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# The Commonwealth's Indigenous land tenure reform agenda: Whose aspirations, and for what outcomes?



July 2016

Ed Wensing



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AUSTRALIAN INSTITUTE OF ABORIGINAL  
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# The Commonwealth's Indigenous land tenure reform agenda: Whose aspirations, and for what outcomes?

**AIATSIS research publications**

**Ed Wensing**

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## Abstract

*Ever since the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) in the late 1990s, the Commonwealth<sup>1</sup> has been pursuing an Indigenous land tenure reform agenda, which has continued to gain momentum. Although a clear policy on Indigenous land tenure reform has not been articulated, the underlying premise is that traditionally grounded, communal forms of land title are a barrier to wealth creation and that communally owned lands should give way to individualised and alienable rights in land (Dodson and McCarthy 2010:85). Even though the agenda has shifted in focus over time, this still appears to be the underlying objective.*

*In this paper I argue that weak links are being made between increasing opportunities for economic development (including private home ownership) and the need for Indigenous land tenure reform. The paper draws on a considerable body of background research and analysis, including Aboriginal and Torres Strait Islander peoples' collective views about Indigenous land tenure reform and their aspirations for protecting and not diminishing their hard-won gains through native title determinations and statutory land rights grants or acquisitions; the composition and location of the Indigenous estate and the land titling revolution that has taken place over the past 50 years; the geographic spread of the Aboriginal and Torres Strait Islander population around Australia and on the Indigenous estate; the origins of the Commonwealth's Indigenous land tenure reforms from the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) in 1997 and its trajectory to June 2016; the current land dealing provisions (private sale, leasing and mortgaging) in the statutory Aboriginal and Torres Strait Islander land rights schemes and the Native Title Act 1993 (Cth) and how they facilitate or hinder economic development and/or private home ownership aspirations; and how the mainland states and the Northern Territory have (or have not) responded to the Commonwealth's Indigenous land tenure reform agenda over the past decade.*

*The research highlights the frustration of Aboriginal and Torres Strait Islander peoples with the nature and direction of the Commonwealth's Indigenous land tenure reform agenda and their strong opposition to any diminution of their estate. They want genuine recognition of their inherent customary rights and interests to their traditional lands and waters. The confluence of several Commonwealth initiatives over the past 18–24 months and the development of a clear set of guiding principles and outcomes by the Indigenous Property Rights Network provide an opportunity to refocus the reform agenda.*

*I conclude that what is required is an implicit recognition of the prior and continuing ownership of all land and waters in Australia by Aboriginal and Torres Strait Islander peoples under their traditional laws and customs to embed the genuine consideration of their rights, interests, knowledges, values, needs and aspirations in all conventional land tenure and contemporary land use planning systems. I also postulate that it is time to*

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<sup>1</sup> In this paper Commonwealth refers to the Australian Government.



*'puncture some legal orthodoxies' (McHugh 2011:68, 328-339) relating to property, especially in relation to inalienability and extinguishment, and that land use planning systems must also undergo fundamental change that acknowledges and respects the parity of two distinctly different but co-existing land ownership and governance approaches.*

## **Acknowledgements**

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I acknowledge the permission of my dear friend and colleague, Jonathan Taylor, to reproduce and update some of the material that we co-authored for our joint paper on *'Secure tenure for home ownership and economic development on land subject to native title'* Discussion Paper No. 31 published by AIATSIS in 2012.

I am very grateful to the National Centre for Indigenous Studies for allowing me to undertake my PhD at the Australian National University and to AIATSIS for agreeing to publish my background research.

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## Acronyms

ABS	Australian Bureau of Statistics
AHRC	Australian Human Rights Commission
ALRA (NSW)	<i>Aboriginal Land Rights Act 1983 (NSW)</i>
ALRA (NT)	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
ALRC	Australian Law Reform Commission
ALT	Aboriginal Lands Trust
ARIA	Accessibility/Remoteness Index of Australia
ATSIC	Aboriginal and Torres Strait Islander Commission
CHINS	Community Housing and Infrastructure Needs Survey
COAG	Council of Australian Governments
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs (formerly Department of Families, Community Services and Indigenous Affairs (FaCSIA))
IBA	Indigenous Business Australia
ILC	Indigenous Land Corporation
NIC	National Indigenous Council
NIRA	National Indigenous Reform Agreement (Closing the Gap)
NPA	National Partnership Agreement
NPA-RIH	National Partnership Agreement on Remote Indigenous Housing
NPA-RSD	National Partnership Agreement on Remote Service Delivery
NSWALC	New South Wales Aboriginal Land Council
NTA	<i>Native Title Act 1993 (Cth)</i>
NTRB	Native Title Representative Bodies
NTSP	Native Title Service Providers
PBC	Prescribed Body Corporate
RNTBC	Registered Native Title Body Corporate



## Introduction

In 1997 Prime Minister John Howard instigated a review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ARLA (NT)). The review was conducted by John Reeves QC, and his final report ‘stirred considerable controversy in the Northern Territory and beyond’ (HORSCATSIA 1999:154). In the report Reeves discussed the merits of the inalienability of freehold titles under the ARLA (NT) and recommended retaining those restrictions but lifting others. Although his discussion of the inalienable nature of Aboriginal freehold tenure in the Northern Territory and the related recommendations did not attract much attention in the immediate aftermath of the review, a debate erupted in 2004 and 2005 and prompted the Commonwealth to more vigorously pursue an Indigenous land tenure reform agenda.

Although the Commonwealth’s Indigenous land tenure reform policies have never been clearly articulated (Terrill 2016:290), the public record shows that the Commonwealth initiated an Indigenous land tenure reform agenda in about 2004–05 because it regarded existing land tenure arrangements in discrete/remote Aboriginal and Torres Strait Islander communities to be obstacles to the expansion of government-backed home ownership programs and because of the lack of secure tenure over public investments in housing and infrastructure assets. The reforms have continued to gain momentum, albeit with some shifts in focus, and are still generally aimed at dismantling the communally owned lands into individuated and alienable forms of tenure.<sup>2</sup>

This paper argues that weak links are being made between increasing opportunities for economic development (including private home ownership) and the need for Indigenous land tenure reform, and that Aboriginal and Torres Strait Islander people are frustrated with the direction of the Commonwealth’s Indigenous land tenure reform agenda and are very concerned about the likely impact any reforms will have on diminishing the Indigenous estate.

The paper draws on a considerable body of background research and analysis, including an examination of:

- Aboriginal and Torres Strait Islander peoples’ collective views about Indigenous land tenure reform and their aspirations for protecting and not diminishing their hard-won gains made through native title determinations and statutory land rights grants or acquisitions
- the composition and location of the Indigenous estate and the land titling revolution that has taken place over the past 50 years
- the geographic spread of the Aboriginal and Torres Strait Islander population on the Indigenous estate and around Australia

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<sup>2</sup> For alternative narratives of Indigenous policy over roughly the same period, see Bradfield (2006), Moreton-Robinson (2009) and Sullivan (2011); for a more detailed analysis of the Indigenous land reform debate in Australia, see Godden and Tehan (2010) and Terrill (2016).

- the origins of the Commonwealth's Indigenous land tenure reforms from the Reeves review of the ARLA (NT) in 1997 and its trajectory to June 2016
- the current land dealing (private sale, leasing and mortgaging) provisions in the statutory Aboriginal and Torres Strait Islander land rights schemes and the *Native Title Act 1993* (Cth) (NTA) and how they facilitate or hinder economic development and/or private home ownership aspirations
- how the mainland states and the Northern Territory have (or have not) responded to the Commonwealth's Indigenous land tenure reform agenda.

Each of these areas is examined to set the Commonwealth's Indigenous land tenure reform agenda into a wider geospatial, demographic, statutory and policy context and to ascertain the relevance of the Commonwealth's current agenda to Aboriginal and Torres Strait Islander peoples' land tenure reform expectations and aspirations. As my colleague Jonathan Taylor and I have previously articulated (Wensing and Taylor 2012), and as Terrill (2016:293) has more recently found, what becomes abundantly clear from this analysis is that the case for reforms aimed at dismantling the communally owned lands into individuated and alienable forms of tenure is not well articulated and is fundamentally flawed. I agree with Terrill (2016:291): we are having the wrong debate.

This paper concludes that what is required is an implicit recognition of the prior and continuing ownership of all land and waters in Australia by Aboriginal and Torres Strait Islander peoples under their traditional laws and customs to embed the genuine consideration of their rights, interests, knowledges, values, needs and aspirations in all conventional land tenure and contemporary land use planning systems. I also postulate that it is time to 'puncture some legal orthodoxies' (McHugh 2011:68, 328-339) relating to property, especially in relation to inalienability and extinguishment, and that land use planning systems must also undergo fundamental change that acknowledges and respects the parity of two distinctly different but co-existing land ownership and governance approaches.

## Explanation of terms

This paper very deliberately uses the phrase 'the rights, interests, knowledges, values, needs and aspirations of Aboriginal and Torres Strait Islander peoples'. This section explains what these terms mean.

The ***rights and interests*** of Aboriginal and Torres Strait Islander peoples relates to (1) their human rights as stated in international treaties, covenants, conventions and declarations to which Australia is a signatory and (2) to land arising from native title claims and determinations and the statutory land rights schemes operating in the different jurisdictions around Australia.

The ***knowledges and values*** of Aboriginal and Torres Strait Islander peoples relates to their unique systems of knowledge, culture, lore and traditions embodied in their belief systems and ways of life.

The **needs and aspirations** of Aboriginal and Torres Strait Islander peoples and communities relates to their cultural, environmental, social and economic wellbeing as citizens of Australia.

Throughout this paper, therefore, references to the rights and/or interests of Aboriginal and Torres Strait Islander peoples embraces the full suite of their rights, interests, knowledges, values, needs and aspirations and their unique position as the first peoples of Australia.

## Indigenous aspirations for and engagement in the land tenure reform debate

Aboriginal and Torres Strait Islander expectations and aspirations about Indigenous land tenure reform can be gauged from a range of sources over the past 11 years. Sets of principles or issues about Indigenous land tenure reform have emerged from:

- the National Indigenous Council (NIC) in 2005 in the context of providing advice to the Australian Government (NIC 2005)
- the Aboriginal and Torres Strait Islander Social Justice Commissioner in 2009 in the context of the decision by the Council of Australian Governments (COAG) to include Indigenous land tenure reforms as a key element of two separate National Partnership Agreements under the umbrella of the National Indigenous Reform Agreement between the Australian Government and state/territory governments to ‘Close the Gap’<sup>3</sup> in disparities between Indigenous Australians and the rest of the Australian general population (ATSISJC 2009)
- SGS Economics and Planning in 2012 in the context of the ‘Living on Our Lands’ study for the Western Australian Department of Indigenous Affairs (SGS Economics and Planning 2012a)
- the Australian Law Reform Commission in 2014–15 in the context of the Commission’s review of the NTA (ALRC 2015a)
- the Indigenous Leaders Roundtable in 2015 convened by the Australian Human Rights Commission (AHRC) in Broome, Western Australia, as part of the AHRC’s follow-up to its *Rights and Responsibilities Consultation Report* (AHRC 2015a, b, c, d)
- the Expert Indigenous Working Group in 2015 in the context of advising and assisting the COAG Senior Officers Working Group in its report *Investigation into Indigenous land administration and use* (Senior Officers Working Group 2015)

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<sup>3</sup> ‘Close the Gap’ is used in this paper as a short-hand way of referring to the commitments that COAG made in the National Indigenous Reform Agreement to close the gap in certain social and economic measures of the disparities between Aboriginal and Torres Strait Islander people and the rest of the population. One of the difficulties with this agenda is that it fails to take account of Aboriginal and Torres Strait Islander peoples’ rights, interests, knowledges, values, needs and aspirations as distinct from COAG’s views of what constitutes quality of life.

- the Indigenous Property Rights Network in 2016 in the context of the Indigenous Property Rights Roundtable in Canberra convened by the AHRC (2016b) as a further follow-up to its *Rights and Responsibilities Consultation Report* (AHRC 2015a).

The principles or issues from each source are reproduced in Appendix A.

Each set of principles or issues was developed either directly by Aboriginal or Torres Strait Islander peoples themselves or in consultation with Aboriginal and Torres Strait Islander peoples, but four stand out as coming directly from a group of Indigenous leaders — the NIC in 2005<sup>4</sup>, the Indigenous Leaders Roundtable in 2015, the Expert Indigenous Working Group in 2015 and the Indigenous Property Rights Network in 2016.

Although all these processes were government initiated, Aboriginal and Torres Strait Islander peoples were generally involved in the development of the statements of principles or issues that emerged from these processes. Whatever one might think about the participatory processes for engagement with Aboriginal and Torres Strait Islander peoples, it can nevertheless be argued that they articulate a collective Indigenous perspective on the Indigenous land tenure reform debate.

A summary of the principles or issues in each set of principles identified above is shown in Table 1.

**Table 1: Summary of Indigenous land reform principles and issues in key documents from 2005 to 2016**

Principle or issue	Document						
	NIC 2005	ATSISJ C 2009	SGS Economics and Planning 2012a	ALRC 2015a	AHRC 2015d	Senior Officers Working Group 2015	AHRC 2016b
Land is fundamental to Indigenous culture and is inalienable	✓	✓	✓			✓	✓
Communal forms of land ownership should be respected and preserved	✓		✓			✓	
Distinctions must be made between different interest holders		✓	✓				✓
Indigenous land is no lesser a form of land ownership than any other form of land ownership		✓	✓				

<sup>4</sup> The principles developed by the NIC were presented as a draft to the annual Native Title Conference on 3 June 2005 for discussion. According to the Aboriginal and Torres Strait Islander Social Justice Commissioner, these draft principles were formalised without change and presented to the Ministerial Taskforce on Indigenous Affairs for consideration at the NIC meeting on 15–16 June 2005 (ATSISJC 2005:10).

International human rights standards must be applied	✓		✓		✓
Self-determination is fundamental and includes free, prior and informed consent	✓	✓	✓	✓	✓
No diminution of the Indigenous estate	✓			✓	✓
Local Aboriginal and Torres Strait Islander decision making must be respected	✓	✓		✓	✓
Ability to use land as collateral but not have to alienate native title interests	✓			✓	✓
Build/improve land administration equivalent to that for non-Indigenous land					✓
Build capacity of Indigenous landholders to manage their estate				✓	✓
Build and support partnerships for economic development				✓	✓
Support sustainable long-term social, economic and cultural development			✓	✓	✓
Changes to land tenure should only be voluntary	✓	✓			✓
Full disclosure and complete information must be provided	✓	✓			
Land to be transferred to the Indigenous estate must be remediated and made safe			✓		
Compulsory acquisition only as a measure of last resort and compensation must be on just terms	✓	✓	✓	✓	✓

Table 1 shows common elements across the sets of principles and conveys several key messages. In particular, that:

- land is central to Aboriginal and Torres Strait Islander peoples' culture and ways of life and these are inseparable
- international human rights standards are applicable, in particular the rights to self-determination and to free, prior and informed consent on matters affecting their rights and interests, including customary lands and waters
- Aboriginal and Torres Strait Islander peoples' right to pursue, reject or negotiate development on their lands should be respected, especially local decision making
- Aboriginal and Torres Strait Islander peoples want to be able to use their land as collateral for long-term social, economic and cultural development
- there should be no diminution of the Indigenous estate or of their rights and interests.

These general themes and concerns are also reflected in recent literature by several Indigenous authors, including, for example, Black (2011), Tobin (2014), Moreton-Robinson (2007, 2015) and Watson (2015).

The fact that land is central to Aboriginal and Torres Strait Islander peoples' culture and ways of life is reflected in several documents. For example, in releasing the NIC's principles in June 2005, the Chairperson of the NIC, Sue Gordon, stated that 'While we have differing views within our community on how to improve the variety of special Indigenous land tenures across Australia, we recognise that collective ownership is inherent in Aboriginal custom and we believe in the fundamental importance of securing that underlying land title for future generations' (NIC 2005:184). Further, 'Improved land tenure arrangements are necessary for Indigenous Australians to be able to gain improved social and economic outcomes from their land base now and into the future, but in a way that maintains communal ownership' (ATSISJC 2005:58).

However, Gordon also astutely argued that land tenure arrangements are only one piece of a much larger jigsaw of social and economic factors and that 'bigger challenges remain the primary obstacles to economic independence and to wealth generation on Indigenous land' (NIC 2005:184). Perhaps Gordon was trying to shift the Commonwealth's focus onto those bigger obstacles and away from eroding the hard-won gains made by Aboriginal and Torres Strait Islander people under the various statutory land rights schemes and native title determinations.<sup>5</sup>

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<sup>5</sup> Each of the statutory land rights schemes around Australia emerged in response to the concerted protests and street marches by Aboriginal and Torres Strait Islander peoples and their supporters during the 1960s, '70s and '80s (Attwood and Marcus: 1999), and each of the early landmark native title cases before the courts were costing between \$11 and \$14 million and taking between 6-10 years to resolve.

More recently, an Expert Indigenous Working Group<sup>6</sup> was appointed by the Commonwealth to assist a COAG Senior Officers Working Group to undertake an investigation into Indigenous land administration and use. The Expert Indigenous Working Group worked with the Senior Officers Working Group to ensure the views of Indigenous stakeholders were reflected in the Senior Officers Working Group's report. The final report includes a three-page statement of intent from the Expert Indigenous Working Group. The statement expresses Aboriginal and Torres Strait Islander peoples' frustrations with governments over the nature and direction of the Indigenous land tenure reform agenda (Senior Officers Working Group 2015:5–7).

The Expert Indigenous Working Group said that throughout its consultations with Aboriginal and Torres Strait Islander peoples and communities, it has:

been cautioned by Indigenous people and organisations that there is potential for the COAG Investigation to represent nothing more than a 'Trojan horse' through which governments and industry would seek to further weaken Indigenous land rights legislation in the interest of promoting Indigenous economic development through more efficient 'processing' of land use proposals for third party interests. (Senior Officers Working Group 2015:5)

This is not the first time that Aboriginal and Torres Strait Islander leaders have used the term 'Trojan horse' to identify their concerns about Indigenous land tenure reforms eroding their hard-won gains made through statutory land rights schemes and native title determinations (as discussed later). The Expert Indigenous Working Group also expressed serious concerns about the direction of the Indigenous land tenure reform agenda and the need for the agenda to go in a different direction:

The Expert Indigenous Working Group is adamant that the time has come for a very different conversation. The outdated 'traditional' approach to making land administration and use more efficient through weakening and mandating time limits for procedural rights afforded to Indigenous land holders has been shown not to work. The Expert Indigenous Working Group would argue that any approach on Indigenous land and waters that does not properly recognise and respect traditional ownership of that land (whether or not that ownership is fully recognised at law) will only lead to ill-feeling, project uncertainty and delays. Such an approach has the effect of diminishing hard fought gains in this area and well established principles around the human rights of traditional owners. Such an approach also has the effect of entrenching the current cycle of welfare dependency and poverty by creating a culture of dependency on government. It also does little to shift the responsibility for the social wellbeing of Indigenous people from the current status quo of inefficient, tax payer-funded government service delivery and provision of welfare. (Senior Officers Working Group 2015:5)

The Expert Indigenous Working Group invoked the United Nations Declaration on the Rights of Indigenous Peoples (UN 2007) to support its claims:

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<sup>6</sup> The members of the Expert Indigenous Working Group were Mr Wayne Bergmann (Chair), Mr Brian Wyatt (Deputy Chair), Dr Valerie Cooms, Mr Craig Cromelin, Mr Maluwap Nona, Ms Shirley McPherson, Mr Murradoo Yanner and Mr Djawa Yunupingu.

