a key method of early settler behaviour to *occupy* and thus steal land, and design ways to keep Aboriginal owners *out* of those lands. James Boyce's (2011) account of the settlement of Melbourne in 1835 demonstrates this process very precisely. Urban boundaries were demarcated to enable regulations that prohibited Aboriginal people from coming into the city and subjected them to violent retribution when they did. Cities were a 'mosaic frontier' as Edmonds (2010) shows in her comparative analysis of Melbourne and Victoria (Canada). The actual techniques of survey and selection were part of this colonialist endeavour (Byrne 2003: 172). Settling Darwin (then named Palmerston) in 1869 occurred from on board the ship that South Australia's Surveyor General, Goyder, arrived on and it was rapidly determined without

so much as batting an eye that the best place to land and build was a large Aboriginal burial site (Jackson 1997a and b). Jackson's work (1997a and b) on Darwin and Broome, along with Jacobs' (1996) work on Perth (1996), and Carter's (1996) on Adelaide all clearly position urban planning and the settlement of cities at the centre of colonial strategies of dispossession and marginalisation. Cities in Australia, like those in other settler-colonial states, are enmeshed in 'specifically urban colonial politics' (Stanger-Ross 2008: 546).

That original founding of cities, the moment of arrival of settlers and their surveyors-general, is, however, merely the beginning of a *continuous and as yet unending process* of dispossession and marginalisation of Aboriginal and Torres Strait Islander peoples. In subsequent periods of Australian city development since colonial settlement, Aboriginal and Torres Strait Islander people have been further dispossessed. One mechanism for this occurs when Aboriginal reserved lands, set aside during the early stages of colonial settlement, are later revoked and recapitalised for urban development. They are effectively stolen again from Aboriginal occupation and ownership, as occurred in Broome in the early 1990s, where Aboriginal Land Trust reserves were 'relinquished for housing development' (Jackson 1997b: 223) and in the 1980s when Kennedy Hill was rezoned for commercial use (see Jackson 1997b). The revocation of reserve lands for use in urban development is a common feature of colonial cities in other places (see Harris 2002). The erosion of land from Aboriginal reserves in Australia has now been largely stopped following a Court decision that found the extinguishment of native title rights should be disregarded if the land is held expressly for the benefit of Aboriginal and Torres Strait Islander people³.

Another form of ongoing dispossession and marginalisation is the more generalised urban process of renewal resulting in gentrification. Urban Aboriginal communities often live in the poorer parts of cities, a function of the higher rates of poverty, unemployment and socio-economic marginalisation they experience. Those are the very same places that come to be recapitalised after periods of disinvestment and experience pressure from a hyper-capitalised property market. Perth's inner east is a case that demonstrates this trend very pointedly (see Byrne and Houston 2005), as does the debate over the future of housing development on 'The Block' in Redfern, Sydney (NITV 2015).

³ In *Pareroultja v Tickner* (1993), the Full Federal Court of Australia found that 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 (Nettheim 1994). The NTA was amended in 1998 to include the following provisions. **Section 47A(1)(b)(i) NTA** provides that extinguishment of native title can be disregarded if the transfer of an interest in land, that is held as freehold or leasehold, is done under legislation that provides the transfer was for the benefit of Aboriginal People or Torres Strait Islanders or, if the area is held expressly for the benefit of Aboriginal People or Torres Strait Islanders. **Section 47A(1)(b)(ii) NTA** provides for extinguishment to be disregarded if an area is held expressly for the benefit of Aboriginal peoples or Torres Strait Islanders. **Section 47B NTA** applies where vacant Crown land, not covered by a freehold estate or a lease is to be held only to promote and benefit Aboriginal People or Torres Strait Islanders and can be applied even where the legislation under which the land is transferred does not meet the test set out in s.47A NTA.

