



Land Justice for Indigenous Australians:

How can two systems of land ownership, use and tenure co-exist with mutual respect based on equity and justice?

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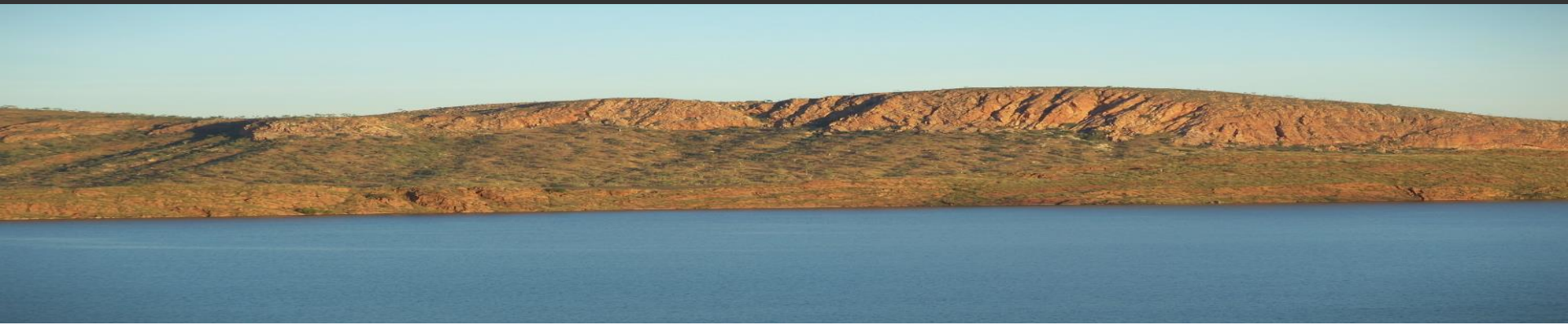
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Acknowledgements

- We acknowledge the Yawuru people on whose country we are meeting, and pay our respects to your elders past, present and emerging.
- We recognise that your lands were taken from you without your consent, without a treaty and without compensation, and these matters are yet to be resolved.
- I also wish to record my deep gratitude to Yawuru and Bardi and Jawi RNTBCs, the Bidan Aboriginal Corporation and the KLC.

Warning

- Aboriginal and Torres Strait Islander peoples are advised that this presentation contains names of deceased Aboriginal and Torres Strait Islander persons.



Decolonising Property:

How Indigenous and Settler systems of land ownership, use and tenure can co-exist in parity.

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Outline of Presentation

- Issues and Challenges confronting Bardi and Jawi.
- Issues and Challenges confronting Yawuru.
- Indigenous and Western approaches to property.
- Universal nature of property in land
- Three elements of property.
- Relevance of UNDRIP
- 10 Foundational Principles for Coexistence.
- A Model for Coexistence and a Framework for Implementation.
- Apply the Foundational Principles; and
- Invite responses from case study RNTBCs and KLC.

Some truths about land ...

- Henry Reynolds once said that Aboriginal people have the oldest continuing land tenure system in the World.
- I say, Aboriginal people have the oldest continuing land use and environmental planning system in the World.
- Put the two together and you have the oldest continuing system of land ownership, use and tenure in the World.

A gift ...

As Galarrwuy Yunupingu says:

- ‘What a gift this is that we can give you, if you choose to accept us in a meaningful way’
- Galarrwuy Yunupingu, *‘Rom Watangu. The Law of the Land’*, The Monthly, July 2016.

What this research is about ...

‘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, Minjerribah (North Stradbroke Island) in August 1997.