It is the strong view of the Expert Indigenous Working Group that development on Indigenous land and waters will only be successful and sustainable where Indigenous people are provided with the opportunity to be partners in development, to give their free, prior and informed consent and to benefit economically and socially from the development. Such an approach is consistent with the United National Declaration on the Rights of Indigenous Peoples which was endorsed by the Australian Government in April 2009. There is a clear incentive where they are given the opportunity to engage as equals for Indigenous people to find ways to make development work on their country. (Senior Officers Working Group 2015:5)

Following the release of its *Rights and Responsibilities: Consultation Report 2015* (AHRC 2015a), the AHRC undertook an Indigenous Property Rights Project. The AHRC convened an Indigenous Leaders Roundtable in Broome in May 2015 and follow-up forums in Sydney in December 2015, Canberra in March 2016 and Minjerribah in May 2016. According to the AHRC (2016a), the Indigenous Property Rights Project seeks to facilitate a national dialogue between Aboriginal and Torres Strait Islander peoples and government/s about ways to leverage the economic potential of the Indigenous estate, to develop and lead policy, and to propose legislative reforms in the areas of native title, land and water rights, and environment and cultural rights.

At its meeting in March 2016 the Indigenous Property Rights Network released its 'Guiding rights and principles for process and outcomes' document (AHRC 2016c) on Indigenous land tenure reforms. The document defined the Indigenous estate: 'The Indigenous Estate includes the lands, seas, waters and resources of Aboriginal and Torres Strait Islander Peoples' (AHRC 2016c:1).

This is a very broad definition and can be taken to include land where native title exists or may exist, land held under statutory land rights schemes, land held by Aboriginal and Torres Strait Islander people under the conventional land tenure systems administered by the states/territories, land subject to agreements about natural resource management (such as Indigenous Protected Areas), and potentially any other lands or waters where Aboriginal and Torres Strait Islander peoples have traditional or historical connections to customary lands.

The document is divided into three parts that deal with foundational rights, process and outcomes. In relation to foundational rights, the Indigenous Property Rights Network cites the United Nations Declaration on the Right to Development (UN 1986) and the Declaration on the Rights of Indigenous Peoples (UN 2007), in particular the articles relating to self-determination; participation in decision making, the application of free, prior and informed consent, and good faith; respect for and protection of culture; and equality and non-discrimination. In relation to process, the Indigenous Property Rights Network has stated that it is committed to making decisions by consensus and will engage and build relationships with governments, stakeholders and each other in ways that are based on good faith, equality and non-discrimination, that involve collaboration, cooperation and inclusiveness, and that are participatory, and it will base its decisions on experience, advice, research and evidence. In relation to outcomes, the statement focuses on self-determination,

securing and protecting the Indigenous estate, the right to make decisions, and respect for and protection of culture. The challenge for the Indigenous Property Rights Network will be for it to sufficiently influence the ensuing debate about Indigenous land tenure reforms and whether it will be able to exert enough pressure to genuinely change the course of reforms. It appears there may be some opportunity to do so, given the confluence of several processes (discussed later) that the Commonwealth has initiated over the past two to three years.

What is evident from this analysis is that, as Gordon astutely observed in 2005, the real focus is beginning to shift to the bigger issues impeding social and economic development on Indigenous-owned lands (NIC 2005), such as those identified by the Indigenous Leaders Roundtable (AHRC 2015d) and the Indigenous Property Rights Network (AHRC 2016c), rather than focusing on the spurious land tenure reforms espoused by the neoliberal<sup>7</sup> think-tank, the Centre for Independent Studies, in the mid-2000s, which would only result in eroding the hard-won gains in developing the Indigenous estate over the past 50 years (Altman 2012).

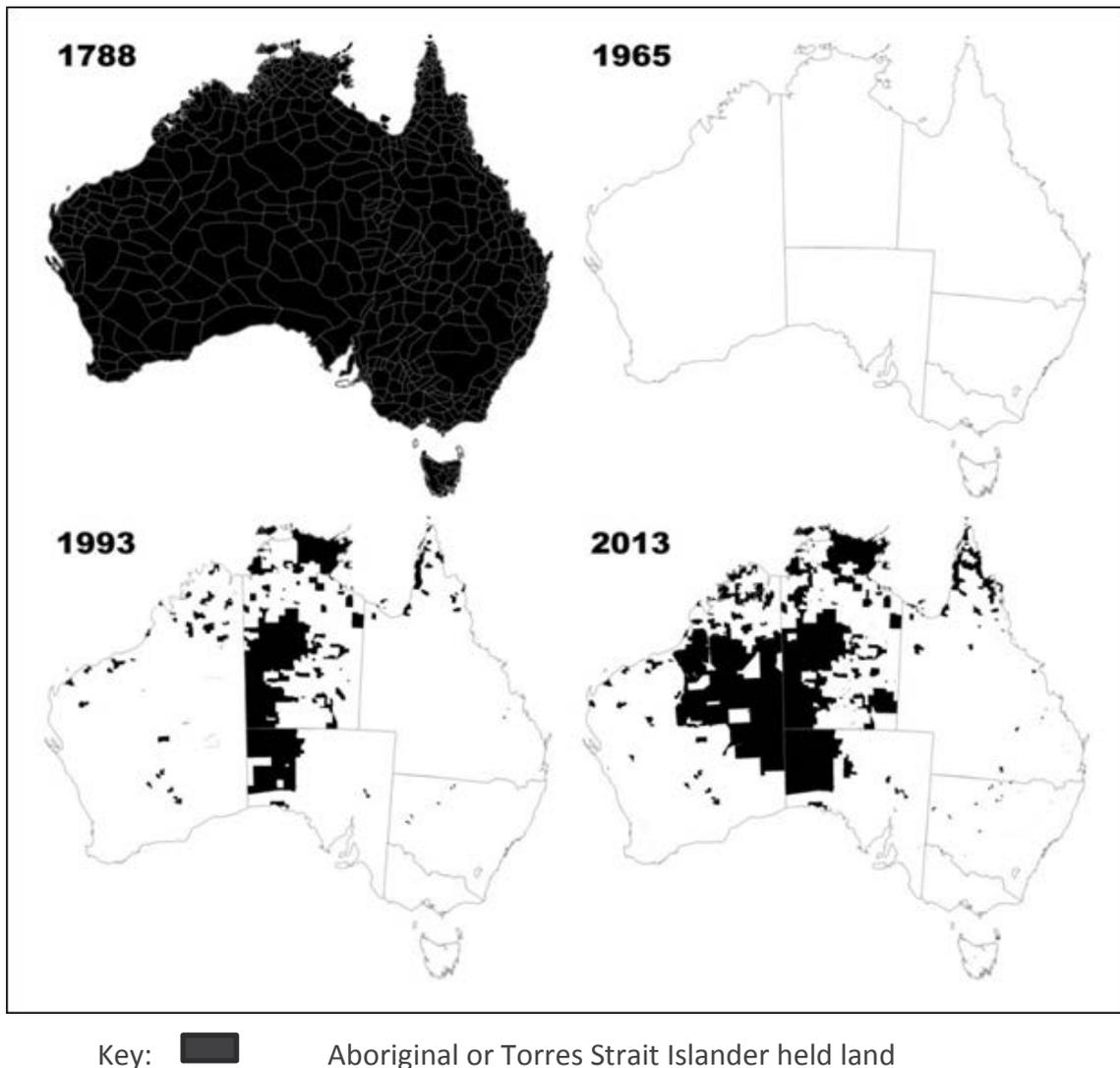
Through the Expert Indigenous Working Group's statement of intent (Senior Officers Working Group 2015:5–7), Aboriginal and Torres Strait Islander peoples are giving all governments in Australia a very clear message that they are frustrated with the nature and direction of the Indigenous land tenure reform agenda and that they want genuine recognition of their inherent rights and interests to their lands and waters. If there is to be land tenure reform, it must continue to grow the Indigenous estate, not erode it, and the reforms must benefit Aboriginal and Torres Strait Islander peoples and not just other Australians.

## The Indigenous estate and the land titling revolution

Jon Altman (2014) has examined the Indigenous estate and what he terms the 'Indigenous land titling revolution'. Figure 1 shows the extent of dispossession and retitling of Aboriginal and Torres Strait Islander peoples' interests in land from 1788 to the present.

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<sup>7</sup> I use the term 'neoliberal' advisedly. Harvey (2005:2) describes neoliberalism as 'a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and market skills within an institutional framework characterised by strong private property rights, free markets, and free trade'. Strakosch (2015:38-39) defines the core features of neoliberal logics in Anglophone settler policy as including 'a dominant rhetorical focus on the economic sphere, and a particular emphasis on economic insecurity and competition', 'an increased preoccupation with individual subjectivities', neoliberalism does not necessarily result in liberated capital because the state maintains its social reach by reconfiguring its services rather than withdrawal in pursuit of markets and market-ready citizens. Strakosch's further concludes that 'While neoliberalism asserts and demands the withdrawal of the state, it paradoxically legitimises constant extensions of state authority into individual lives in order to create the conditions for its own withdrawal'. For example, Terrill (2016:14) has found that through the land tenure and social housing reforms in the Northern Territory, the Commonwealth has 'resulted in governments playing a more embedded and controlling role in the management of remote communities. Concomitantly, they reduce the scope for communities to govern themselves'.



**Figure 1: A snapshot of Indigenous held land from 1788 to 2013 (Altman 2014:3)**

As Altman (2014:3) notes:

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

The land titling revolution includes a range of land rights grants, purchases, native title determinations and areas subject to Indigenous Land Use Agreements or other joint management arrangements. Altman has recently mapped these land titles (Altman and Kerins 2012; Altman 2014), which total around 2.5 million square kilometres or roughly 33 per cent of terrestrial Australia (Figure 2). Altman (2014:5) explains that Figure 2 specifically includes land titling under three tenures:

- land claimed or automatically scheduled under land rights law (an estimated 969,000 sq kms);

- 92 determinations of exclusive possession under native title law totalling 752,000 sq kms; and
- 142 determinations of non-exclusive possession under native title law totalling 825,000 sq kms.

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

All of these land holdings are the result of many different statutory processes for granting, allocating or recognising Aboriginal or Torres Strait Islander connections to and traditional responsibilities for country, or by direct purchase from the market place (Neate 2004) and includes land held under general land administration legislation that allows governments to create reserves and freehold title or leases for the benefit of Aboriginal or Torres Strait Islander people. It also covers the statutory land rights schemes that generally grant an inalienable freehold title to traditional owners (who are identified in accordance with traditional laws and customs and are communal land holders) or to Aboriginal or Torres Strait Islander residents of a discrete community. And it includes land held under the NTA, which provides for the recognition of the communal, group or individual rights and interests of native title holders under their traditional laws and customs in relation to their land or waters.

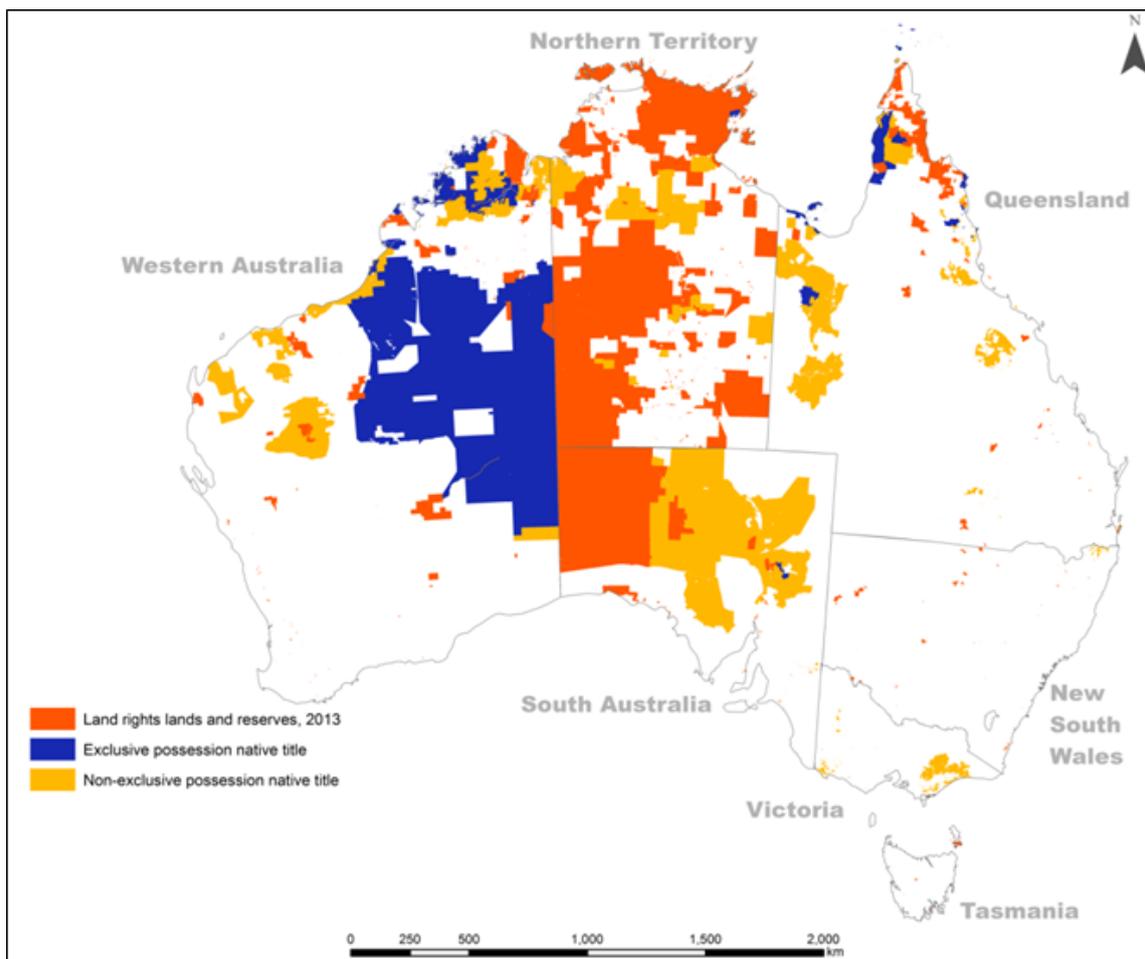


Figure 2: Indigenous land titling under three tenures (Altman 2014:6)

Although the amount of land under Aboriginal or Torres Strait Islander ownership or management may appear to be significant, ‘the generosity recedes when the location and commercial value of Indigenous land is considered’ (McRae et al. 2003:194) and the distribution of the Aboriginal and Torres Strait Islander population is taken into consideration. Most of the estate is marginal and of limited economic benefit (Mundine 2005:5; see also Altman and Kerins 2012 and Altman 2014).

## Indigenous peoples on Indigenous lands

In the 2011 Census the Aboriginal and Torres Strait Islander population of Australia was 669,881 people or 3 per cent of the total population of Australia.

Applying the Accessibility/Remoteness Index of Australia (ARIA) for spatial analysis — which classifies population according to area (Department of Health and Ageing 2001)<sup>8</sup> — to the results of the 2011 Census, Table 2 shows that almost 57 per cent of the Aboriginal and Torres Strait Islander population resides in inner regional areas and major cities, almost 22 per cent resides in outer regional areas, 7.6 per cent resides in remote Australia and 13.7 per cent resides in very remote Australia (ABS 2013).

	Aboriginal and Torres Strait Islander population		Other population		Total	
	No.	%	No.	%	No.	%
<b>Australia</b>						
Major cities of Australia	233,146	34.8	15,451,394	71.3	15,684,540	70.2
Inner regional Australia	147,683	22.0	3,963,346	18.3	4,111,029	18.4
Outer regional Australia	146,129	21.8	1,880,300	8.6	2,026,429	9.0
Remote Australia	51,275	7.6	263,401	1.2	314,676	1.4
Very remote Australia	91,648	13.7	111,702	0.5	203,350	0.9
<b>Total</b>	<b>669,881</b>	<b>100.0</b>	<b>21,670,143</b>	<b>100.0</b>	<b>22,340,024</b>	<b>100.0</b>

**Table 2: Estimated Aboriginal and Torres Strait Islander and other population by remoteness areas, June 2011 (ABS 2013)**

In 1999 and 2001 the Australian Bureau of Statistics (ABS) conducted the Community Housing and Infrastructure Needs Survey (CHINS) covering Indigenous housing organisations and discrete Indigenous communities on behalf of the former Aboriginal and Torres Strait Islander Commission (ATSIC). Information covered by CHINS included details of current housing stock, management practices and financial arrangements of Indigenous organisations that provide housing to Aboriginal and Torres Strait Islander peoples, and details of housing and related infrastructure such as water, electricity, sewerage, drainage and solid waste disposal, as well as other facilities available in discrete Aboriginal and Torres Strait Islander communities (ABS 2007a).

<sup>8</sup> See Appendix B for details of ARIA.

In 2006 the ABS conducted a further CHINS for the Australian Government Department of Families, Community Services and Indigenous Affairs to collect data on changes within the Indigenous community housing sector and on circumstances in discrete communities since 2001, and in April 2007 the ABS published *Housing and infrastructure in Aboriginal and Torres Strait Islander communities, 2006* (ABS 2007b). It appears that no similar survey has been conducted since that time, so the 2006 data is the most recently available population data on the quantum of Aboriginal and Torres Strait Islander people residing in discrete Indigenous communities.

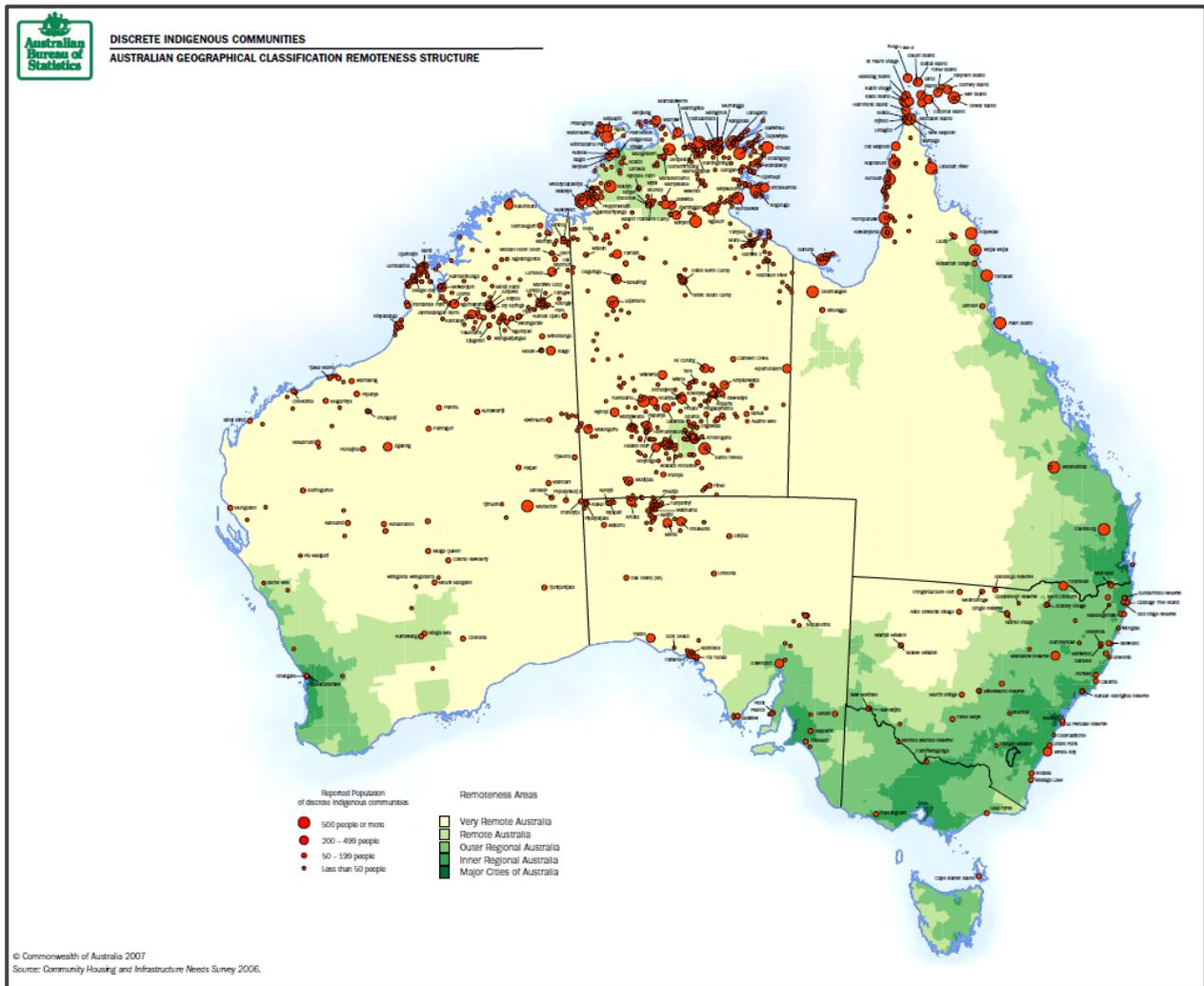
The ABS (2007b:38) defines a discrete Indigenous community as ‘A geographic location bounded by physical or cadastral boundaries, and inhabited or intended to be inhabited predominantly (i.e.: greater than 50 per cent of usual residents) by Aboriginal or Torres Strait Islander peoples, with housing or infrastructure that is managed on a community basis.’