Yet existing demographic trends indicate that the complexities and urgencies of addressing this situation is only going to increase. In 2011, Aboriginal and Torres Strait Islander people comprised 2.5 per cent of the total population (ABS 2012), with the Australian Bureau of Statistics (ABS) projecting the Aboriginal and Torres Strait Islander population to nearly double by 2026 (ABS 2014). Increasingly, this population resides in cities. In 2011, 33 per cent of Aboriginal and Torres Strait Islander people lived in capital city areas, with Adelaide and Melbourne having the highest proportions of their respective State's Aboriginal and Torres Strait Islander population (see Table 1). Applying the ARIA index of spatial analysis, which classifies population according to area (Department of Health and Ageing 2001), a further 22 per cent of Aboriginal and Torres Strait Islander Australians live in Inner Regional Australia (ABS 2007: 6).⁴ Given the ABS's growth projections, it is reasonable to predict that the relative proportions of Aboriginal and Torres Strait Islander people residing in capital cities will only continue to grow.

[Table 1 here]

Table 1 2011 Census Counts: Indigenous by Capital City and Rest of State (a)

	Aboriginal and Torres Strait Islander peoples	Proportion of Aboriginal and Torres Strait Islander peoples within Capital City/Rest of State Areas
Capital City/Rest of State	No.	%
New South Wales		
Greater Sydney	54 746	31.7
Rest of State	116 961	67.8
No usual address	915	0.5
Total New South Wales	172 622	100.0
Victoria		
Greater Melbourne	18 023	47.4
Rest of State	19 683	51.8
No usual address	284	0.7
Total Victoria	37 990	100.0
Queensland		
Greater Brisbane	41 904	26.9
Rest of State	113 188	72.6
No usual address	721	0.5
Total Queensland	155 825	100.0
South Australia		
Greater Adelaide	15 597	51.3
Rest of State	14 671	48.2
No usual address	165	0.5
Total South Australia	30 433	100.0

⁴ While most state and territory capital cities are classified as Major Cities, Hobart is classified as Inner Regional Australia and Darwin as Outer Regional Australia.

Western Australia		
Greater Perth	27 103	38.9
Rest of State	42 101	60.4
No usual address	455	0.7
Total Western Australia	69 666	100.0
Tasmania		
Greater Hobart	6 895	35.1
Rest of State	12 650	64.5
No usual address	74	0.4
Total Tasmania	19 626	100
Northern Territory		
Greater Darwin	11 101	19.6
Rest of Territory	45 541	80.2
No usual address	133	0.2
Total Northern Territory	56 778	100.0
Australian Capital Territory		
Australian Capital Territory	5157	99.5
No usual address	26	0.5
Total Australian Capital Territory	5186	100
Australia (b)	548 370	

(a) Usual residence Census counts, excludes overseas visitors.

(b) Includes Other Territories, comprising Jervis Bay Territory, Cocos (Keeling) Islands and Christmas Island.

Source: ABS 2012.

Living in capital cities and major regional centres has thus become a key dimension of modern life for Aboriginal and Torres Strait Islander people. The traditional owners⁵ of Australian cities are present, and continue to practice their connections to and responsibility for their country. Forced removals and migration of Aboriginal and Torres Strait Islander people means that many other Aboriginal and Torres Strait Islander communities are also present in cities, with perhaps complex historical and contemporary connections and responsibilities both to lands within cities and to their traditional territories. These different and sometimes divided communities express and practice their responsibilities to land, kin and law in a variety of ways (Rose 1996). There is a long history of struggle for rights (Attwood and Markus 1999) marked by several significant conflicts in our major cities and regional centres: housing in Redfern (Anderson 1993; Shaw 2007); the redevelopment of East Perth (Taylor 2000; Byrne and Houston 2005); the redevelopment of the Old Swan Brewery in Perth (Jacobs 1996); the long history of conflict between Rubibi and the Shire of Broome over new housing developments in Broome (Jackson 1997a and b; Sandercock 2003); and the controversy over the Hindmarsh Island Bridge south of Adelaide (Curthoys, Reilly and Genovese 2008~~7~~: 167-190; Katinyeri 2009). Each of these speaks to the extent to which Aboriginal people have been

⁵ See Edelman (2009) for a discussion on the definition of this term. However, in the context of this paper, we use this term as a short-hand reference to the Aboriginal people that were the owners of the land under their law and custom prior to white settlement and that would be able to establish a legitimate native title claim had their ancestors not been so violently and disrespectfully dispossessed of their country.

actively seeking a voice in urban policy and planning matters that deeply affects their lives. In each case, the real question was not only about existence, but also about the recognition and survival of Aboriginal cultures and traditions in areas that are pervasively affected by urban settlement. As Taylor (2000: 33) notes, there is still a continuity of traditions in the places that Aboriginal people inhabit in towns and cities, weaving together cultural memory, place and identity. Cities, then, are places where an increasing focus on the question of an Aboriginal land base, and its implications for planning, is urgently needed.