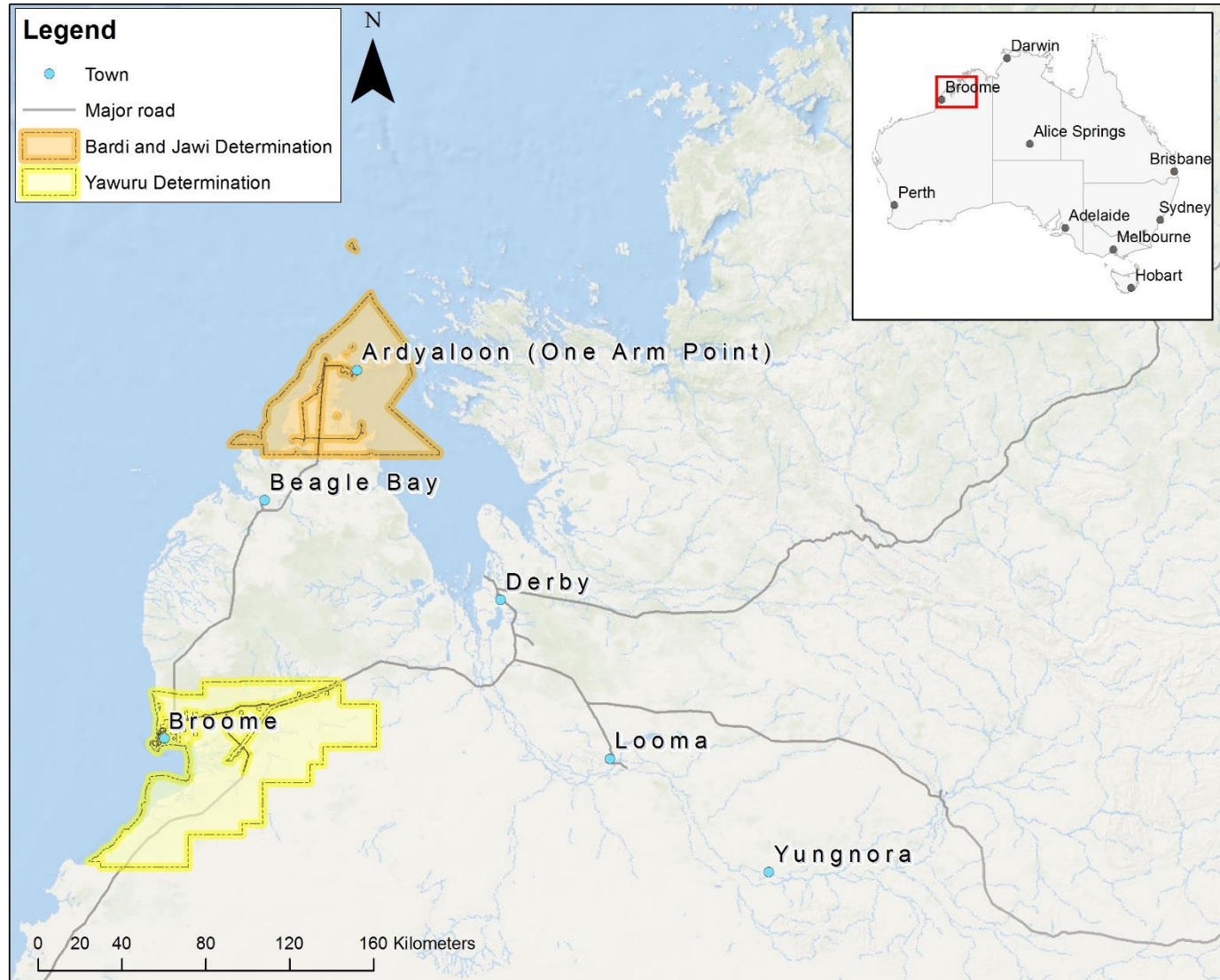
‘There are two laws. Our covenant and white man’s covenant, and we want these two to be recognised... We are saying we do not want one on top and one underneath. We are saying that we want them to be equal.’

- David Mowaljarlai, Elder, Ngarinyin people, Western Australia, 1997.

‘I see DOGIT and native title as being on the same level, not one on top of the other, not native title underneath DOGIT.’

- Dan Mosby, Chair of Kulkalgal Registered Native Title Body Corporate, Torres Strait, Queensland, 2013.

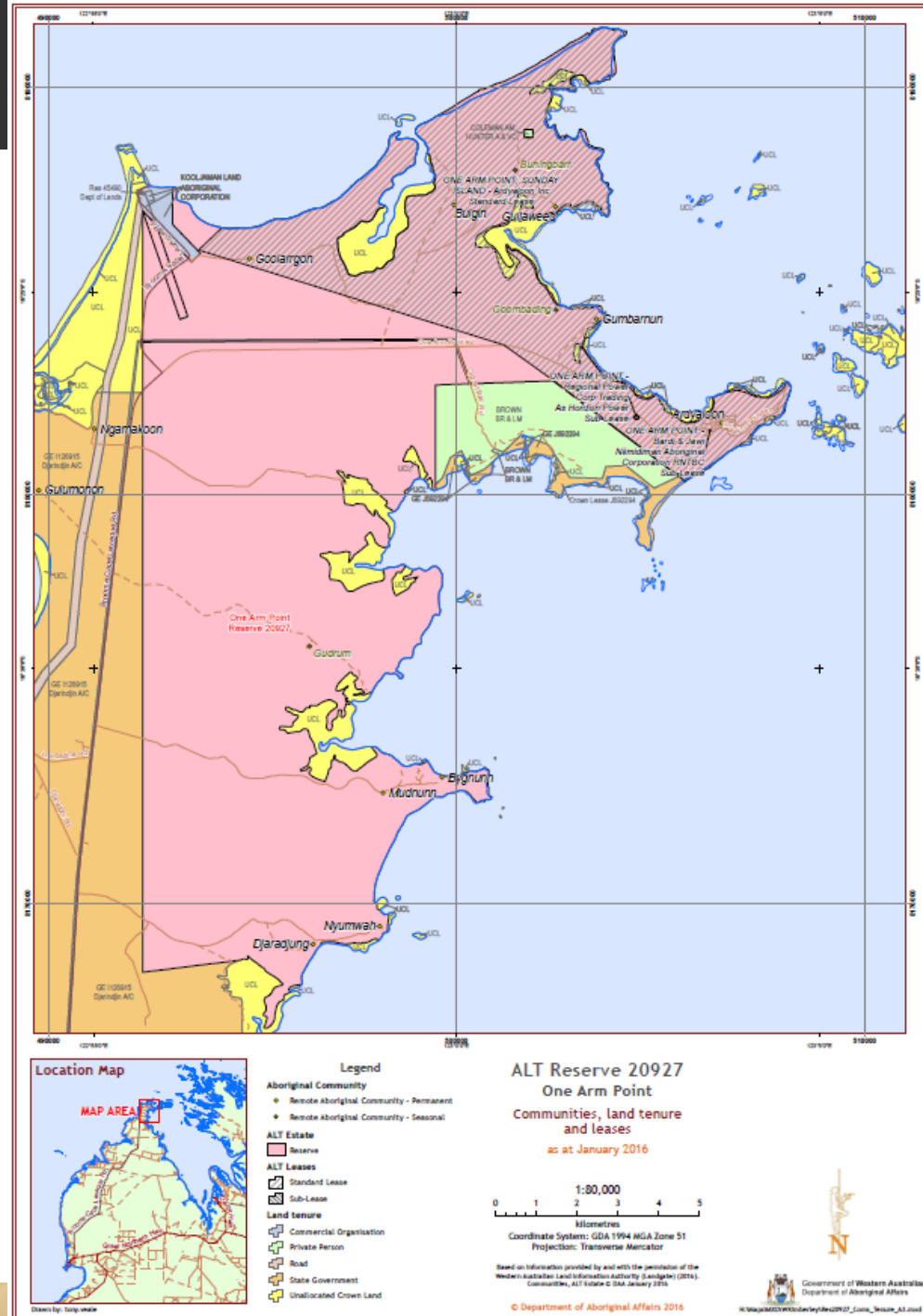
Case Study localities: Bardi and Jawi RNTBC, and Yawuru RNTBC.



