12 June 2015  
Mr Wayne Bergmann  
Chair

Expert Indigenous Working Group

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Dear Mr Bergmann,

# **Re: Request for written advice to the Expert Indigenous Working Group on the COAG Investigation into Indigenous Land Administration and Use**

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide input and advice to the Expert Indigenous Working Group (EIWG) for the COAG Investigation into Indigenous Land Administration and Use. This investigation provides a unique opportunity to review the impact of state and Commonwealth interactions on the effective and efficient administration of Indigenous lands.

AIATSIS has developed significant expertise in the development, application and reform of native title law and policy. For over 20 years the Native Title Research Unit (NTRU) has been funded to provide research and information resources to support the native title sector. Drawing on this expertise we have made a number of suggestions, most specifically related to native title, about how Indigenous land administration systems and processes could be improved to support better economic development outcomes for Indigenous people. In summary, we recommend:

* Increasing the alignment between land administration frameworks
* Reforming land tenure regimes to provide greater alignment with native title rights
* Creating and supporting peak representative forums for traditional owners at state and territory level
* Improving the capacity of traditional owners to govern and administer their corporations
* Reforming future act and state-based Indigenous heritage management regimes to improve the capacity of traditional owners to strategically manage place-based heritage
* Providing traditional owners with a right to say ‘no’ to development
* Supporting peaceful communities through investment in locally managed mediation and conflict resolution services
* Encouraging greater economic and political investment in Aboriginal and Torres Strait Islander land

I apologise that our submission exceeds the requested five pages, however the scope of the COAG Investigation into Indigenous Land Administration and Use and the issues you requested we address are so broad that we felt a lengthier response was warranted if our input was to be of use.

Officers from the NTRU are available to provide further information or clarification of the points we raise should you find that necessary. I trust that our advice is of use and we looking forward to the possibility of providing further advice to the Expert Indigenous Working if required.

Yours sincerely,

Dr Lisa Strelein

Executive Director, Research

**Advice to the Expert Indigenous Working Group on the COAG Investigation into Indigenous Land Administration and Use on improving Indigenous land administration frameworks and processes**

Dr Tran Tran, Dr Pamela Faye McGrath, Dr Rod Kennett, Dr Lisa Strelein, Claire Stacey and Donna Bagnara

Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

**Increase alignment between land administration frameworks**

Aboriginal and Torres Strait Islander land is administered or influenced by several intersecting and sometimes competing legislative regimes. It is a patchwork of multiple tenures including: Indigenous law tenure and distribution of rights, Crown radical title, native title, inalienable and alienable freehold; leasehold; licences; Aboriginal licences and land tenures; and deed of grants in trust (DOGIT); among others.[[1]](#footnote-1) Many different bodies are potentially involved in managing different aspects of Aboriginal and Torres Strait Islander lands, including: Registered Native Title Bodies Corporate (RNTBCs); Aboriginal Shire Councils; land trusts; Aboriginal Corporations; Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs); state governments; Commonwealth government; State and local government. Moreover, the arrangements for the administration of Aboriginal and Torres Strait lands varies considerably between states and territories, influenced by many factors including the settlement history of jurisdictions, legal powers and regulatory frameworks, and social and economic resources and priorities.

There are many areas of land administration where a lack of clarity – as between the legislative and other regulatory environments in the states and territories, as well as between the states and territories and the Commonwealth – creates considerable administrative and legal complexity. This complexity hampers the efficient and effective management and development of Aboriginal and Torres Strait Islander land. For example, few land administration or land use Acts currently reference the *Native Title Act 1993* (Cth) (NTA).[[2]](#footnote-2) There is also considerable disparity in approaches taken by various jurisdictions to aligning state land and water management with native title, which frequently appear to have been undertaken on an ad-hoc basis.