The international dimension of this requirement is also clear. The United Nations '*Declaration on the Rights of Indigenous Peoples*' (UN 2007) establishes enabling rights that are fundamental to the realisation of the full suite of development rights, including the right to cultural difference and the right to pursue a pathway to social and economic development that is determined and controlled by the Indigenous people themselves (Articles 3, 19, 23, 26, and 32). These are fundamentally linked together, as Mary Robinson, then UN High Commissioner on Human Rights observed in a lecture to the World Bank, stating that the Declaration:

... makes clear the link between human rights and development, namely that the one is not possible without the other. Thus economic improvements cannot be envisaged without protection of land and resource rights. Rights over land need to include recognition of the spiritual relation Indigenous people have with their ancestral territories. And the economic base the land provides must be accompanied by recognition of Indigenous people's own political and legal institutions, cultural traditions and social organisations. Land and culture, development, spiritual values and knowledge are as one. To fail to recognise one is to fail in all (Robinson 2001, p.6)

One of the ways that Aboriginal people in Australia are trying to reassert their rights to country in urban centres is through whatever legal processes are available, and especially through native title claims. Native title is a particularly important discussion for Australian planners to have, both in cities and regional and remote parts of the country. It is especially important given the lack of understanding currently in the profession about what native title is, and what it means for planning (see Brunner and Glasson 2015). Unlike other legislative land rights regimes established across Australia in response to Aboriginal activism from the 1960s and 1970s, native title is *not* an 'act of grace or favour' by governments.⁶ Over 204 years after Governor Phillip annexed Australian soil to Britain, the High Court of Australia in *Mabo (No. 2)* rejected the "doctrine of *terra nullius*" (land belonging to no-one). It also rejected the configuration of power and knowledge that had legitimated the colonial dispossession of Aboriginal people (Ritter 1996: 32). Native title rights and interests are, thus,

⁶ With the exception of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) because this Act established a land claims process based on traditional associations to country, which all other forms of statutory land rights regimes in Australia do not do, as they are the discretion of the relevant government minister of the day.

a recognition of the pre-existing land rights and interests of Australia's Aboriginal and Torres Strait Islander peoples arising from their traditional laws and customs, albeit rather belatedly and within the confines of the Australian legal system (Smith and Morphy 2007: 7). Native title is a significant part of what Altman has recently termed an 'Indigenous titling revolution' (Altman 2014). In the next section we take a close look at native title in urban Australia to establish the importance of this aspect of urban Aboriginality for planners.

Native title in urban Australia

The preparation of an application for native title recognition is a difficult and time-consuming task (Duff 2014). Many Aboriginal people are motivated to prepare a native title application because they want to gain recognition in the eyes of Australian law as the 'traditional owners' of their lands and waters (Smith and Morphy 2007; Bauman et al 2013). But in order to gain that recognition they must endure a complex process under the Australian legal system, a system that is a part of continuing colonial domination, while 'settler law not only remains unquestioned, but also retains the authority to rule over the acceptability of Indigenous claims' (Morris 2003, cited in Smith and Morphy 2007: 7).

Native title claims raise a wide range of expectations, especially around involvement in decision making that affects their country, but the reality is that the bodies created to hold the native title rights and interests after a positive determination by the Federal Court of Australia '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) about what their native title rights and interests mean. The claims process is very stressful and unsettling, especially where it is difficult to establish the basic requirements of a native title claim in order to pass the 'Registration Test'. Then claimants must endure the very lengthy processes for a determination by the Federal Court, which in most of the cases has been by litigation and not by negotiation and consent. It is only in recent years and where claims are more clear-cut that the States and the Northern Territory have been willing to proceed on the basis of negotiation and consent, than by contested litigation. Bauman et al (2013: 1) are correct in observing that for native title holders, the 'recognition of traditional rights in country is often hard won, euphoric and highly symbolic'.