Bardi & Jawi Country:

ALT Reserve 20927

- Classified 'For the use and benefit of Aborigines' under Part III of the *AAPA Act 1972 (WA)*.
- Shows lease to Ardyaloon Inc. (shaded grey) to 2074.

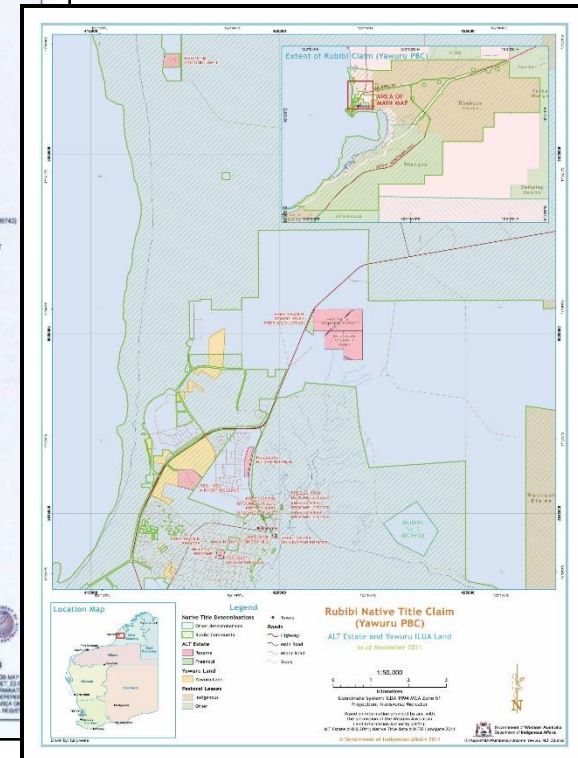
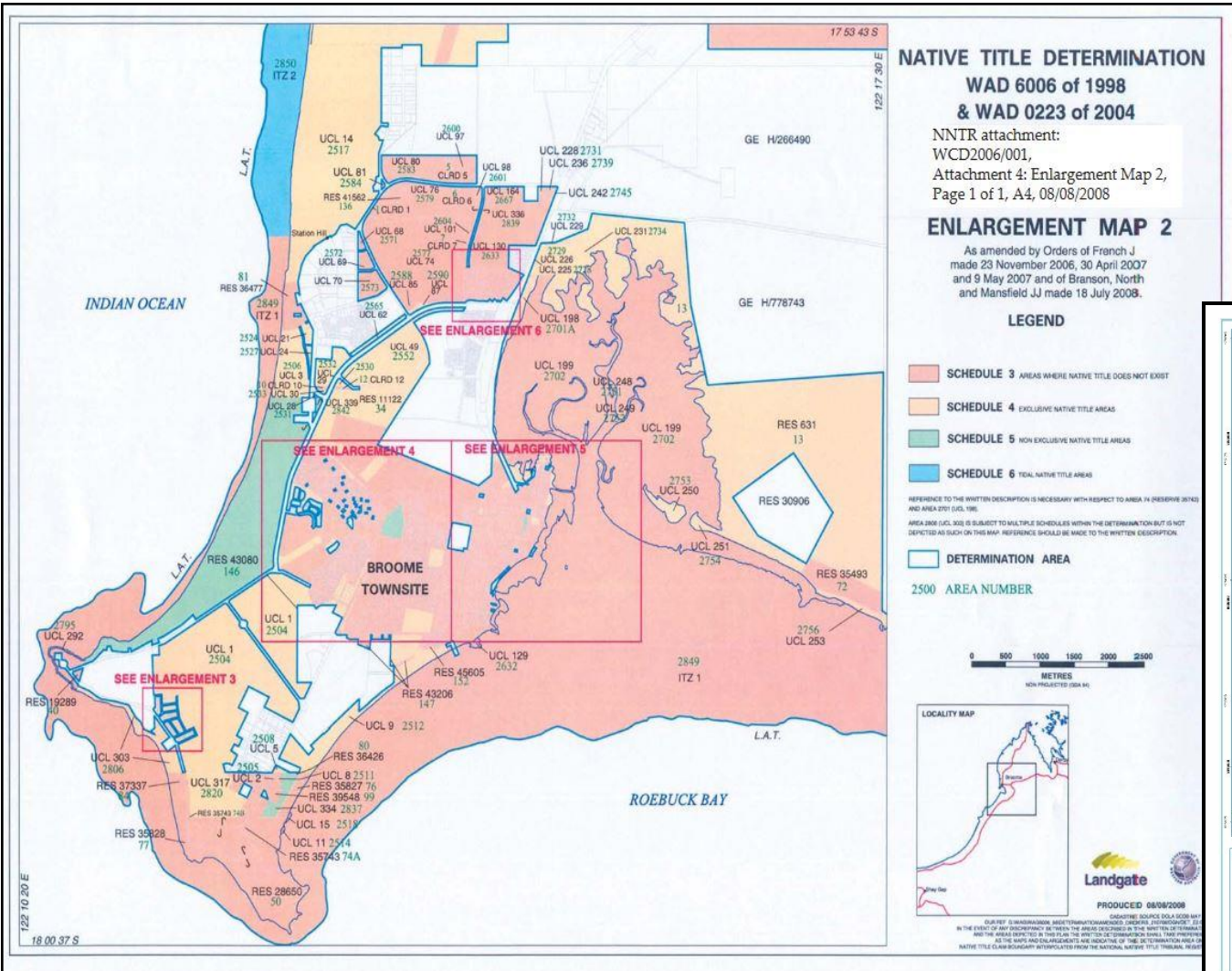