It is evident that State and Territory land administration regimes have not adjusted to the existence of native title. There has been no considered exploration of how Crown authority and responsibilities for land under radical Crown title may differ from previous understandings of management of ‘Crown lands’.[[3]](#footnote-3) That is, where native title exists as a beneficial interest, the Crown holds only an underlying sovereign right to regulate or extinguish the enjoyment of native title rights, yet the administration of ‘unallocated Crown land’ subject to native title has changed little over the last 20 years.  Sharing responsibilities and funding for land administration between the Crown and native title holders requires a negotiated approach to ensure that the administration of radical title/native title lands doesn’t not become a burden on native title holders and introduce unnecessary risks.[[4]](#footnote-4) This may involve native title holders delivering environmental management services under long term contractual arrangements or other funding mechanisms.

Some reforms have occurred successfully at the Commonwealth level in terms of the taxation of native title payments and in carbon farming legislation.[[5]](#footnote-5)

* To date, tax reform has enabled traditional owners to maximise payments and benefits derived from their native title lands and more importantly ‘remove the longstanding uncertainty about the income tax treatment of these payments and benefits by confirming they are not subject to income tax’.[[6]](#footnote-6) There are opportunities to extend additional beneficial tax arrangements on Aboriginal lands to encourage economic ventures.
* Similarly, explicit inclusion of native title interests under carbon farming legislation enables traditional owners to engage in projects that have environmental benefit (by reducing carbon emissions) carried out within a cultural framework that also has economic benefit (through the accumulation of carbon credits).[[7]](#footnote-7)

There have been other initiatives at the state government level, for example:[[8]](#footnote-8)

* Reforms to the Conservation and Land Management Act 1984 (WA) (CALM Act) in Western Australia enables the delivery of commitments in native title agreements made during the Ord Stage 3 negotiations, Kimberley gas negotiations and, more recently, negotiations for the Single Noongar Claim. The reforms enable the protection of customary rights via the creation of a defence for activities that would otherwise be an offence in recognition of the ‘special connection Aboriginal people have to the land and sea and the existence or otherwise of the native title rights of Aboriginal people’. [[9]](#footnote-9)
* The *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) was amended in 2010 to enable a registered native title body corporate (RNTBC) to hold a deed of grant in trust.[[10]](#footnote-10)
* The *Aboriginal Cultural Heritage Act 2003* (Qld) and the analogous *Torres Strait Islander Cultural Heritage Act 2003* (Qld) was amended in 2010 to enable native title holders to become a cultural heritage body.[[11]](#footnote-11)
* Under the *Water Management Act 2000* (NSW) native title holders are entitled to take water without a licence, in the exercise of native title rights and interests.[[12]](#footnote-12) Native title rights and interests are also accounted for in water sharing plans, although the majority of these statutory plans occur in areas without native title rights and interests.
* The *National Parks and Wildlife Act 1974* (NSW) provides for the recognition of native title rights and interests and provides for entering into an agreement with recognised native title holders.[[13]](#footnote-13)

There is little doubt that streamlining of laws and regimes is required to better support traditional owners to use their lands to achieve socio-economic independence. The challenge, however, is to ensure that any refinements to legislative and administrative processes do not undermine existing and developing rights, authority and controls that Aboriginal and Torres Strait Islanders have fought so hard for. AIATSIS seeks to express concern that streamlined processes could create efficiencies for proponents while undermining the ability of traditional owners to make informed decisions about all aspects relating to the management of land, water and place-based heritage assets. Such ‘efficiencies’ cannot result in improved socio-economic circumstances for host communities, but will rather further exacerbate already entrenched economic marginalisation. Examples of delays and inefficiencies created by the failure to account for native title include the stalled development of housing on Indigenous lands.[[14]](#footnote-14) Establishing a regime of native title rights that are clear, strong and economically valuable can, in turn, provide a resource base for Indigenous social and economic development.[[15]](#footnote-15) However, an inadequate statutory framework, weak accountability arrangements and insufficient funding for NTRBs/NTSPs and RNTBCs have been identified as impediments to addressing Indigenous disadvantage.[[16]](#footnote-16)

**Reform land tenure regimes to provide greater alignment with native title rights**

Tenure reform is vital to empowering Aboriginal and Torres Strait Islander people to maximise the social and economic benefits that can potentially be derived from land. However, tenure reform is a complex proposition, and many initiatives to realign Indigenous administration and land tenures have been plagued by delays as a result of confusion over responsibilities, and have been undermined by a lack of alternative tenure types that suit the needs of traditional owners.