This definition of ‘discrete Indigenous community’ does not include the large number of other communities with high proportions of Aboriginal and Torres Strait Islander people, such as particular suburbs in capital cities (for example, Mount Druitt and Redfern in Sydney) or many regional towns around the country (for example, Condobolin, Gilgandra, Warrnambool, Robinvale and many more).

Figure 3 shows the ARIA Remoteness Areas (ARIA)<sup>9</sup> and the reported population and approximate location of discrete Indigenous communities in Australia.

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<sup>9</sup> See Appendix B for a discussion of the ARIA index



**Figure 3: Discrete Indigenous communities and their remoteness in Australia (ABS 2007c)**

According to the ABS (2007b:5), 1187 discrete Aboriginal and Torres Strait Islander communities in Australia have an estimated population of at least 92,960 people (2006 Census data). Applying the ARIA definitions:

- in 2006, 1,112 discrete Indigenous communities (94 per cent) were located in remote and very remote areas; 104 of these communities are remote (with an estimated total population of 11,237 people in 2006), and 1,008 of these communities are very remote (with an estimated total population of 69,253 people in 2006) (ABS 2007b:17)
- the majority (80,500) of Indigenous people living in discrete Indigenous communities in 2006 lived in either remote or very remote areas; this population accounted for around 61 per cent of all Indigenous people (131,392) in remote and very remote areas (ABS 2008)
- in 2006, 26 per cent of people in remote Indigenous communities lived in one of the 14 communities with 1,000 or more people; a further 42 per cent lived in communities with between 200 and 1,000 residents, and 20 per cent were in communities with between 50 and 199 residents; nearly 13 per cent of people living in remote

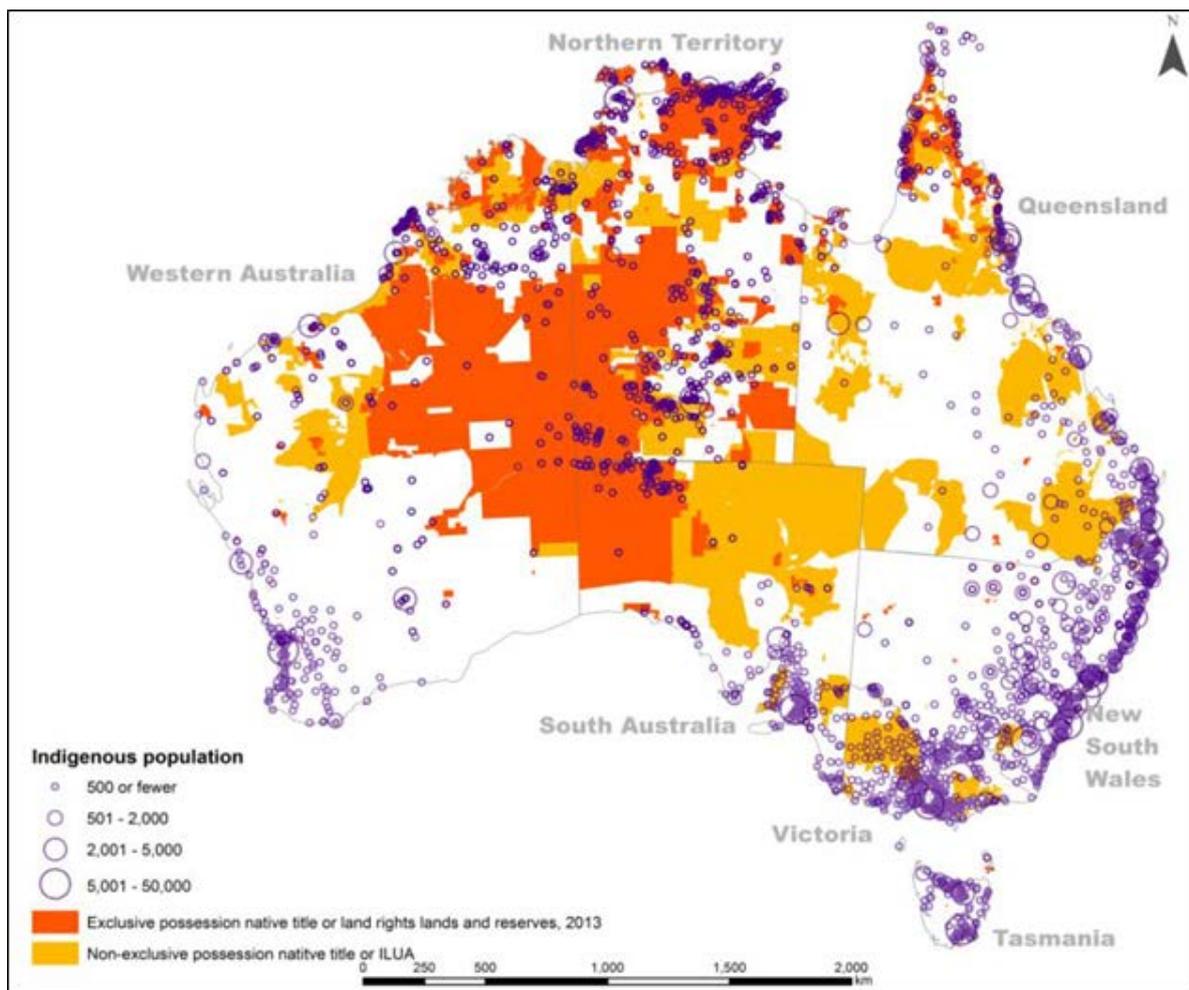
Indigenous communities lived in the 838 communities with a population of less than 50 people (ABS 2008).

According to Altman (2012:9–10), the number of discrete Indigenous communities currently stands at about 1,200, with a total population of 100,000 people or about 15 per cent of the total estimated Indigenous population of Australia of 670,000 people. A few of these communities have a population of more than 500 people, but nearly 1000 have a population of less than 100 each (Altman 2012:9–10).

Figure 4 shows the spread of the total Indigenous population over Australia against the Indigenous estate. It is not clear from census or other population data how many Aboriginal people are the traditional owners<sup>10</sup> of the Aboriginal lands that they are currently living on. Altman (2014:7) argues, as Figure 4 shows, that most Aboriginal and Torres Strait Islander Australians do not live on Aboriginal titled land.

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<sup>10</sup> As Tran and Stacey (2016: 2) note ‘The term “traditional owner” is employed by both Indigenous people and non-Indigenous people in a broad range of contexts, which gives rise to ambiguity and debate over its definition. One definition of traditional owner is someone who has customary rights to land. It encapsulates both Aboriginal and Torres Strait Islander peoples who have recognised legal rights (through native title and/or land rights) and Aboriginal and Torres Strait Islander peoples who do not have recognised legal rights’, but may have other historical or familial ties to the land in question. For further discussion and clarification of the term ‘traditional owner’, see Edelman (2009).



**Figure 4: Distribution of Indigenous population from the 2011 Census and Indigenous land titles based on 2013 data (Altman 2014:7)**

The argument for land tenure reform of the Indigenous estate aimed at individuating land titles and creating a land market for private home ownership as a way of achieving higher home ownership rates for Aboriginal and Torres Strait Islander people in discrete and/or remote Indigenous communities where no viable market exists is futile for two reasons. First, as the above analysis shows, most of the Aboriginal and Torres Strait Islander population does not live on the Indigenous estate. Second, there is no merit in creating a false home ownership market in locations where there is no prospect of developing a vibrant regional economy to support such a market in the long term, as discussed later in this paper.

The issues in discrete/remote Indigenous communities are far more complex than the focus on Indigenous land tenure reforms of the various statutory Aboriginal and Torres Strait Islander land rights schemes suggests.

By correlating population with land held under land rights or exclusive possession native title, Altman (2014:7) estimates that more than 80 per cent of the population in these locations is Aboriginal or Torres Strait Islander compared with a national proportion of just on 3 per cent. Altman also argues, hypothetically, that if all native title claims were successful, as much as 70 per cent of Australia could be under some form of Aboriginal

title and as much as 40 per cent of the Aboriginal and Torres Strait Islander population could be resident on those lands.

The ABS (2014) predicts that the Aboriginal and Torres Strait Islander population is expected to increase nationally at an average growth rate of between 2.0 per cent to 2.3 per cent per year between now and 2026, compared to between 1.5 per cent and 1.8 per cent per year over the same period for the total Australian population.

Assuming the ABS population predictions are correct, the number of Aboriginal people living in discrete/remote Aboriginal communities is likely to increase over the coming years. The dispersed nature of the Aboriginal population and the discrete/remote Aboriginal communities present significant challenges in terms of needs assessment, feasibility, and delivery of municipal and essential services to these locations, as well as for the delivery of other social services such as education, health and access to justice.

If Australia is serious about 'Closing the Gap' in disparities between the Aboriginal and Torres Strait Islander population and the total population, then access to reliable power supply, quality potable water, proper sanitation and solid waste disposal, basic health services, adequate housing and accessible roads are essential. Unreliable or poor delivery of these services below acceptable public standards has serious adverse impacts on the health and socio-economic wellbeing of local communities and will detract from efforts to 'Close the Gap' in other key areas of social, economic and cultural wellbeing (Wensing 2015). These issues cannot be separated from the Indigenous estate because local controls over land tenure and land use are crucial to a community's long-term wellbeing.

## **The Commonwealth's agenda for Indigenous land tenure reform**

The Commonwealth has been actively pursuing a reform agenda for Indigenous-held lands since the late 1990s. I believe the seeds for this agenda were sewn in the context of the 1997 review of the ARLA (NT), because the barriers to private home ownership and economic development on Aboriginal lands in the Northern Territory were discussed in the Reeves report, but the relevant recommendations in the report were not acted on for several years, as discussed below.<sup>11</sup>

Over the past 20 years or so I have carefully chronicled the course of this agenda, especially from 1997 to 2016. Some of the detail is worth recalling because it helps to understand the origins of the current debate over Indigenous land tenure reforms and

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<sup>11</sup> The author acknowledges that Aboriginal and Torres Strait Islander peoples have struggled for the recognition of their pre-existing land rights ever since 1788 and that the statutory Aboriginal and Torres Strait Islander land rights schemes enacted by the states and the Commonwealth (in the case of the two mainland Territories) since 1966 were enacted primarily in response to the land rights campaigns of the 1960s, 1970s and 1980s, partially in recognition of Aboriginal and Torres Strait Islander peoples' pre-existing customary land rights and partially as a means of enabling economic and other development on their lands for their benefit. However, their success is highly debatable.

why they have taken on particular focuses. Also, from very early on the Commonwealth expected the states to introduce similar reforms to their statutory Aboriginal and Torres Strait Islander land rights schemes that were introduced in response to the Aboriginal and Torres Strait Islander lands rights campaigns during the 1960s, '70s and '80s (with the exception of Western Australia which never introduced such a scheme), remembering that the states still have constitutional responsibility for land administration in their respective jurisdictions. For reasons examined later in this paper, the states have not embraced the Commonwealth's agenda with any degree of enthusiasm.

This account of the Commonwealth's Indigenous land tenure reform agenda begins with Prime Minister John Howard, who sought to stamp his own narrative on Indigenous Australia that was remarkably different from the preceding Hawke–Keating era. Howard was Prime Minister from 1996 to 2007, and from the very beginning of his term his words and actions demonstrated a deep-seated disrespect for Aboriginal and Torres Strait Islander people and their cultural rights and obligations (Dodson 2004:119). As Dodson (2004:119) records:

During his Prime Ministership, John Howard has refused to acknowledge the reality of prior ownership of this land by Aboriginal and Torres Strait Islander people. He has persistently denied the truth about the forcible removal of Indigenous children from their families and communities. He has refused to engage in reconciliation and some kind of settlement for past injustices, and he has denied the Indigenous view of history concerning the European occupation of this country.

Howard also continued his staunch opposition to the recognition of native title rights and interests during his reign as Prime Minister. In opposition, the Liberal–National parties staunchly opposed the NTA, which Prime Minister Keating had brokered between the National Indigenous Working Group, the states, miners, farmers and other affected parties in order to put in place a workable regime that would go some way to recognising native title rights and interests around Australia in accordance with the High Court's landmark decision in *Mabo v the State of Queensland [No. 2]* (1992) 175 CLR 1 (*Mabo (No.2)*) (O'Brien 2015:528-557). In December 1996 the High Court delivered its verdict in *Wik Peoples v the State of Queensland* (1996)187 CLR 1, in which the High Court determined that native title rights and interests could continue to co-exist on pastoral leases but that the pastoral lessee's interests will always prevail over the native title rights and interests. In government since March 1996, Howard and his government were very receptive to the vehement and relentless campaign mounted by the pastoral and mining industries to strengthen their legal position at the expense of native title holders. In May 1997 Howard released a 10-point plan to amend the NTA that was deliberately designed to 'tilt the Act further in favour of non-Indigenous interests' (McRae et al. 2009:311). In his opening address to the Reconciliation Conference in Melbourne, Howard (1997:1) stated, 'The fact is that the *Wik* decision pushed the pendulum too far in the Aboriginal direction. The 10 point plan will return the pendulum to the centre.' The Deputy Prime Minister, Tim Fischer (cited in McRae et al. 2009:311), contributed to the debate by stating that the 10-point plan contained 'bucket-loads' of extinguishment.

There can be little doubt, therefore, that the Howard government's views about the statutory land rights schemes introduced by the states before the High Court's decision in *Mabo (No. 2)* would be similarly hostile towards Aboriginal and Torres Strait Islander peoples' rights and interests and the survival of their unique cultures.

In October 1997 the Howard government instigated a review of the ARLA (NT), the first comprehensive review of the Act since Justice John Toohey's review in 1984 (Toohey 1984). This review was conducted by John Reeves QC, a Darwin barrister. The Reeves review found that the inalienability of Aboriginal freehold land under the ARLA (NT) 'does not significantly restrict the capacity of Aboriginal Territorians to raise capital for business ventures or to make commercial use of inalienable freehold land, if they so wish', and that 'Inalienability of title is a source of deep reassurance to Aboriginal Territorians that they cannot again be dispossessed of their lands for whatever reason' (Reeves 1998:473–86).

Although the review recommended that the provisions in the Act preventing the sale, transfer or perpetual leasing of Aboriginal land (except to another Aboriginal Land Trust or to the Northern Territory or Commonwealth governments) should be retained (Reeves 1998:xxx, 473–86), there was also considerable discussion on the issue of private ownership on Indigenous communal land:

At present, all houses and other buildings (with certain exceptions specified in the Act) are owned by the Land Trust that holds the title to the land. During the course of the Review a number of persons proposed that the residents of Aboriginal communities on Aboriginal land should be given the opportunity to sub-lease their house, or land within the community for business purposes.

In their oral submission to the Review, members of the Ngukurr community in South East Arnhem Land expressed the desire to be able to own their houses at Ngukurr. One speaker felt that Aboriginal people would be 'proud' of their houses if they owned them. Assuming that could occur, home ownership on Aboriginal communities might represent part of the solution to the very serious housing problems on Aboriginal communities.

The town of Nhulunbuy is situated on Aboriginal land. However, the residents of the town are able to sub-lease their houses from the corporation that holds the head lease to the township. The residents are able to sell their sub-lease and obtain finance to purchase a sub-lease. This system is similar to the leasehold system that operated in the Northern Territory prior to the introduction of freehold title in the early 1980s.

I have already recommended that all Aboriginal communities should be afforded the opportunity to obtain secure title to the land upon which their community is situated. Taking into account the submissions referred to above, the ability of the Community Council, or other body, if it wished, to sub-lease its land for housing or business purposes, would be a sensible refinement of this arrangement. I therefore recommend it. (Reeves 1998:500)

This discussion did not attract much attention in the immediate aftermath of the Reeves review, but it later provided the stimulus for a debate about the extent to which land held under the various statutory Aboriginal and Torres Strait Islander land rights schemes

and under native title determinations around Australia could or could not be used for economic development (including private home ownership).

Following on from the Reeves review (Reeves 1998) and the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into the review (HORSCATSIA 1999), in 2002 the Commonwealth provided the Northern Territory Government with an options paper for reform of the ARLA (NT), and in August 2003 the four Northern Territory Land Councils and the Northern Territory Government made a joint submission to the Australian Government outlining a package of agreed amendments designed to improve the workability of the Act. This culminated in several amendments to the Act in 2006 (discussed below).

In 2004 the Commonwealth made one of the most significant changes to the administration of Indigenous affairs by abolishing ATSIC and reassigning all its Indigenous programs to mainstream departments and agencies of the Commonwealth. The abolition of ATSIC effectively deprived Aboriginal and Torres Strait Islander people of a voice in the way government funding for Indigenous affairs was allocated and in the way programs were delivered. In its place, the Howard government appointed the NIC to provide advice on policy and service delivery to the Ministerial Taskforce on Indigenous Affairs.

Also in 2004, in a number of speeches and papers, Noel Pearson, as head of the Cape York Institute, began arguing that the lands on which most discrete and remote Aboriginal communities are located are collectively owned and inalienable and therefore cannot be used to create more capital (Pearson and Kostakidis-Lianos 2004, Pearson 2004; Dalton and Maiden 2005).

In early December 2004 Warren Mundine, Chief Executive Officer of New South Wales Native Title Services<sup>13</sup> and a member of the Prime Minister's newly appointed NIC, issued a media release covering a number of issues, none of which he expected would be of any interest in the mainstream media. Mundine raised the issue of economic development on Indigenous-owned land and the relationship between communal ownership and development, and stated, 'We need to move away from communal land ownership and non-profit community business and take up home ownership, economic land development and profit-making businesses' ('Land system holds us back says Mundine' *Sydney Morning Herald* 7 December 2004, page 6, cited in Bradfield 2005b:3). This media release and the attendant national coverage it received sparked responses from several Aboriginal leaders, including David Ross, Mick Dodson, Wayne Bergman, Aiden Ridgeway, Noel Pearson and many others (Bradfield 2005a, 2005b).