Issues and challenges for Bardi and Jawi

- Land tenure reform on the Dampier Peninsula?
- To ‘normalise’ places like Ardyaloon, but what does this entail?
- The Reserve status is like a ‘double-edged sword’:
- Provides a high level of protection from outsiders, but leaves the community in a state of insecurity and fully dependent on the state.
- Revoking Reserve will have deep and long-lasting impacts, including extinguishment of our native title.
- Cape Leveque Road sealing: no-one is discussing the impact this will have on the Peninsula, positive and negative.

Yawuru: Native title determination over Broome

Including over the ALT Estate (15 Lots)



Issues and challenges for Yawuru

- Connections to Country are central to Yawuru.
- Yawuru see their land as part of an ethical/spiritual matrix.
- Many elements of the Global Agreement have been fulfilled, but others still cause for concern, because they involve extinguishment.
- Yawuru faces same challenges over ALT estate and revocation of reserve status over two communities.
- State's planning system shows only cursory interest in Aboriginal peoples' rights, and predicts more growth for Broome and the Kimberley.
- Most significant challenge is making prudent and responsible decisions about land ownership, use and tenure.

Challenges and Realities

Two Challenges:

- How native title holders want to hold their rights and interests.
- If native title is no lesser than any other form of land ownership, then native title holders will be responsible for managing that responsibility (as they already are in their law and custom).

Two Realities:

- Holding native title (unextinguished) alongside other forms of tenure means you have to manage the interactions between them.
- Becoming a responsible land owner in a contemporary sense.

RNTBCs and Native Title holders face two dilemmas:

Land tenure reforms come at a cost: Extinguishment and deep and everlasting change.....

Giving rise to two dilemmas:

1. Deciding on the form(s) of land tenure that native title holders are prepared to accept from the Crown and on what conditions.
2. Deciding whether native title holders want to become a land authority making decisions about land ownership, use and tenure.

Comparing Indigenous and Western concepts

Simply put:

- Western view: property as a set of dispensable material rights.
- Aboriginal peoples: relationship between the right to cultural difference and land is inextricably linked and cannot be evaluated in material terms.
- The standout difference is the importance of obligations Aboriginal peoples place on Country for past, present and future generations.

Universal nature of property in land

- Property is an essential component of any society.
- The way we manage our interactions with land is an abstract thing.
- How a society uses, controls and transmits its property in land determines the nature of its ubiquity among its members and ultimately the wellbeing of the planet.

Property: Three key elements

Property in land comprises:

1. Ownership – the conceptualisation of property in land as a relationship.
2. Use – the use to which land may be put and regulated through land use planning.
3. Tenure – the form of transmission between people and land, whether legally or customarily defined.

Foundational Principles for Coexistence

- For two systems of law and custom to work together effectively, every one of these principles must be applied.

Foundational Principles for Parity and Coexistence

1. Land is integral to Aboriginal peoples' culture and ways of life and these are inseparable. Land is also inalienable from Aboriginal knowledge, culture and tradition.
2. Self-determination in relation to land ownership, use and tenure is fundamental to Aboriginal peoples' economic, social and cultural development and wellbeing. This includes undertaking their own land use and occupancy planning in accordance with their law and custom.
3. The free, prior and informed consent of Aboriginal people (Traditional Owners) must be obtained and respected, and Aboriginal people must be able to use their own legal traditions to structure their decision-making and to define the meaning of consent.
4. No (further) extinguishment of native title rights and interests and no diminution of the (existing) Indigenous estate.
5. Aboriginal land is no lesser a form of land ownership than any other form of land ownership.
6. Communal forms of land ownership should be recognised, respected and preserved.
7. Aboriginal peoples' have the right to pursue, reject or negotiate development on their lands and this should be respected.
8. Land used by Traditional Owners (or other Aboriginal people with the Traditional Owners' free, prior and informed consent) as collateral for long-term social, economic and cultural development must not depend on alienation of the underlying Aboriginal land rights and interests.
9. Compulsory acquisition of Aboriginal land rights and interests should never be exerted by the Crown or any third party. Acquisition can only proceed on the basis of terms negotiated and agreed with the Traditional Owners.
10. Compensation for any extinguishment, loss, diminution, impairment or damage of/to Aboriginal land rights and interests must be on just terms having regard to all of the above principles.

UN DRIP

Foundational Principles match several of the Articles in the UN DRIP.