Tenure reform is burdened by misconceptions about the efficiency and suitability of freehold titles without reference to the traditional ownership and governance in the region. In Cape York and the Torres Strait, for example, the transfer of a DOGIT (or reserve lease) to the RNTBC was a critical stage for each traditional owner group to realise recognition of land ownership by aligning titles.[[17]](#footnote-17) However, Indigenous forms of cultural governance were not accommodated in tenure transfer and reform until 2007 changes to the Aboriginal and Torres Strait Islander Lands Acts that allowed the vesting of ownership (native title and inalienable freehold) and the cultural governance (PBCs as trustee land holders) to be aligned.

Some examples of attempts at tenure reform from which much can be learned are provided below.

* In 2014, the Mura Badugal (Torres Strait Islander) Corporation RNTBC became the first RNTBC in the Torres Strait to achieve the divestment of a DOGIT to the RNTBC.

Following the administrative changes made to Torres Strait Island Councils through the *Local Government and Other Legislation (Indigenous Regional Councils) Amendment Act 2007* (Qld), which merged smaller island councils under the umbrella of a Torres Strait Island Regional Council (TSIRC), legal action contesting the acquisition of the DOGIT for Badu Island by TSIRC began. Badu Island Council argued that an acquisition of the DOGIT by TSIRC would remove ownership from the Badugal people. Badu Island Council leveraged rights under the *Torres Strait Islander Land Act 1991* (Qld), seeking a court order against the state of Queensland to block transfer of the DOGIT to TSIRC. Under the court orders it was the state’s obligation to transfer the DOGIT and therefore there was no budgetary limit placed on the consultation process for the DOGIT transfer. Following seven years of community consultation and negotiations between Mura Badugal RNTBC, TSIRC and the state over the terms of the DOGIT transfer, divestment was achieved in 2014.

* In 2013, Mer Gedkem Le (Torres Strait Islander) Corporation RNTBC achieved the divestment of a community reserve lease.

Mer Gedkem Le RNTBC required support from the state in the initial stages to administer the lands. However the state government provided funding support sufficient only to employ an administrative officer for one year. Following this period, the Torres Strait Regional Authority (TSRA) has had to provide support to Mer Gedkem Le, and this has raised concerns about cost shifting between the state and the Commonwealth.

Effective regional governance can protect the indigenous estate whilst also creating marketable, fungible tenure, for example though head-leases or commercial property development.

The NTA provides for the protection of Indigenous rights and interests based on their traditional laws and customs but also protects existing tenures that would otherwise be rendered invalid by the recognition of native title. The NTA also outlines procedures for how future and existing activities can interact with recognised native title rights and interests. However, the NTA is often viewed as an obstruction to development although it has been clearly stated that native title is not a means of controlling the exercise of state legislative power, but is a means of excluding laws made in exercise of that power from affecting native title holders.[[18]](#footnote-18)

The absence of a tradable tenure should not be confused with the absence of effective mechanisms and enforceable rights to enjoy native title for commercial or economic gain. In a recent publication, Dr Strelein explored the right to resources and the right to trade under native title to conclude that economic exploitation of native title rights without significant risk to the underlying native title estate is paramount achieving Indigenous and government objectives for economic and development outcomes from native title.[[19]](#footnote-19)

**Create and support peak representative forums for traditional owners at state and territory level**

Establishing state/territory-level representative forums for traditional owner groups will provide a setting in which government can engage with and agree upon appropriate strategies to improve the administration of Aboriginal and Torres Strait Islander lands and support economic growth. Unlike for example, the Business Council of Australia, Australia’s Indigenous peoples do not have a national body or guiding authority to assist in the policy and governance of land administration, especially following the demise of ATSIC and the reduced power and authority of other organisations, such as the National Congress. And while national representative forums and discussions are important, it is at state level that a way forward through the unique and complex circumstances of each jurisdiction will need to be mapped.