In 2005 the neoliberal think-tank, the Centre for Independent Studies, joined the debate when it released two issue analysis papers (Hughes and Warin 2005; Cleary 2005). The papers supported enabling private home ownership and economic development on Aboriginal lands by dismantling communal forms of tenure and replacing them with

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<sup>13</sup> A Native Title Service Provider appointed under Division 2 of Part 11 of the NTA.

private freehold titles; they also suggested that communal ownership of Aboriginal land was a 'socialist experiment' instigated by HC 'Nugget' Coombs<sup>14</sup> (Hughes and Warin 2005:1): 'Transferring inalienable land rights to remote (and other) Aboriginal and Torres Strait Islander communities was seen in the Coombs model not only as restitution, but also as the base for customary, communal, socialist societies distinct from the rest of capitalist Australia' (Hughes and Warin 2005:4). One paper concluded that communal ownership of land should be abandoned in favour of individuating land in Aboriginal communities into private freehold (Hughes and Warin 2005:15). The authors asserted that communal forms of tenure are an impediment to economic development and that they should give way to individualised forms of alienable tenure such as private freehold.

The assertions by Hughes and Warin (2005) and Cleary (2005) cannot be taken seriously. First, socialism cannot be reduced to an 'experiment'. Second, it is difficult to see how socialism can be compared to Aboriginal forms of land ownership and tenure, which are based on an entirely different cosmological and philosophical understanding and were in existence for many thousands of years before socialism emerged as a political movement in the early 20th century. As Rowse (2012:133) notes, 'It is difficult to think of a socio-economic political order more unlike Soviet society under central planning than the Northern Territory homelands.'

But Hughes and Warin's views appear to have resonated with the Howard government. In April 2005, in a media interview in Wadeye in the Northern Territory, Howard (2005a) stated:

I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking towards private recognition...I certainly believe that all Australians should be able to aspire to owning their own home and having their own business. Having the title to something is the key to your sense of individuality; it's the key to your capacity to achieve, and to care for your family and I don't believe that indigenous Australians should be treated any differently in this respect.

Noel Pearson's response to the Prime Minister's remarks is interesting. Pearson was reported in *The Australian* on 14 April 2005 as stating that 'The concern from the indigenous community that I'm hearing is that the legitimate issue of home ownership might be used as a Trojan horse for a reallocation of land rights — a taking of rights away from Aboriginal people' (Pearson cited in Dalton and Maiden 2005).

As highlighted earlier in the context of the March 2016 statement of intent from the Expert Indigenous Working Group (Senior Officers Working Group 2015:5–7), the phrase 'Trojan horse' has been used more than once. In 2005 it was used by Noel

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<sup>14</sup> HC Coombs was an economist, Governor of the Commonwealth Bank of Australia from 1949 to 1960, the first Governor of the Reserve Bank of Australia from 1960 and retired from this post in 1968. Between 1967 and 1976, HC Coombs chaired the Council for Aboriginal Affairs, a policy advisory body. From 1976 until his withdrawal from public life in 1995, Coombs used his affiliation with the Australian National University as a base from which to continue his policy advocacy on Aboriginal Affairs and he was particularly influential in developing what became known as the Community Development Employment Program or CDEP (Rowse 2010:9, see also Rowse 2000).

Pearson to reflect an underlying suspicion and discontent by Aboriginal and Torres Strait Islander peoples that Indigenous land tenure reforms by governments might be another ruse to undermine the hard won gains through the statutory Aboriginal and Torres Strait Islander land rights schemes and native title determinations. Aboriginal and Torres Strait Islander peoples had good reasons to be suspicious because the Howard government's 10-point plan amendments to the NTA in 1998 contained 'bucket loads of extinguishment' (Tim Fischer cited in McRae et al. 2009:311), as well as an erosion of the right to negotiate over future acts on native title lands.

At the National Reconciliation Planning Workshop in May 2005, Howard supported the view that land rights and native title needed to be changed. Howard (2005b) informed participants that the role that Indigenous land could play in supporting home and business ownership for Indigenous families and individuals was under consideration by the Attorney-General and the Minister for Immigration and Multicultural and Indigenous Affairs:

[A]s somebody who believes devoutly and passionately in individual aspiration as a driving force for progress and a driving force for progress in all sections in the Australian community, I want to see greater progress in relation to land. We support very strongly the notion of indigenous Australians desiring to turn their land into wealth for the benefit of their families. We recognise the cultural importance of communal ownership of land, and we are committed to protecting the rights of communal ownership and to ensure that indigenous land is preserved for future generations. And when I talk about land in this context let me make it clear that the Government does not seek to wind back or undermine native title or land rights. Rather we want to add opportunities for families and communities to build economic independence and wealth through use of their communal land assets. We want to find ways to help indigenous Australians secure, maximise and sustain economic benefits. We want to make native title and communal land work better.

In an address to the 2005 Native Title Conference, Warren Mundine (2005) explained the circumstances and the content of his 5 December 2004 media release. Mundine stated:

On a quiet Sunday, to be précis, the 5th December 2004, I was at home and just before going out on a normal non-eventful, non-exciting grocery shopping trip with my wife and children I put out a media release covering a number of issues which I didn't think would rate a mention in the mainstream media, but before I was halfway through my five minute drive to the shops my mobile phone exploded with calls from the media. First the ABC Radio and TV, then The Australian, then 2SM, 2GB and the calls when on and on much to the annoyance of my wife and children as their quiet Sunday shopping turned into a media circus that continued for several days.

I was surprised by the response, first of all by the media and then the reaction within and without the Indigenous community as well as my own party the ALP. The surprise was that I had been talking about these issues for a number of years in fact some fifteen years or more, and no one seem to bother too much about them in past.

In his address to the Native Title Conference, Mundine reiterated that he was talking about the Indigenous people in the metropolitan areas of Sydney, Brisbane and

Melbourne, and not the 'far flung remote areas of Australia'. Mundine's address focused on the use of Aboriginal land and other resources and the fact that the benefits of native title and land rights need to be shared among Indigenous people and not just by a privileged few. Mundine drew attention to the use or under-use of land and poor governance as a major contributor to Indigenous disadvantage and made several suggestions about breaking the cycle of poverty and improving the socio-economic wellbeing of Indigenous people and communities. Mundine called for changes to the tenure of Indigenous land to facilitate increased home ownership and business development and he also called for a whole raft of other initiatives aimed at addressing Indigenous disadvantage compared to the rest of population (Mundine 2005).

In May 2006 the Commonwealth introduced amendments to the ARLA (NT) (the amendments came into effect in September 2006). The amendments to the Act did a number of things including changing the rules for dealing with Aboriginal land and enabling the granting of 99-year township leases to Northern Territory entities and for subleasing to occur. The Commonwealth stated that its primary objective in changing the Act was:

To facilitate a higher level of economic development on Aboriginal land. This is to be done without undermining the [Act's] current balance of interests under which traditional owners of Aboriginal land must consent to minerals exploration. The Government's reform proposals relate predominantly to two areas: Part IV of the [Act] dealing with exploration and mining; and provisions that will allow for more direct Aboriginal traditional owner participation in decisions about development of their land (by devolution of decision-making by Land Councils). (Brough 2006a:2)

To achieve the government's objective, the Bill provided for a new tenure system for townships on Aboriginal land that would allow individuals to have property rights. The fundamentals of the Act, such as inalienable Aboriginal land title and the role of traditional owners, would be preserved. Ninety-nine year head leases over townships with individual subleases under the head leases would make it significantly easier for individuals to own their own homes and establish businesses. The Bill would also enable the Northern Territory government to establish its own legislation to administer the scheme.

One of the most contentious parts of the amendments was s.19A, under which a Land Trust may grant a 99-year lease of a township to an 'approved entity', which means either a Commonwealth or Northern Territory entity, if both the Minister and the Land Council agree to the granting of the lease. The Commonwealth was added at the last moment, with federal doubts mounting as to the Northern Territory Government's commitment to the plan. According to the Aboriginal and Torres Strait Islander Social Justice Commissioner (2007:50):

The 99 year leasing provision of s.19A of the ALRA has the practical effect of 'alienating' Indigenous communal land. While a lease is not alienation in fact, it will have the same effect in practice. Ninety nine years is at least four generations. With potential to create back-to-back leases, there is a high probability that the leases will continue in perpetuity.

The Aboriginal and Torres Strait Islander Social Justice Commissioner also noted that the Commonwealth was expecting other jurisdictions to make similar amendments to their land rights statutes through home ownership funding incentives and bilateral agreements: 'I hope these changes (amendments to ALRA) motivate other state governments to amend their Indigenous land legislation to facilitate similar opportunities for Indigenous Australians who reside on community land' (Brough 2006b).

But, as will become evident from the analysis later in this paper, this statement of expectation upon the states was oblivious to the very different nature of the various statutory Aboriginal and land rights schemes in each jurisdiction. It was nonsensical for Victoria, Tasmania or the Australian Capital Territory to even consider, and South Australia and Western Australia would need to abolish their respective Aboriginal Lands Trusts in order to pursue these objectives, which they were (and still are) averse to do. The extent to which the states have responded to this agenda is explored later in this paper.

In May 2007 the *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007* was introduced into the Australian Parliament. This Bill sought to establish an office of Executive Director of Township Leasing to enter into and administer township leases on Aboriginal land in the Northern Territory. The Bill specified the functions of the Executive Director, provided for appointment by the Governor-General, and provided for the terms and conditions under which the Executive Director would hold office, the way in which the Executive Director would obtain the assistance of staff and consultants, and reporting procedures for the Executive Director. The Bill was criticised for not including any requirement for the Executive Director to undertake ongoing consultation or negotiation with traditional owners or Land Councils regarding management of their land once the head lease was agreed. It would be up to the Land Councils and traditional owners to negotiate such terms before a lease would be granted (Parliamentary Library 2007:8). These amendments came into effect in June 2007.

Using its constitutional powers under s.122 of the Australian Constitution, on 21 June 2007 the Howard government announced the Northern Territory Emergency Response, also known as the Intervention. The emergency response included several measures that had implications for Aboriginal-owned and controlled land in the Northern Territory. Consequently, the Howard government compulsorily acquired five-year leases over Aboriginal-owned land in the Northern Territory on terms and conditions that were not negotiated but set by the government. It took over the control of town camps, allowed for the suspension of the permit system (which ensured traditional owners can control who enters their land) and suspended the future acts regime in the NTA. The government introduced these measures with the intent that they would assist in building new houses, upgrading existing houses and bringing in new arrangements for the management of public housing in communities (Department of Families, Community Services and Indigenous Affairs n.d.).

Reggie Wurridjal and the Bawinanga Aboriginal Corporation unsuccessfully sought to sue the Commonwealth claiming that the *Northern Territory National Emergency Response Act 2007* (Cth) resulted in an acquisition of property of the Arnhem Land Aboriginal Land Trust and Wurridjal to which s. 51(xxxi)<sup>15</sup> of the Australian Constitution applied and sought a declaration that the legislation was invalid in its application to certain land held by the Land Trust and certain property of Wurridjal (Brennan 2009:958). In the High Court's judgement, the Chief Justice Robert French noted that 'In order that this could be done quickly the government had a need to "control the land in the townships for a short period"' (French CJ in *Wurridjal v the Commonwealth* (2009) 237 CLR 309 at 334).

In May 2008 the Rudd government introduced amendments to the *Northern Territory National Emergency Response Act 2007* (Cth) and the ARLA (NT) to, among other things, allow for more flexible lease arrangements in Aboriginal communities in the Northern Territory. This included extending leases from 40 years to 99 years, providing rights of renewal for township leases and empowering the Executive Director of Township Leasing to hold title to other types of leases over Aboriginal-owned land in the Northern Territory, including over community living areas and town camps (such as the Alice Springs town camps) (Macklin 2008).

In December 2008 COAG agreed to the National Indigenous Reform Agreement (Closing the Gap) (NIRA), a partnership between all levels of government to work with Indigenous communities in order to 'Close the Gap' in Indigenous disadvantage (SCFFR 2008a). In recognition that this required a long-term generational commitment, COAG identified a range of strategic platforms or 'building blocks' to guide the reform process. Using this framework, COAG has entered into several National Partnership Agreements (NPAs). These agreements fund specific projects and use payment incentives to reward states that deliver on nationally significant reforms. Each jurisdiction is responsible for developing an Overarching Bilateral Implementation Plan or OBIP to underpin the co-operation between the respective jurisdictions to realise the commitments and objectives made under the NIRA by:

- incorporating implementation plans developed under all Indigenous-specific NPAs
- progressing implementation of the National Urban and Regional Service Delivery Strategy for Indigenous Australians
- clearly articulating activities that the Commonwealth, states and territories will undertake to improve data required under the NIRA
- establishing bilateral governance mechanisms (FaHCSIA 2012; SCFFR 2012).

The National Partnership Agreement on Remote Indigenous Housing (NPA-RIH) (SCFFR 2008b) and the National Partnership Agreement on Remote Service Delivery (NPA-RSD) (SCFFR 2008c) are the two agreements of most relevance to this paper.

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<sup>15</sup> S.51(xxxi) of the Australian Constitution requires the Commonwealth to compensate owners for the acquisition of property from any State or person 'on just terms'.

The parties to the NPA-RSD are the Commonwealth, New South Wales, Queensland, South Australia, Western Australia and the Northern Territory. Taken together, the NPA-RIH and the NPA-RSD aim to address unmet housing needs in remote communities and to implement a more equitable model of service delivery to ensure that Indigenous communities receive a standard of housing, service delivery and infrastructure that is comparable to non-Indigenous communities of a similar size and location.

The objectives of the NPA-RIH with respect to land tenure reform are to:

- provide asset security for government investments
- facilitate home ownership and enable land to be used as security against a debt
- facilitate the attraction of private investment.

Since COAG's endorsement of the NIRA, the Commonwealth and the states that are party to the NPA-RSD have taken several steps to implement the Commonwealth's Indigenous land tenure reforms contained in those agreements. An overview of the extent to which the states and territories have implemented the Commonwealth's Indigenous land tenure reform agenda is included later in this paper.

A comprehensive policy document discussing the rationale and detailed objectives behind the Commonwealth's current Indigenous land tenure reforms does not exist, other than in the NPA-RIH and the NPA-RSD and the government's *Indigenous Home Ownership Issues Paper* (FaHCSIA 2010). Aspects of the reform agenda may be discerned only through an analysis of these documents and recent reforms to the relevant land rights legislation in the Northern Territory, for which the Commonwealth is responsible.

The objectives of the land tenure reform agenda are, however, made clear in a January 2009 communiqué written by the Minister for Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to each of the state Ministers responsible for public housing and in a speech delivered to the New South Wales Aboriginal Land Council in 2009 (Macklin 2009, Macklin cited in AHRC 2009:132). The letter to the states advises of three key requirements that determine whether secure land tenure has been settled and that ought to be resolved prior to the delivery of capital works programs funded by the Commonwealth in remote Indigenous communities:

1. The government must have access to and control of the land on which construction will proceed for a minimum period of 40 years. A longer period has additional advantages.
2. Tenure arrangements must support the implementation of tenancy management reforms including the issue of individual tenancy management agreements between the state housing authority and the tenant without requiring further consent from the underlying land owner. This capacity must also permit replacement of the housing service provider if required.

3. Native title issues must also have been resolved, in that any applicable process required by the NTA has been conducted. (Macklin 2009)

Enactment of these requirements and the formalisation of secure tenure arrangements are regarded as underpinning the long-term goals of raising service delivery standards, facilitating economic development and promoting home ownership. Moreover, removal of impediments to public and private investment (on communal-title lands and Aboriginal lands held under other titles) is expected to clarify responsibilities for housing management in Aboriginal communities by giving housing authorities long-term access to and control over public housing assets.

These conditions have cleared the way for the negotiation of long-term leases on Aboriginal lands in some jurisdictions that have transferred control over land use decision making from local Aboriginal entities to centralised government agencies. The subsequent creation of subleases designed to promote individualised dealings in land is seen as the principal means of achieving the security of tenure necessary for public and private investments to occur (including by individual home owners) as the basis for overcoming severe problems of poverty, welfare dependency and community breakdown.

The Commonwealth is unable to undertake land tenure reforms directly (except in the Northern Territory), so the land component is the particular responsibility of each of the states, given their constitutional responsibility over land within their respective jurisdictions. Instead, the Commonwealth must rely on its role as a funding provider to stimulate the states to undertake land tenure reforms, and the funding of remote Indigenous housing has become the focus of the Commonwealth's land tenure reform program (Terrill 2010:5).

Terrill (2010:6) notes that state governments do not necessarily share the Commonwealth's focus on obtaining secure tenure. However, what is clear is that with billions of dollars of funding at stake, the Commonwealth's new requirements are dominating the states' land tenure reform programs, often to the exclusion of other potential approaches (Robinson 2009; Terrill 2009; Crabtree et al. 2012a, 2012b; Wensing and Taylor 2012). The extent to which the states have amended their Aboriginal and Torres Strait Islander land rights statutes in response to the Commonwealth's Indigenous land tenure reform agenda is examined later in this paper.

## **Indigenous land tenure reforms and the private home ownership debate<sup>16</sup>**

The Commonwealth's perspective on the importance of private home ownership on Indigenous land is clearly outlined in its *Indigenous Home Ownership Issues Paper* (FaHCSIA 2010:2), which talks about 'the home ownership gap between Indigenous people and other Australians' and the importance of providing 'a pathway for those who

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<sup>16</sup> Reproduced from from Wensing and Taylor 2012 with minor edits.

want and are able to own their own homes'. The paper acknowledges that a potential difference between Indigenous and non-Indigenous aspirations to home ownership is 'the opportunity to create wealth', in that, for Indigenous people, 'the economic benefits of home ownership, such as being able to sell the house for a profit, are generally seen as less important' (FaHCSIA 2010:5). The perceived benefit of home ownership for Aboriginal people is, however, clearly stated as being a secure, safe and healthy home base over which owners can enjoy significant control and the option to transfer the asset to future generations (FaHCSIA 2010:18).

The Commonwealth regards existing group and communal land tenure arrangements in remote Aboriginal communities as an obstacle to the expansion of government-backed home ownership programs, since land subject to native title rights and interests lacks the title individuation and fungibility necessary for individual prospective home owners to transfer their land title or use it and the house on it as security against a loan. This is particularly so in regional and remote areas where an Aboriginal entity holds land on behalf of a group of Aboriginal people or an Aboriginal community and is unable to dispose of or transfer its interest (and where the basic survey work required to prepare the land for subdivision has not been undertaken).

FaHCSIA argues that these tenure arrangements in remote communities need to be changed, not only to enable home ownership but also to provide security of tenure for government and private investments in infrastructure and community facilities (FaHCSIA 2010:16). Moreover, it believes removal of these impediments to public and private investment would clarify responsibilities for housing management in Aboriginal communities by giving housing authorities long-term access to and control over public housing assets.

To overcome constraints on sale or transfer, the Commonwealth requires 40-year leases and has introduced leasing arrangements that enable the provider of a housing asset to secure an interest in the land. These conditions have cleared the way for government to negotiate long-term head leases on Aboriginal lands. In the case of 99-year leases in the Northern Territory instituted through the Executive Director of Township Leasing, this has arguably transferred control over land use decision making from local Aboriginal entities to centralised government agencies with the power to issue subleases.

In the Northern Territory and Queensland the creation of subleases on long-term head leases is seen as the principal means to achieve the security of tenure necessary for public and private investments and to promote individuated dealings in land, which facilitate private home ownership. The Commonwealth's contributions to remote Aboriginal housing over 10 years from 2009 therefore depends on the states reforming their land tenures to promote tenure security for public and private investments and to enable individual home ownership on Aboriginal land (as part of a solution to chronic housing shortages in many rural and remote Aboriginal communities).

According to Part 5 of the NPA-RIH (SCFFR 2008b), the Commonwealth has committed a maximum of approximately \$4.8 billion over 10 years. Given this scale of expenditure and the lack of private economic development opportunities in most remote communities

(at least over the short to medium term), this emphasis on secure tenure is arguably more about protecting public investments in housing and related infrastructure and less about providing secure tenure for Aboriginal people on their terms that will enable them to set and implement their own development goals, since the outcome of the tenure reform process rarely results in a stronger form of Aboriginal ownership and control over the land.