Table 6.2 Links between specific Articles in the UNDRIP, Aboriginal land ownership, use and tenure in Australia, and the Foundational Principles for Parity and Coexistence

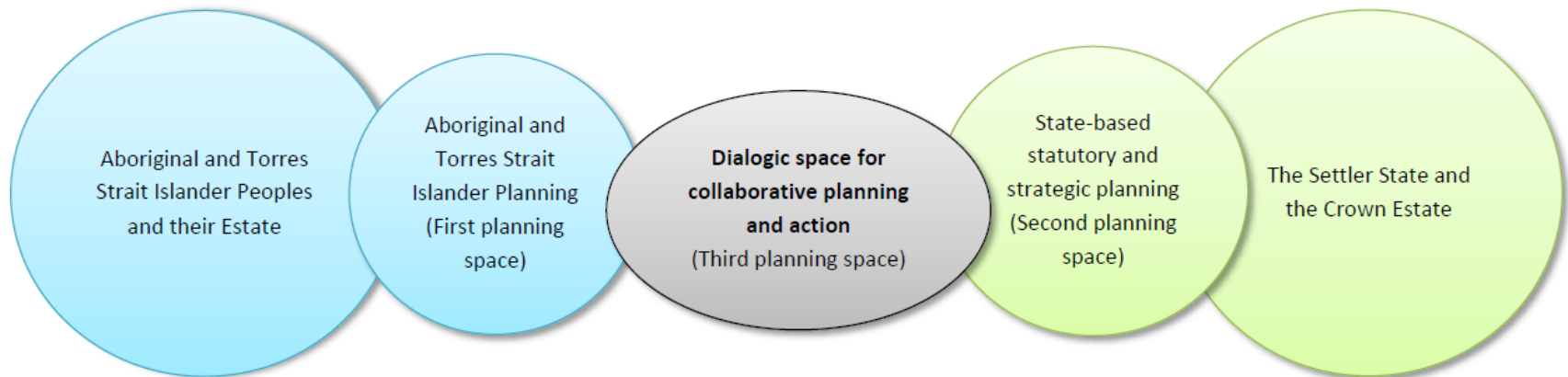
Article in UN DRIP (headings inserted by the author)	Foundational Principles
3 – Self determination	2
4 – Autonomy or self-government	2, 3, 6, 7, 8
8 – No forced assimilation, destruction of their culture or dispossession of their lands	9
10 – No forced removals	1, 2, 3, 9, 10
11 – Cultural traditions and customs	2, 4, 6
18 – Decision making	3, 7
19 – Free, prior and informed consent	3
21 – Right to improvement of economic and social conditions	2, 8
23 – Development priorities	2, 3, 7
25 – Spiritual relationship with land and waters and responsibilities to future generations	1, 2, 5
26 – Rights to ownership, use and development of traditional lands	1, 2, 5, 6, 8
27 – Transparency	3, 4, 7
28 – Redress and just, fair and equitable compensation	10
31 – Cultural heritage	1, 7
32 – Planning for land use and tenure	1, 2, 3, 7, 8
34 Institutional structure	2, 5, 6

Source: UN 2007 and adapted from R. Davis 2008, with permission and in consultation with Roger Davis, 25 August 2016. The author also acknowledges guidance and input from Assistant Professor Felix Hoehn, College of Law, University of Saskatchewan, Saskatoon, Canada. Headings against the relevant Articles have been inserted by the author. (See text for full Table)

Three sites of/for planning

- Hirini Matunga and I believe there should be three spaces of/for planning: Indigenous planning, state-based planning and a space for collaborative planning where these two are brought together.