The Victorian Federation of Traditional Owner Corporations is an exceptional example of how effective state and territory representative forums for traditional owner groups can be. The Federation, a not-for-profit organisation with Deductible Gift Recipient status, has created a space where Aboriginal Victorians can come together to share information and collaborate on issues. Its strategic engagement is directed into three key areas: policy, economy and country.[[20]](#footnote-20) It aims to ensure traditional owners have the opportunity to fully participate in key policy decision making, engage in the mainstream economy, and keep their land and heritage healthy. The objects of the organisation include promoting economic development and self-determination for traditional owners, and supporting mutual beneficial collaboration and partnerships between member-owned social and commercial enterprises. Their work to date has included convening a symposium of traditional owners and government to discuss water management in Victoria, which has resulted in the development of a Water Policy Framework.[[21]](#footnote-21) The Federation also has a trading arm—Federation Heritage Services—through which the organisation hopes to encourage a range of joint-venture partnerships, and it has already established its first partnership venture with a major international construction company. The Federation has made a number of submissions to law reform inquiries on behalf of Victorian traditional owners, and is currently working with the Victorian government to develop a Preferential Procurements policy that will, if implemented, be a very significant step towards encouraging Aboriginal employment and enterprise development, and incentivising stronger and long-term investment in Victoria.

Victoria is currently the only state or territory with a peak body that represents the interests of all of its traditional owner groups. If state, territory and Commonwealth governments are to achieve sustainable improvements in the effectiveness and efficiency of Aboriginal and Torres Strait land administrative frameworks and operating environments, they will need to find ways to support and appropriately resource the formation of such forums within their own jurisdictions.

**Improve the capacity of traditional owners to govern and administer their corporations**

Under-resourcing is demonstrated within a growing body of research as the primary factor in the lack of corporate capacity among native title organisations.[[22]](#footnote-22) Building the capacity of native title holders to manage their multiple and complex responsibilities is of vital importance. Without strong governance and support structures, Indigenous lands cannot be utilised effectively for social or economic benefit. Indeed, the Deloitte Access Economics Review of the Roles and Functions of Native Title Organisations found that the limited capacity of RNTBCs ‘seriously constrains their ability to give effect to the Act’, and adversely impacting on the management of native title lands and compromising the potential success of development projects on those lands.[[23]](#footnote-23)

Most determinations of native title, whether litigated or by consent, are not part of or supported by a comprehensive settlement of native title matters. There are no discussions and agreements with the State concerning future land access, additional land transfers, sustainable economic settlements for future economic development or negotiation of regional governance and land management responsibilities. More comprehensive agreements have been reached, for example in the cases of Yawuru, Miriuwung Gajerrong, kuku Yalanji and Gunditjmara settlements and settlements under the Victorian *Traditional Owner Settlement Act 2010* demonstrate the range of issues that Indigenous peoples may see as appropriately part of a ‘settling’ native title. Most recently, the Noongar agreement in south west Western Australia sets a new benchmark for native title settlements. These comprehensive agreements, while presenting significant challenges for the Indigenous nations in implementation, do demonstrate how the native title process can be used to achieve much greater outcomes than a bare determination.

The Western Australian government has made an effort to tie their agreement to a consent determination to their template land use ILUA. However the ILUA represents significant diminution of rights rather than establishing a strong foundation for future economic sustainability and has not received support from Indigenous groups and representative bodies in that State. Australian government agreement making with Indigenous peoples remains immature in comparison to other similar countries. The High Court in Mabo introduced the discriminatory treatment of native title rights as not subject to compensation for extinguishment prior to the introduction of the *Racial Discrimination Act* in 1975[[24]](#footnote-24) has limited our conception of what recompense is due to Indigenous peoples for the history of dispossession, dislocation and cultural harm caused by colonisation. Compensation under the NTA should be viewed more broadly as a means of restoring connections to land, building cultural strength and resilience and establishing a foundation for future development aspirations.