This is particularly so in our major cities. Table 2 is a summary table of over 50 native title applications that have been made since 1992 over land and waters in Australia's capital cities and the four regional centres of Alice Springs, Broome, the Gold Coast and Mt Isa. These four regional centres are included because they are the only major centres where native title claims were made over the whole town area and the determinations have resulted in both positive and negative determinations within the declared or gazetted town boundaries. The 52 native title applications include 48 claimant applications and four compensation applications. The compensation applications are included in this analysis because the Federal

Court of Australia must first determine whether native title exists before it can make a determination for compensation. At the time of the analysis for this paper, one compensation application has been dismissed and three such applications are still active.

[Table 2 here] (Landscape orientation please)

Table 2 Statistical summary of native title determination applications over Australia’s capital cities and four regional centres, 1992 to March 2015

Location	Number of Applications	Area (Sq Kms)	Registered	Unregistered	Positive Determination (native title exists, wholly or partly)	Negative Determination (native title does not exist)	Withdrawn	Discontinued	Dismissed or Rejected	Currently Active
Adelaide	1	8,159.87	1							1
Alice Springs	1	155.77		1	1					
Brisbane	6	13,566.74	1	5	2	2		2		
Broome	18	13,410.53		17	3		15			
Canberra	6	4,020.69		6			1	3	2	
Darwin	7	353.7		7		4		2	1	
Gold Coast	1	1,639.79		1		1				
Mt Isa	1	38,719	1		1					
Melbourne	1	1,558.33		1			1			
Perth	6	193,860.02		6		1			1	4
Sydney	4	267,279		4		2		2		
TOTALS	52	542,723.44	3	49	7	10	17	9	4	5
%	100		6	94	13	19	32	17	8	10

Note: Total areas may include overlapping claims and areas adjoining cities and towns.

Sources: NNTT Registers and FCA Decision. Analysis by the authors.

Sources: National Native Title Tribunal (NNTT) Register of Native Title Claims, National Native Title Register and Applications. <http://www.nntt.gov.au/searchRegApps/Pages/default.aspx>
Federal Court of Australia. Judgements. <http://www.fedcourt.gov.au/publications/judgments>

What this table reveals is that Aboriginal people are trying to re-assert their presence inside the cadastral grid of dispossession (Byrne 2003: 177) that came with the development of cities and regional centres. However, it also reveals just how difficult it is for Aboriginal people to succeed in gaining that recognition. Table 2 shows that as of March 2015, seven applications (or 13% of the 52 applications) have resulted in positive determinations of native title inside the boundaries of our major capital cities and regional centres. These include the Mbantuarinya/Arrernte People in Alice Springs, the Quandamooka People in Brisbane, the Yawuru People in Broome, and the Kalkadoon People in Mt Isa. Ten applications (19%) have resulted in negative determinations of native title (i.e. that native title does not exist in the claim area). The Table also shows that the bulk of the applications have either been withdrawn, discontinued, dismissed or rejected – a total of 30 applications or 57%. Five applications remain active, three of which are compensation applications and two are claimant applications (discussed below). Only six of the applications (6%) achieved ‘Registered’ status before being processed, an important point to which we will return shortly.

What this analysis also shows, is that the attrition rate for native title claims over our major capital cities is very high and the likelihood of a successful native title claim is indeed very slim or will never happen under the current prevailing conditions. The reasons for the high attrition rate through withdrawal, discontinuation, dismissal or rejection are many and varied. In order to explain how this situation emerges, its implications and the import for planning, it is necessary to understand how the native title system works.

In response to the High Court’s decision in *Mabo (No. 2)* in June 1993, the Australian Government enacted the *Native Title Act 1993* (Cth) (NTA) as a statutory basis for the recognition and protection of native title rights and interests. The NTA provides a claims and determination process oversights by the Federal Court of Australia (FCA). An application for a determination of native title can only be made over certain types of land and waters, primarily unallocated Crown lands, national parks and reserves, other Crown lands that are not privately owned and some land already held by or for Aboriginal or Torres Strait Islander people under existing land tenure systems. This is because Australian governments moved, after a backlash of fear and hostility around the High Court’s decisions in *Mabo (No. 2)* and *Wik*, to secure the property rights of private owners, and to confirm the extinguishment⁷ of native title rights and interests on freehold land, some leasehold land and several other forms of conventional land tenures. Such areas cannot be included in a native title determination application (NNTT 2009: 6). What we have in native title then, is a regime of *extinguishment* (rather than a regime of recognition) that is particularly spatially intense in cities.