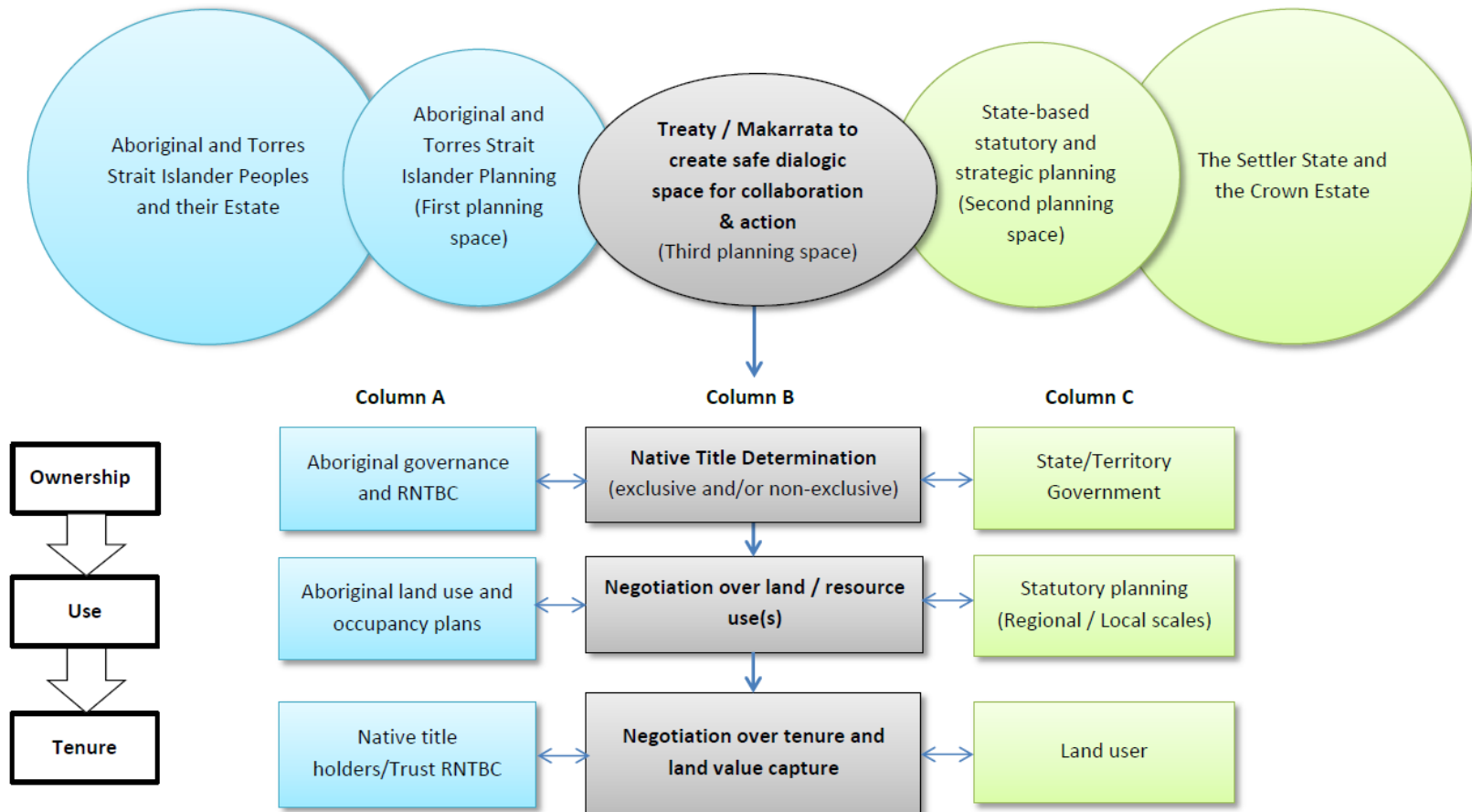
Figure 7.1: Three spaces of/for Planning



Adapted from Wensing, 1999 and Matunga, 2017.

Model for Coexistence

Figure 7.2: Model for coexistence between Aboriginal and Crown land ownership, use and tenure



Adapted from Wensing, 1999 and Matunga, 2017.



Table 7.1 Details of the Model for coexistence between Aboriginal and Crown land ownership, use and tenure*

THE INTERCULTURAL CONTACT ZONE BETWEEN TWO DIFFERENT LAWS AND CUSTOMS WITH RESPECT TO LAND OWNERSHIP, USE AND TENURE		
<i>Column A</i>	<i>Column B</i>	<i>Column C</i>
<p>Aboriginal and Torres Strait Islander Peoples and their Estate</p>	<p><i>A safe dialogic space for collaboration and action</i></p>	<p>The Settler State and the Crown Estate</p>
<p style="text-align: center;">Box A1</p> <p>Indigenous governance and RNTBC: NTRB/SP pursues the native title claim, assists claimants to establish a RNTBC and assists with the development of its corporate governance capacity. Indigenous governance advises/supports RNTBCs with decision making under their law and custom and methods for engaging with others on a nation-to-nation basis.</p>	<p style="text-align: center;">Negotiating land ownership</p> <p>A determination of native title rights and interests (by consent of contest): Confirms Aboriginal sovereignty and their ongoing law and custom. Native title as a property right, equal to any other and can be of exclusive possession and/or non-exclusive possession. Sovereign-to-sovereign relationship is the basis of all negotiations. Foundational Principles in Chapter 6 forms the basis of all negotiations over land/resource use and tenure.</p>	<p style="text-align: center;">Box C1</p> <p>State/Territory Government: The Crown is no longer the source of all authority over land and waters. The state relinquishes power of compulsory acquisition over native title. Extinguishment of native title only on basis of FPIC as negotiated with native title holders, and compensation only on just terms.</p>
<p style="text-align: center;">Box A2</p> <p>Aboriginal Planning: Aboriginal peoples undertake land use and occupancy planning according to their law and custom consistent with their values, worldviews and processes.</p>	<p style="text-align: center;">Negotiating land / resource use</p> <p>This is the 'third space' where the parties bring together their respective planning outcomes and jointly develop land use and resource management plans based on mutual respect, collaboration and partnership. This may result in areas being identified for protection, and other areas being identified for development or other resource use, for public infrastructure and other essential services, or for public use.</p>	<p style="text-align: center;">Box C2</p> <p>State-based statutory & strategic planning: State undertakes land use and environmental planning and management consistent with their values, worldviews and processes.</p>
<p style="text-align: center;">Box A3</p> <p>Native title holders: Native title holders decide how they want to hold and protect their native title rights into the future. They also decide to what extent their native title rights and interests may be suppressed for a period and on what terms, including payment of rent.</p>	<p style="text-align: center;">Negotiating tenure and land value capture</p> <p>Parties agree over form of tenure(s), specific to the proposed land/resource use. Title must be able to be used as collateral for finance for home ownership or economic development, where relevant. Parties agree over payment of rent for use of land that affects or suppresses native title rights and interests. State/Territory land title Registrars could be contracted by native title holders to perform land administration functions under their direction.</p>	<p style="text-align: center;">Box C3</p> <p>Land user(s): Land users have use and enjoyment of land, including the ability to use the title as collateral for finance and where relevant for economic development, but subject to terms agreed with native title holders, including payment of land rent where appropriate.</p>

* Aboriginal and Torres Strait Islander peoples do not view things in a hierarchical fashion. This Table does not purport to reflect an Indigenous Australian view. Adapted from Wensing, 2002.

