Land Justice for Indigenous Australians:

How can two systems of land ownership, use and tenure coexist with mutual respect based on parity and justice?

Part 1

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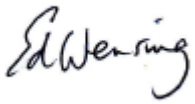
Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university. To the best of the author's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.



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Acknowledgments

First and foremost, I acknowledge the Traditional Owners on whose land I live, work, study and play, the Ngunawal/Ngambri people. I acknowledge you have suffered the indignity of your land being taken from you without your consent, without a treaty and without compensation. I also acknowledge that these matters are yet to be resolved. It is my sincere hope that this research sets the groundwork for a just resolution.

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I am deeply indebted to my dear friend and colleague at James Cook University, Dr Sharon Harwood, for pursuing the reforms that we saw as vitally necessary for restoring a level of parity and justice for Aboriginal and Torres Strait Islander peoples' knowledge, culture and tradition in conventional land use planning systems.

And to the ANU Library staff who worked tirelessly locating hard to find resources and with formatting the final documents. To NCIS academics, staff and my HDR colleagues who shared the journey with me for providing a nurturing and rewarding research environment, my sincere thanks. I also am deeply indebted to many, many friends and colleagues for their wisdom and insights, but they are in no way implicated with any responsibility for what follows. And to my wonderful teacher and mentor on social research methods, Bruce Smyth and one of his brilliant students, Giverney Ainscough, who provided some much-needed academic rigour at the eleventh hour, my sincere thanks.

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Referencing

Referencing in this inter-disciplinary thesis in Indigenous Studies uses both the Melbourne University's *Australian Guide to Legal Citation* (2010) for legal citation, and for everything else the Australian National University's *Fenner School Harvard Referencing Style Guide* (2015). Where authors by the same family name are cited, they are distinguished by the initial of their first name, i.e. I. Watson, or N. Watson.

Terminology

I recognise the diversity of cultures, languages, kinship structures and ways of life and world views of the Aboriginal and Torres Strait Islander peoples. There is no single cultural model that fits all Aboriginal and Torres Strait Islander peoples, and I recognise they retain their distinctive cultural identities, regardless of where they live in Australia. In this thesis therefore, I use the term 'Aboriginal and Torres Strait Islander peoples' to refer to their collective terrestrial rights and interests throughout Australia. I use the term 'Aboriginal peoples' to refer to the terrestrial rights and interests of Aboriginal peoples, mainly in the Western Australian context, but sometimes throughout Australia and who are not traditionally from the Torres Strait Islands. Where relevant, other applications of these and related terms are explained in footnotes.

Copyright

Ethics

The research for this thesis was conducted in accordance with the Australian Institute of Aboriginal and Torres Strait Islander Studies' (AIATSIS) *Guidelines for Ethical Research in Australian Indigenous Studies 2011* (AIATSIS, 2011) and the Australian National University's (ANU) Human Research Ethics requirements. The ANU's Human Research Ethics Committee granted ethics clearance for the inclusion of two case study communities on 5 February 2014. A variation to include the Bidan Aboriginal Corporation as an illustrative example was granted by the ANU's Human Research Ethics Committee on 19 November 2015.

The research was also conducted in accordance with a Research Agreement between the Kimberley Land Council (KLC), The ANU and Edward Wensing, and with the KLC's Intellectual Property and Traditional Knowledge Policy and the KLC's Research Protocol.

Warning

Aboriginal and Torres Strait Islander people are advised that this thesis contains names of deceased Aboriginal and Torres Strait Islander persons.

Epigraph

'They talk about the civilised world coming to the untamed world, but I think it is the other way around. It was the barbarians that came to our civilised world.'

Mr Steve Goldsmith, Kaurna Miyurna.

'ENCOUNTERS. Revealing stories of Aboriginal and Torres Strait Islander objects from the British Museum, National Museum of Australia, 27 November 2015 – 28 March 2016.

The Block, Redfern NSW. 'Sovereigngy. Nevr Ceeded'

Photo: Ed Wensing, 22 June 2014.

Abstract

Prior to *Mabo (No. 2)* the legal imaginary of *terra nullius* enabled the creation of a property system as if the pre-existing land rights and interests of the Aboriginal peoples simply did not exist. Ever since the High Court of Australia's landmark decision in *Mabo v State of Queensland (No. 2)* (1992) and the Australian Parliament's enactment of the *Native Title Act 1993* (Cth) there are two legally recognised and distinct systems of land ownership, use and tenure operating in Australia: one older (over 60,000 years), the other much younger (only 230 years).

While *Mabo (No. 2)* dismissed the convenient legal fiction of *terra nullius* as the basis for establishing Australia's sovereignty, the decision set the ground rules for the legal recognition of the pre-existing land rights of the Aboriginal peoples of Australia, which the High Court termed native title rights and interests. Every positive determination of native title is therefore, an affirmation of Aboriginal law and custom and their sovereignty that was present prior to 1788. But *Mabo (No. 2)* gives rise to several 'troubling disjuncts', including the High Court's ambivalence about fracturing the 'skeletal principles' of Australia's sovereignty and the outright denial of Indigenous peoples' sovereignty, the Crown's monopoly power to extinguish native title rights and interests, and their inalienability.

The Aboriginal peoples of Australia continue to assert they never ceded their sovereignty, their land was stolen from them without their consent, extinguishment is alien to their law and custom. As such, the Settler state's assertion of ownership and sovereignty over land has no legitimacy under their law and custom. Aboriginal peoples' persistent desire is that the two systems of law and custom relating to land be accorded an equal and non-discriminatory status. This is not mere historical or symbolic posturing. They want to use their property rights to engage in the economy on their terms and at their choosing. Their position is supported by various international human rights instruments.

This PhD thesis explores the possibilities of supplanting the prevailing orthodoxy with a coherent policy and praxis framework for a mutually respectful coexistence between two culturally distinct forms of land ownership, use and tenure based on parity, mutual respect, reciprocity and justice.

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Acronyms

AAPA	Aboriginal Affairs Planning Authority (WA Government)
AAPA Act	*Aboriginal Affairs Planning Authority Act 1972* (WA)
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ABC	Australian Broadcasting Corporation
ABS	Australian Bureau of Statistics
ACJ	Acting Chief Justice
AFL	Australian Football League
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AIVLE	Australian Institute of Valuers and Land Economists (now API)
AHRC	Australian Human Rights Commission
ALGA	Australian Local Government Association
ALJR	Australian Law Journal Reports
ALRC	Australian Law Reform Commission
ALT	Aboriginal Lands Trust (WA unless otherwise specified)
ANU	The Australian National University
AOTM	Australian on the Map
API	Australian Property Institute
ATNS	Agreements, Treaties and Negotiated Settlements (database)
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSISJC	Aboriginal and Torres Strait Islander Social Justice Commissioner
AusAID	Australian Agency for International Development (Australian Government)
CAEPR	Centre for Aboriginal Economic Policy Research
CALM Act	*Conservation and Land Management Act 1984* (WA)
CANZUS	Canada, Australia, New Zealand, United States (of America)
CAR	Council for Aboriginal Reconciliation
CAT	Centre for Appropriate Technology
CATSI Act	*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)
CBD	Convention on Biological Diversity
CEMAT	European Conference of Ministers Responsible for Regional/Spatial Planning (English translation)
CEO	Chief Executive Officer
CGC	Commonwealth Grants Commission
CJ	Chief Justice

CLR	Commonwealth Law Report
COAG	Council of Australian Governments
CQS	Court of Quarter Sessions
Cth	Commonwealth of Australia
DA	Development Assessment
DAA	Department of Aboriginal Affairs (WA Government)
DIA	Department of Indigenous Affairs (WA Government)
DIAs	Development Investigation Areas
DOGIT	Deed of Grant in Trust
DoH	Department of Housing (WA Government)
DoL	Department of Lands (WA Government)
DP	Deposited Plan
DRD	Department of Regional development (WA Government)
DSD	Department of State Development
ed	Editor
eds	Editors
EIWG	Expert Indigenous Working Group
Est.	Established
FaCSIA	Department of Families, Community Services and Indigenous Affairs (Australian Government)
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs (Australian Government)
FAO	Food and Agriculture Organisation
FCAATSI	Federal Council for the Advancement of Aborigines and Torres Strait Islanders
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
FHEA	Fellow Higher Education Academy
FLR	Federal Law Report
FPIA	Fellow Planning Institute of Australia
GDP	Gross Domestic Product
HCA	High Court of Australia
HDR	Higher Degree Research (scholars)
HREOC	Human Rights and Equal Opportunity Commission
HRH	His Royal Highness

ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	Indigenous Land Corporation
ILO	International Labour Organisation
ILUA	Indigenous land use agreement
Imp	Imperial
Inc.	Incorporated
IPWG	Indigenous Planning Working Group
IUCN	International Union for the Conservation of Nature
J	Justice
JJ	Justices
KDC	Kimberley Development Commission
KLC	Kimberley Land Council
KRED	Kimberley Regional Economic Development Enterprises Pty Ltd
KRPIF	Kimberley Regional Planning and Infrastructure Framework
LAA	*Land Administration Act 1997* (WA)
LGAB	Local Government Advisory Board
LGERA	Local government and environmental reports of Australia
LNG	Liquefied Natural Gas
LUAA	Land Use Activity Agreement (Victoria)
LRCWA	Law Reform Commission of Western Australia
LUAR	Land Use Activity Regime (Victoria)
MoAD	Museum of Australian Democracy
MLC	Member of the Legislative Council
MO	Management Order
NAA	National Archives of Australia
NAC	National Aboriginal Council
NAILSMA Ltd	North Australian Indigenous Land and Sea Management Alliance Ltd
NBY	Nyamba Buru Yawuru
NCIS	National Centre for Indigenous Studies
NCoA	National Commission of Audit
NIC	National Indigenous Council

NIRA	National Indigenous Reform Agreement
NLA	National Library of Australia
NMA	National Museum of Australia
NNTT	National Native Title Tribunal
NPARC	Northern Peninsula Area Regional Council
NPA-RIH	National Partnership Agreements on Remote Indigenous Housing
NPA-RSD	National Partnership Agreement on Remote Service Delivery
NSWALC	New South Wales Aboriginal Land Council
NSWLR	New South Wales Law Report
NSWSA	New South Wales State Archives
NTA	*Native Title Act 1993* (Cth)
NTLR	Northern Territory Law Report
NZ	New Zealand
ORIC	Office of the Registrar of Indigenous Corporations
p	page
PBC	Prescribed Body Corporate
PIA	Planning Institute of Australia
pp	pages
PC	Privy Council
QC	Queen's Counsel
R	Regina
RAPI	Royal Australian Planning Institute of Australia
RC	Referendum Council
RCADC	Royal Commission into Aboriginal Deaths in Custody
RNTBC	Registered Native Title Body Corporate
s	section
SC	Supreme Court
SCFFR	Standing Council on Federal Financial Relations
SCR	Supreme Court of Canada Reports
SGSEP	SGS Economics and Planning
SOWG	Senior Officers Working Group
SPP	State Planning Policy
ss	sections
SWALSC	South West Aboriginal Land and Sea Council

TAFE	Technical and Further Education
TO	Traditional Owner
ToLA	*Transfer of Land Act 1893* (WA)
TOSC	Traditional Owner Steering Committee
TSIRC	Torres Strait Island Regional Council
UK	United Kingdom
UN	United Nations
UNCERD	United Nations Committee on the Elimination of Racial Discrimination
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHRC	United Nations Human Rights Council
UNPFII	United Nations Permanent Forum on Indigenous Issues
USA	United States of America
UWA	University of Western Australia
VLR	Victorian Law Report
VTOLJG	Victorian Traditional Owner Land Justice Group
WAPC	Western Australian Planning Commission
WGIP	Working Group on Indigenous Populations

1 INTRODUCTION:
Two land ownership, use and tenure systems

'Two different timelines, two different cultures, and two different laws.'