The capability of the native title organisations to maximise the potential of their land and benefits from agreements is critical. Supporting Aboriginal and Torres Strait Islander corporations to improve their corporate capabilities will require a range of coordinated strategies that address multiple issues, including: an over-reliance on volunteer labour; a lack of corporate management experience among Boards of Directors; difficulties securing and keeping skilled staff and advisors, particularly in remote areas; a lack of relevant local training options to support Indigenous people to pursue career pathways in governance and administration; and a lack of coordination between agencies who currently provide training and advice.[[25]](#footnote-25)

Building the information and knowledge management capacities of traditional owner corporations will also be crucial if they are to be empowered to deploy their full range of cultural, social and economic assets to their best advantage. A recent AIATSIS survey of 22 native title organisations showed that the vast majority are struggling with the challenge of securing their collections of cultural materials and corporate records and urgently require more skilled people and greater access to technology if they are to appropriately respond to the knowledge management risks they are currently facing.[[26]](#footnote-26)

Strategies for supporting the building of governance and corporate capacity might include:

* Increasing the length of government grants for RNTBCs to empower these organisations to engage in longer-term planning for future economic development projects
* Providing RNTBCs with capital funds with which to build essential physical and technological infrastructure
* Ensuring coordination and cooperation between providers of advice and training for Aboriginal corporations, and in particular native title corporations
* Working with secondary schools and tertiary educational institutions including TAFEs to develop relevant, locally-accessible education pathways for Indigenous people seeking to improve their skills in land administration, corporate governance, knowledge management, environmental management, heritage management and other relevant areas.

**Reform future act and state-based Indigenous heritage management regimes to improve the capacity of traditional owners to strategically manage place-based heritage**

The place-based cultural heritage of Aboriginal and Torres Strait Islander peoples is an invaluable significant asset that, if sustainably managed, will enable communities to grow and prosper long after the profits of development have ceased. Knowledge of country and its unique human history is a powerful resource that Indigenous families and their corporations can deploy for a range of future social and economic development initiatives, such as: cultural education; language teaching and revitalisation: social mapping; native food production and harvesting; scientific and cultural tourism ventures; ranger programs; and land use planning.

And yet in every state and territory the legislative and regulatory arrangements for the management of Indigenous place-based cultural heritage in the context of development do not provide traditional owners with genuine decision making powers in relation to the management of significant sites, places and landscapes on their lands. The future act regime provides an opportunity for some traditional owners to negotiate the conditions under which their place-based heritage will be managed, but the combination of a lack of transparency about how Indigenous cultural heritage issues are being managed through future act agreements,[[27]](#footnote-27) and the absence of public reporting of heritage surveys, site recordings and site destructions, makes understanding of the extent to which place-based heritage is being impacted by development on native title lands impossible to assess.[[28]](#footnote-28)

Native title and traditional owner groups take their responsibilities in relation to the management of place-based heritage very seriously, but very few have the resources they need to fully and meaningfully engage in heritage processes. In many regions the amount of work this responsibility entails is enormous. Currently 137 RNTBCs and 273 claimants groups are responsible for managing the impacts of development on native title rights and heritage over more than 60 per cent of the country. Collectively, they field thousands of future act notices every year, organise and participate in thousands of Indigenous Cultural Heritage surveys, and identify tens of thousands of places whose values potentially collide with those of development.[[29]](#footnote-29)