That is not to say that governments are not concerned about providing Aboriginal people with long-term social and economic development opportunities, but rather that the immediate objective of tenure reform is to provide funders with reassurance that public assets in Aboriginal communities can be legally controlled by government. In the Northern Territory, where tenure reform is most advanced, concerns about the direction of the policy and the limited extent of Aboriginal influence (particularly the limited ability of traditional owners to negotiate the terms of long-term leases) have prompted some commentators to question the equity of a 'secure tenure agenda' and its implications for the rights of Aboriginal people (Terrill 2009:841; Tehan 2010:6, 363).

Security of tenure for government agencies, it is argued, is not tenure reform as such, but an 'abnormalisation' of land tenure (Dalrymple 2007:216). Neville Bonner's review of the Aboriginal Lands Trust in Western Australia in 1996 and SGS Economics and Planning's research for the 'Living on Our Lands' study in 2011-12, both found that Aboriginal people do not relate to forms of tenure that require them to sever their cultural connections to and responsibilities for country for economic development (SGS Economics and Planning 2012a:4; 2012b:36-38). The study undertaken by SGS Economics and Planning for the then Department of Indigenous Affairs in Western Australia found that native title holders are reluctant to surrender their native title rights and interests in exchange for a form of tenure they have little or no understanding of and which they regard as being inferior to their customary land rights (Wensing and Taylor 2012: 21).

According to Tom Calma, during his role as the Aboriginal and Torres Strait Islander Social Justice Commissioner, a common theme of tenure reform internationally is the objective of making it easier for Indigenous landowners to make use of their land (including commercial use) in ways that are consistent with cultural aspirations — something that cannot be reduced by providing only a secure interest over land and its infrastructure. If the aim of tenure reform was simply to provide clarity of ownership, this could be achieved within existing tenures and legal frameworks 'by quickening processes for the return of land to Aboriginal people and by supporting them to pursue their right to development' (ATSISJC 2009:125).

Calma proposed that each of the four elements of the 'security of tenure agenda' — housing management by state housing authorities, encouraging public investment, encouraging private sector investment and encouraging home ownership — could be better delivered through improved forms of Aboriginal and Torres Strait Islander land ownership. That is not to say that providing clarity of ownership is not also a legitimate aim of tenure reform, but that a reform process should, crucially, aim to provide long-

term clarity through changes that deliver improved forms of Aboriginal and Torres Strait Islander ownership and control and that support the development of local governance (rather than simply providing clear ownership for governments) (ATSISJC 2009:134).

The phrase ‘improved forms of Aboriginal and Torres Strait Islander ownership’ necessarily raises the issue of the community’s or traditional owners’ capacity to govern and manage the development process on properties, including management of head leases or divestment responsibilities. Resolution of this issue would sensibly require the integration of any land tenure reform agenda with programs that provide ongoing resources and support for these organisations — something that governments have been slow to do for Prescribed Bodies Corporate, which native title holders are required to establish following a positive determination of native title by the Federal Court (Bauman and Tran 2007; Attorney-General’s Department 2007). These issues were explored in the Deloitte Access Economics (2014) *Review of the Roles and Functions of Native Title Organisations: Discussion Paper* and in the Ernst & Young (2014) *Review of the Indigenous Land Corporation and Indigenous Business Australia*, and were picked up by the Australian Law Reform Commission (ALRC) in its report, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC 2015a) and by the Expert Indigenous Working Group in its statement of intent (Senior Officers Working Group 2015).

A related issue requiring resolution is the entity that would take control of building and infrastructure assets on Aboriginal-owned land following any transfer, given the Commonwealth’s continued requirement to retain control over public housing assets. Under these circumstances, long-term leases would continue to be a feature of any new tenure arrangements, albeit on terms that align more closely with the aspirations of local Indigenous land owners. For Calma, the regularisation of government occupation of Aboriginal land should be seen as part of this process, by placing government leases on a proper legal and commercial footing through the negotiation of leases and with rents paid at commercial rates (ATSISJC 2009:133, 140).

Whatever direction is taken, providing clarity of ownership for individual land titles is likely to be a slow and costly process (given the significant costs associated with subdivision, surveying and registration, as well as the necessary consultation and negotiation), which is likely to hamper the implementation of future reforms. Terrill (2010) has identified four types of transaction costs that typically occur under any leasing or individual freeholding model, namely:

- planning costs (preparing a survey plan and complying with planning laws and subdivision laws)
- legal costs (negotiating and drawing up lease agreements and registering these)
- consultation costs (consulting with native title holders and community members)
- the cost of administering the system.

These costs cannot be avoided.

Furthermore, where native title exists or is likely to exist, compliance with the relevant processes under the NTA are likely to be a significant cost component, requiring either the negotiation of an Indigenous Land Use Agreement or compliance with the relevant future act process where a dealing or activity constitutes a future act under that Act. This is an issue that has to be factored into any reforms of the statutory Aboriginal and Torres Strait Islander land rights schemes because land granted or reserved for the benefit of Aboriginal and Torres Strait Islander people under those schemes is deemed not to have extinguished native title rights and interests and any dealings in those lands would constitute a future act under the NTA. This is discussed in more detail later in this paper.

## **Dealing with land in the statutory Aboriginal and Torres Strait Islander land rights schemes**

There are 24 different Aboriginal and Torres Strait Islander land rights statutes operating across Australia, including the Commonwealth's NTA. The form of title under the statutory Aboriginal land rights schemes within most states and the Northern Territory differs within and between jurisdictions, but titles are generally an estate in fee simple or freehold. These statutory forms of title differ in whether landholders can privately sell, lease, mortgage or dispose of their land. Table 3 is a comparative analysis of the statutory Aboriginal and Torres Strait Islander land rights regimes. It lists the different statutes and includes details of the landowner, form of title, and whether or not private sale, leasing, subleasing or mortgaging is permitted.

The original source for this comparative analysis, which focuses specifically on the land dealing (private sale, leasing and mortgaging) provisions in the different Aboriginal and Torres Strait Islander statutory land rights schemes, is the analysis in the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 2005* (ATSISJC 2005:66–87). The Social Justice Commissioner undertook this comparative analysis because the NIC had released its principles for land tenure reform (NIC 2005). The NIC principles and subsequent government comments and actions implied that the statutory land rights schemes did not enable Aboriginal and Torres Strait Islander peoples to pursue economic development goals, such as owning their own homes or leasing of their lands.

Ever since that time and for various reasons, I have been monitoring the various Aboriginal and Torres Strait Islander land rights statutes around the country and maintaining a record of changes to the dealing provisions in those statutes. The analysis in Table 3 is current as at 1 June 2016.

The ability of title holders to deal in the land varies within and between jurisdictions. In most cases the land is inalienable and cannot be sold, transferred or otherwise dealt with, except in accordance with the provisions of the relevant legislation. There are no situations where there are no statutory restrictions on dealings in the land. Table 3 shows that in most cases land is not able to be sold on the open market, but in 20 instances a legislative basis already exists in all jurisdictions (with conditions attached)

that enables leasehold interests to be created. In 15 instances this includes the ability to use the leasehold interest as security for a mortgage.

In response to the Commonwealth's and COAG's Aboriginal and Torres Strait Islander land tenure reform agenda of the past decade, only Queensland has enacted specific legislation with effect from 1 January 2015 that enables Aboriginal and Torres Strait Islander lands to be converted to freehold and no restrictions on subsequent trading in the open market. South Australia, by contrast, in 2014 endowed its existing Aboriginal Lands Trust (ALT) with greater statutory independence and the ability to undertake economic development on Trust land and to buy additional land on the open market for the benefit of Aboriginal people. The ALT can also dispose of Trust land by transfer or grant of fee simple, but it can only do so if it is in accordance with a resolution of both Houses of Parliament and all relevant requirements under the NTA have been satisfied.

**Table 3: Summary of dealing provisions in the *Native Title Act 1993* (Cth) and the statutory Aboriginal and Torres Strait Islander land rights schemes around Australia (as at 1 June 2016)**

	<b>Statute</b>	<b>Landowner</b>	<b>Form of title</b>	<b>Is private sale permitted?</b>	<b>Is leasing or subleasing permitted?</b>	<b>Is mortgaging permitted?</b>
CTH	<i>Native Title Act 1993</i> (Cth)	Common law holders as determined by the Federal Court of Australia and held in trust by a registered native title body corporate	Recognition of the communal, group or individual rights and interests in accordance with s.223 of the NTA	No	No	No
ACT	<i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i> (Cth)	Community Council	Vested in the council and compulsory lease back to Commonwealth as national park	No	Yes	Yes of leasehold interest
NSW	<i>Aboriginal Land Rights Act 1983</i> (NSW)	Local Aboriginal Land Councils or NSWALC	Freehold (except in Western Division — leasehold)	Yes, subject to NSWALC approval	Yes, subject to NSWALC approval	Yes, subject to NSWALC approval
NSW	<i>National Parks and Wildlife Act 1974</i> (NSW)	Local Aboriginal Land Councils or NSWALC	Freehold and compulsory lease to NSW Government as national park	No	No	No
NT	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)	Aboriginal Land Trusts — consisting of Aboriginal people resident in the regional Land Council area	Inalienable freehold title	No	Yes of leasehold interest	Yes of leasehold interest
NT	<i>Pastoral Land Act 1992</i> (NT)	Aboriginal Association	Restricted freehold	No	Yes, with restrictions	Yes, with restrictions
QLD	<i>Aboriginal and Torres Strait Islander Land (Providing Freehold) Act 2014</i> (Qld)	Specified Aboriginal or Torres Strait Islander people	Freehold	Yes, subject to conditions	Yes	Yes
QLD	<i>Aboriginal Land Act 1991</i> (Qld)	RNTBCs, trustees or Aboriginal people	Inalienable freehold or leasehold	No	Yes	No
QLD	<i>Torres Strait Islander Land Act 1991</i> (Qld)	RNTBCs, trustees or Torres Strait Islander people	Inalienable freehold or leasehold	No	Yes	No
QLD	<i>Aborigines and Torres Strait Islanders (Land Holding) Act 2013</i> (Qld)	Specified Aboriginal or Torres Strait Islander people	Leasehold	Transferable, but not sale	Yes	No
QLD	<i>Land Act 1994</i> (Qld)	Trustee	Reserve or fee simple in trust	No	Yes	No

SA	<i>Aboriginal Lands Trust Act 2013 (SA)</i>	Aboriginal Lands Trust	Freehold or leasehold or any other titles it purchases	Yes, but must have support of Parliament	Yes, subject to conditions	Yes, subject to conditions
SA	<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)</i>	Anangu Pitjantjatjara body corporate representing all TOs	Inalienable freehold — vested in perpetuity	No	Yes, subject to conditions	No
SA	<i>Maralinga Tjarutja Land Rights Act 1984 (SA)</i>	Maralinga Tjarutja body corporate representing all TOs	Inalienable freehold — vested in perpetuity	No	Yes, subject to conditions	Yes
TAS	<i>Aboriginal Land Rights Act 1995 (TAS)</i>	State-wide Aboriginal Land Council	Inalienable freehold — vested in perpetuity	No	Yes	Yes on lease or licence
VIC	<i>Aboriginal Lands Act 1970 (Vic)</i>	Aboriginal Trust	Inalienable freehold — vested in perpetuity	No	Yes, subject to conditions	Yes
VIC	<i>Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982 (Vic)</i>	Aborigines Advancement League Inc.	Crown grant, unspecified	No	Yes	Yes
VIC	<i>Aboriginal Lands Act 1991 (Vic)</i>	Specified Aboriginal corporations	Conditional fee simple	No	No	No
VIC	<i>Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth) (at the request of the Victorian Government)</i>	Specified Aboriginal corporations	Freehold	No	Yes	Yes
VIC	<i>Aboriginal Land (Northcote Land) Act 1989 (Vic)</i>	Aborigines Advancement League Inc.	Conditional freehold	No	Yes	Yes
VIC	<i>Traditional Owner Settlement Act 2010 (Vic.)</i>	Traditional Owner groups	Inalienable fee simple	No	No	No
WA	<i>Aboriginal Affairs Planning Authority Act 1972 (WA)</i>	Aboriginal Lands Trust	Crown reserve for the 'use and benefit of Aboriginal inhabitants'	No	Yes, subject to conditions	Yes, subject to conditions
WA	<i>Land Administration Act 1997 (WA)</i>	Aboriginal person or approved Aboriginal corporation	Conditional freehold or lease and Crown reserves for the 'use and benefit of Aboriginal inhabitants'	No	Yes, subject to conditions	Yes, subject to conditions
WA	<i>Land Administration (South West Native Title Settlement) Act 2016 (WA)</i>	The Noongar Boodja Trust (Freehold tiles).	Freehold (but not Cultural Land or Managed Reserve Land)	Yes, subject to conditions	Yes, subject to conditions	Yes, subject to conditions

ACT: Australian Capital Territory; Cth: Commonwealth; NSW: New South Wales; NSWALC: NSW Aboriginal Land Council; NT: Northern Territory; QLD: Queensland; RNTBC: Registered Native Title Body Corporate; SA: South Australia; TAS: Tasmania; TO: traditional owner; VIC: Victoria; WA: Western Australia

From the perspectives of both economic engagement and social justice, the ideal situation would be a 'no' in the 'Is private sale permitted?' column in Table 3 and a 'yes' in both the leasing and mortgaging columns. This would protect the underlying tenure of Aboriginal ownership, while also allowing use of the land as equity or security for finance. Fifteen of the 24 existing statutory land rights regimes show that this is possible. However, land rights land is also subject to native title rights and interests, which, as discussed below and as shown in the first row of Table 3, are not able to be sold, leased or mortgaged.

## Dealing with land subject to native title rights and interests

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.<sup>17</sup>

Therefore, any dealings in communally owned land or land reserved for the use and benefit of Aboriginal people must also take into account the native title rights and interests for the dealings to be valid. In order to facilitate home ownership and economic development on lands subject to native title rights and interests, they must first be surrendered and extinguished, or otherwise compulsorily acquired by the Crown with compensation on just terms, before a freehold or leasehold title can be granted.

Land subject to native title rights and interests is inalienable and under the NTA the native title rights and interests can only be surrendered to the Crown. A native title determination does not give native title holders any power or authority to grant subsidiary interests, including leases, and is statutorily protected from debt recovery processes. It is therefore unusable as security against a loan.

The extent to which a Prescribed Body Corporate is able to assign leases over land still subject to native title rights and interests may also be constrained by s.56(5) of the NTA, which states that the native title rights and interests held by a body

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<sup>17</sup> In *Pareroutja v Tickner* (1993) FCA 654, 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) 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) provides for extinguishment to be disregarded if an area is held expressly for the benefit of Aboriginal peoples or Torres Strait Islanders. Section 47B 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.

corporate are not able to be ‘assigned, restrained, garnisheed, seized or sold’ or ‘made subject to any charge or interest...as a result of the incurring, creation or enforcement of any debt or other liability of the body corporate’, including ‘any act done by the body corporate’.

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

This provision of the NTA, while intent on supporting inalienability in light of potential misdealings, is in practice a significant impediment to development by Aboriginal and Torres Strait Islander people and communities who hold native title rights and interests (Wensing and Taylor 2012:20).

In order to facilitate economic development and/or home ownership on lands subject to native title rights and interests, most state and territory governments are requiring native title holders to agree to the surrender and permanent extinguishment of their native title rights and interests as a precondition to offering a conventional form of tenure such as a freehold or leasehold land title under their conventional land tenure systems.<sup>18</sup> State and territory governments can also compulsorily acquire the native title rights and interests subject to the provisions of s.51 of the NTA regarding compensation ‘on just terms’<sup>19</sup> for any loss, diminution, impairment or other effect of that act or activity on the native title rights and interests (Wensing and Taylor 2012:24).

It is difficult to establish from the public record why state and territory governments are requiring native title holders to agree to the surrender and permanent extinguishment of the native title holders’ native title rights and interests before they will issue a new fee simple or leasehold title of exclusive possession over such lands as it does not appear in any of their publicly available policy statements on native title matters. It appears that state and territory governments are adopting this position because in *Western Australia v Ward (2002)*<sup>20</sup> the High Court of Australia

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<sup>18</sup> The details of this position by state and territory governments is sealed in confidential Indigenous land use agreements between the affected parties and is not contained in any public policy statements. This information has been garnered from discussions with several Native Title Representative Bodies around Australia between July 2011 and 2015.

<sup>19</sup> As per s.53 of the NTA and Paragraph 51(xxxi) of the Australian Constitution.

<sup>20</sup> *Western Australia v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002).

determined that the nature of the rights contained in a grant by the Crown and their inconsistency with the continuance of native title rights and interests is the principal factor in determining that native title rights and interests need to be permanently extinguished before a conventional form of tenure can be issued over land where native title rights and interests have been determined to exist (Government of Western Australia 2007).

More recently, the Western Australian Attorney-General, the Hon. Michael Mischin has given a much clearer indication of the Western Australian Government's position with respect to native title and the State's requirement for extinguishment. In a speech to a native title seminar in Perth in June 2015, the Attorney-General stated:

Native title is not an asset which is amenable to being transacted like other forms of title or property.

For better or worse, that is the nature of traditional rights in land which both the common law, and Parliament, of this country has recognised.

Hence, the way forward for Indigenous economic opportunity does not lie in a quixotic legal and policy adventure to try and re-make property law.

The solution lies in a mix of Indigenous economic enterprise and the exploitation of the existing property rights system to make better use of native title rights.

Ideally, an unbiased and pragmatic dialogue on property rights and wealth creation in the interests of Indigenous people is also able to accommodate an objective analysis of the need for practical amendments to the Native Title Act which can expedite and encourage economic activity and development proposed by either native title holders or other proponents. (Mischin 2015:8–9).

This is the first time in more than a decade that a state government has made its policy position with respect to the requirement for the surrender of native title so clear on the public record.

Mischin also stated that there was very little interest among native title lawyers in pursuing non-native title outcomes from native title claims via regional agreements such as that currently being finalised between the Noongar people of south-west Western Australia and the Western Australian Government, noting that the lack of interest in such solutions to native title claims requires 'the surrender of any native title rights' (Mischin 2015:4). The settlement with the Noongar people includes a package of benefits as compensation for the surrender, loss, or impairment of native

title rights and interests in relation to land and water in the south-west of Western Australia (Department of the Premier and Cabinet 2016a, 2016b, 2016c 2016d).<sup>21</sup>

What the Western Australian Attorney-General omitted to say is that such settlements also require the permanent extinguishment of all native title rights and interests in the agreement area. This is the elephant in the room for native title holders.

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

The complexity of the issues at stake here should not be underestimated and is discussed in more detail elsewhere (Wensing and Taylor 2012:22–7).

It is also worth noting that the Commonwealth amended the NTA (s.24JAA) in 2010 to limit procedural rights for native title holders and registered claimants before public housing and certain public facilities can be built on land subject to native title rights and interest, bypassing the need to develop an Indigenous Land Use Agreement. During the consultation process for this particular amendment to the NTA, there was little support for the amendments based upon a lack of evidence to support the changes, legal uncertainties, inadequate provisions for consultation, the impact of 'effective' extinguishment, racial discrimination and the exclusion of any criticism of the bureaucratic processes that contribute to delays in public housing provision (Stacey and Fardin 2011:11). The only positive feature to these amendments to the NTA is that they have a 10-year sunset clause from the date of their enactment (s.24JAA(1)(d)).