Mrs Margaret Iselin, Quandamooka Elder, 1997.[1]

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

David Mowaljarlai, Elder, Ngarinyin people, Western Australia, 1997.[2]

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

Dan Mosby, Chair of Kulkalgal Registered Native Title Body Corporate, Torres Strait, Queensland, 2013.[3]

1.1 Two land ownership, use and tenure systems

The three statements above by prominent Aboriginal and Torres Strait Islander people from opposite ends of Australia echo what is at the heart of this thesis. There are two distinct systems of law and custom in Australia, those of the Aboriginal and Torres Strait Islander peoples and that brought to Australia by the British colonisers in 1788 (Reynolds, 1992:7; Wensing and Sheehan, 1997:1),[4] and on any measure of justice, they should be seen as being at least equal in status and value.

[1] Mrs Iselin made this statement at the signing of the Native Title Process Agreement between Redland Shire Council and the Quandamooka Land Council Aboriginal Corporation, North Stradbroke Island (Minjerribah) in August 1997. I was present at this public event, representing the Australian Local Government Association (ALGA) and noted this statement at the time, with the consent of the speaker.

[2] I am indebted to Kado Muir, a traditional Aboriginal man from the deserts of Western Australia, for drawing this statement to my attention. More about Kado Muir can be found here: http://kadomuir.wixsite.com/kadomuir

[3] Cited in Strelein (2013:86). A DOGIT is a Deed of Grant in Trust, a system of community-level land trusts established under the *Community Services (Torres Strait) Act 1984* (Qld) and *Community Services (Aborigines) Act 1984* (Qld). There were 15 DOGITs in Queensland. Both Acts were repealed in 2004 and the DOGITs were transitioned to Shire Councils. The *Local Government (Community Government Areas) Act 2004* (Qld) came into effect on the 1 January 2005 and applies most of the provisions of the *Local Government Act 1993* (Qld) to DOGIT communities. Further reforms were introduced in 2007 through the *Local Government Reform Implementation Act 2007* (Qld) and the *Local Government and Other Legislation (Indigenous Regional Councils) Act 2007* (Qld) to establish Torres Strait Island Regional Council (TSIRC) and the Northern Peninsula Area Regional Council (NPARC) and bring them into line, as far as practicable, with other councils already operating fully under the *Local Government Act 1993* (Qld).

[4] It is acknowledged that neither of the two systems of laws and customs are of a unitary nature. There are many clans, tribes or groups or nations of Aboriginal and Torres Strait Islander peoples in Australia, each with their own distinct laws and customs. The Australian nation is a federation of six States and two Territories. Each with their own distinct laws and customs, and peculiarities.

The Aboriginal peoples[5] of Australia have owned and occupied these lands for over 65,000 years (Yunupingu, 1997:1).[6] They have the oldest living culture on Earth (Flood, 2006:133); they have the oldest continuing system of land tenure in the world (Reynolds, 1999:217); and, in all likelihood, they also have the oldest continuing system of land use planning and management in the world. As I have previously stated (Wensing, 2014e:9), Aboriginal knowledges and experiences should be seen as a gift to all Australians, rather than a hindrance. However, in reality and on a daily basis these two systems of law and custom come into contact with each other and the Aboriginal system is 'subsumed and disavowed' (Brigg and Murphy, 2011:29) by the other, especially in relation to land ownership, use and tenure.

The Aboriginal peoples of Australia have never ceded their sovereignty. As the image on the back of the Gym at The Block in Redfern attests 'Sovereignty Never Ceded' (see the image under the Epigraph at the front of this Thesis). Australia has never 'formally come to terms with the reality of Indigenous peoples' lands, laws, languages, customs and cultures' (C. Saunders, 2016:25) and has never dealt fairly with the Aboriginal peoples about the loss of their lands (Wensing, 2016a:50). Nor has Australia developed 'a mutual understanding on the basis of which coexistence could occur' (C. Saunders, 2016:25), especially when it comes to land ownership, use and tenure. The problem is, as Dodson (1997:1) states, the non-Indigenous side of the equation insists that 'only one law can and should operate'.

The Aboriginal peoples of Australia therefore continue to assert their lands were stolen from them without their consent. They regard extinguishment[7] as alien to their law and custom and, as such, the Settler state's[8] assertion of ownership and sovereignty over land has no legitimacy under their law and custom. Aboriginal peoples' persistent desire is that the two systems of law and custom relating to land be accorded an equal and non-discriminatory status (Dodson, 1997). This is not mere historical or symbolic posturing. They want to use their property rights to

[5] I use the term Aboriginal peoples because the focus of this thesis is on Aboriginal peoples' as distinct from Torres Strait Islander peoples', unless otherwise specified. I use the plural because I respect the fact that in 1788 there were over 500 Aboriginal and Torres Strait Islander nations scattered about the Australian continent, each with their own distinct laws and customs and land tenure systems (Wallace-Bruce, 1989: 97).

[6] See also Gammage (2011); Pascoe (2014); Tobler *et al* (2017). For more detailed discussion of Aboriginal history of Australia, see Lawlor (1991); Flood (2006); Perkins and Langton (2008).

[7] 'Extinguish' in relation to native title is defined in s.237A of the *Native Title Act 1993* (Cth) (NTA) as 'to permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect'. Extinguishment is discussed in more detail in Chapter 3.

[8] The term 'Settler state' is used to denote the system of government established by the coloniser. MacDonald (2018:238) sees the state 'as a socially constructed institution of governance' and 'as a complex assembly of agencies and entities with varying levels of power and often contradictory interests, rather than a monolithic entity with a single set of interests pursued through internally coherent strategies. The contemporary state is fragmented, not only by level and branch of government but also through internecine conflicts, boundary disputes, internally contradictory strategies, and the shifting relative power of individual agencies.' In this thesis 'Settler state' is sometimes used inter-changeably with term 'the Crown', which is explained in Footnote 32.

engage in the economy 'on their terms' (Cornell and Kant, 1992:13) and at their choosing.[9] Their position is supported by various international human rights instruments.[10]

In this thesis, I examine the interactions between two distinct land ownership, use and tenure systems: The Aboriginal peoples and the Settler states. I seek to determine how they can co-exist in one place and time with parity and justice. In particular, in such a way that the Settler states' system does not always have to prevail over the Aboriginal peoples' system by requiring the 'submersion' (Hoehn, 2016:130) or 'extinguishment' (Strakosch, 2015:186) of Aboriginal peoples' law and custom relating to land.

Throughout this thesis I use the phrase 'land ownership, use and tenure' to separate property in land into three constitutive elements.[11] Firstly, the conceptualisation of property in land as a relationship. Secondly, the use to which land is put through the discipline of planning and regulation. And thirdly, tenure[12] being the form of transmission between people and land, whether legally or customarily defined, for transactional purposes (FAO, 2002:7). Bhandar (2018:34) asserts that the conjuncture between land ownership, use and benefit 'remains a potentially fruitful arena for reshaping the prevailing property norms.' In order to understand the relationship between the three elements and to reshape the property system in Australia, these three elements need to be separated from each other. The reasons for approaching the analysis in this way will become clear in later Chapters of this thesis.

The Australian Constitution distributes power between the States[13] and the Australian Government by enumerating the Commonwealth's powers in s.51. The Constitution permits the States to exercise power concurrently with the Commonwealth Parliament provided there is no conflict, or the Constitution does not vest the powers exclusively in the Commonwealth

[9] By this turn of phrase, I mean that native title holders have 'genuine decision-making control over the running of tribal affairs and the use of tribal resources' (Cornell and Kant, 1992:13), including the discretion to make decisions about land tenure and land use without outside interference and on the basis of free, prior and informed consent, consistent with Articles 18 and 19 of the UN *Declaration on the Rights of Indigenous People* (UN, 2007).

[10] Including, but not limited to, the *Universal Declaration of Human Rights* (UN, 1948), the *International Covenant on Civil and Political Rights* (ICCPR) (UN 1966a), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (UN, 1966b), the *Declaration on the Right to Development* (UN, 1986) and the *Declaration on the Rights of Indigenous Peoples* (UN DRIP) (UN, 2007). The relevance of international human rights norms and standards and the role of these international instruments are discussed in Chapters 8 and 9.

[11] J. Wallace *et al* (2006:80) argue that the basic functions of land administration systems are to 'organise land tenures, values, uses and development'. I argue later in this thesis, that because land is fixed in location all societies have to manage their relationship with land through ownership, use and tenure and that its value arises from these three constitutive elements.

[12] The term 'tenure' is discussed in Part 4.4 of Chapter 4. As noted in Chapter 4, the term is used throughout this thesis to mean the relationship between people and land, whether legally or customarily defined (FAO, 2002:7) and the means by which that relationship is regulated in some way, especially for transactional purposes between people.

[13] I use a capital when referring to an Australian governmental jurisdiction such as the Australian Government or one of the States or Territories, and a lower case when referring to a form of sovereign nation-state governance.

Parliament (Tehan, 2010:119).[14] In forming the federation, the States did not rescind their Constitutional responsibility for land administration and land use planning in their respective jurisdictions.[15] Land administration and land use planning are the responsibility of State governments, and not the Australian government.[16] Furthermore, under current land use and environmental planning laws in Australia, land cannot be put to use without the owner's consent and without government approval (Wensing, 2017d).[17] Land ownership, use and tenure are therefore not mutually exclusive, they are inextricably interlinked and interdependent (Wensing, 2016c:46).

The stark reality is that through the processes of colonisation and the formation of the nation state of Australia, the Aboriginal peoples' systems of law and custom, including their sovereignty, governance and land ownership, use and tenure arrangements, were not recognised in any formal way (Lavery, 2015) … until the High Court of Australia's (HCA) decision in *Mabo v the State of Queensland (No.2)* in 1992.[18] As we now know, colonisation was not about the survival of the fittest, but rather about settler society assuming and asserting superiority and inferiority over others and that it was 'a test of ethics in which the colonising societies … consistently failed to implement their own purported ethical codes' (Howitt, 2019:5). Today, the extent of recognition of Aboriginal peoples systems of law and custom relating to land are limited by the parameters set by the dominant culture and society[19], in particular by the *Native Title Act 1993*

[14] Australia came into existence on 1 January 1901 after the British Parliament passed the *Commonwealth of Australia Constitution Act 1900* (UK) on 9 July 1900. Under the federal system created by the Australian Constitution, the six former colonies (New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia) became the six States of Australia, each of which has their own constitution. Since 1 January 1901 the States are bound by the Australian Constitution, and the constitutions of the States must be read subject to the Australian Constitution (ss.106 and 107). When a State law is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid (s.109 Australian Constitution). The Commonwealth has exclusive powers only in relation to the seat of government and Commonwealth land and places, the public service (s.52), the establishment of the High Court ss.71-80), the imposition of customs and excise (s.90), raising defence forces (s.114) and coining money (s.115).