Even well-resourced RNTBCs, such as Nyamba Buru Yawuru Ltd, report that future acts represent a significant drain on limited resources.[[30]](#footnote-30) It is not just a matter of a lack of money to pay for legal and anthropological expertise. There are many other costs associated with establishing and maintaining effective and appropriate governance, and less obvious costs associated with people’s expenditure of time and social capital.[[31]](#footnote-31) Some boards and members of RNTBCs are particularly concerned about the potential for their organisations to mishandle future act negotiations as a result of lack of capacity, thus missing out on significant opportunities to protect their native title and places of cultural significance and/or to achieve appropriate compensation.[[32]](#footnote-32)

The Productivity Commission has recently made a number of recommendations towards reform of current Indigenous Heritage compliance processes to reduce what some in the resources sector have historically referred to as ‘black tape’. Noting that the Commission’s terms of reference did not extend to processes under the NTA or the *Aboriginal Land Rights Act (Northern Territory)* 1976, these include improving their access the information about Aboriginal places held on state heritage registers, and accrediting state and territory government processes which meet Australian government standards of Indigenous Heritage protection.[[33]](#footnote-33) This ‘one-stop-shop’ approach to the management of place-based heritage is problematic, not least because the bar for engagement with Indigenous people on issues of Indigenous Heritage set by Commonwealth itself has been set so low.[[34]](#footnote-34) But such reforms are also highly problematic as they are fundamentally aimed at benefiting proponents of development projects rather than traditional owner groups.

The Commission is quite clear that its understanding of ‘best practice’ in heritage management involves ensuring effective consultation with affected Indigenous peoples. This runs counter to their recommendation that Indigenous heritage be managed on a risk assessment basis where a ‘streamlined duty of care’ approach is taken where there is a low risk or likelihood of interference with Indigenous heritage places, and where there is a higher risk or likelihood of interference an ‘agreement making approach’ be adopted. While it is important to acknowledge that reducing the costs of Indigenous heritage processes for proponents may encourage greater investments in resource exploration and mining on Aboriginal and Torres Strait Islander lands, to do so at the expense of the ability of traditional owners to have a say in how any and all activities being undertaken on their lands are conducted undermines the cultural and corporate strength that the COAG Investigation into Indigenous Land Administration is so keen to find ways to support.

An alternative solution lies in state and territory and Commonwealth governments and their Indigenous constituents working together to devise new strategies for the management of Indigenous heritage that increase the level of RTNBC and traditional owner input into decision making while expediting the processing of land access approvals. The example of Victoria, where a system of Registered Aboriginal Parties (RAPs) provides a representative structure through which free, prior and informed consent on heritage related issues can legitimately be granted, represents current best practice in this area.[[35]](#footnote-35) In addition, developing national standards for the conduct of Indigenous heritage surveys on Aboriginal and Torres Strait Islander lands would create a benchmark that both traditional owner groups and proponents of development projects could use to ensure that valuable heritage is appropriately documented and managed.

The recent Review of Native Title Organisations proposes a future in which even those RNTBCs whose land is not located in areas of significant resource extraction activities will be in a position to generate income through fee-for-service or government-funded work in Indigenous cultural heritage management activities.[[36]](#footnote-36) What the Review only tacitly acknowledges is the extent to which this will require not only capacity building for RNTBCs, but also state government recognition of and support for the natural authority of traditional owners in relation to the management of Indigenous Heritage on native title lands. In those areas where native title has been determined to exist and rights to protect sites have been recognised, it makes both legal and cultural sense that native title holders through their recognised representatives be the first and primary contact for all cultural heritage issues, including future act related cultural heritage compliance projects.[[37]](#footnote-37)

**Provide traditional owners with a right to say ‘no’ to development**

By precluding a right of veto when negotiating future acts, the NTA denies native title groups essential free prior informed consent rights and the associated leverage.[[38]](#footnote-38) More than anything else, providing traditional owners with a right to say ‘no’ to development proposals will increase their ability to strategically manage land-based assets for greater social and economic development. The right to say ‘no’ enables real negotiation, not just consultation, and allows groups to strategically preserve valuable environmental, cultural or other resources for alternative future use.