## **The States' responses to the Commonwealth's agenda**

I have undertaken an analysis of the land dealing provisions in each jurisdiction's Aboriginal and Torres Strait Islander land rights schemes, in particular how the states and territories have (or have not) amended their relevant statutes in order to respond to the Commonwealth's Indigenous land tenure reform agenda. This includes an analysis of the nature of the statutory land rights scheme, the provisions

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<sup>21</sup> For details of the settlement, see Department of the Premier and Cabinet (2015a, 2015b, 2016a, 2016b, 2016c 2016d) and SWALSC (2014).

in those statutes for private sale, leasing and mortgaging of land held under those statutes (the land dealing provisions), the current arrangements for social housing on Aboriginal lands, the relationship between the statutory land rights scheme and native title rights and interests, and concluding observations on each jurisdiction.

The following is a summary of the analysis of how each state and the Northern Territory have or have not responded to the Commonwealth's Indigenous land tenure reform agenda by amending their relevant statutes.

Queensland's long history of discriminatory treatment of Aboriginal and Torres Strait Islander people and the State's land tenure history mean that the Aboriginal and Torres Strait Islander land rights schemes have very limited applicability spatially across the State. As a consequence, Queensland has one of the most complex Aboriginal and Torres Strait Islander statutory land rights schemes which has undergone significant amendments over the past 25 years as the State has had to endure its historical legacies and the implications of the High Court's decision in *Mabo (No. 2)*. The Queensland Government is the only jurisdiction that has sought to implement the Commonwealth's Indigenous land tenure reform agenda with respect to enabling private home ownership on Aboriginal or Torres Strait Islander lands as articulated by Prime Minister Howard and Senator Amanda Vanstone in 2005 (Howard 2005a, 2005b, 2005c; Vanstone 2005a, 2005b, 2005c). The mechanisms for converting Aboriginal or Torres Strait Islander Trust land to freehold that Queensland has implemented in Aboriginal and Torres Strait Islander communities is voluntary and has some safeguards in place, but there are flaws in the system that could render it open to exploitation and in the long term lead to the gradual erosion of land holdings by Aboriginal and Torres Strait Islander people and communities in that State.

However, as the Commonwealth's focus of its Indigenous land tenure reform agenda shifted to secure tenure for government-funded investments in social housing, community facilities and infrastructure assets (Terrill 2015:27), all the mainland states (except Victoria) have amended their land rights schemes to provide secure tenure arrangements over publicly funded assets. This shift in focus to provide secure tenure over infrastructure and other government assets was also about enabling public housing management systems to take control of social housing on Aboriginal lands because access to Commonwealth funding under the NPA-RIH was dependent upon states satisfying the Commonwealth's requirements for secure tenure for social housing and other public assets. This includes New South Wales, Queensland, South Australia and Western Australia. Although the Victorian Government was a signatory to the NPA-RIH, it was not a signatory to the NPA-RSD and its Aboriginal land rights scheme only applies to one discrete Aboriginal community (Framlingham). This meant that the Victorian Government was therefore

not bound to respond to the Commonwealth's Indigenous land tenure reform agenda in the NPAs.

In the Northern Territory, the Commonwealth used its constitutional powers over the territories (s.122 of the Australian Constitution) to take control of Aboriginal townships and town camps in the context of the Northern Territory Emergency Response by amending the ARLA (NT) to enable a government entity to hold 99-year non-negotiable leases and to exercise complete control over subleasing without any further consultation with the traditional owners. The intention of the amendments to the ARLA (NT) in 2006 and 2007 was to expedite the granting of individual leases in order to provide security of tenure for the mainstreaming of service delivery and to advance the creation of land markets to facilitate home ownership possibilities. Although leases granted by traditional owners to the Executive Director of Township Leasing are voluntary, delivery of new housing and related infrastructure to participating communities has been subject to their signing. To date, the majority of subleases have gone to government agencies rather than individuals, with the largest leaseholder being the Territory Housing Authority (ATSISJC 2007:50). It is blatantly clear that the Commonwealth's hidden agenda was to normalise the land tenure arrangements in Aboriginal townships in the Northern Territory by breaking down each community 'into a plethora of surveyed and registrable lots' (Dalrymple 2007:218) and 'supplanting it with Commonwealth Government control' (Howey 2014:19).

Perhaps Terrill (2010:6) was correct when he noted that state governments do not necessarily share the Commonwealth's enthusiasm for Indigenous land tenure reforms, given their differing Aboriginal and Torres Strait Islander land rights schemes and differing histories of treatment of Aboriginal and Torres Strait Islander peoples and communities.

Because of the very limited nature of the Aboriginal land rights schemes in Tasmania, Victoria and the Australian Capital Territory, the Commonwealth's agenda has no applicability in those jurisdictions.

An examination of the public record reveals that:

- there is nothing on the public record to suggest that New South Wales and South Australia have active plans to make any further amendments to their Aboriginal land rights schemes to enable the freeholding of Aboriginal land for private economic development (including home ownership).
- Western Australia has a longstanding policy of transferring land from the Aboriginal Lands Trust estate to Aboriginal people. The Department of Aboriginal Affairs' annual reports show that the size of the Aboriginal Lands Trust (ALT) estate has shrunk from 11 per cent of the land mass of Western Australia in June

2011 to 9.65 per cent in June 2015. However, serious questions arise as to how this is being undertaken and about the intent of its transfer policy when the land transfers are still effectively Crown reserves and any use and subleasing of the land still requires the prior written approval of the Minister for Lands. Nevertheless, the Western Australian Government has an outstanding commitment to the Commonwealth to implement the second stage of its land tenure reforms (Government of Western Australia 2009). No progress has been made since the *Aboriginal Housing Legislation Amendment Act 2010* (WA) was enacted in 2010 and the results of the 'Living on Our lands' study were abandoned in 2012.

There are also significant conflicts between the statutory Aboriginal or Torres Strait Islander land rights schemes and native title rights and interests in each jurisdiction. For example:

- In every jurisdiction, lands granted or reserved for the use and benefit of Aboriginal and Torres Strait Islander people are deemed by the Federal Court of Australia to be subject to native title rights or interests (*Pareroutja v Tickner* (1993)), and therefore any dealing that involves transferring the land to private freehold or private leasehold outside the Aboriginal or Torres Strait Islander land rights scheme would constitute a future act under the NTA, and the future act regime in the NTA applies, requiring either the negotiation of an Indigenous Land Use Agreement or compliance with the relevant future act process in the Act. If the dealing involves extinguishment of native title by compulsory acquisition, the right to negotiate will apply.
- In New South Wales there is a perverse form of dispossession playing out, arising from the conflict between the Aboriginal Land Rights Act 1983 (NSW) (ALRA (NSW)) and the recognition of native title under Commonwealth law through the non-claimant application process under the NTA.
- In Queensland it is questionable whether the consultation and agreement provisions in the *Aboriginal and Torres Strait Islander (Providing Freehold) Act 2014* (Qld) are sufficient to comply with Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, let alone whether the granting of freehold tenure can be regarded as adequate compensation for the permanent loss of native title rights and interests. There are several important matters for native title holders to contemplate with respect to the permanent extinguishment of their native title rights and interests and what might constitute adequate compensation for the permanent loss of those rights and interests when considering applications for the freeholding of lands where their native title rights and interests have been found to exist by the Federal Court of Australia.
- In South Australia any internal dealings with land under the various land rights statutes are deemed not to affect native title rights and interests, but the potential

for conflicts between the residents of ALT lands and native title holders over the use of such lands still exists. How these matters are acknowledged and managed are matters for discussion and negotiation within each community (Department of State Development 2014).

- In Western Australia the Department of Aboriginal Affairs states that it is aligning the divestment of the ALT estate with existing and future native title priority determination areas by examining land holdings and facilitating divestment through agreements. There are serious questions about the extent to which the State is being transparent about the real nature of such land transfers, whether native title rights and interests on ALT lands will be affected by the transfers, and the extent to which such transfers are seen as constituting some form of compensation for the loss of native title rights and interests. Any dealings in ALT lands involving the creation of freehold or leasehold interests outside the current Aboriginal reserve system must also take the native title holders' rights and interests into account in accordance with the NTA.

All these issues are far from being resolved to the satisfaction of the Aboriginal and Torres Strait Islander peoples and communities that are affected by these changes.

## **The Commonwealth's continuing agenda for Indigenous land tenure reform**

The Commonwealth has now been actively pursuing an Indigenous land tenure reform agenda for well over a decade. This agenda has been described by Terrill (2015:25–8; 2016:128–71) as comprising three overlapping periods:

- the first period occurred between 2004 and 2007 during the final term of the Howard Coalition government when the reforms were developed in the context of an emerging critique of communal land ownership and the focus was on enabling the individuation of Aboriginal lands for private home ownership and/or economic development
- the second period occurred during the term of the Rudd–Gillard Labor governments from 2007 to 2013 when the focus shifted to securing tenure for government investments in housing and infrastructure and other public assets
- the third period emerged during the term of the Abbott Coalition government from 2013 to 2015 when the responsibility for most Indigenous policies and programs was moved from various portfolios into the Department of the Prime Minister and Cabinet (PM&C) and there was renewed effort in acquiring township leases over Aboriginal communities in the Northern Territory and renewed pressure on state governments to reform their Aboriginal land tenure systems to enable private home ownership and economic development on Aboriginal lands.

I agree with Terrill's conclusions that the debate has several fundamental flaws and that it has been 'harmful for both understandings of land reform and debate about Indigenous policy more generally' (Terrill 2016:153). I also agree with Terrill's analysis that the opportunity for a more detailed analysis of what has worked and where reforms may be necessary, and exactly what the various stakeholders were seeking through land tenure reforms and for what outcomes, has been overlooked (Terrill 2016:153–154). The real need for reform of Indigenous land tenures has never been fully investigated, and this is reflected in the numerous statements of principles that various Aboriginal and Torres Strait Islander leaders have developed over the past decade, as discussed earlier in this paper. Their frustration with the Commonwealth's agenda is clearly evident.

Nevertheless, the Commonwealth continues to pursue an Indigenous land tenure reform agenda. The following is a summary of several recent initiatives. Each activity is likely to have some bearing on the future course of the Commonwealth's agenda.

In February 2014 the Commonwealth released the *Review of the Indigenous Land Corporation and Indigenous Business Australia* undertaken by Ernst & Young (2014). The task of this review was to assess the effectiveness of Indigenous Business Australia (IBA) and the Indigenous Land Corporation (ILC) in driving Indigenous economic development and how enhanced outcomes could be achieved by government, including through consideration of an integration of IBA and the ILC. Ernst & Young's starting point for the review was that Indigenous economic development in relation to IBA and the ILC creates sustainable Indigenous employment opportunities, particularly through new Indigenous enterprises (Ernst & Young 2014:7). The report identified land tenure as one of the inhibitors of Indigenous economic development and that there was an advocacy role for organisations like the ILC and IBA to play in negotiating or facilitating resolution of land tenure issues (Ernst & Young 2014:11). To date, the Commonwealth has not issued any comments on the future of IBA or the ILC.<sup>22</sup>

In May 2014 the Commonwealth released the final report of the *Review of the Roles and Functions of Native Title Organisations* undertaken by Deloitte Access Economics (2014). This review examined the roles and functions of native title representative bodies and native title service providers 20 years after their establishment in the native title system, including how those organisations can continue to meet the evolving needs of the system, particularly the needs of native title holders after claims have been resolved. The review found that Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs)

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<sup>22</sup> Other than making a concessional loan of up to \$65 million to the ILC in the 2015-16 federal budget in order to reduce the 'crippling' impact of interest on debt incurred when the ILC purchased the Ayers Rock Resort (Haughton 2016).

continue to be heavily involved in supporting native title holders with the complex work of native title claim resolution and associated activities relating to future acts and agreements prior to the determination of native title; it also found a growing demand associated with the rising number of Registered Native Title Bodies Corporate (RNTBCs) being established and seeking to use their native title for economic and community development purposes. The review expects that NTRBs/NTSPs will continue to play a central role in the native title system in both pre- and post-determination contexts, and that the efficiency and effectiveness of the native title system will be strengthened to the extent that it makes use of the considerable strengths that NTRBs/NTSPs have developed to date, by working closely with native title holders and their RNTBCs. To date, the Commonwealth has not issued any response to the outcomes of this review. However, the Expert Indigenous Working Group (discussed later in this paper) believes these organisations play a significant role in the native title system and that they should be far better resourced.

In August 2014 the Commonwealth released the report of *The Forrest Review: Creating Parity* (Forrest 2014). The Australian Government had appointed Andrew ‘Twiggy’ Forrest to undertake a review of **Indigenous training and employment services** to consider improvements that could be made to help create parity between Indigenous Australians and other Australians, including through development on Indigenous land and land subject to native title. The Forrest review calls for an agreement between the Commonwealth and the states and territories to commit to tenure reforms in Indigenous communities to enable home ownership and economic development and includes a number of specific recommendations to this effect (Forrest 2014:119, 220). To date, the Commonwealth has not responded to the land tenure reform recommendations in the Forrest review.

In September 2014 the Australian Parliament’s Joint Select Committee on Northern Australia (2014) tabled *Pivot North: Inquiry into the Development of Northern Australia*, the final report of its inquiry into policies for developing parts of Australia that lie north of the Tropic of Capricorn, spanning Western Australia, the Northern Territory and Queensland. The report states that the Committee received considerable evidence that land tenure arrangements are a serious impediment to economic development in northern Australia. The Committee also cites a research paper jointly authored by CSIRO, James Cook University and the Cairns Institute arguing that the case for improving tenure arrangements across northern Australia is compelling but that there are also considerable challenges requiring cross-jurisdictional co-operation and national investment in research and development and data management. The report also cited evidence from many organisations and state governments about efforts to address some of the land tenure concerns. The Committee recommended that the Australian Government pursue, through the Northern Australia Strategic Partnership, the harmonisation and simplification of land

tenure arrangements in the jurisdictions across northern Australia (Joint Select Committee on Northern Australia 2014:194–5). The Commonwealth’s response is contained in *Our north, our future: White Paper on developing northern Australia* (Australian Government 2015, discussed below).

In April 2015 the AHRC released the *Rights and Responsibilities: Consultation Report 2015* (AHRC 2015a). The consultation asked Australians about issues that mattered to them among the core of liberal individual human rights and freedoms (freedom of speech, freedom of association, religious freedom and property rights) and about how well the Australian people think their human rights and freedoms are protected in Australia, including Aboriginal and Torres Strait Islander people’s property rights. The report included a discussion about the rights to property, including the freedom to exercise native title rights. The report also stated that the Human Rights Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner will jointly facilitate a high-level forum with Aboriginal and Torres Strait Islander leaders to discuss reforms that remove legal and regulatory barriers faced by native title holders seeking economic development (AHRC 2015a:42–4). This forum, the Indigenous Leaders Roundtable, was held in Broome on 17 and 18 May 2015. The Indigenous Leaders Roundtable on Property Rights discussed issues associated with enabling better economic development within the Indigenous estate and the AHRC released two media stories (AHRC 2015b, 2015c).

Following the Roundtable, the Indigenous Leaders Forum issued a communiqué (AHRC 2015d:2), which called for dialogue about five sets of issues regarding economic development within the Indigenous estate: fungibility and native title; business development support and succession planning; financing economic development within the Indigenous estate; compensation; and promoting Indigenous peoples’ right to development. These are reproduced in full in Appendix A.

In June 2015 the final report of the ALRC inquiry into the connection, joinder and authorisation aspects of the NTA — *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC 2015a) — was tabled in the federal parliament. This report marks the first major review of the law governing connection in native title claims since the introduction of the NTA. It also examines authorisation of persons bringing claims and joinder of parties to a native title claim. The ALRC report makes 30 recommendations for reform. In formulating its recommendations, the ALRC had regard to the development of the law, procedure and practice over the 20 years since the NTA was introduced, as well as the significant policy and economic arena in which native title is being implemented. The ALRC report also includes several recommendations for reform in relation to connection requirements, the nature and content of native title, the authorisation provisions, joinder and party provisions, and claims resolution.

Also in June 2015 the Australian Government released *Our North, Our Future: White Paper on Developing Northern Australia* (Australian Government 2015), which includes measures to simplify land arrangements to support investment, including new investments by the Australian Government for reforms in relation to Indigenous-held land and native title. In releasing the White Paper, the Prime Minister, Tony Abbott, said that 'Land in the north has the potential to support greater and more diverse economic activity. But the complexity of land arrangements has slowed development to date' and that the government is supporting simpler and more secure land arrangements in the north through a range of initiatives. The Prime Minister also committed the government to working with COAG to reduce native title costs and delays, and to allow Indigenous Australians to borrow against or lease exclusive possession native title land (Abbott 2015).

In December 2015 the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Human Rights Commissioner convened the second Indigenous Property Rights Planning Meeting in Sydney, which was attended by approximately 65 Indigenous leaders from around Australia. The purpose of the meeting was to progress the outcomes of the Indigenous Leaders Roundtable on economic development and property rights that was held in Broome in May 2015. At the Sydney meeting, the Commonwealth Attorney-General committed to support the AHRC to facilitate a dialogue on the issues raised in the Broome communiqué (AHRC 2015d) and the Indigenous Property Rights Project commenced. The aims of the project are to:

1. understand the opportunities and challenges for economic development of the Indigenous Estate, building on the work of other Indigenous property rights related processes
2. facilitate dialogue that considers development of legislative and policy reform affecting the Indigenous Estate, led by Aboriginal and Torres Strait Islander peoples
3. facilitate engagement between Aboriginal and Torres Strait Islander peoples, government/s, industry and other stakeholders that recognises development on Indigenous land and waters will only be successful and sustainable where Aboriginal and Torres Strait Islander peoples are provided with the opportunity to:
  - be partners in development
  - give their free, prior and informed consent
  - benefit economically and socially from the development. (AHRC 2016a)

In December 2015 COAG accepted the recommendations of the report by the Senior Officers Group on the *Investigation into Indigenous Land Administration and Use*

(Senior Officers Working Group 2015). At its meeting in October 2014, COAG, at the behest of Queensland and the Northern Territory, had committed to undertaking an investigation into Indigenous land administration and use. In response, the Australian Government established a Senior Officers Working Group to undertake the investigation, with membership drawn from first Ministers' departments and departments with relevant Indigenous affairs policy responsibility from the Commonwealth, New South Wales, Victoria, Queensland, South Australia and the Northern Territory. Western Australia declined to participate in this process. An Expert Indigenous Working Group was also established by the Commonwealth in February 2015 to provide guidance to the investigation on policy directions and proposals for Indigenous land administration and use; input and advice on the report to COAG; and leadership on consultation and engagement with Indigenous stakeholders. The final report of the Senior Officers Working Group identified five key areas for governments to focus on with respect to Indigenous land tenure reforms, including a set of five guiding principles, six recommendations and several detailed proposals to amend the NTA. As discussed earlier in this paper, the Senior Officers Working Group was supported by an Expert Indigenous Working Group, which included its own strongly worded statement of intent about the nature and direction of the Indigenous land tenure reform agenda (Senior Officers Working Group 2015:5–7).

In December 2015 the Prime Minister, Malcolm Turnbull, announced the membership of a Referendum Council on constitutional recognition of Aboriginal and Torres Strait Islander peoples to advise on progress and the next steps towards a referendum to recognise Aboriginal and Torres Strait Islander people in the Australian Constitution (Turnbull 2015). This Council was established in response to the Expert Panel on Constitutional Recognition of Indigenous Australians, which reported to the Commonwealth in January 2012 (Expert Panel on Constitutional Recognition of Indigenous Australians 2012), and the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth). An important question that arises in the context of constitutional recognition is whether any recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution will have any consequences for the recognition of their customary land rights.