[15] Responsibility for Aboriginal and Torres Strait Islander Affairs also remained a State level responsibility until the Australian Constitution was amended in 1967. In 1967, s.51(xxvi) was amended to remove certain words which as a consequence would enable the Commonwealth to make special laws for the Aboriginal and Torres Strait Islander peoples of Australia if it were deemed necessary. These amendments also had the effect of enabling the Commonwealth to accept wider, but not exclusive, responsibility for Aboriginal and Torres Strait Islander affairs (Gardiner-Garden, 1997). Aboriginal and Torres Strait Islander affairs therefore remains a shared or concurrent power with the States, subject to s.109 of the Australian Constitution which provides that where there is a conflict, the Commonwealth law prevails.

[16] Except where the Commonwealth owns the land, i.e. defence bases, National Parks and National Land in the Australian Capital Territory.

[17] Discussed in more detail in Chapters 4, 7 and 9.

[18] *Mabo v the State of Queensland (No. 2)* (1992) 175 CLR 1 (hereafter cited in-text as *Mabo (No. 2)*). While the statutory Aboriginal land rights grant/transfer scheme in the Northern Territory enables the establishment of Aboriginal land trusts to hold title to land in the Northern Territory for the benefit of Aboriginal peoples entitled by Aboriginal tradition to the use or occupation of the land concerned, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was enacted as an act of grace or favour by government in response to the land rights campaigns of the 1960s and 1970s (Foley and Anderson, 2006). In line with convention in legal texts, I have adopted the use of italics in referring to land or native title claims or cases, i.e. *Mabo (No. 2)*.

[19] See for example, Kerruish and Purdy (1998); Pearson (2003; 2004); Moreton-Robinson (2007); Brigg and Murphy (2011); Secher (2014); I. Watson (2002a; 2002b; 2005a; 2005b; 2007a; 2007b; 2015).

(Cth)(NTA)(Lavery, 2015).[20] There are several long-standing legal, institutional and political barriers as to why the Settler states' land ownership, use and tenure systems continue to prevail over the ancestral land rights of Aboriginal peoples.[21]

While I accept that native title is the term adopted by the HCA in *Mabo (No. 2)* to recognise the pre-existing land rights and interests of the Aboriginal peoples of Australia under their system of law and custom, I also argue that native title determinations are a foundation for genuine change in the nature of the relationship between Aboriginal peoples and the Settler state and an opportunity for 'explicatory dialogue' (Morphy, 2007) between the two systems of land ownership, use and tenure. As this thesis unfolds, I depart from the statutory definition of native title in the strict sense of the NTA. I am conceiving a much wider interpretation of native title as a robust and inherently empowering set of rights and interests more analogous to the relationships that Aboriginal peoples have to their ancestral lands as expressed through their law and custom (I. Watson, 2015:12-13), rather than as a mechanism that enables Aboriginal peoples' rights and interests to be continually 'subsumed and disavowed' (Brigg and Murphy, 2011:29) by the state. My wider conceptions about native title are explored in more detail in Chapters 8 and 9 of this thesis.[22]

The space between the two systems of land ownership, use and tenure and its unequal consequences are the central focus of this thesis. The interactions between the two systems reveal areas of incommensurability[23] and misalignment leading to conflict, dispossession and disenfranchisement. The incommensurabilities also act as barriers to Aboriginal peoples' ability to participate in the economy on their terms and at their choosing. It is the failure to accept that there are two distinct systems of law and custom relating to land that is impeding a recognition of Aboriginal peoples' land rights and interests as having a status that is at least equal to the way in which State (and Territory) governments view their land tenure and land use planning systems.[24] By confronting this failure and teasing out the space between the two systems, this thesis demonstrates that it is possible to supplant the prevailing orthodoxies with

[20] For a brief description of the context in which the Mabo case began, see Reynolds (2017). For a chronology of the debate surrounding the formulation and passage of the *Native Title Bill 1993* through the Australian Parliament, see Gardiner-Garden (1993).
[21] These are well articulated and examined by Lavery (2015).
[22] In Part 9.1.1. of Chapter 9 in particular.
[23] 'Incommensurable' – not commensurable; having no common measure or standard of comparison; utterly disproportionate. Discussed in more detail in Chapters 4 and 6.
[24] See for example, Williamson *et al* (2012).

a coherent policy framework of coexistence based on parity, mutual understanding, respect, reciprocity and justice between two culturally distinct forms of land ownership, use and tenure.

The thesis highlights the persistent but changing forms of power, land and governance and the entanglement of race and colonisation. These power relations are examined and illustrated through the experiences of two Registered Native Title Bodies Corporate (RNTBCs) [25] representing the Bardi and Jawi native title holders and the Yawuru native title holders. In particular, with the case study RNTBCs, I explore the role that native title has played, and is playing, for those communities. It is pertinent to note that the situation the case study RNTBCs find themselves in is a product of their successful native title claims before the Courts. Against the backdrop of the case studies and using elements of a constructivist grounded theory method[26] of research and analysis, this thesis unpacks the distinguishing features of the two land ownership, use and tenure systems and their interactions with each other in the context of native title. This thesis then identifies areas of evident misalignment and contestation, and explores the possibilities for commensurability and constructive alignment and interaction in such a way that the Aboriginal land owners are able to use the proprietary[27] rights in their land on their terms and at their choosing.

Of particular interest to this thesis is the extent to which equitable, just and peaceful co-existence can be achieved without having to permanently extinguish the Aboriginal peoples' inherent ancestral land rights and interests. The thesis provides a cohesive analysis of both systems, at national and jurisdictional levels as well as at a very local level, in order to provide an overarching framework within which to investigate how these issues play out on the ground in WA, where the two case studies are located. This thesis then examines what conditions are necessary for a constructive alignment and a just and respectful co-existence between the two systems.

This Chapter sets out the multidisciplinary nature of this research, the need for this research, poses the hypothesis and research questions, outlines the research methods, the case study locations and the scope of this research. The final part of this Chapter outlines the thesis structure.

[25] S.253 NTA. A registered native title body corporate (RNTBC) is a prescribed body corporate whose name and address are registered on the National Native Title Register (see ss.192 and 193 of the *Native Title Act 1993* (Cth)).
[26] Discussed in Part 1.5 below.
[27] Indigenous and western concepts of 'property' and 'ownership' are explored in more detail in Chapter 5.

1.2 A multidisciplinary thesis

This thesis delves into the highly technical fields of native title rights and interests, the statutory Aboriginal land rights schemes, and the land administration and land use planning systems of the settler state. But this thesis is not a doctor of laws. Rather, it is a multidisciplinary doctor of philosophy in Indigenous[28] studies. By necessity, it draws on the conventional disciplines of law, history, anthropology, political science and the social sciences. It also draws on the emerging disciplines of land administration and the regulation of land use through land use and environmental planning,[29] which have tended to ignore the rights of Indigenous peoples (Porter, 2017a; Jackson *et al*, 2018).[30] For the first time, this thesis sets out the discourse between these different disciplines/fields of endeavour and therefore fills an important gap in our knowledge and understanding.

The thesis is structured into two parts.

- **Part 1** includes the ten Chapters that comprise the thesis and a comprehensive Bibliography for Parts 1 and 2.
- **Part 2** comprises six separate Appendices, which carefully documents the meetings, interviews and discussions that comprise a significant part of the method for this research (**Appendix A**), an annotated summary of selected historical court cases from 1788 to 1992 (**Appendix B**), a description of Aboriginal land administration and reform in WA (**Appendix C**), a detailed summary of the analysis of the complexity of native title, land tenure, land use and planning, local municipal and essential service provision and local governance arrangements in two case study localities in Western Australia (WA)

[28] The term 'Indigenous' has evolved through international law and acknowledges a particular relationship of Aboriginal people to the territory from which they originate. I therefore use the term 'Indigenous peoples' to refer to the diverse international community of Indigenous Peoples, whose distinct identity and rights are recognised in international law (i.e. the United Nations *Declaration on the Rights of Indigenous Peoples*), unless otherwise specified. Where the term Indigenous is used by government agencies or other sources, I reflect their use of the term.

[29] The registered professional association for planners in Australia is the Planning Institute of Australia (PIA), of which I am a Fellow. PIA was founded at the Albert Hall in Canberra in 1951 (Wensing and Norman, 1992). From 1995 to 1997, I was PIA's inaugural National Policy Director, and in that role I prepared 'Guidance Notes on Native Title for Planners and Valuers' (in conjunction with the then Australian Institute of Valuers and Land Economists (AIVLE), now Australian Property Institute (API)) on the professions' obligations under the NTA (RAPI and AIVLE, 1997). The Guidance Notes were released shortly after the High Court's decision in *Wik Peoples v the State of Queensland ("Pastoral Leases case")* [1996] HCA 40, and received wide national media coverage. In 2016, following a long campaign, PIA adopted a new 'Policy for the Accreditation of Australian Planning Qualifications' which for the first time in PIA's history includes 'Aboriginal and Torres Strait Islander and other Indigenous perspectives on planning' as a supportive knowledge area in planning education (PIA, 2016). See Wensing and Sheehan (1997); IPWG (2010); Wensing (2016e); Porter (2016, 2018b).

[30] Although my own research over the past twenty years offers a counterpoint to that contention, albeit that my writings have focussed more on planning's praxis toward Aboriginal peoples' rights and interests rather than the character and presumptions of the integration of Aboriginal cultural values into urban design, planning, resource agreements and community administration. My own professional journey in the disciplines of land administration and land use and environmental planning are very similar to those of Richie Howitt (2019) in relation to the discipline of human geography.

(**Appendices D and E**), and Glossaries of native title terms and land administration and land use planning terms (**Appendix F**) The Appendices should therefore be read in conjunction with the thesis.

Each of the highly technical fields examined in this thesis have their own regulatory regimes and highly specialised languages, which complicates their interaction and mutual understanding (Wensing, 2015b). For this reason, the first of use of particular terms are footnoted to explain their relevant meaning. Comprehensive glossaries of native title terms and of land administration and land use planning terms are included in **Appendix F**.

I approach this topic from the perspective of a non-Indigenous land use planning practitioner and public policy analyst. I cannot, and do not, purport to give an Indigenous perspective.[31] Rather, I am taking responsibility for my own law and history. This thesis draws on a lifetime of work and practice in urban and regional planning and land administration around Australia and two decades of research and practice in the native title field, in land use and environmental planning, in the statutory Aboriginal land rights schemes, in natural and cultural heritage protection and in natural resource management around Australia. I have a well-grounded and practical understanding of the Crown's[32] land tenure systems, especially of the differences between private freehold and public leasehold.[33]

[31] I was born of Dutch parents within 24 hours of their arrival in Australia as post-war migrants in 1953 under the *Netherlands Australia Migration Agreement 1951* (NLA Trove, The Canberra Times, 1951) and admitted into Australia as 'Aliens' under the *Aliens Act 1947* (Cth). Michael and Petronella Wensing came to Australia seeking refuge from the ravages of German occupation during World Wars I and II (NAA, 2018). My father, a highly skilled artisan, experienced both occupations and the Great Depression. My mother, later to become world-renown for her prowess in Belgian lace, lived through the Great Depression and the German Occupation of the Netherlands during World War II. My parents were not 'Aliens' and they did not 'carry colonialism in their bones' (Veracini, 2007) because as a child, I watched my parents stand up for their equal rights as citizens of this country on many occasions. My mother never brooked any nonsense from anyone and taught me to always question authority. I attribute my deep sense of social justice to my parents.