**Support peaceful communities through investing in a national dispute resolution and decision-making service which supports locally and regionally managed mediation and conflict resolution services**

Land administration and development on Indigenous lands usually involves multiple interest groups who often have competing interests and a great deal of cultural, commercial and environmental capital at stake. In such circumstances it is unsurprising that dispute and conflict at times occurs between those involved, including between Indigenous parties. As recent events in the town of Roebourne illustrate, such conflict can easily get out of hand when the communities involved do not have sufficient support to resolve conflict on their own terms and instead must rely on the interventions and resources of proponents with vested interests to help find a way forward.[[39]](#footnote-39) But conflict is not necessarily inevitable if Indigenous communities and organisations are equipped with the skills and support they need to identify and manage disputes in their early stages. This includes their seeking the assistance of independent third party practitioners.

Recent research into the effectiveness of the Yuendumu Mediation and Justice Committee suggests that investing upfront in locally designed and delivered conflict resolution services deliver a substantial economic benefit in the form of increased community productivity, healthier children and adults, reduced rates of imprisonment and fewer resources spent on policing. The project is an extraordinary example of how a community devastated by deeply entrenched conflict can be supported to restore stability and break cycles of disadvantage, distress and suffering through strategies that also delivers substantial savings. In fact, for every dollar the government spends on the Yuendumu Mediation and Justice Committee project, it is conservatively estimated that they recoup an extraordinary $4.30 in savings in the areas of health, education, policing, and housing.[[40]](#footnote-40)

AIATSIS research on Indigenous facilitation, mediation, and dispute resolution provides the case for a National Indigenous Dispute Resolution, Agreement Making and Decision-Making Service, as recommended by the National Alternative Dispute Resolution Advisory Council to the Commonwealth Department of Attorney General in 2006.[[41]](#footnote-41) Such a service would involve networked local, regional, and national services and a national training curriculum to address the urgent need for more Indigenous mediators and facilitators. While lauded by many in various government departments, this service requires championing and driving.

Improving the operational environment of Aboriginal and Torres Strait land administration will necessarily involve ensuring that Indigenous communities all around Australia—urban, rural and remote—have the resources they need to identify, address and resolve conflicts over land when they occur. A peaceful community will be an efficient and empowered community that will be positioned to take greatest advantage of the economic development opportunities that come their way.

**Encourage greater economic and political investment in Aboriginal and Torres Strait Islander land**

The benefits of investing in projects on Aboriginal lands are not always clear to interested parties and would-be investors. A lack of commercial rights, or an understanding of these rights, is a contributing factor.[[42]](#footnote-42) Notwithstanding these barriers, traditional owners may be afforded greater rights over and use of land if land is viewed as a form of equity.

There are numerous examples of Aboriginal and Torres Strait Islander communities building on the intellectual, social and physical capital of their lands and expertise to create a diversified range of economic enterprises.[[43]](#footnote-43) These include fee for service biosecurity monitoring, eco-tourism, wildlife harvest and management, research support and delivery, fisheries and surveillance for foreign vessels and monitoring and control of introduced plants and animals. Many of these bring revenue and economic development in remote areas of otherwise limited opportunity and high social welfare costs.

Environmental management enterprises on Indigenous lands also provide substantial benefits to the nation. For example, weeds in Australia cost agriculture $1.5 billion a year in control and a further $4.5 billion in lost production,[[44]](#footnote-44) feral animals cost at least $720 million per year,[[45]](#footnote-45) and an outbreak of foot and mouth disease (FMD) would cost $50 billion over 10 years. A likely scenario for FMD introduction is from livestock brought in by illegal entrants to north Australia and the surveillance provided by Indigenous people on native title and other Indigenous managed lands provides a front line defence for biosecurity threats to Australia. Unfortunately, Australia currently lacks a coordinated picture of the entirety of this growing Indigenous land and sea management sector and the overall environmental and socio-economic benefits it provides.