In March 2016 *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (ALRC 2015b), the final report of an ALRC inquiry, was tabled in the federal parliament. The inquiry was instigated by a request from the Attorney-General to identify and examine Commonwealth laws that encroach upon traditional common law rights, freedoms and privileges. The final report includes three chapters on property rights, including a chapter on real property rights. Chapter 20 includes a discussion of the common law protection of real property rights and particular areas of concern about Commonwealth laws affecting the rights of landholders, including environmental, native title and criminal laws. The ALRC reports that it received only

three submissions discussing native title in a broad sense and therefore the discussion in Chapter 20 focuses only briefly on matters relating to establishing proof of native title by claimants, extinguishment of native title and limitations of the NTA. The ALRC report then refers to the processes currently underway by the AHRC arising from its *Rights and Responsibilities: Consultation Report 2015* (AHRC 2015a).

Also in March 2016 the AHRC convened its third Roundtable on Indigenous Property Rights in Canberra (AHRC 2016a) and a communiqué was released (AHRC 2016b). At this Roundtable the AHRC reported on its work creating an inventory of existing state, territory and Commonwealth legislation that recognises or creates rights and interests that make up the Indigenous estate, as well as heritage protection laws, and the participants agreed that there is value in working together with the National Native Title Tribunal to progress the development and design of a national mapping tool. Participants also discussed a range of legislative and non-legislative ideas for reform of native title and Indigenous land rights. All agreed that any proposals for reform would be based on the principle of strengthening and securing Aboriginal and Torres Strait Islander rights and interests in their lands, seas, waters and resources.

At this meeting the Indigenous Property Rights Network considered and approved a set of eight guiding principles (discussed earlier in this paper) in which it defined the 'Indigenous estate' as 'including the lands, seas, waters and resources of Aboriginal and Torres Strait Islander Peoples' (AHRC 2016c:1). What sets these principles apart from the previous sets of principles is that they are based on international human rights principles (AHRC 2016b).

The AHRC is progressing the outcomes of the Indigenous Leaders Roundtables into an action strategy with the establishment of three expert groups to undertake further work on:

- governance (the structures for organising and making decisions about Indigenous property rights)
- finance and risk (the capacity of Indigenous landowners to use their rights and interests in land to raise capital for investment)
- land title and tenure (the infrastructure required for effective and efficient land administration).

In May 2016 the AHRC convened its fourth Roundtable on Indigenous Property Rights on Minjerribah and a communiqué was released (AHRC 2016d). The purpose of this Roundtable was to establish a relationship between Aboriginal and Torres Strait Islander people and the finance sector (AHRC 2016d: 1) and there was strong consensus among the participants that this would be the first of many conversations about the financing of economic development on Indigenous-held lands (AHRC

2016d: 4). The Communique identifies a number of issues that the Indigenous Property Rights Network should continue to address, including for example, continuing to map the Indigenous estate to better understand its characteristics, exploring and testing tenure models that will provide for economic development and maintain the Indigenous ownership of the estate and exploring finance mechanisms to mitigate risk.

Two further Roundtables will be convened during 2016 (AHRC 2016a):

- a workshop on tenure, business and benefit sharing to be held as part of the AIATSIS National Native Title Conference in Darwin, Northern Territory, 1-3 June 2016
- a roundtable on land, business and governance to be held as part of the Garma Festival in Gulkula, Northern Territory, 29 July – 1 August 2016.

The AHRC is also proposing further Roundtables in 2017 (AHRC 2016a).

Each initiative discussed above includes a body of work around Indigenous sovereignty, land and/or native title matters and many of them include recommendations for land tenure reforms. The Indigenous Property Rights Network that has emerged from the work of the AHRC is a rare opportunity for Aboriginal and Torres Strait Islander people to directly influence the public policy development process. The challenge for the Network will be whether it can have sufficient influence over the outcomes of all of those initiatives and in such a way that the future course of the Indigenous land tenure reform agenda will address their expectations and aspirations and not lead to the erosion of the Indigenous estate or the diminution of any existing rights within the estate.

## **Conclusion: What land tenure and land use planning reforms are needed?**

I have long maintained that there are two elements to the High Court's *Mabo (No. 2)* decision (Wensing 1999). In substance, the judgment recognised that Eddie Mabo and others on behalf of the Meriam people of the Murray Islands in the Torres Strait had prior and continuing occupation and ownership of the Murray Islands. In essence, the judgment found that Aboriginal and Torres Strait Islander law and culture is recognised by the common law of Australia. As a consequence, there are now effectively two distinct systems of land law in Australia, one deriving from colonisation, the other from prior traditional ownership of Australia by Aboriginal and

Torres Strait Islander peoples.<sup>23</sup> These conceptions indicate critical changes to the way we need to think about land tenure and land use and environmental planning.

The Aboriginal and Torres Strait Islander peoples of Australia have never ceded their lands and Australia has never dealt fairly with them about the loss of their lands. We can no longer deny that the root of all property in land for settler Australians involved acts of dispossession of Aboriginal and Torres Strait Islander peoples, thefts for which no-one has ever been held responsible (Kerruish and Purdy 1998). This denial of the existence of prior Aboriginal and Torres Strait Islander ownership of Australia has become an international embarrassment. It is no longer tolerable that we continue constructing legal orthodoxies that suit the settler state. For example, the provisions in the NTA that declare that the extinguishment of native title has occurred (partly or wholly) will not make the laws and customs of Aboriginal and Torres Strait Islander people disappear.

As Justice French (as he then was) and Neate have both stated, the term 'extinguishment' is a metaphor for placing limits upon the extent to which recognition will be accorded to Aboriginal and Torres Strait Islander peoples under Australian law (French J in *The Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v State of Queensland* (2001) FCA 414; Neate 2002:118). Regardless of judicial or legislative status, Aboriginal and Torres Strait Islander peoples will always retain their special relationship with and responsibility for land and sea country (Rose 1996; Dodson 1998:209).

Given the many constraints around native title, it is reasonable to ask whether native title holders are feeling somewhat frustrated or disillusioned because they are unable to use their property rights to engage in the modern economy on their terms when opportunities arise and without having to surrender and permanently extinguish their native title rights and interests. Smith (2001:2) likens this to replacing 'the historical fiction of *terra nullius* with the legal fiction of extinguishment'. Little wonder that some commentators (Ring 2006) see native title as a 'dodgy conveyance'.

The reality is that there is very little evidence that forcing the subdivision of communally owned lands into individualised and alienable land titles will improve the day-to-day lives of Aboriginal and Torres Strait Islander people (Dodson and McCarthy 2010:100). As Dodson and McCarthy (2010:100) rightly conclude, governments 'must not be permitted to legislate away the traditional, spiritual, and unique connection of Indigenous peoples to their lands'.

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<sup>23</sup> It is acknowledged that neither of the two systems of laws and customs is of a unitary nature. There are many tribes, mobs, clans or nations of Aboriginal and Torres Strait Islander peoples in Australia, each with its own distinct laws and customs. The Australian nation is a federation of six states and two territories, each with its own distinct laws and customs.

It is time therefore to ‘puncture some legal orthodoxies’ (McHugh 2011:68, 328-339) relating to property and land tenure and, in particular, to inalienability, extinguishment and non-extinguishment of customary rights to land.

Let me finish with a few suggestions.

Real change has to happen inside the Crown’s land tenure system. Let’s turn the legal principles of property relations, inalienability and extinguishment on their proverbial heads. Let’s develop a form of leasehold, owned and operated by the appropriate Aboriginal or Torres Strait Islander customary land rights holders that will allow them to determine the terms and conditions for development on their lands so they can partake in the risks and benefits arising from land development and resource exploitation. This is a big step, but its time has come.

Land use planning systems and the practices through which they are made operational must also undergo fundamental change. Everyday planning practice must involve a habitual engagement with Aboriginal and Torres Strait Islander peoples about their country, about proposals that affect their lands and waters, and in a manner that acknowledges and respects the parity of two co-existing land ownership and governance approaches. A basic starting point would be to take seriously the relevance to land use and environmental planning of Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which embodies the principle of free, prior and informed consent, before adopting and implementing legislative or administrative measures that may affect Indigenous peoples and their traditional country (UN 2007). This is an integral part of the human rights-based approach and is 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 (Wensing and Porter 2015:9).

Garrick Small and I have previously argued that the logic of customary ownership suggests very strongly that customary owners have both a real and a symbolic cause to be included in land use planning (Wensing and Small 2012). As the original owners, from whom most rights have been stripped in many cases, the right to have a voice against what they consider inappropriate development is arguable from the perspective of natural justice. By allowing customary owners the right of veto in land use planning comparable to the operational power of urban and regional planners, no right is being removed from Western freehold landholders. We have also argued that the history of customary owners as prudent stewards of land and waters suggests that their exercise of such powers would be prudent and in the interests of the community, especially in the longer term.

My overall conclusion is that a stronger system of implicit recognition of the prior and continuing ownership of all land and waters in Australia by Aboriginal and Torres Strait Islander peoples under traditional law and custom is required to embed their

consideration in conventional land tenure and contemporary land use and environmental planning systems. This is precisely what my doctoral research is exploring.

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## Appendix A: Principles for Indigenous land tenure reform

Over the course of the debate about Indigenous land tenure reforms, Aboriginal and Torres Strait Islander people and organisations articulated their aspirations for land tenure reform through the development of principles. These include:

- the National Indigenous Council in 2005
- the Aboriginal and Torres Strait Islander Social Justice Commissioner in 2009
- SGS Economic and Planning in the context of the 'Living on Our Lands' study for the Western Australian Department of Indigenous Affairs in 2012
- the Australian Law Reform Commission in 2014 in the context of the Commission's review of the *Native Title Act 1993* (Cth)
- the Indigenous Leaders Roundtable convened by the Australian Human Rights Commission in Broome, Western Australia, in 2015
- the Expert Indigenous Working Group advising the Senior Officers Working Group in its report to COAG on the investigation into Indigenous land administration and use in 2015
- the Indigenous Property Rights Network at its meeting in Canberra in 2016.

This appendix presents the principles from each of these sources.

## National Indigenous Council: Indigenous land tenure principles, 2005

In February 2005 the National Indigenous Council (NIC) developed a set of five 'Possible Indigenous land tenure principles' (NIC 2005:185). The NIC was an advisory body appointed to the Australian Government through the Ministerial Taskforce on Indigenous Affairs. It was created in December 2004 and was wound up in 2008, early in the first term of the Rudd Labor government. Its purpose was to advise the government on a range of issues, including economic development for Indigenous Australians. Warren Mundine, an NIC member, took the draft principles to the National Native Title Conference in Coffs Harbour, New South Wales, in early June 2005. The NIC then presented them, without change, to the Ministerial Taskforce on Indigenous Affairs on 15–16 June 2005.

### National Indigenous Council: Indigenous land tenure principles, 2005

No.	Principle (NIC 2005:185, emphasis added)
1.	<b>The principle of underlying communal interests in land is fundamental to Indigenous culture.</b>
2.	<b>Traditional lands should also be preserved in ultimately inalienable form for the use and enjoyment of future generations.</b>
3.	<b>These two principles should be enshrined in legislation, however, in such a form as to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.</b>  An effective way of reconciling traditional and contemporary Indigenous interests in land — as well as the interests of both the group and the individual — is a mixed system of freehold and leasehold interests.  The underlying freehold interest in traditional land should be held in perpetuity according to traditional custom, and the individual should be entitled to a transferable leasehold interest consistent with individual home ownership and entrepreneurship.
4.	<b>Effective implementation of these principles requires that:</b> <b>the consent of the traditional owners should not be unreasonably withheld</b> for requests for individual leasehold interests for contemporary purposes; <b>involuntary measures should not be used except as a last resort</b> and, in the event of any compulsory acquisition, strictly on the existing basis of just terms compensation and, preferably, of subsequent return of the affected land to the original owners on a leaseback system basis, as with many national parks.
5.	<b>Governments should review and, as necessary, redesign their existing Aboriginal land rights policies and legislation to give effect to these principles.</b>

## Aboriginal and Torres Strait Islander Social Justice Commissioner: Principles for Indigenous land tenure reform, 2009

In the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 2009*, the Commissioner included a set of 14 'Principles for Indigenous land tenure reform' (ATSISJC 2009:184–7). In the context of the United Nations Declaration on the Rights of Indigenous Peoples, and reflecting the fact that a key principle in that Declaration is the right to free, prior and informed consent and the fact that Australia has endorsed the Declaration, the principles should be considered prior to the introduction of land tenure reforms and any home ownership scheme.

### Aboriginal and Torres Strait Islander Social Justice Commissioner: Principles for Indigenous land tenure reform, 2009

No.	Principle (ATSISJC 2009:185–7, emphasis added)
1.	<b>Indigenous land must not be treated as a lesser form of land ownership.</b> Consistent with this principle, Indigenous land owners must not be required to forego any of their rights in relation to the land in order to receive essential services and infrastructure.
2.	<b>Government policies in relation to negotiating leases on Indigenous land should be consistent with international human rights standards.</b> Consistent with this principle: the lease area and period of the lease must not be greater than what is required for the provision of the service; the right of Indigenous landowners to charge rent must be respected; and the terms should respect the principles of self-determination by incorporating local Aboriginal decision-making authority.
3.	<b>Reforms to Indigenous land tenure must follow the process for free, prior and informed consent.</b> Consistent with this, governments must consult broadly in relation to any reforms. For consultation to be effective, governments need to provide clear and detailed information about the purpose and scope of any proposed reforms. Principles for consultation are set out in Appendix 3 [of the <i>Native Title Report 2009</i> ].
4.	<b>Government policies must acknowledge the distinction between the interests of community residents and the interests of land owners and native title holders, and support appropriate mechanisms for agreement making.</b>
5.	<b>Tenure reform should not lead to any involuntary reduction in the Indigenous estate.</b>
6.	<b>Tenure reforms should aim to provide Indigenous people with stronger forms of Indigenous land ownership.</b>
7.	<b>Compulsory acquisition of Indigenous land or native title rights, must only be used as a measure of last resort after full consideration of the social, cultural and spiritual consequences of acquisition,</b> including a consideration of the traditional law of many Indigenous peoples to have control over access and use of their lands. Consistent with this, laws in relation to compulsory acquisition must not make it easier to acquire Indigenous land than other forms of land.
8.	<b>Where Indigenous land or native title is acquired, the land owners or native title holders must receive just terms compensation.</b>
9.	<b>Before a home ownership scheme is developed on Indigenous land, the community residents and land owners and any native title holders must first be provided with all necessary information on home ownership.</b> This includes: economic modelling for that community on the possible implications of a home ownership scheme, which must include a description of what might happen to house prices over time and what this might mean for the community and homeowners;

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how the price will be worked out for the sale of former government housing;  
the options in relation to transfers, including the implications of 'open' and 'closed' markets;  
how the scheme might be regulated and governed;  
the obligations of home owners in relation to maintenance; and  
the obligations of home owners under a home loan or mortgage, including the circumstances in which a home may be lost or forfeited.

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10. **Where a community chooses to develop a home ownership scheme, the governance arrangements for the scheme must respect local Aboriginal or Torres Strait Islander decision-making authority.**

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  11. **Government housing must be sold at a price that reflects the housing market and the income capacity of participants rather than the depreciated asset value of the building.**

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  12. **Financing for home ownership schemes should include ways of recognising broader contributions, such as 'sweat' finance and 'good renter' programs, and ways of giving Indigenous land owners and native title holders the benefit of their land ownership.**

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  13. **Participants in home ownership schemes must receive appropriate information before entering the scheme.** This includes:
    - a property condition report that includes a description of potential repairs and maintenance for the building in the next few years;
    - financial planning advice; and
    - legal advice on the implications of home ownership and having a home loan / mortgage.

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  14. **Governments must ensure that any home ownership benefits or incentives offered to Indigenous people living on Indigenous lands are extended to Indigenous people across Australia in a fair and equitable manner to ensure that all Indigenous people can enjoy the benefits of home ownership.**
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## SGS Economics and Planning: ‘Living on Our Lands’ study, 2012

As part of the ‘Living on Our Lands’ study for the Western Australian Department of Indigenous Affairs in 2012 and building upon the principles developed by the Aboriginal and Torres Strait Islander Social Justice Commissioner and community consultations with case study communities in the Kimberley region, SGS Economics and Planning developed a set of nine ‘Principles for Indigenous land tenure reform’ (SGS Economics and Planning 2012a:45–9). As part of this study, the consultants were required to ‘Investigate Aboriginal people’s perspectives about the meaning and application of tenure and home ownership’ (SGS Economics and Planning 2012b: xiii).

### SGS Economics and Planning: Principles for Indigenous land tenure reform

No.	Principle (SGS Economics and Planning 2012:45–9, emphasis added)
1.	<b>That the inalienability of Aboriginal lands be preserved. Inalienability prevents the severing of cultural and spiritual connections to land through loss of the Aboriginal estate, and provides the cultural, social and political basis for self-determined processes of development.</b>
2.	<b>Tenure reform should aim to provide Aboriginal people with stronger forms of Aboriginal land ownership.</b> Consistent with this principle: Tenure reform should provide Aboriginal people with secure forms of tenure on terms which maximise proprietary rights of ownership and enable effective self-determination. Aboriginal land must not be treated as a lesser form of land ownership and Aboriginal land owners must not be required to forego any of their rights in relation to the land in order to receive essential services and infrastructure.
3.	<b>That effective communal management, development and occupation by Aboriginal people be given the utmost encouragement.</b> Consistent with this principle: Individual leases should not be used as a mechanism for diminishing or eroding communal ownership and control. Lease arrangements should be on terms specified with the free, prior and informed consent of Aboriginal owners and native title holders, and not subject to ongoing requirements for Ministerial consent. The precise form of governance arrangements will depend on the local context — with potential for provisions which create subsidiary governance vehicles and tenures depending on the land use objectives in question — but the underlying estate management function should be retained for the community or traditional owner group as a whole.
4.	<b>Changes to tenure must be voluntary: issued only with the free, prior and informed consent of Aboriginal land owners.</b> Consistent with this principle: Tenure reform should not lead to any involuntary reduction in the Aboriginal estate. The imposition of compulsory leases or acquisition orders, irrespective of the perceived benefits, would represent a significant winding back of Indigenous rights in Australia. Reforms to Aboriginal land tenure must follow the process for free, prior and informed consent. For consultation to be effective, governments need to provide clear and detailed information about the purpose and scope of any proposed reforms.
5.	<b>Policies in relation to the negotiation of leases on Aboriginal land should be respectful of Aboriginal decision-making authority and not treat Aboriginal land as an inferior form of tenure.</b> Consistent with this principle: Where leases are negotiated, the lease area and period of the lease must not be greater than what is required for the provision of the service and the right of Aboriginal landowners to charge rent must be respected.

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Land subject to transfer should be inclusive of all parcels, rather than make exemptions for land on which public infrastructure has been built.

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6. **Compulsory acquisition of native title rights and interests or Aboriginal land must only be used as a measure of last resort, and after full consideration of the economic, social, political and cultural consequences.** Consistent with this principle:

Government policies regarding the compulsory acquisition of native title rights and interests or Aboriginal land should be transparent and may require the exercise of a statutory impact assessment process to consider the cost-benefit of economic, social, political and cultural impacts.

Where native title rights and interests or Aboriginal land are compulsorily acquired, native title holders or land owners must receive compensation on just terms. A grant of land may form part of this payment.

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7. **Tenure arrangements must acknowledge the distinction between the interests of native title holders, Aboriginal land owners and the interests of community residents with historical ties.**

For development to be socially and politically sustainable, the rights and interests of native title holders and Aboriginal land holders must be reconciled with those possessing historical ties to the land in decision-making over identified land uses, for a specified period of time, in prescribed locations. Governance arrangements established for the implementation of development planning through the management of interests in land should reflect this requirement.

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8. **Lands and property transferred to Aboriginal ownership should be remediated and made safe.**

Lands transferred to Aboriginal ownership should be free of liabilities resulting from contamination or dilapidation of land and buildings.