[32] The term 'Crown' arises from English colonisation and constitutional monarchy. The term is frequently used to refer to 'the state' or 'the government' (Hoehn and Stevens, 2018) encompassing all its manifestations in Australia, including the Australian and State and Territory Governments, and possibly local governments because they are established under State statutes with delegated decision-making powers on behalf of the States. McNeil (2015:26) believes that as a single juristic entity 'the Crown' has 'outlived its purpose … long ago and should be relegated to legal history'. McHugh and Ford (2013:1) assert that for the Aboriginal peoples of Australia and Canada 'the notion of the Crown has been the great mystery of Anglo-imperial legal faith' and that it has shifted and changed over time 'behind the cloak of settler law and practice'. However, because Australia is a federation of States, there is 'the Crown in right of Australia', as well as 'the Crown in right of each State'. The same applies to the Northern Territory and the Australian Capital Territory, but only because they were each granted a form of self-government by the Commonwealth of Australia in 1978 and 1989 respectively. In this thesis, wherever I use the term 'the Crown', it infers 'the state' in all its manifestations in the Australian context, unless otherwise indicated.

[33] As a private citizen of Canberra, I spent over twenty-five years from the early 1970s to the early 2000s researching, writing and campaigning for better administration of the ACT's unique leasehold tenure system as a public leasehold system. This involved several investigations of the public records, title searches, correspondence with Ministers, submissions to and appearances before Parliamentary inquiries, private litigation through the courts, preparing media releases and briefing journalists, radio and TV interviews, and writing several op-ed pieces for *The Canberra Times*. My personal papers of this period are in the Manuscripts repository in the National Library of Australia (NLA). This is the largest private collection of materials on the history of Canberra's planning and leasehold systems in the NLA's Manuscript repository, occupying over 10 metres of shelf space. See the Bibliography for details.

In addition, over the past twenty years, I have held various positions in non-government organisations and governments, in the private sector as a consultant, and part-time or casual positions in academia that have involved providing practical guidance, training and education to practitioners on the interactions between the native title system, statutory land rights schemes, the Crown's land tenure systems, contemporary land use planning, natural and cultural heritage protection schemes, natural resource planning and management and local government in every jurisdiction within Australia.[34] I have written extensively on these matters over many years and the **Bibliography** at the end of this thesis includes a list of publications and research reports where I was the lead researcher.

1.3 Need for this research

The lack of recognition and respect for Indigenous peoples' law, culture and sovereignty in relation to land is an issue, not just domestically within Australia, but also internationally. Despite the many international covenants and declarations,[35] national parliamentary inquiries, royal commissions, High Court judgements and law reform commission inquiries, [36] reconciliation between these two systems of law and custom concerning land have not reached an amicable resolution.

Two Law Reform Commissions in Australia conducted separate inquiries into the recognition of Aboriginal customary laws. The first was the Australian Law Reform Commission (ALRC) in the mid-1980s which considered the question of customary rights to land to be outside the scope of its inquiry (ALRC, 1986).[37] Almost twenty years later in the mid-2000s, the Law Reform Commission of WA (LRCWA) conducted an inquiry into the interaction of WA law with Aboriginal law and culture,[38] which did not consider Aboriginal peoples' ancestral land rights as an integral part of Aboriginal law and custom in WA (LRCWA, 2005; 2006).[39] Both inquiries confined their investigation of land rights to an examination of aspects of the use of land by way of traditional hunting, fishing and foraging rights.[40] The approaches of these inquiries to Aboriginal peoples'

[34] Many of the resources generated by this body of work are in the AIATSIS Collection. See the last page of the Bibliography in this thesis for relevant details.
[35] For the text of the *Universal Declaration of Human Rights*, the seven international human rights treaties ratified by Australia and the *United Nations Declaration on the Rights of Indigenous Peoples*, see AHRC (2012).
[36] For a documentary history of many of these, see Attwood and Markus (1999).
[37] In particular, see Para 212, Chapter 11. The ALRC's inquiry focussed on criminal law; criminal investigation; traditional marriages; children; and hunting and fishing.
[38] References to Aboriginal culture refer to the distinct set of assumptions and practices that inform everyday-life as it occurs today. See for example, Trigger (2005:41-42), cited in Terrill (2016:18).
[39] The LRCWA's inquiry focussed on the criminal justice system; the civil law system; family law; hunting, fishing and gathering rights; courtroom evidence and procedure; and Aboriginal community governance.
[40] In particular, see ALRC (1986) Part VII; and LRCWA (2006) Chapter VIII.

cultural connections to their Country[41] are a reflection of the 'ideology of superiority' and the portrayal of Aboriginal peoples as 'having no civilised customs, societies and government', let alone a coherent system for land ownership, use and tenure (P. Dodson and Cronin, 2011:189).

The continuing dominance of the Settler states' land tenure systems over Indigenous peoples' inherent land rights has been identified nationally and internationally as an area in need of research.[42] This thesis examines these issues in one particular jurisdiction within Australia, because my recent experiences in WA brought these issues relating to land ownership, use and tenure into sharp relief.

The stimulus for focussing this research on WA arises from a study titled '*Living on Our Lands'* undertaken by SGS Economics and Planning (SGSEP) for the (then) WA Department of Indigenous Affairs (DIA) in 2011-12, (SGSEP, 2012a). I was the lead researcher and the principal author of the final reports for the *'Living on Our Lands'* study.[43] The study required, amongst other tasks, an investigation of Aboriginal peoples' perspectives about the meaning and application of 'tenure' and 'home ownership'.[44] The study found there is a low level of understanding amongst Aboriginal community members of what 'home ownership' means and the implications of becoming a home owner; a high level of misunderstanding of the Crown's land tenure system; a high level of apprehension about the need for changes to land tenure arrangements; and a high level of mistrust amongst Aboriginal people and native title holders because governments are notorious for continually changing their policies and positions, including about land tenure (Wensing and Taylor, 2012:21).

More significantly, the study 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 ancestral land rights (Wensing

[41] 'Country' refers to 'the collective identity shared by a group of people, their land (and sea)' (L. Palmer, 2001) and includes all the 'values, places, resources, stories, and cultural obligations' (Smyth, 1994) associated with Aboriginal peoples' ancestral lands and waters. D.B. Rose (1996: 7) concludes that for Aboriginal people, 'country' is a nourishing terrain: 'Country is a place that gives and receives life. Not just imagined or represented, it is lived in and lived with. … [Aboriginal] people talk about country in the same way they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy. … Country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home, and peace: nourishment for the body, mind and spirit; heart's ease' (D.B. Rose, 1996:7). See also M. Davis and Langton (2016:1) for further discussion. Gammage (2011:139) sums it up more succinctly: 'Songlines distributed land spiritually; 'Country' distributed it geographically'.

[42] See for example Keal (2003); United Nations (2009:53); Xanthaki (2010:237-279); Gilbert and Doyle (2011:289-328); and Weissner (2014:31-63).

[43] The final 8-volume report of the *Living on Our Lands* study has not been publicly released by the WA Government.

[44] It was assumed by the Australian and WA Governments that Aboriginal people understood what 'home ownership' entailed and shared the wider Australian community's aspirations for home ownership (FaHCSIA, 2010a), which the *Living on Our Lands* study showed not to be the case (SGSEP, 2012a).

and Taylor, 2012:21). This is an important point, because the Aboriginal people interviewed for the '*Living on Our Lands'* study were unanimous in their opposition to extinguishment in exchange for a form of Crown tenure which they do not fully understand, nor trust, such as freehold or leasehold of exclusive possession (SGSEP, 2012a:84-87).

These findings therefore give rise to two important questions:

1) Why do native title holders have to agree to the surrender and permanent extinguishment of their ancestral rights and interests to participate in the economy?
2) Why is it not possible for their ancestral land rights and interests to be recognised as a form of tenure equal in status to the Crown's land tenure system and in such a way that enables the rights holders to use their lands to engage in the economy, on their terms and without having to surrender and permanently extinguish their ancestral land rights and interests?

These questions informed the hypothesis and key research question(s) for this thesis (discussed below).

The research for this thesis also endeavours to extend the knowledge frontiers and scholarly literature on Indigenous peoples' land rights and interests within Australia and particularly within the wider land administration and land use planning contexts. This research cites the works of Brennan *et al* (2015)[45]; Godden and Tehan (2010)[46]; Jackson, Porter and Johnson (2018)[47]; Lavery (2015)[48]; Mantziaris and Martin (2000)[49]; Matunga (2013, 2017)[50]; Moreton-Robinson (2007, 2015)[51], Porter (2010) and Porter and Barry (2016)[52,] Ritter (1996, 2009a,

[45] Brennan *et al* (2015) is an edited collection of chapters written by several of Australia's leading scholars in the native title space with a united concern that native title rights and interests make a real impact on the economic and social circumstances of Australia's Indigenous communities.

[46] Godden and Tehan's (2010) book is an edited collection of essays by leading scholars and practitioners with a focus on a comparative perspectives of individual and communal forms of ownership for achieving long term environmental and economic sustainability for Indigenous peoples and communities.

[47] Jackson, Porter and Johnson's (2018) book documents the role of planning in the history of Australia's relations with the Aboriginal peoples of Australia, makes a valuable contribution towards the decolonisation of planning and advances new ways to think and practice planning in Indigenous Australia.

[48] Lavery's (2015) PhD thesis examines the provenance, justification and legitimacy of occupation as the mode of acquisition of a foreign territory, and asserts therefore that every determination by the Federal Court of Australia (FCA) that native title exists (either wholly or partly) is an affirmation of a normative system of Aboriginal law and custom. Lavery's more recent writings (2017, 2018) are also cited in this thesis.

[49] Mantziaris and Martin's (2000) research on Native Title Corporations included a closer analysis of Pearson's (1996, 1997) concept of the recognition space between two systems of law and custom, which is further scrutinised in Chapter 4 of this thesis.

[50] Matunga's (2013, 2017) research is at the cutting edge of Indigenous approaches to planning, albeit from the Maori perspective in New Zealand. Matunga's concept of a level playing field between two distinct cultures is extended in this thesis to apply in the Australian context.

[51] Moreton-Robinson (2015) explores the links between race, sovereignty and possession through the themes of property in land and how Australia is constructed as a white possessive. Moreton-Robinson's edited volume (2007) critically examines how the Indigenous Peoples of Australia are inextricably linked to the act of dispossession and the ongoing loss of sovereignty.