1. Strelein, L & Tran, T 2013, 'Building Indigenous Governance from Native Title: Moving away from ‘Fitting in’ to Creating a Decolonised space', Review of Constitutional Studies, vol. 18, no. 1, pp. 19-48. [↑](#footnote-ref-1)
2. Tran T & Stacey C forthcoming, ‘Overlapping tenure, overlapping governance: conflicting roles of native title holders and community/shire councils in remote Indigenous communities’ *Land, Rights, Laws: Issues of Native Title*, AIATSIS Canberra. [↑](#footnote-ref-2)
3. In Canada the Supreme Court has held that Aboriginal title lands are NOT Crown lands, having never been ceded to or acquired by the Crown. [↑](#footnote-ref-3)
4. Duff, N 2011, *Managing Weeds on Native Title Lands: Workshop report Broome 26-27 October 2011*, AIATSIS, 2012. [↑](#footnote-ref-4)
5. [*Tax Laws Amendment (2012 Measures No. 6) Act 2013*](http://www.comlaw.gov.au/Details/C2013A00084)(Cth); *The Carbon Credits (Carbon Farming Initiative) Act* *2011* (Cth) [↑](#footnote-ref-5)
6. *Tax Laws Amendment (2012 Measures No. 6) Act 2013*; *Tax Laws Amendment (2013 Measures No.2) Act 2013.*  [↑](#footnote-ref-6)
7. *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), s 43. [↑](#footnote-ref-7)
8. Other references made to native title are made as an express intention not to impact on native title rights and interests. See for example: *Heritage Act 2011* (NT), s 16 and *Aboriginal Heritage Act 2006* (VIC), s 10, *National Parks Act 1975* (VIC) s 50N, *Sustainable Forest (Timber) Act 2004* (VIC), s 97; or provide for the recoding of native title: *Real Property Act 1900* (NSW), s 12C, *Game and Feral Animal Control Act 2002* (NSW) s 54; or reiterate the notification provisions of the NTA: *Petroleum Act* (NT)*,* s 57F. [↑](#footnote-ref-8)
9. CALM Act s 103 A and *Wildlife Conservation Act 1950* (WA), s 23. [↑](#footnote-ref-9)
10. *Aboriginal Land Act 1991* (Qld), s 39. See also, *Torres Strait islander Land Act 1991* (Qld). [↑](#footnote-ref-10)
11. *Aboriginal Cultural Heritage Act 2003* (Qld), ss 34-37; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) ss 34 - 37. [↑](#footnote-ref-11)
12. *Water Management Act 2000* (NSW), s 55. [↑](#footnote-ref-12)
13. *National Parks and Wildlife Act 1974* (NSW) s 71B1. Although no compensation is payable for a breach of the section. [↑](#footnote-ref-13)
14. Weir, J ‘Karajarri : a West Kimberley experience in managing native title’ *Research Discussion Paper* no. 30, Australian Institute of Aboriginal and Torres Strait Islander Studies. [↑](#footnote-ref-14)
15. Native title also featured in FaHCSIA’s *Indigenous economic development strategy 2011–2018,* http://www.fahcsia.gov.au/sites/default/files/documents/09\_2012/ieds\_2011\_2018.pdf, accessed 22 August 2013. [liberal references] [↑](#footnote-ref-15)
16. Jenny Macklin, *Beyond Mabo: native title and closing the gap*, Mabo Lecture presented at James Cook University, Townsville, 21 May 2008, http://www.nswbar.asn.au/circulars/macklin.pdf, accessed 30 July 2013. [↑](#footnote-ref-16)
17. Tran T & Stacey C forthcoming, ‘Overlapping tenure, overlapping governance: conflicting roles of native title holders and community/shire councils in remote Indigenous communities’ *Land, Rights, Laws: Issues of Native Title*, AIATSIS Canberra. [↑](#footnote-ref-17)
18. *Western Australia v Commonwealth* [1995] HCA 47 [33]. [↑](#footnote-ref-18)
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