Model for Coexistence

- Middle column providing a safe dialogic space for collaboration and negotiating outcomes.
- Three layers, each dealing with:
 1. Land ownership;
 2. Land & resource use; and
 3. Land tenure & value capture (separately).

Implementation Framework

- Land admin & planning is still a State responsibility.
- Implementation therefore rests with the States, not the Commonwealth.
- Can be done by Treaty/ies.

Two step process:

- What variables require a decision?
- How can decisions be made?

Table 7.2 Summary of Implementation Framework

Step One: <i>What</i> requires a decision?	
Variables	Comments
Underlying land use and tenure authority	Aboriginal people have been making land use and tenure decisions for thousands of years under their laws and customs. When two systems law and custom are placed alongside each other as equal and there are interactions between the two systems, the native title holders/RNTBCs will take on the role of a land use and tenure authority. This involves making decisions about land use and tenure, and who the recipient or beneficiary will be. Becoming a land use and tenure authority requires sound governance arrangements, creating separate entities between native title holders, community, residents and other occupiers, and who has ultimate control needs to be carefully documented and managed.
Land use	A decision about land use should drive decisions about tenure, not the other way round. Aboriginal peoples have their own form of land use and occupancy planning that should form the basis for informing land use decisions by their peoples and by others.
Allocation of land and assets	Allocating land and assets also determines who will benefit and how the benefits will flow. This requires careful analysis and consideration.
Form of tenure and enforcement	The form of tenure should be a means to an end, a mechanism for sharing rights of access to and use of land on pre-determined terms and conditions. Leasehold tenure is an effective way of regulating how land is accessed and used, including the payment of land rent. Enforcement of conditions is integral to the integrity of the system.
Infrastructure provision, operation and maintenance	Consideration is required on how infrastructure is to be provided, operated and maintained and whether user charges will apply.
Step Two: <i>How</i> can decisions be made?	
Factors	Comments
Governance	Sound governance is crucial to prudent land ownership and management. This involves identifying the body (or bodies) that will play the role of land use and tenure authority, who makes that decision and how. The tensions between different interest holders will need to be carefully managed and caution exercised to avoid decision making becoming too fragmented. A separate Aboriginal land administration entity may also be required where the native title holding group may be too small and not have the expertise to undertake these functions.
Market conditions	Prevailing market conditions, including social, environmental and cultural conditions as well as economic, will facilitate or constrain what may be possible. Understanding an assessment and developing an understanding of the wider context is crucial to sound management. Decisions will also need to be made as to whether the local circumstances will benefit from an open or restricted land market.
Benefit provision	Understanding the relationship between benefit provision and land reform and what falls within the purview of land use and tenure decisions is crucial to prudent land management, especially in their wider context and circumstances. Critical areas include housing, land rent and ownership of enterprises on Aboriginal lands. Native title holders need to make prudent and responsible decisions consistent with their stated values and longer term aspirations.

Adapted from Terrill, 2016:260-267.



Applying the Foundational Principles – to Existing Reserve

- Existing situation in Ardyaloon & Airport Reserve in Broome.
- Does not satisfy any of the Foundational Principles.

Option A: Existing Situation in Ardyaloon/Airport Reserve		Foundational Principles:									
Assumptions:	Existing conditions: Crown land classified as a Part III Reserve under the Aboriginal Affairs Planning Authority Act 1972 (WA) 'for the use and benefit of Aboriginal inhabitants'.	1	2	3	4	5	6	7	8	9	10
Layers of Rights & Interests	Current Situation	Does this action satisfy the Foundational Principle?									
Access rights	Entry permits (short term only) administered by ALT. Permit holders must respect 'no-go' areas.	Red	Red	Red	Red	Yellow	Red	Red	Red	Red	Red
Use rights	Housing in Aboriginal communities managed under a Housing Management Agreement between Community Association and Dept of Housing. The Dept of Housing has a tenancy agreement with residents. Other users in the community currently not under any lease arrangements.	Red	Red	Red	Red	Yellow	Red	Red	Red	Red	Red
Secure interest	Generally not permitted under current arrangements.	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
Registered interest	Freehold tenure or 99-year leases issued by Crown to Aboriginal organisations or individuals but restricted 'for use and benefit of Aboriginal inhabitants'. No leasing, sub-leasing, mortgaging permitted without Minister's prior consent. Community may be subject to by-laws under Aboriginal Communities Act 1979 (WA).	Red	Red	Red	Red	Yellow	Red	Red	Red	Red	Red
RNTBC interest	Holds and manages native title rights and interests as Trustee on behalf of native title holders. Can enter into agreements with others. Exercises procedural rights for future acts, including IUAs.	Red	Red	Red	Red	Green	Red	Red	Red	Red	Red
Crown reserve	Crown designates land under the Aboriginal Affairs Planning Authority Act 1972 (WA) as a Reserve specifically 'for use and benefit of Aboriginal inhabitants' consistent with the continued existence of native title and the exercise of native title rights and interests. Reserve status can only be revoked by motion of both Houses of State Parliament.	Red	Red	Red	Red	Green	Red	Red	Red	Red	Red
Native title rights and interests	Exclusive possession native title arises at the time of acquisition of sovereignty (confirmed at determination date). Holds full beneficial interest. No alienation outside native title group. Cannot assign or encumber the native title rights and interests. Can only surrender to the Crown. Entitled to certain procedural rights under the Native Title Act 1993 (Cth) including IUAs.	Red	Red	Red	Red	Green	Red	Red	Red	Red	Red
Crown interest (Radical title)	Crown in right of the state holds radical title. No beneficial interest, but can compulsorily acquire native title rights and interests. Power to regulate land use under Planning and Development Act 2005 (WA) and/or Conservation and Land Management Act 1997 (WA). Power to authorise all sub-leasing under s.18 Land Administration Act 1997 (WA). No power to grant new interests without agreement of native title holders or by compulsory acquisition of native title rights and interests.	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red