[52] Porter (2010, including other works: 2017a, 2017b, 2018a, 2018b, and Porter and Barry, 2016) are seminal in arguing that the state-based activity of planning was an integral part of colonisation. Porter's works shine a spotlight on planning's theory and

2009b)[53]; Small (2000) and Small and Sheehan (2005, 2008)[54]; Strelein (1998, 2009a)[55]; Terrill (2016)[56], Tobin (2014)[57], and I. Watson (2015)[58]. All of these researchers have written compelling insights and frameworks of analysis which are extensively and incisively referred to at various points throughout this work. This thesis builds on their ideas and postulates that because Aboriginal peoples continue to assert they never ceded their sovereignty, their land was stolen from them without their consent, extinguishment is alien to their law and custom and they want to use their property rights to engage in the economy on their terms and at their choosing, that the prevailing orthodoxies can and should be supplanted with a coherent policy framework for a mutually respectful coexistence between two culturally different forms of land ownership, use and tenure based on parity, mutual respect and justice.

practice toward Indigenous peoples, especially in Australia, and coupled with Barry, in Canada, providing a useful comparative analysis in two of the four British common law countries with similar colonial histories. Porter and her research colleagues (2010, Porter and Barry, 2016; Jackson, Porter and Johnson, 2017) conclude that there is an urgent need to develop genuine relationships with Indigenous peoples by sharing the right to define what the issues are, the values that matter and to shape the course of planning together collaboratively, rather than combatively. In this thesis, I develop a set of Foundational Principles and a Model for Coexistence for this to occur in situations where native title has been found by the FCA to exist. Libby Porter was a member of my Supervisory Panel for this thesis.

[53] Ritter's (1996, 2009a, 2009b) works provide an incisive analysis of *Mabo (No. 2)*, the hard-fought contests over land, resources, money and power. His analysis of the culture of agreement making is also referred to in this thesis.

[54] Small's (2000) PhD thesis examines the contribution of property in land to the common good, leading to the identification of land within social economics including a review of property theory. Small (2008) also examines how Western and Customary land rights in Australia can be justly integrated from a land valuation perspective. Small and Sheehan's (2005, 2008) writings examine the metaphysics of Indigenous and Western forms of land ownership. Prior to taking on this PhD thesis, I co-authored a conference paper with Garrick Small which examines the how the relationship between customary ownership and western law have implications for planning and argues that the logic of customary ownership implies Indigenous peoples should have a right of veto against development proposals comparable to that which is the operational power of urban and regional planners where their land rights are affected (Wensing and Small, 2012). Garrick Small was a member of my Supervisory Panel for this thesis.

[55] Strelein (1998, 2009a) as Director of Research at AIATSIS is Australia's leading native title and Indigenous governance research lawyer. Strelein's (1998:iv) PhD Thesis examines the potential of the common law to accommodate Aboriginal peoples claims to self-determination following *Mabo (No. 2)* and concludes that 'the notion of equality of peoples' is 'a proper foundation for the courts to structure the relationship between Indigenous peoples and the state'. I argue later in this thesis that equality is also a proper foundation for governments to structure their relationships with the Aboriginal and Torres Strait Islander peoples of Australia. The second edition of Strelein's book '*Compromised Jurisprudence*' (2009a) is a masterful analysis of the promises and perils that have befallen the native title system. These and other works by Strelein (2009b, 2013, 2016) are cited throughout this thesis. Lisa Strelein was my principal supervisor and a member of my Supervisory Panel.

[56] Terrill's (2016) book '*Beyond Communal and Individual Ownership*' is a seminal contribution to the analysis of current legislative and policy settings affecting the statutory land rights systems in Australia albeit with a particular focus on the Northern Territory and Queensland and how it is necessary to move beyond the binary concepts of individual vs communal ownership. Several of Terrill's writings are cited in this thesis (2009, 2010, 2011a, 2011b, 2015a, 2015b). My thesis seeks to extend on Terrill's arguments for alternative approaches to land reform in communities on Indigenous land.

[57] Tobin's (2014) research analyses the role of customary law in tribal, national and international governance of Indigenous peoples' lands, resources and cultural heritage, which throws light on the rich legal diversity and underlying principles of customary law that are at the heart of advances in intercultural justice.

[58] Professor Irene Watson is the Pro Vice Chancellor Aboriginal Leadership and Strategy, and Professor of Law with the School of Law, University of South Australia Business School, where her teaching and research focuses primarily on Indigenous Peoples in both domestic and international law. Professor Watson belongs to the Tanganekald, Meintangk Boandik First Nations Peoples, of the Coorong and the south east of South Australia (https://people.unisa.edu.au/Irene.Watson#About-me). Irene Watson's (2015) book is the first to assess the legality and impact of colonisation from the viewpoint of Aboriginal law, rather than from the dominant Western legal tradition. Other works by Irene Watson (2002a, 2002b, 2005a, 2005b, 2007a, 2007b, 2009) are also cited throughout this thesis.

1.4 The hypothesis and research question(s)

The native title recognition scheme established by the Australian Government following *Mabo (No. 2)* 'failed to give rise to a genuinely postcolonial, let alone decolonised Australia' because the law 'has functioned to discursively historicize Indigenous Australia, …to construct Indigenous Australian culture, practices and laws as historical relics belonging to a time now past' (Keenan, 2014:164).[59]

The requirements for proof of native title under the NTA rests on the claimants and includes establishing the existence of an identifiable community or group; traditional connection with or occupation of the land under the group's laws and customs; and the substantial maintenance of the connection from colonisation to the present.[60] Claimants are required to establish their ancestors were the original occupants of the land under claim, that their present laws and customs are derived from the laws and customs of the original occupiers and that they continue to practice their laws and customs (Reilly and Genovese, 2004:24). Claimants often have to go to extraordinary lengths to establish these facts (Bauman *et al*, 2013:1). There is an apparent truth in the claim by Tully[61] that 'the colonial imagination failed to imagine a relationship of equality and co-existence in all its variations…that is the fundamental source of the problem today' in the places colonised by the British during the seventeenth and eighteenth centuries. It is this 'failure of imagination' that this thesis seeks to investigate and address.

The unsettled issues of past dispossession and the inability of the current NTA to deliver equitable results demand a fresh approach. As Toohey (1985:175) observed over thirty years ago, it is time 'to accord the traditional Aboriginal ownership of land a place (within the relevant legislative framework) in the Anglo-Australian system of registration of title and dealings with land'. Or to paraphrase Bennett (G.I. 1978:622-23) 'the purpose is not to translate Aboriginal customary land ownership into "transferable rights of property known to English law", but rather to accord proprietary status to the existing Aboriginal system of land holding'.

[59] See also Motha (2005); I. Watson (2002a; 2015).
[60] As per s.223 of the NTA. It should be noted that the issues associated with establishing the composition of a native title claimant group and the extent of a claim are beyond the scope of this thesis.
[61] Cited in McLaren *et al* (2005:6). James Tully made these remarks to a colloquium on *Property Rights in the Colonial Imagination and Experience* that was held at the Faculty of Law at the University of Victoria, Canada in February 2001, attended by a range of academic scholars working in the fields of law, history and Aboriginal studies, and gave rise to a book edited by McLaren, Buck and Wright (2005:5).

This thesis therefore, explores what causes the ancestral land rights of Indigenous peoples to be framed in such a way that they are unable to enjoy the benefits of being property owners in the contemporary sense. It further examines whether there is scope for regarding native title rights and interests 'more creatively' and as 'representing a point of interface between two different legal systems' (J. Gray, 2002:11): the Crown's legal system on the one hand and Aboriginal law and custom on the other.

1.4.1 The Hypothesis

As discussed earlier, there are two legally recognised and distinct systems of land ownership, use and tenure operating in Australia which give rise to the following inter-related hypotheses for this thesis:

1) If native title is an intercultural contact zone between two distinct systems of land ownership, use and tenure, then it will evidence not only contestation, but also potential alignments that are conducive to a respectful and just co-existence and opportunities for Aboriginal landholders to engage in the economy at their choosing and on their terms; and that

2) If two distinct land ownership, use and tenure systems can exist alongside each other respectfully and justly, then native title holders do not always have to agree (or be required by others) to the surrender and permanent extinguishment of their native title rights and interests to participate in the economy.

This thesis explores the 'recognition space',[62] or what I prefer to term the 'inter-cultural contact zone' between the two distinct systems of law and custom, from the point of view of 'preserving and not destroying, diminishing or diluting, the uniqueness[63] of Indigenous customs and traditions' (J. Gray, 2002:8). While the 'inter-cultural contact zone' assumes discrete and separate worlds of Aboriginal and Western[64] cultures respectively (Weiner, 2003:99; 2006:17), I am not assuming that the two systems of laws and customs are of a unitary nature, nor are they constant or uniform in relation to each other. Moreover, both systems of law operate over a

[62] This concept is drawn from Pearson (1996, 1997 and 1998) and Mantziaris and Martin (2000) and explored in Wensing (2002). Martin (2003:3) notes that Pearson has 'firmly resiled from this conception of native title'. This concept is explored in more detail in Chapter 4.

[63] *Mabo v State of Queensland (No. 2)* 175 CLR 1. Per Deane and Gaudron JJ, 22.

[64] The term 'Western' is used here to connote the 'chronology of thought that can be traced from Ancient Greece, to Roman appropriations and late Medieval Latin rediscoveries, providing the conceptual frame within which the emergence of the modern state and its territories occurred' (Elden, 2010:811).

single territorial space and hence continually encounter each other, whether acknowledged or not.

I argue that the time has come to move beyond mere recognition and to reframe the relationship and create 'new geographies of humble engagement and respectful coexistence' (Howitt, 2019:13) based on a level of equality or parity between the two systems. While the concept of equality is discussed in Part 4.8 of Chapter 4, in this thesis I am applying a wider interpretation of equality than what is currently accepted in the native title context. The native title system that emerged from the HCA's land mark decision in *Mabo (No. 2)* is based on the rationales of pragmatism and equality with only limited protections to native title holders. The native title holders' traditional connections to their ancestral lands are recognised in only limited circumstances and the Crown holds the upper hand with respect to extinguishment of those rights and interests should the land be needed by someone else for other more profitable purposes (Bartlett, 1995:309). The only level of equality that is enshrined in the NTA is compensation 'on just terms'[65] for the loss of native title rights and interests, but again, only in limited circumstances. In this respect, native title is still viewed as 'spaces of exclusion, separation, exploitation, violence, inequality and vulnerability' (Howitt, 2019:7). The native title system therefore creates interactions between Aboriginal peoples as native title holders and Settler society that can be described as 'collision zones' or spaces for 'coexistence'[66] (Howitt, 2019:7), but only in very limiting circumstances, as is explored later in this thesis.

As a land use planner with over twenty years' experience working in the 'intercultural contact zone' between Aboriginal peoples and Settler society, I have been inspired by Aboriginal peoples' perceptions of places, cultures and environments over space and time at particular and multiple scales (Howitt, 2019:7). These experiences have taught me to be humble, to learn by listening and to engage between cultures as equals rather than one always dominating over the other, as David Mowaljarlai captures so colourfully in one of the epigraphs at the beginning of this Chapter. In this thesis, I argue that it is time to take the opportunity dwell on the liminal spaces between two distinct approaches to land ownership, use and tenure and contribute to 'a more complex, constructive and inclusive "edge politics"[67] that grapples with ambivalence, change, overlap and

[65] S.51 NTA and para 51(xxxi) od the Australian Constitution.
[66] The concept of coexistence is discussed in Part 4.7 of Chapter 4 and its application in Chapter 9.
[67] In reference to the landmark work of Jane M. Jacobs (1996) '*Edge of Empire. Postcolonialism and the City*', in which Jacobs explores the way 'British imperialism carved its way through space, possessing and ordering territories across the globe … and the unruly spatial politics of race and nation, nature and culture, past and present' (back cover notes).

interaction' to 'dislodge colonial metaphors of empty spaces and frontier heroics' (Howitt, 2001:234).