⁷ ‘Extinguish’ is defined in s.237A of the NTA as permanently extinguishing native title.

In addition to this regime of extinguishment, is a series of proof tests that require claimants to establish that they are the descendants from the original inhabitants of the land and waters in question; that the rights and interests are possessed under the traditional laws acknowledged and customs observed by the claim group; that they have a continuing connection with the land or waters; and that the rights and interests are capable of being recognised by the common law of Australia (s.223 of the NTA). Given the particular colonial histories of Australian cities and urban settlements – where Aboriginal people were systematically dispossessed of all of their lands, forced into servitude, incarcerated, and murdered – such burdens of proof are extremely demanding. Much has been written on native title as another round of colonial dispossession (Atkinson 2002; Dodson 1997 and 1998; Howitt 2006; Keenan 2010, Kerruish & Purdy 1998, Moreton-Robinson 2007, Strelein 2009, Watson 1997, 2002, 2004, 2005, 2007a and b, 2009, 2015) and our own perspectives are aligned with those critiques.

All claimant and compensation applications and most amended claimant applications are subject to a ‘Registration Test’, which is a set of 12 merit and procedural conditions in the NTA that must be applied by the Registrar of the National Native Title Tribunal (NNTT). In order to satisfy the merit conditions, the applications must meet certain standards, which include an identification of the area subject to claim; the factual basis for the rights and interests claimed; and that at least one member of the claimant group has had traditional physical connection with the claim area (for further information see NNTT 2014). If an application passes all 12 conditions then it is entered on the Register of Native Title Claims and it becomes a registered claim. Registered claimants gain access to important procedural rights while their claim is pending for certain types of ‘future acts’⁸ that may ‘affect’⁹ native title rights and interests. However, if an application fails the registration test, then the applicants do not have access to the procedural rights while their claim is pending.

Table 2 shows that 46 (or 88%) of the applications in our capital cities and four regional centres ‘failed’ (in the language of the native title regime) the Registration Test and were not registered. There are a multitude of substantive reasons that empowers the NNTT to fail applicants on the Registration Test. The regime regards that where Aboriginal or Torres Strait Islander people are regarded to have ceased to observe their customary laws and traditions on which their title is based, or where they are regarded as having lost their continuing connection with an area and lack of evidence of connection, then these are grounds for failing the Registration Test. In addition, internal tensions within the claimant group, and tensions with neighbouring traditional owner communities over who has the relevant connection to

⁸ ‘Future Acts’ is defined in s.233(1) of the NTA as ‘consisting of the making, amendment or repeal of legislation and takes place after 1 July 1993, or is any other act that takes place after 1 January 1994, and either validly or invalidly affects or extinguishes native title – such as a freehold grant or the grant of a lease over Crown land where native title continues to exist.

⁹ ‘Affect’ is defined in s.227 of the NTA: ‘An act *affects* native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise’.

and responsibility for country under traditional laws and customs are also grounds. All of these factors have significant impacts on Aboriginal and Torres Strait Islander people and communities and they leave their marks in terms of dissatisfaction and complete disillusionment with the native title system (Smith and Morphy 2007). And for good reason – each is evidence of the persistent legacy of Australia’s history of colonialism and its inability to justly treat with the First Peoples. Our analysis here is to pointedly expose the language of ‘failure’ and ‘extinguishment’ in the native title regime as evidence of the ongoing pursuit of settling Australian territory in the interests of the western settler state.