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9. **Before a home ownership scheme is developed on Aboriginal land, native title holders, community residents and land owners should first be provided with all necessary information on the implications of home ownership.** This includes:

Economic modelling of the likely movement of asset values over time and what this might mean for the community and homeowners;

How the price will be worked out for the sale of former government housing;

The options in relation to transfer, including the implications of 'open' and 'closed' markets;

How the scheme might be regulated and governed;

The obligations of home owners in relation to maintenance;

The obligations of home owners under a home loan or mortgage, including the circumstances in which a home may be lost or forfeited.

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## Australian Law Reform Commission: The guiding principles for the Inquiry, 2015

In the context of its review in 2014 of the *Native Title Act 1993* (Cth), the Australian Law Reform Commission (ALRC) developed a set of five guiding principles (ALRC 2015a:15, 50–5). A fuller discussion of the guiding principles is contained in the ALRC’s final report. In examining what, if any, changes could be made to Commonwealth native title laws and legal frameworks, the terms of reference for the review directed the ALRC to be guided by the Preamble and objects of the *Native Title Act 1993* (Cth). The ALRC does not elaborate on how it arrived at the set of five principles contained in its final report.

### Australian Law Reform Commission: The guiding principles for the Inquiry, 2015

No.	Principle (ALRC 2015a:50–5, emphasis added)
1.	<b>Acknowledging the importance of the recognition of native title.</b> Reform should acknowledge the importance of the recognition and protection of native title for Aboriginal and Torres Strait Islander peoples and the Australian community.
2.	<b>Acknowledging interests in the native title system.</b> Reform should acknowledge the range of interests in achieving native title determinations that support relationships between stakeholders.
3.	<b>Timely and just resolution of determinations.</b> Reform should promote timely and practical outcomes for parties to a native title determination through effective claims resolution, while seeking to ensure the integrity of the process.
4.	<b>Consistency with international law.</b> Reform should reflect Australia’s international obligations in respect of Aboriginal and Torres Strait Islander peoples, and have regard to the United Nations Declaration on the Rights of Indigenous Peoples.
5.	<b>Supporting sustainable futures.</b> Reform should promote sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

## Indigenous Leaders Roundtable Communiqué, 2015

In May 2015 the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, and Human Rights Commissioner, Tim Wilson, convened a high-level meeting in Broome, Western Australia, with Indigenous leaders to discuss how to tackle the barriers to property rights after native title. This meeting was identified as an Indigenous Leaders Roundtable and was hosted at the Nulungu Research Institute at The University of Notre Dame on the land of the Yawuru people. The purpose of the roundtable was to identify options for addressing challenges to Aboriginal and Torres Strait Islander peoples creating economic development opportunities, particularly due to barriers that prevent the leveraging of property rights. A communiqué was released at the conclusion of the roundtable and identified five sets of issues (AHRC 2015d).

### Indigenous Leaders Roundtable Communiqué, 2015

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#### **No. Issues to better enable economic development within the Indigenous estate (AHRC 2015b:2)**

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1. **Fungibility and native title** — enabling communities to build on their underlying communal title to create opportunities for economic development.
  2. **Business development support and succession planning** — ensuring that Aboriginal and Torres Strait Islander peoples have the governance and risk management skills and capacity to successfully engage in business and manage their estates.
  3. **Financing economic development within the Indigenous estate** — developing financial products, such as bonds, to underwrite economic development through engaging the financial services sector and organisations including the ILC and IBA.
  4. **Compensation** — rectifying the existing unfair processes for compensation for extinguishment of native title and considering how addressing unfinished business could leverage economic development opportunities.
  5. **Promoting Indigenous peoples [sic] right to development** — promoting opportunities for development on Indigenous land including identifying options to provide greater access to resources on the Indigenous estate.
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## Senior Officers Working Group report to COAG: Expert Indigenous Working Group principles, 2015

At its meeting in October 2014, COAG committed to undertaking an investigation into Indigenous land administration and use (at the behest of Queensland and the Northern Territory). A Senior Officers Working Group was established to undertake the investigation, with membership drawn from first Ministers' departments and departments with relevant Indigenous affairs policy responsibility from the Commonwealth, New South Wales, Victoria, Queensland, South Australia and the Northern Territory. Western Australia declined to participate. An Expert Indigenous Working Group was also established by the Commonwealth in February 2015 to provide guidance to the investigation on policy directions and proposals for Indigenous land administration and use, input and advice on the report to COAG, and leadership on consultation and engagement with Indigenous stakeholders. The purpose of the investigation was to provide COAG with a cohesive policy direction for governments to support Indigenous peoples' use of their rights in land and waters for economic development.

The Senior Officers Working Group's final report states that 'This framing reflects the fact that Indigenous Australians are at various stages along the rights process, from still seeking recognition of those rights, to holding these rights and successfully doing business on their land. It also recognises the difficulties faced in developing land and providing beneficial opportunities for all parties' (Senior Officers Working Group 2015: 24).

The investigation identified five key areas of focus for governments to better enable Indigenous land owners and native title holders to use their rights and interests in land and waters for economic development. The principles were developed by the Expert Indigenous Working Group.

### Senior Officers Working Group report to COAG: Expert Indigenous Working Group principles, 2015

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#### No. Principle (Senior Officers Working Group 2015:11–12)

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1. **Gaining efficiencies and improving effectiveness in the process of recognising rights**

The recognition of Indigenous peoples' rights and interests in land and water is a fundamental first step for government to engage with Indigenous people.

Initiatives and policies should incentivise and resource the settlement of native title claims by agreement and directing resources to post-determination outcomes rather than focusing on the mere existence of native title. This should include assistance with strategic planning and establishment of Prescribed Bodies Corporate (PBCs), the grant of commercially and culturally valuable land to PBCs and Indigenous land holding entities and the comprehensive settlement of compensation for extinguishment (including for pre-1975 extinguishment).

Policy and legislative reforms and initiatives should make the native title claims and determinations process fairer and more efficient for Indigenous claimants, without weakening or compromising the strength of native title rights and interests.

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## 2. **Supporting bankable interests in land**

It is important that, wherever possible, the fundamental inalienable character of Indigenous land and native title should be maintained to preserve communal and intergenerational interests and strengthen the Indigenous estate.

Reforms should allow native title holders to fully realise the value of their traditional land and create economic opportunities through borrowing money and raising capital, without extinguishing the underlying native title interest. This should include looking at appropriate bodies providing loan guarantees, registering Indigenous title in land administration systems and providing Indigenous people with the same home ownership opportunities that non-Indigenous people have (i.e. without giving up their native title/land rights).

Where rights to take resources are established in native title determinations, governments should recognise native title holders' entitlements to use these rights for commercial purposes and provide support to ensure that traditional owners are able to benefit and create economic opportunities in areas where there is otherwise often a paucity of opportunity.

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## 3. **Improving the processes for doing business on Indigenous land and land subject to native title**

Decision-making and approval processes should be made more efficient, but not through weakening Indigenous land owners' and native title holders' procedural rights.

The principle of free, prior and informed consent should underpin any decision to delegate, streamline or pre-authorise decision-making.

The most effective way of increasing efficiency and timeliness of decision-making and approvals processes is to increase the capacity of Indigenous land holding and representative bodies to effectively respond to land use applications.

As much as possible, Indigenous land holding and representative bodies' internal decision-making processes should not be externally mandated, and should be capable of being customised to take account of cultural protocols and commercial imperatives.

Indigenous groups should retain complete autonomy to choose how they set up and structure their PBC or land holding entities (i.e. either under *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) or *Corporations Act 2001* (Cth), and the default PBC should not be the Indigenous Land Corporation (ILC)).

Land use approval processes support Indigenous land owners and native title holders to be partners and proponents in economic development on their land and waters, not just part of a 'tick a box' approvals process.

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## 4. **Investing in the building blocks of land administration**

It is critical the fundamentals of effective land administration are in place on Indigenous land and land subject to native title as they are for non-Indigenous land.

Government approvals processes for Indigenous led development on Indigenous land or land subject to native title should be streamlined, simplified and customised so that they are accessible for and supportive of land and water use proposals by traditional owners.

There should be exemptions and concessions from land user charges, land taxes and duties where Indigenous land is granted as freehold or leasehold to Indigenous land holding bodies and PBCs.

Land that is beneficially held for Indigenous Australians should be converted to exclusive possession native title.

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## 5. **Building capable and accountable land holding and representative bodies**

Indigenous land holding and representative bodies (including PBCs) are charged with exercising statutory functions and it is important that they are resourced accordingly to ensure they are able to operate effectively and efficiently.

In consultation with the Productivity Commission, governments should investigate introducing a national measure to ensure Indigenous land holding entities and PBCs are appropriately resourced.

It is essential that cultural governance and decision-making processes are undertaken either as part of the claims resolution process or immediately post-determination.

State governments must better support economic development through building partnerships with Indigenous land owner and Native Title Representative Bodies (NTRBs).

Indigenous groups should retain complete autonomy over Indigenous benefits but that initiatives to use funds under Indigenous management to support economic development be supported and supplemented by government funding and policy measures.

The role of Office of the Registrar of Indigenous Corporation (ORIC) as regulator under the CATSI Act

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is incompatible with the complex systems of cultural governance and decision-making in PBCs. NTRBs should have primary responsibility for the regulation of PBCs and are well placed to manage dispute resolution scenarios with reference to ethnographic material, decision-making processes and regional context.

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The Senior Officers Working Group's final report also included a set of guiding principles and recommendations agreed by all governments participating in the process. All recommendations also include several specific actions that all governments have agreed to undertake. Including, for example, State and territory governments committing to integrate information about Indigenous land and native title interests into state and territory land title systems (Senior Officers Working Group 2015:9).

## Senior Officers Working Group report to COAG: Principles and Recommendations agreed by All governments, 2015

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### No. Principle (Senior Officers Working Group 2015:8–9)

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- a. Indigenous land owners and native title holders should be involved in the development of reforms that affect their ability to use their rights in land and waters.
  - b. Indigenous land owners and native title holders should have the choice to strike a balance between economic and cultural uses of their rights in land and waters.
  - c. Indigenous land owners and native title holders should have the opportunity to be partners in development on their land and waters.
  - d. Reducing red tape and simplifying administrative processes can reduce the time and cost associated with doing business on Indigenous land, and land and waters subject to native title.
  - e. Maximising economic development on Indigenous land, and land and waters subject to native title is critical to the Closing the Gap agenda and strengthens the Australian economy.
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### No. Recommendation

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- 1. All governments commit to gaining efficiencies and improving the effectiveness of claims processes under the *Native Title Act 1993* (Cth) and statutory land rights regimes.
  - 2. All governments commit to supporting the ability of Indigenous landowners and native title holders to use their rights in land and waters to raise capital for investment.
  - 3. All governments commit to working with Indigenous stakeholders to improve the processes for doing business on Indigenous land and land subject to native title.
  - 4. All governments commit to investing in the building blocks of land administration to lay the foundations for Indigenous people to use their rights and interests in land for economic development.
  - 5. All governments commit to building capable and accountable land holding and representative bodies to effectively represent their communities' aspirations and facilitate economic development.
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## Indigenous Property Rights Network: Guiding rights and principles for process and outcomes, 2016

In March 2016 the Australian Human Rights Commission convened a meeting of the Indigenous Property Rights Network as a continuation of the Roundtables that the Commission had convened in Broome in May 2015 and in Sydney in December 2015. At its meeting in March 2016, the Indigenous Property Rights Network considered and approved a set of eight guiding rights and principles (AHRC 2016c). The principles address the application of international human rights — that the process be Indigenous led; that it be an inclusive process; that the land tenure reform work is grounded in the experience and advice of Aboriginal and Torres Strait Islander peoples; that self-determination is a fundamental right that must be put into practice through the application of free, prior and informed consent to questions of development on Indigenous lands; that the inherent rights of Aboriginal and Torres Strait Islander peoples to their land be strengthened and protected; that Aboriginal and Torres Strait Islander people have the right to make their own decisions; and that there is respect for and protection of culture.

The Indigenous Property Rights Network defined the ‘Indigenous estate’ to include ‘the lands, seas, waters and resources of Aboriginal and Torres Strait Islander Peoples’ (AHRC 2016c:1).

## Indigenous Property Rights Network: Guiding rights and principles for process and outcomes, 2016

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### No. Guiding rights and principles for process and outcomes (AHRC 2016c)

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#### Foundational rights

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##### 1. Application of international human rights

The foundational rights which are applied by the Network in its deliberations and decision making are outlined in:

- The United Nations Right to Development.<sup>24</sup>
  - The United Nations Declaration on the Rights of Indigenous Peoples, in particular:
    - a) self-determination<sup>25</sup>
    - b) participation in decision-making, free, prior and informed consent, and good faith<sup>26</sup>
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<sup>24</sup> United Nations Declaration on the Right to Development A/RES/41/128, 4 December 1986, 97th plenary meeting. At <http://www.un.org/documents/ga/res/41/a41r128.htm> (viewed 12 May 2016). (Not noted in original)

<sup>25</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts 18, 19, 5, 10, 11(2), 27, 28, 29, 32(2), 41, 46. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

<sup>26</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts 18, 19, 5, 10, 11(2), 27, 28, 29, 32(2), 41, 46. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

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- c) respect for and protection of culture<sup>27</sup>
  - d) equality and non-discrimination<sup>28</sup>.
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## Process

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### 2. Indigenous led

The Indigenous Strategy Group has been established to guide the Network.  
Decisions by the Indigenous Strategy Group and the Network are made by consensus.

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### 3. Inclusive process

The Network is open to all Aboriginal and Torres Strait Islander Peoples.  
The Network will engage and build relationships with government, stakeholders and each other in ways that are:

- based on good faith, equality and non-discrimination
  - collaborative
  - cooperative
  - inclusive
  - participatory.
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### 4. Experience, advice, research and evidence

The work of the Network will be grounded in the experience and advice of Aboriginal and Torres Strait Islander Peoples as well as current research and information to ensure all decisions are made using the best available evidence.

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## Outcomes

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### 5. Self-Determination

Self-determination is the fundamental right of Aboriginal and Torres Strait Islander Peoples to shape our own lives and be the key decision-makers in our lives.

An essential expression of self-determination is the application of free, prior and informed consent to questions of development on Indigenous lands.

This includes the right to engage in, oppose and negotiate development on Indigenous lands.

The Network will have regard to the interests of government and industry stakeholders, but the rights of Aboriginal and Torres Strait Islander Peoples to be self-determining in regard to their interests in land will be paramount for the Network.

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### 6. Secure and Protect the Indigenous Estate

Fundamental to the work of the Network is the strengthening of the inherent rights of Aboriginal and Torres Strait Islander Peoples to their land and waters and to exercise self-determination.

The Network recognises native title as a property right.

In the course of its Indigenous Property Rights work, the Network will not diminish, jeopardise or limit in any way the rights and interests of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners.

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### 7. Right to make decisions

The Network respects the right for Aboriginal and Torres Strait Islander Peoples to make their own decisions on matters that affect them. As such, local decision-making about the Indigenous Estate,

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<sup>27</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts (1), 31, 11(1), 11(2), 12(1), 13(1), 15(1), Preamble 3, 7, 10, 11. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

<sup>28</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts 8(1)(e), 9, 15(2), 21(1), 22(2), 44, 46(3), Preamble 5, 9, 18, 22. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

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including questions of development, are a matter for each group with rights and interests in the relevant land or water.

The Network values the right of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners to pursue, reject or negotiate development.

The Network supports and advocates for application of the principle of free, prior and informed consent when decisions are made with respect to development on the Indigenous Estate.

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## **8. Respect for and protection of culture**

The Network will:

- seek to strengthen state, territory and Commonwealth legislative and policy protections for the heritage of Aboriginal and Torres Strait Islander Peoples
  - respect the cultural authority of each group of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners
  - recognise and respect the right of each group of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners to be different
  - work in ways that strengthens the inherent right of each group of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners to exercise self-determination
  - engage respectfully with each group of Aboriginal and Torres Strait Islander landowners, holders of native title, Traditional Owners and their representatives
  - consider appropriate ways to provide education and transfer knowledge to future generations.
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## Appendix B: The Accessibility/Remoteness Index of Australia (ARIA)

In 1998, the then Commonwealth Department of Health and Aged Care commissioned a project to measure and classify the remoteness of populated localities in relation to 'service centres' of various sizes. The result was the Accessibility/Remoteness Index of Australia or ARIA index as it has become known (Department of Health and Ageing 2001; University of Adelaide: n.d.). The ARIA attempts to develop a standard classification and index of remoteness for the whole of the country.

The resulting Accessibility/Remoteness Index for Australia (ARIA) was designed to be comprehensive, sufficiently detailed, as simple as possible, transparent, defensible, and stable over time — and to make sense 'on the ground'.

ARIA was also designed to be an unambiguously geographical approach to defining remoteness. That is, socio-economic, urban/rural and population size factors are not considered for incorporation into the measure. ARIA calculates remoteness as accessibility to some 201 service centres based on road distances. Remoteness values for 11,340 populated localities are derived from the road distance to service centres in four categories (a weighting factor is applied for islands). Remoteness values for each populated locality are then interpolated to a one-kilometre grid that covers the whole of Australia and averages calculated for larger areas.

To create an associated classification, ARIA values are grouped into five categories using 'natural breaks' in the 0 – 12 continuous variable:

1. **Highly Accessible** (ARIA score 0 – 1.84) — relatively unrestricted accessibility to a wide range of goods and services and opportunities for social interaction.
2. **Accessible** (ARIA score >1.84 – 3.51) — some restrictions to accessibility of some goods, services and opportunities for social interaction.
3. **Moderately Accessible** (ARIA score >3.51 – 5.80) — significantly restricted accessibility of goods, services and opportunities for social interaction.
4. **Remote** (ARIA score >5.80 – 9.08) — very restricted accessibility of goods, services and opportunities for social interaction.
5. **Very Remote** (ARIA score >9.08 – 12) — very little accessibility of goods, services and opportunities for social interaction.

ARIA defines five categories of remoteness based on road distance to service centres. In 1999 a further revision of ARIA, called ARIA+, was developed by the

Australian Bureau of Statistics that incorporated more information on the location of service centres. The five levels of remoteness, with their corresponding ARIA values, are as follows:

- *Major Cities* — ARIA values of between 0 and 0.2;
- *Inner Regional* — ARIA values greater than 0.2 but less than or equal to 2.4;
- *Outer Regional* — ARIA values greater than 2.4 but less than or equal to 5.92;
- *Remote* — ARIA values greater than or equal to 5.92 and less than or equal to 10.53; and
- *Very Remote* — ARIA values of greater than 10.53 (ABS 2001:14; see also ABS 2005 and 2011).

For the purposes of this paper, the term 'remote' includes the communities falling within the '*Remote*', '*Very Remote*' and '*Outer Regional*' levels of the ARIA index.

Ever since the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* in the late 1990s, the Commonwealth has been pursuing an Indigenous land tenure reform agenda, which has continued to gain momentum. Although a clear policy on Indigenous land tenure reform has not been articulated, the underlying premise is that traditionally grounded, communal forms of land title are a barrier to wealth creation and that communally owned lands should give way to individualised and alienable rights in land.

This paper argues that weak links are being made between increasing opportunities for economic development (including private home ownership) and the need for Indigenous land tenure reform. The research highlights the frustration of Aboriginal and Torres Strait Islander peoples with the nature and direction of the Commonwealth's Indigenous land tenure reform agenda and their strong opposition to any diminution of their estate.

The paper concludes that what is required is an implicit recognition of the prior and continuing ownership of all land and waters in Australia by Aboriginal and Torres Strait Islander peoples under their traditional laws and customs to embed the genuine consideration of their rights, interests, knowledges, values, needs and aspirations in all conventional land tenure and contemporary land use planning systems.

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