This thesis explores the points of convergence that exist between the Crown's and Aboriginal peoples' land ownership, use and tenure systems, with a particular focus on protecting the latter's ancestral rights and interests for future generations. A practical outcome will be an analysis of the evidence to identify how two distinct systems of land ownership, use and tenure can coexist in parity based on mutual understanding, respect, reciprocity and justice and without native title holders having to permanently extinguish their underlying ancestral land rights and interests.

1.4.2 The Research Question(s)

The critical question at the heart of this thesis is therefore:

- How can the two distinct systems of land ownership, use and tenure co-exist alongside each other and what legal and practical conditions are necessary for this to happen, with parity based on mutual understanding, respect, reciprocity and justice?

The thesis research will be based around the following inter-related research questions:

1) What are the distinguishing contemporary features of both the Aboriginal and Australian land tenure systems? In particular, in what ways are they similar or dissimilar?
2) In the context of there being an 'intercultural contact zone' or overlap of the two property systems, are there identifiable characteristics in each of the two systems and in their interactions with each other that would enable constructive alignment, commensurability and relative autonomy for respectful and just co-existence?
3) Or are there characteristics that will generate unpredictable, counterproductive contestation or incommensurability which works against a respectful and just co-existence?
4) Therefore, what conditions or attributes are necessary for a mutually respectful and just form of coexistence, and is there any evidence to support this?

The focus in the research questions is on the tensions between the Aboriginal customary system(s) vs the Crown's system(s) of land ownership, use and tenure and what I am terming the 'intercultural contact zone' between them. By necessity, the case studies in Chapter 7

explore the frictions between the native title system established under the NTA and the Crown's land administration system, especially in the highly protected reserve system under the Aboriginal Land Trust (ALT) in WA, as an illustration of how the tensions between the customary and settler systems are playing out in reality. The level of analysis in Chapter 7 is both detailed and complex.[68] In the final analysis in Chapters 8 and 9, the attention turns to the commensurabilities and incommensurabilities between the two culturally distinct approaches to land ownership, use and tenure and how they can be treated as being of equal status alongside each other.

1.5 Research methods

The research method for this thesis is based on elements of constructivist grounded theory. Constructivist grounded theory is 'a contemporary version' of Barney Glaser and Anselm Strauss's (1967) original statement on a grounded theory method (Charmaz, 2016:34). Grounded theory method (Strauss and Corbin, 1998:7)[69] is a qualitative approach to research that enables 'the systematic discovery of theory from data, so that theories remain grounded in observations of the social world, rather than being generated in the abstract' (Robson, 2011:526).[70] The key characteristics of a grounded theorist include 'the ability to step back and critically analyse situations, … to recognise the tendency toward bias, … to think abstractly, … to be flexible and open to helpful criticism,' to be sensitive to 'the words and actions of respondents', and have 'a sense of absorption and devotion to the work process' (Strauss and Corbin, 1998:7). According to Robson (2011:147), grounded theory method is 'both a strategy for doing research', as well as 'a particular style [method] of analysing the data arising from the research'.

The contemporary constructivist adaptation of grounded theory method 'fosters asking probing questions, … scrutinises the researcher and the research process' and 'locates the research process and product in [its] historical, social, and situational' context (Charmaz, 2016:35). According to Charmaz (2016:34), constructivist grounded theory 'shifts the epistemological foundations of the original version'[71] of the grounded theory method by examining how social,

[68] With additional supporting information provided in Appendices C, D and E.
[69] See also Bryant and Charmaz (2010:608); Bryman (2016:691).
[70] This is evident in Chapter 5 of this thesis where I explore a common understanding of property in land in all societies and the differences in approaches to property by Indigenous and Western societies.
[71] For example, from the 'positivist' approach that has been the standard philosophical view of the natural sciences whereby objective knowledge 'is gained from direct experience or observation and is the only knowledge available to science' (Robson, 2011:20).

historical, temporal and situational contexts of research affect the researcher and the research participants, including their hidden preconceptions and the things they take for granted (Charmaz, 2016:39; Harris, 1996:63; Howitt, 2019:5, 6, 12).[72] More importantly for this research, constructivist grounded theory method involves bringing people and their perspectives and experiences into the foreground by 'moving back and forth between stories and analysis' (Charmaz, 2016:41) and by making connections between theory and data, and theory and practice (Bryant and Charmaz, 2010:25).[73]

The research for this thesis seeks to find an answer to complex issues of public law and policy, and of parity and justice relating to property in land that have bedevilled Australia for the past 250 years. There are theories[74] of property, law, history, sovereignty and self-determination, coexistence, equality and justice to consider, as well as key concepts such as land use and planning, land tenure and title, and native title as an inter-cultural contact zone. There are qualitative assessments to be made of the numerous statutory and other planning and land administration instruments that create and control the way discrete Aboriginal communities evolve and operate, and how those prevailing circumstances affect the determined native title rights and interests. There are also empirical observations to be made about what the case study partners think about the fact that their pre-existing ancestral rights to land are not being seen as having equal status in the Australian property system and how they want the system to change so that they are recognised as being of equal status to provide them with a more secure future.

Given the scope of the task as outlined above, I chose to use key elements of the constructivist grounded theory method for this research. Principally because it enabled me to study action and process as well as meanings, to trace assumptions, and to map change over time and space (both temporally and spatially) (Charmaz, 2016:38) and to design a process that was reflective and responsive to the data and the analysis as the research progressed. In order to answer the research question(s) for this thesis, I was able to design a series of interactions between the research participants (drawing on their unique knowledge and contextual experiences) and the researcher (drawing on my professional background and expertise), thereby creating opportunities to 'rethink, ground or justify' decisions or findings while at the same time, having

[72] This is evident in Chapter 4 of this thesis where I unpack many of the concepts that tend to be taken for granted in relation to property in land.
[73] This is evident in my analysis of the case study localities in Chapters 7 and 9 of this thesis.
[74] The term 'theories' is used in a general sense at this juncture in the thesis to mean an explanation of a proposition whose status is still conjectural, in contrast to well-established propositions that are regarded as matters of fact (Macquarie Dictionary).

an ongoing dialogue with the research participants about their aspirations (Mruck and Mey, 2010:519). This 'moving back and forth' (Bryant and Charmaz, 2010:25; Charmaz, 2016:39) between researcher and research participants and between possible theory and data, enabled the outcomes to be more empirically based in the social, historical, temporal and contextual realities rather than in abstract form. More significantly, with its roots in pragmatism, applying elements of the constructivist grounded theory method enabled me to use the research questions to produce 'thoughtful, often provocative, analysis' (Charmaz, 2016:37) that challenges public policy settings which may otherwise remain invisible or out of reach.

The elements of a constructivist grounded theory method that I used include desktop research and discourse analysis of public documents at national and state levels over a defined period of time; a review of relevant literature in many different fields of academic research including law, politics, history, anthropology, sociology, human rights and environmental studies; face-to-face semi-structured interviews and/or informal discussions with key people/organisations; several dialogues with two separate case study RNTBCs; and a synthesis and refinement of the results of the research with the case study RNTBCs. A case study approach is included in this research because case studies offer the opportunity to examine real-world contexts in greater depth and to assess the opportunities and constraints that may arise from testing the hypothesis and identifying policy and/or legislative changes that will be of practical benefit to the communities. The case studies in this thesis have a detailed focus, but they also tell a larger story, and that is their search for equality and justice when it comes to recognition of their pre-existing rights to their ancestral lands which the settlers ignored until the HCA's decision in *Mabo (No. 2)*. As I discuss in more detail below, the two case study RNTBCs largely drove the direction of this research.

This thesis examines a national and international phenomenon holistically and in detail in a jurisdiction within a nation state through the eyes of two Aboriginal communities and through the eyes of my own professional work[75] at the intersecting contact zone between two culturally

[75] In relation to my own professional work, over the last 40 years I have specialised in dissecting legislation and relevant policy documents in several different fields and reassembling them in ways that make it easier for relevant practitioners and users to understand their intent and how to comply with the processes inherent in such instruments. For example, in relation to the administration of Canberra's unique leasehold system of land tenure; the interactions between the national and territory land use planning systems in Canberra as Australia's national capital after the ACT was granted self-government in 1989; the user rights of people in aged care and supported accommodation; the rights of people living long term in caravan or mobile home parks; the obligations of land use planners and land valuers under the *Native Title Act 1993* (Cth) in its first iteration; local government's obligations under the *Native Title Act 1993* (Cth) after it was significantly amended in 1998; and the application of the new National and Commonwealth Heritage listing and protection schemes following their insertion into the *Environment Protection and Biodiversity Protection Act 1999* (Cth) in 2003.

distinct systems of land ownership, use and tenure. The primary point of this research from the perspective of the case study RNTBCs was to find a way in which two distinct systems of land ownership, use and tenure could coexist in parity with each other following their successful native title claims. The primary point of this research from a methodological perspective was to identify and analyse the problem and work toward a solution by engaging directly with the parties affected by the current legislative and policy settings around the recognition of Aboriginal peoples' land rights in Australia in the 21st Century, albeit in a particular locality. By necessity, this thesis focusses on areas where native title rights and interests have been determined by the Federal Court of Australia (FCA) to exist, although as I argue in the final chapter, the foundational principles and model for parity and coexistence developed in this thesis are also potentially applicable in other contexts where Traditional Owners can demonstrate they are the custodians for an area under their law and custom, but may not be able to establish it to the satisfaction of the FCA under the *Native Title Act 1993* (Cth).

While constructivist grounded theory methods are not without their problems (Bryman, 2016:580), I determined it suitable to use of a flexible design approach to my research method. This meant that I was undertaking research and analysis on several different aspects at the same time. For example, while I was undertaking meetings with each of the case study RNTBCs, I was also undertaking a search of the public records locating key documents and developing a chronology of events; or undertaking a discourse analysis of the chronology of events while also conducting semi-structured interviews and/or discussions with selected key people throughout the process. The following discussion provides an overview of the different tasks that were an integral part of the research method for this thesis, but they are not presented in any particular order.

For the past twenty years I have been working in what I call the 'intercultural contact zone' between Aboriginal peoples' land rights and interests based on their law and custom and the Crown's statutory land administration and land use planning systems. In particular, working with local governments and alongside my own professional colleagues in land use and environmental planning to come to terms with the wider impacts of the recognition of native title rights and interests following the HCA's decision in *Mabo (No. 2)*. In embarking on the research for this thesis, I was already acutely aware of paucity of research on the interactions between Indigenous peoples' rights and knowledges and the Crown's statutory land administration and land use planning systems and significant gaps in an analysis of the public

record in a number of key areas. These knowledge gaps came into sharper focus as I commenced undertaking the necessary research for this PhD. Committing to undertaking a PhD provided the opportunity to fill some of the gaps. Over the course of my research from January 2013 to January 2019, I produced six Background Research Papers on the following topics:

1) The crisis in funding for municipal and essential services in discrete and remote Aboriginal Settlements (Background Research Paper No. 1, Wensing, 2015a);
2) Concepts and terms used in the Aboriginal land reform debates in Australia. (Background Research Paper No. 2, Wensing, 2015b);
3) An annotated chronology of key events that have influenced the Commonwealth's Indigenous land tenure reform agenda from 1997 to 2016. (Background Research Paper No. 3, Wensing, 2017a);
4) A comparative analysis of the statutory Aboriginal land rights schemes and the native title system in Australia as at January 2017 (Background Research Paper No. 4, Wensing, 2017b);
5) Indigenous rights in land use planning (Background Research Paper No. 5, Wensing, 2017d); and
6) The Commonwealth's Indigenous land tenure reform agenda: Whose aspirations, and for what outcomes? (Background Research Paper No. 6, Wensing, 2016a).