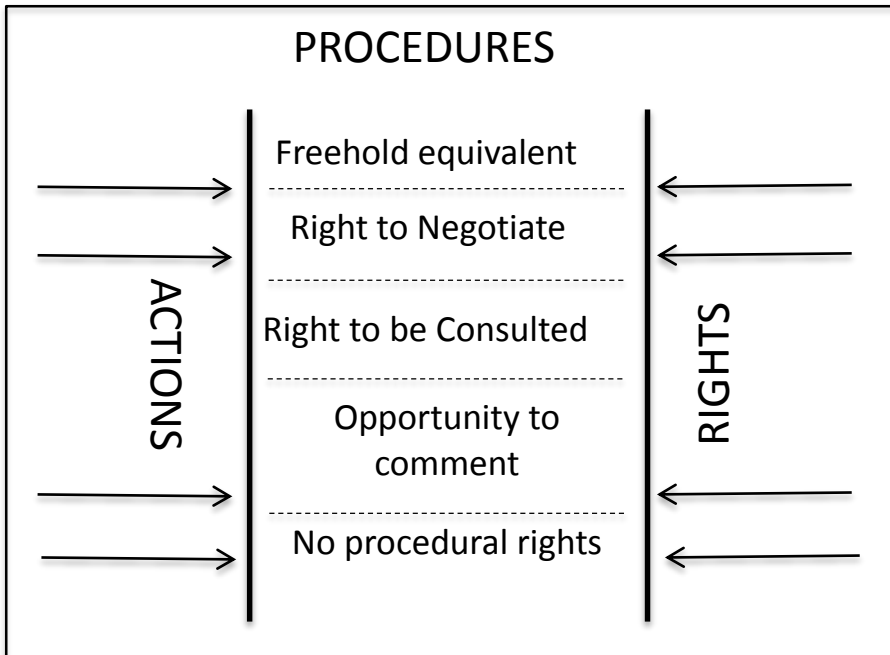
Where a determination is made that native title does not exist, then no further claims can be made for that particular area. An unsuccessful native title claim is a very negative and traumatic experience and leaves claimants feeling frustrated and ‘stateless’ because their traditional authority and their connections to country will never be recognised (Smith and Morphy 2007).

When the FCA makes a *positive* determination of native title, the determination will identify the boundary of the determination area; the areas subject to exclusive possession and non-exclusive possession; the areas excluded from the determination; areas where native title does not exist; the members of the native title holding group; and the content of the native title rights and interests (and all these will vary between groups and locations). Rights and interests may include: the right to possess, occupy, use and enjoy the area; make decisions; access and control the access of others; receive a portion of any resources taken by others; and maintain and protect places of importance.

A positive determination also gives native title holders access to a range of procedural rights (see Figure 1) to protect their native title rights, but the nature of the procedural rights will depend on the kind of act being done (NNTT 2009). There are important parallels here with the procedural rights that are standard features of conventional land use and environmental planning systems. When planning and development assessment processes are triggered (on the left of Figure 1), stakeholders (on the right) are accorded certain procedural rights ranging from *no procedural rights* to the *same rights as a freeholder* (the freehold test).

[Figure 1 here]

Figure 1 Hierarchy of procedural rights in conventional land Use and environmental planning systems



(Source: Wensing and Macmillan 1999)

No procedural rights means that the proponent of a development need not take any action to notify or to consult other potential stakeholders about a particular act. In a native title context only low impact future acts are subject to this procedure.¹⁰ The *same rights as a freeholder* depends on the rights given to freeholders under relevant State/Territory or Federal legislation. In a native title context, this means that native title holders or registered claimants should not be put in a worse position than freehold land owners.

Procedural rights in-between *no procedural rights* and *freehold equivalent* were defined more clearly by the Full Federal Court of Australia in *Harris v the Great Barrier Reef Marine Park Authority* [2000]. Here the court defined the *opportunity to comment* as a right to proffer information and argument to the decision-maker that it can make such use of as it considers appropriate; that *consultation* may be a continuous process; and that the *right to negotiate* is ‘designed to achieve agreement’ and can be seen as an entitlement for the native title holders ‘to participate closely in the validation process’ ([2000] FCA 603: 14, 9 and 15). Very few future acts trigger the right to negotiate. This clearly demonstrates that the procedural rights accorded to native title holders and registered claimants do not amount to much, and certainly do not amount to a right of veto over any development on land subject to native title rights and interests, as popularly misconceived by development interests.

As Table 2 shows, very few native title claims over Australia’s capital cities result in positive determinations. The Quandamooka People’s claim on the outskirts of south east Brisbane

¹⁰ A low impact future act can take place over an area without public notice or negotiation with any potential native title holders/registered claimants before a determination that native title exists is made, but they can only continue after a determination is made with the agreement of the native title holders.

which includes large parts of South Stradbroke Island and parts of Moreton Bay, is to date the only positive native title determination in a capital city metropolitan area and it was arrived at by consent following many years of delays and stalled negotiations between the parties. However, the traditional owners had to concede that native title no longer exists on the mainland part of their claim area (NNTT 2011). The successful claims over Alice Springs, Broome and Mt Isa are included in our analysis to demonstrate that native title claims can succeed in urban areas¹¹. However, in the cases over Alice Springs and Broome the claimants faced considerable opposition from state and territory governments.