Legend:

- No (Red)
- Partially (Yellow)
- Yes (Green)

Applying the Foundational Principles – to the Model

Rests on several assumptions:

- Native title determination confirms Aboriginal sovereignty.
- Native title is a property right, same as any other.
- Aboriginal law and custom includes governance of land.
- Sovereign-to-sovereign negotiations.
- Foundational Principles applied.
- Aboriginal peoples have right to pursue, reject or negotiate.

Assumptions:			Foundational Principles:												
(a) A native title determination is a confirmation of Aboriginal sovereignty and their law and custom. (b) Native title is a property right equal to any other property right. (c) Aboriginal law and custom has a way of governing the use, allocation and distribution of resources among their peoples. (d) Aboriginal peoples have their own approaches to planning land use, allocation and tenure. (e) Sovereign-to-sovereign relationship is the basis for all negotiations. (f) Foundational Principles in Chapter 6 forms the basis of all negotiations over land/resource use and tenure. (g) Aboriginal peoples have the right to pursue, reject or negotiate development on their lands.			1	2	3	4	5	6	7	8	9	10			
THE INTERCULTURAL CONTACT ZONE BETWEEN TWO DIFFERENT LAWS AND CUSTOMS WITH RESPECT TO LAND OWNERSHIP, USE AND TENURE			Does this layer satisfy the Foundational Principle?												
Column A Aboriginal and Torres Strait Islander Peoples and their Estate	Column B <i>A safe dialogic space for collaboration and action</i>	Column C The Settler State and the Crown Estate													
Box A1 Indigenous governance and RNTBC: NTRB/SP pursues the native title claim, assists claimants to establish a RNTBC and assists with the development of its corporate governance structure and capacity. Indigenous governance advises/supports RNTBCs with decision making under their law and custom and methods for engaging with others on a nation-to-nation basis.	Negotiation over land ownership A determination of native title rights and interests: Confirms Aboriginal sovereignty and their ongoing law and custom. Sovereign-to-sovereign relationship is the basis of all negotiations. Native title as a property right, equal to any other and can be of exclusive possession and/or non-exclusive possession. Sovereign-to-sovereign relationship is the basis for all negotiations. Foundational Principles in Chapter 6 forms the basis of all negotiations over land/resource use and tenure.	Box C1 State/Territory Government: The Crown is no longer the source of all authority over land and waters. The state relinquishes power of compulsory acquisition over native title. Extinguishment of native title only on basis of FPIC as negotiated with native title holders, and compensation only on just terms.													
Box A2 Aboriginal Planning: Aboriginal peoples undertake land use and occupancy planning according to their law and custom consistent with their values, worldviews and processes.	Negotiation over land / resource use This is the 'third space' where the parties bring together their respective planning outcomes and jointly develop land use and resource management plans based on mutual respect, collaboration and partnership. This may result in areas being identified for protection, and other areas being identified for development or other resource use, for public infrastructure and other essential services, or for public use.	Box C2 State-based statutory & strategic planning: State undertakes land use and environmental planning and management consistent with their values, worldviews and processes.													
Box A3 Native title holders: Native title holders decide how they want to hold and protect their native title rights into the future. They also decide to what extent their native title rights and interests may be suppressed for a period and on what terms, including payment of rent.	Negotiation over tenure and land value capture Parties agree over form of tenure(s), specific to the proposed land/resource use. State/Territory land title Registrars could be contracted by native title holders to perform land administration functions under their direction. Title must be able to be used as collateral for finance for home ownership or economic development, where relevant. Parties agree over payment of rent for use of land that affects or suppresses native title rights and interests.	Box C3 Land user(s): Land users have use and enjoyment of land, including the ability to use the title as collateral for finance and where relevant for economic development, but subject to terms agreed with native title holders, including payment of land rent where appropriate.													
Legend: No Partially Yes															

Conclusions (1)

- No constitutional change is required to implement the Model.
- The uncomfortable truth about Australia is that every village, town, city is built on the stolen lands of the Aboriginal peoples.
- This is the ‘dark side’ of Australian planning that we have yet to come to terms with.
- Rejection of the *‘Statement from the Heart’* is unacceptable.
- Australian Govt’s obduracy and duplicity is perplexing.
- Opposition to dealing with these matters comes down to political will and lack of commitment.

Conclusions (2)

- *‘No generation has a freehold on the earth. All we have is a life tenancy – with a full repairing lease.’* (Maggie Thatcher 1988)
(I never thought I could agree with anything Maggie Thatcher ever said.)
- The recognition of Aboriginal peoples’ land rights as being equal, if not more superior, to the Crown’s land interests is the unfinished business of colonisation that Australia must come to terms with.
- The last word in my thesis goes to Tom Trevorrow, a Ngarrindjeri Elder, who states:
- *‘Let us not leave this unfinished business to our children and future generations. Let us sit down now as mature people and resolve the unfinished business.’*

- **Thank you**