An explanation of how I arrived at each topic, how I approached the research and an outline of the content and conclusions of each of the Background Research Papers is provided in **Part A1** of **Appendix A** to this thesis.[76] The research and analysis for each of the Papers was forensic in scope and scrutiny of the details. The task entailed reviewing thousands of documents including relevant speeches, media statements, policy statements, legislation (current and repealed), legislative amendments, explanatory memorandums and exposure drafts of Bills, Hansard records of Parliamentary debates (Federal and some States), COAG Communiques, inquiry reports, consultancy reports and a raft of other documents on the public record from 1997 to 2017 at national and State levels. This thesis seeks to flip the analysis of how two distinct systems of land ownership, use and tenure are interacting with each other away from the desire of settler societies to take land away from the Indigenous peoples (Howitt, 2019:2), to find the points of constructive alignment, commensurability and relative autonomy and a platform for

[76] The background research also generated several journal articles, book chapters, conference papers and book reviews for academic journals, the details of which are included in the Bibliography in Part 1 of this Thesis under the heading: '*Publications and Projects undertaken by Ed Wensing*'.

respectful and just coexistence. To do this required a deep understanding of the context in all its details to expose the disjuncts and dilemmas historically and contemporaneously that continue to bedevil the interactions between Indigenous peoples and the Settler state in relation to land ownership, use and tenure, especially in Australia. The Background Research Papers (and other outputs) therefore provide a considerable body of research that underpins the analysis in this thesis.

In relation to the selection of the case study RNTBCs, it is relevant that I disclose how they came to be, in effect, self-selected. The '*Living on Our Lands'* study (mentioned earlier) included four case study locations in the Kimberley Region of WA. It was after the completion of the '*Living on Our Lands'* study in 2012, that I was approached separately by two of those case study communities,[77] asking the same questions that I had addressed in that study: Why is the State of WA requiring native title holders to extinguish their hard-won[78] native title rights and interests in exchange for freehold tenure? Ethically and legally, I could not disclose the results of my earlier research because the consultancy contract with DIA included non-disclosure clauses. In response, I asked both native title holding bodies if I could turn their question into a PhD research topic. They agreed, and in effect, they became the two case studies for this research. While this may raise questions about their selection and their validity, there are several similarities and differences, contestations and conflicts and commensurabilities and incommensurabilities[79] in these two localities that point toward the difficulties that many RNTBCs are experiencing in a post-native title determination environment (Scheiner, 2018). The advantage of working with these two RNTBCs is that I already had a well-established working relationship with them stretching over many years.[80]

The first case study locality is the country of the Bardi and Jawi people on Cape Leveque on the Dampier Peninsula. The second case study locality is the country of the Yawuru people in and around Broome. Both case study localities are in WA. The primary role of these case study localities is discussed in Chapter 7 with additional supporting information in **Appendices C and**

[77] In their capacity as native title holding bodies, because following a positive native title determination by the FCA, the native title holders must establish a Registered Native Title Body Corporate (RNTBC) to hold and manage their native title rights and interests.
[78] 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 Markus, 1999), and each of the early landmark native title cases before the courts were costing millions of dollars and taking between 6-10 years to resolve.
[79] Discussed in Parts 7.5, 7.6 and 7.7 of Chapter 7.
[80] If I had used other criteria to select other case study localities with similar circumstances, in all probabilities I would have had to develop new working relationships with them to build the necessary trust and respect that I already had with Bardi and Jawi and Yawuru.

D respectively. In both localities the FCA has made positive native title determinations and the relevant Registered Native Title Bodies Corporate (RNTBC) have been established to hold and manage the native title rights and interests in trust (Bardi and Jawi RNTBC, 2008; Yawuru RNTBC, 2014). The RNTBCs provide a practical and legal point of contact for interacting with native title holders in any particular locality.

In working with the case study RNTBCs, I adopted a flexible and iterative approach to my interactions with them. The details of my working arrangements, the schedule of meetings and a summary of the discussions and outcomes with each of the RNTBCs are documented in table form in **Part A2** of **Appendix A**. The details contained in **Tables A1 and A2** in **Appendix A** do not adequately capture the dynamism of the meetings and the depth of discussions that occurred as the research progressed.

At this stage it is necessary for me to point out that my access to Bardi and Jawi Niimidiman Aboriginal Corporation RNTBC (hereafter Bardi and Jawi RNTBC) was governed by a formal Research Agreement between the Kimberley Land Council (KLC), the ANU and myself as the Researcher. More details are provided in **Part A2.1** of **Appendix A**. In contrast, my interactions with the Yawuru RNTBC was governed by an informal agreement with the CEO of NBY Ltd and their Principal Legal Officer (PLO) and/or Community Development Manager. Given the corporate nature and the many demands being made of Yawuru, my meetings with Yawuru were principally with the CEO and the senior management team of NBY Ltd as the operational arm of the Yawuru Corporate Group, and where possible, included available Board Members of NBY and/or Yawuru RNTBC. More details are provided in **Part A2.2** of **Appendix A**. In this thesis for ease of reference therefore, I use the term Yawuru RNTBC to refer to the group of Yawuru people and senior management team that I met with throughout this research. To interpret my reference to Yawuru or Yawuru RNTBC in any other way would be inappropriate and misleading, unless otherwise stated. It is also necessary to clarify that I always met with the case study RNTBCs separately, and never together for reasons outlined in **Part A2** of **Appendix A**. Where possible in this thesis, I have attributed comments made by particular members of the RNTBCs back to them directly, and with their prior and informed consent in accordance with the human research ethics clearances by the ANU and the KLC.

My initial interaction with both case study RNTBCs was to meet with them, separately, with the original question they raised with me about after the completion of the *Living on Our Lands*

study. I wanted to commence a dialogue with them about the issues they face in trying to achieve their aspirations and how my research may be able to assist them. For each case study RNTBC, I let the discussions drive the direction of the research, especially in relation to the information and analysis they require to make informed decisions and in relation to developing an understanding of the complexities and challenges for coexistence between two distinctly different systems of land ownership, use and tenure. As a consequence of applying a flexible approach, I produced five detailed Research Papers for each of the case study RNTBCs,[81] each of which involved a forensic examination of the full suite of the issues and constraints they face with respect to their native title lands.

The preparation of the detailed Research Papers for each of the case study RNTBCs[82] involved unpacking several layers of complexity in the conventional land administration and land use planning systems and their institutional governance, delving into the minute details of the respective native title determinations for each of the case study localities and how the various systems apply to particular parcels of land. A detailed understanding of the land administration system in WA is required,[83] including an understanding of how the land titling system works, deciphering the several layers of regional and local strategic and statutory land use planning instruments and their application to particular localities, and an understanding of the local institutional governance arrangements. The level of analysis and understanding required could not be expected of the average planner, let alone most native title holders and their governing bodies because each of these systems has their own peculiar terminology and jargon.[84] Furthermore, each Research Paper for the case study RNTBCs also put the detailed local analysis into the wider regional, State and national (and sometimes international) policy contexts that was impacting on their aspirations.

Another important feature of the research was to conduct several face-to-face semi-structured interviews or informal discussions with selected bureaucrats in the Australian Government and some State Governments, Native Title Representative Bodies (NTRBs), researchers, academics

[81] For the Bardi and Jawi RNTBC, see Wensing 2014a; 2014b; 2014c; 2016b; 2018a. For the Yawuru RNTBC, see Wensing, 2014d; 2016c; 2017c; 2017e; 2018b.

[82] The Research Papers prepared for each of the RNTBCs remain the property of the RNTBCs respectively, and are not publicly available.

[83] In many respects, the fact that the two case study localities are situated in WA is fortuitous, because the WA Government has never established a statutory land rights grants scheme similar to that in the Northern Territory or New South Wales. Furthermore, no detailed study of the Aboriginal land system in WA has been undertaken in recent years, and the analysis in this thesis is the first time this has occurred in more than a decade.

[84] See **Appendix F** for a separate Glossary of Terms in the Native Title system and in the Land Administration and Land Use Planning systems.

and experts on native title matters, property law and land tenure (particularly with an understanding of these issues in WA). These people were selected on the basis of their (current or former) positions in government or non-government organisations or as a researcher or academic in tertiary institutions with specialist expertise in a particular field. Over 123 interviews/discussions were conducted with 78 different people over the course of the research for this thesis. At the outset, I developed a list of key questions as a guide to my inquiries (see **Part A4** of **Appendix A**), but most of the interviews or discussions were aimed at eliciting information or a more detailed understanding of existing policies or statutes, especially for the Background Research Papers mentioned above, as well as for the Research Papers that I was preparing for the case study RNTBCs. Often, my questioning went beyond the pre-prepared list of questions, depending on the course of the discussion.

Coincidentally, during this research an illustrative example of the dilemmas and challenges that native title holders and Aboriginal communities are facing also emerged. In 2013-14, the Bidan Aboriginal Community located on the Great Northern Highway between Broome and Derby accepted the transfer of three parcels of land from the ALT in WA. When they heard about my research through a colleague at the National Centre for Indigenous Studies (NCIS), they approached me with their concerns about the nature of those land transfers and expressed a willingness to participate in this research. My meetings with them resulted in their agreement to including their experiences in my thesis as an illustrative example of the difficulties that Aboriginal people are encountering under current legislative and policy settings.[85]

Finally, I undertook a synthesis of the resulting practicalities and possibilities with each of the case study RNTBCs Boards of Management and/or senior staff, and refined the results accordingly. Having taken each of the case study RNTBCs on a journey through all the details with respect to their native title rights and interests, the existing land tenure, land use planning, local municipal and essential service delivery responsibilities, Aboriginal cultural heritage protection schemes and local governance arrangements in their respective localities, and having assisted them in developing their understanding of the essential differences between Aboriginal and Western systems of land ownership, use and tenure, I was able to lead them into a deeper exploration of the philosophical differences and what features or characteristics may be common to all societies. I also sought their input into how to develop a level playing field between the two different systems. These discussions hinged around their longer-term

[85] And documented in more detail in **Appendix C.**

aspirations for the survival of their unique culture and how they want their interactions with the Western system and ultimately the state/State to change, such that the Aboriginal system of law and custom relating to land is seen as being of equal value and status and not as always being subservient to the state/State.

Ultimately, the methods used in this research were aimed at building a theory that is faithful and comparable to the evidence and that the research was executed in a way that is precise, rigorous, replicable and defensible (Neuman, 2011:71).

1.6 Scope of the research

While there are many similarities in the conventional land tenure systems in each of the jurisdictions within Australia, their land tenure histories and statutory Aboriginal land rights schemes are quite different (Wensing, 2016a, 2017a, 2017b). A detailed analysis of the different systems in each jurisdiction is far beyond the scope of this thesis.[86] For practical reasons this research focuses on the existing land tenure system in WA concerning land and not marine areas, and so as far as I have been able to ascertain, this is the first piece of major academic analysis of the native title and Aboriginal land systems in WA. Similar research has been undertaken in other jurisdictions within Australia,[87] but no such research has focussed on these issues in WA, the jurisdiction with which I am most familiar. There is also a dearth of research in recent years on these issues at the national scale. The contemporary need for this research could not, therefore, be more self-evident.