There are still two active claims over capital cities. These are the Kurna Peoples' claim over metropolitan Adelaide and the Single Noongar Claim over SW WA, including metropolitan Perth. Whether the native title claim over metropolitan Adelaide will result in a positive determination remains to be seen. Following decisions by the Federal Court of Australia in 2006 and 2008¹², the six native title claimant groups in SW Western Australia that all identify as Noongar people authorised the South West Aboriginal Land and Sea Council (SWALC) to negotiate with the WA State Government with a view to reaching agreement on an alternative settlement. The WA Government and SWALC entered into a Heads of Agreement in December 2009 for such a settlement. In June 2015 the State executed six Indigenous land use agreements (ILUAs) in compliance with the NTA. The ILUAs can only come into full effect once they have been registered by the National Native Title Tribunal, and this is not expected to occur before July 2016 as there are a number of other legal steps that must be completed before they can be registered (Department of the Premier and Cabinet 2015a and b). Under the settlement, native title would be exchanged for a negotiated package of benefits from the WA Government over a twelve year period, which includes formal recognition of the Noongar people as the Traditional Owners of Noongar country; land; joint management of National Parks; improved heritage regime; new governance structures; investments and other benefits. However, the negotiated settlement will also require the Noongar claimants to agree that no native title exists in the claim areas in the entire area of SW WA, including metropolitan Perth in exchange for the agreed package of benefits (Bradfield 2012). The Noongar people have the choice of either accepting the settlement on offer from the State or continuing with litigation in Federal Court under the *Native Title Act 1993* (Cth) where the final outcome would be less certain, especially in terms of the likely benefits. SWALC (2014:2) believes the settlement provides a great opportunity and is worthy of consideration. That may well be the case, but this native title claim is a classic demonstration of the 'miasma of complex legal and political issues' and the uncertainty about the meaning of native title rights and interests to which Bauman et al (2013) refer.

¹¹ For a discussion of other successful claims over significant regional towns and urban centres, see Bauman et al 2013.

¹² *Bennell v State of Western Australia* [2006] FCA 1243, 19 September 2006, and *Bodney v Bennell* [2008] FCAFC 63, 23 April 2008.

The question, then, of the formal recognition under the native title regime of the ongoing Aboriginal connection to urban areas in Australia is vexed to say the least. Our purpose in this section has been to introduce planners in Australia to the legal complexities and import of Aboriginal customary law in urban areas and the demands and responsibilities these pose to professional urban planning practice. In doing so, however, we have at the same time shown just how limited the formal recognition possibilities are for Aboriginal people whose territories are now urban or who live in urban Australia, and what has been described as a 'small, shallow contact zone' (Porter and Barry 2014:3).

This delivers to Australian planning a complex set of responsibilities. At one level, planning professionals must be cognisant of the complexities of native title and other regimes of recognition that Aboriginal people are pursuing. Yet at a much deeper level, planning must begin to take very seriously its own responsibilities beyond the limitations and shallowness of the current regimes of recognition and extinguishment. Regardless of the outcomes of particular native title claims, and especially because those claims face such enormous barriers for any real and meaningful recognition, planning holds an ethical and moral responsibility toward Aboriginal people in Australian cities (Wensing 2014; Porter 2010). Our call to Australian planning, its professional practice, research and scholarship, is to look at the presence of the peoples, laws and cultures that co-exist in the very places of our practice, look carefully at the concomitant failure of the formal systems of recognition and think about how to respond in a meaningful, imaginative way.

Conclusion

This paper has argued that contemporary Australian planning has for too long ignored its fundamental responsibilities in its relations with Aboriginal people in urban Australia. Planning was deeply complicit in the dispossession of Aboriginal and Torres Strait Islander people of their country in early colonial times, and remains a mechanism through which those people are persistently excluded from accessing and controlling a land base. A response from planning – the profession, practitioners, scholars and educators – is urgently needed to begin to respond to the ways Aboriginal and Torres Strait Islander people are asserting their continuing presence, connections and responsibilities. That native title is proving a highly limited and contradictory mechanism for land justice, particularly in urban contexts, makes planning an even more important site through which Aboriginal land justice can be addressed. The profession cannot wait to simply comply with legal decisions, but must begin a process of fundamental change.

A basic starting point would be to take seriously the importance of planning to the implementation of Article 19 of the UN Declaration on the Rights of Indigenous Peoples: that 'States shall consult and cooperate in good faith with Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent

before adopting and implementing legislative or administrative measures that may affect them' (UN 2007). The principle of free, prior and informed consent is an integral part of the human rights-based approach. We interpret this as being a much stronger obligation than merely consulting. It is about recognising the parity of Indigenous governance authority with Western systems to seek agreements on matters of mutual concern. For planning it means seriously treating with Aboriginal people in urban contexts.

However, addressing this most basic concern is only part of a much wider array of transformative changes required. Indeed, change that rests only in such mechanisms carry the grave risk of missing the essential point of self-determination – for a more robust discussion of such problems see Coulthard (2014), Povinelli (2002), and on its implications in planning see Porter (2014) and Porter and Barry (forthcoming). Much deeper change is required.

A first step is for the Planning Institute of Australia (PIA) to acknowledge and apologise for the role of the profession in the ongoing dispossession and displacement of Aboriginal and Torres Strait Islander people in Australia. A charter of commitments to redress this situation would be the next obvious, and urgently needed, step. Both of these recommendations have been made before, from within the profession itself. (see Sheehan and Wensing 1998). These suggested actions were also included in the initial drafts of PIA's Reconciliation Action Plan (RAP) prepared by the IPWG during 2008, but the former was not included in the final version of the RAP endorsed by PIA's National Council in 2009. A response is long overdue.

PIA must require planning education in Australia to include mandatory course content that is dedicated to re-educating future professionals on key subjects including native title, cultural heritage, land rights, and colonial history. This urgent call for change has already been made within the profession and is not new. In 2010, the Indigenous Planning Working Group (IPWG), a small group of PIA members with experience working with Indigenous people and communities in Australia and the south Pacific, released a Discussion Paper titled '*Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Recommendations for Reforming Planning Education Curricula for PIA Accreditation*' (IPWG 2010).¹³ That discussion paper identified four areas of planning education requiring urgent attention: planning theory and methodology; normative values and processes; administrative and legal context; and communication skills and ethics. These remain the core areas of concern.

Planning methods, theory and history needs to be fundamentally rethought in ways that attends properly to the role of the nascent profession in early colonial domination, and its ongoing role in securing a land base against Aboriginal and Torres Strait Islander people's

¹³ Ed Wensing co-authored this paper with other members of the IPWG.

interests. A reflexive awareness about this history and what it means to practice western planning in an Australian context must become an essential part of the curricula. It should become just as important for students to learn about Aboriginal and Torres Strait Islander peoples' knowledges, culture and inherent rights to land as it is to learn about planning law, or housing policy. Planners need to become conversant with the differences between grants of land under the various State/Territory statutory Aboriginal or Torres Strait Islander land rights schemes and the pre-existing customary rights to land that are recognised and protected by the *Native Title Act 1993* (Cth). These reforms have languished, with neither consideration by the broader profession, or implementation in the 2010 education review. Now that a new review round is underway, it is time that these discussions came to the fore.

Planning systems, and the practices through which they are made operational, must also undergo fundamental change, as have been proposed by Wensing and Small (2012: 76-80). Recognised customary owners should control the use and development of their country with minimal intrusion by western planning systems. Where formal recognition is not possible, other rights and interests can be identified and recognised in meaningful ways. Everyday planning practice must involve a habitual engagement with Aboriginal and Torres Strait Islander people about their country, proposals that affect their access to land, in a manner that acknowledges and respects parity of two co-existing land ownership and governance approaches.

Such changes would signal the beginning of a crucial shift necessary in Australian planning: toward understanding what a more genuine recognition might be in Australian planning education and practice of the rights, interests, values, needs and aspirations of Aboriginal and Torres Strait Islander people and communities. It is long overdue.

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