Furthermore, the nature of Aboriginal peoples' forms of land ownership, use and tenure are different from those of the Torres Strait Islander peoples (Sharp, 1996:13-14 and 109-110; Small, 2000:115-16). Again, for reasons of practicality, this thesis research focuses on two Aboriginal traditional owner communities in WA.

[86] As discussed in Part 1.5 above, I undertook an analysis of the different Aboriginal and Torres Strait Islander land rights schemes around Australia and the Commonwealth's Indigenous land tenure reform agenda from 1997 to 2017 (Wensing, 2017a; 2017b). The Background Research Papers note that there are significant conflicts between the statutory Aboriginal or Torres Strait Islander land rights schemes and native title rights and interests in each jurisdiction and that each jurisdiction is responding differently to the Commonwealth's agenda. To include that analysis in the body of this thesis would have been a distraction from the critical question(s) this thesis seeks to address.

[87] Other researchers are focussing on similar issues in the Northern Territory (Terrill, 2009; 2010; 2011a; 2011b, 2015a; 2016), in Queensland (Moran *et al* 2002; Moran *et al* 2010, Terrill, 2015b), and in New South Wales (Crabtree *et al*, 2012; Crabtree, 2014; Crabtree *et al*, 2015; Norman, 2015).

Aboriginal peoples' land ownership, use and tenure systems also exist over marine areas as well as terrestrial areas.[88] The State's land tenure system only applies to terrestrial areas with a different regime applying to marine or offshore areas. The scope of this thesis research is on Aboriginal peoples' terrestrial land rights and interests, as distinct from their off-shore marine rights and interests.[89]

Similarly, a different regulatory system applies to the management of water. Although a reference to Aboriginal lands in this thesis also includes inland waters such as rivers, creeks, lakes, aquifers and other inland water bodies, for reasons of practicality this research does not include water planning and the allocation of water rights. While the state applies separate regimes for managing land use and water rights and interests, it should be noted that Aboriginal peoples do not make such distinctions. The division between land and water for the purposes of this research is not intended to disrespect in any way Aboriginal peoples' beliefs and values that land and marine resources and tenure are indivisible (Rigsby, 1998:23).

The thesis therefore explores the following aspects of the WA regime:

1) The WA land tenure system, focussing in particular on the Aboriginal Lands Trust (ALT) estate;
2) The impact of positive native title determinations on the land tenure system in WA and on the ALT Estate;[90]
3) Aboriginal peoples' approaches to holding native title rights and interests while also engaging with the conventional land tenure system in WA;
4) Current Anglo-Australian approaches to engaging with the ancestral land rights of Aboriginal people and communities in WA, focussing on the concepts of inalienability, extinguishment and the non-extinguishment principle[91];
5) Areas where there is evident misalignment and contestation between the two systems; and

[88] See for example, the Torres Strait Sea Claim, *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33, 7 August 2013. See also Marshall (2017) for a discussion of these issues.
[89] For an analysis of Indigenous marine tenure and water rights, see for example Cordell (1992; 1993); S. Brennan (2015:29-43); Marshall (2017); Berry and Jackson (2018); Berry *et al* (2018).
[90] The two case study localities in the north west of WA are where the impacts of colonisation did not result in large-scale dispossession of land through its conversion into private freehold, as occurred in most of the other States. The fact that this research focusses on two positive determinations of native title, rightly raises questions about the applicability of this research in locations where native title claims cannot be claimed or determined to exist. In the final Chapter, I argue that the model for parity and coexistence developed in this thesis has applicability beyond native title determinations, especially where Traditional Owners can demonstrate they are the custodians for an area under their law and custom but are not able to do so to the satisfaction of the FCA under the NTA.
[91] As defined in s.238 NTA.

6) Identifying practical and innovative solutions generated by Aboriginal people themselves or arising from my analysis that will allow the two distinct land ownership, use and tenure systems to co-exist respectfully and peacefully.

As noted above, the findings of this research will have particular applicability in WA and other parts of Australia, including Queensland and South Australia where similar trust arrangements once existed or still exist. The findings may also have some applicability in the other jurisdictions around Australia and/or the CANZUS group of countries[92] because of their similar colonial histories and common law systems.[93]

As a researcher, I am very conscious of what McLaren *et al* (2005:8) described as the tendency of the dominant society and its legal and political agents 'remaining prone to developing solutions that are assumed to be good for Aboriginal people without consulting them and fully appreciating their culture'. The practical component of this research is therefore driven largely by the needs of the two case study communities to find realistic solutions to 'dislodging the "brute force" of the colonisers' approaches to the taking of land from Indigenous peoples based on the dominant society's value sets and paradigms (McLaren *et al*, 2005:6-7).[94] McLaren *et al* (2005:296) warns against assuming that Indigenous property conceptions and rules can be 'squeezed into the property and law matrix' of the dominant society. He also warns that Indigenous people are likely to reject 'a process of filtering' their conceptions of property 'through the colonising lens of law and governance … without their consent and with little or no respect for their beliefs, institutions and traditions'. The practical tools developed as part of this research are therefore deliberately aimed at addressing the current power imbalance between two distinct laws and customs relating to land and reconstituting property relations in Australia based on parity between the two systems, rather than one always dominating over the other.

1.7 Outline of this Thesis

This thesis takes a close-up view based on a forensic analysis of two case study localities in WA and enlarges this analysis to locate the problem in a wider frame. Along the way, this thesis will

[92] Includes Canada, Australia, New Zealand and the United States of America, because of their similar colonial and common law histories.
[93] The extent to which this may be possible is beyond the scope of this thesis and is for others to investigate.
[94] See also Banner (2005a:130) and Ritter (1996).

blow up a few myths, puncture some legal orthodoxies and speak truth to power (Wildavsky, 1979) about land ownership, use and tenure in Australia.

Chapter 2 explores how Australia came to be in the predicament of not formally recognising the prior rights to territory of Aboriginal and Torres Strait Islander peoples from 1770 to 1992, the evolution of Western property theory and its application by the British Empire in its colonial endeavours. Chapter 2 also explores the statutory Aboriginal land rights schemes established prior to *Mabo (No. 2)*, why the notion of *terra nullius* became the 'scapegoat' in *Mabo (No. 2)* for the lack of recognition of the ancestral land rights of Aboriginal and Torres Strait Islander peoples in Australia, and the way the Aboriginal estate changed from prior to 1788 to the present.

The combination of denial of Indigenous sovereignty, the Crown's monopoly powers to extinguish native title and the inalienability of native title are continuing to deny Aboriginal peoples the equality they have repeatedly declared they want.[95] Chapter 3 therefore examines the disjuncts, dilemmas and challenges arising from *Mabo (No. 2)* and positions this in the wider policy and legal context of the Australian Government's Indigenous land tenure reform agenda.

Several concepts relating to property and land that we tend to take for granted are unpacked in Chapter 4 to provide a clear understanding of their application to the analysis in subsequent chapters.

Chapter 5 explores the utility of a common understanding of property if we are to achieve a level of co-existence between two distinct land systems based on parity and justice, the significant differences between Indigenous and Western theories of property and ownership, and builds an iterative analysis of the interactions that occur between two culturally distinct conceptions of property and ownership.

Chapter 6 applies the hypothesis and provides some answers to the critical question(s) by drawing out the distinguishing features between the two distinct land ownership, use and tenure systems and focussing on the incommensurabilities and commensurabilities, and the necessary attributes for a just form of coexistence between the two distinct systems.

[95] See discussion on declaration by the Aboriginal and Torres Strait Islander peoples for reshaping Australia in part 3.4 of Chapter 3 of this thesis.

In Chapter 7, two case study localities and an illustrative example are used to extrapolate the issues and test the hypothesis. The key features of the case study communities are discussed and why they self-selected to be the focus of this research. The nature of the ALT system in WA and the State Government's approaches to resolving native title matters are examined, including the State's requirement for the surrender and permanent extinguishment of native title rights and interests as a pre-condition for a grant of freehold tenure.[96] The similarities and differences between the case studies are discussed, as are the points of contestation and conflict between the two distinct land ownership, use and tenure systems in the two localities. Chapter 7 also explores the commensurabilities and incommensurabilities in a local and practical context, the implications for coexistence and the necessary pre-conditions for reaching a just alignment and coexistence between the two systems.

Drawing on this research and analysis, Chapter 8 establishes a set of ten Foundational Principles for parity and coexistence, recognising that every positive native title determination is an affirmation of Aboriginal peoples' ancestral land rights and interests under their law and custom. The research shows that the foundational principles have wide support from Indigenous leaders in Australia and that international human rights norms and standards are particularly relevant to Aboriginal peoples' human rights concerning land and development. Chapter 8 then evaluates the existing situation in the case study localities and an option for land tenure reform that is possible within the existing statutes in WA against the foundational principles.

Using the conceptual framework in Chapter 4, the theoretical propositions in Chapter 5, the results from applying the hypothesis and answers to the critical research questions in Chapter 6, the results of case study analyses in Chapter 7, the foundational principles in Chapter 8, Chapter 9 develops a Model for parity and coexistence between the two land ownership, use and tenure systems that will enable a more just alignment and a peaceful coexistence based on parity and justice. A framework for applying the Model for Parity and Coexistence is also discussed. Chapters 8 and 9 present the key pre-requisites for a model that would support a respectful and just coexistence between two land ownership, use and tenure systems to be used, adapted and tested by others. The Model includes a form of leasehold tenure that might offer the greatest potential for respecting Aboriginal peoples' inherent connections to and cultural responsibility for country.

[96] Or leasehold of exclusive possession.

Chapter 10 as the final chapter, draws together the findings, contributions and conclusions of this thesis. Chapter 10 includes a chapter-by-chapter review of the research, a summary of the empirical findings, a synthesis of the conceptual and theoretical contributions of the research, the thesis' contributions to praxis and my conclusions.

The six Appendices to this thesis include documentation of the research activities, an annotated summary of a selection of the court cases that shaped the judicial history of the treatment of Aboriginal peoples' rights in Australia, documentation of the case study material and a comprehensive glossary of terms.

The research for this thesis is the first time such an intricate analysis between these distinct systems has been undertaken in the Australian context by applying elements of a constructivist grounded theory method to arrive at its findings and conclusions.

CHAPTER 2
AN AUSTRALIAN PREDICAMENT: 'A troubling inheritance'[97]

> *'Europe's encounter with and treatment of the world's tribal peoples is an immense theme, sprawling over five centuries and across all the inhabited continents. Yet it is also a phenomenon whose outline retains a fundamental clarity. In essence it is a story of how a handful of small, highly advanced and well-populated nation-states at the western extremity of Eurasia embarked on a mission of territorial conquest. And how in little more than 400 years they had brought within their political orbit most of the diverse peoples across five continents.*
>
> *It is in equal measure a tale of extraordinary human achievement in adversity, conferring on the victors possession of much of the world's physical resources, and a tragedy of staggering proportions, involving the deaths of many millions of victims and the complete extinction of numerous distinct peoples. In fact, when viewed as a single process the European consumption of tribal society could be said to represent the greatest, most persistent act of human destructiveness ever recorded.'*
>
> Mark Cocker (1998:iii).

2.1 Introduction: Learning from the past?

Cocker's summation of European conquest spanning over 400 years from the sixteenth to the twentieth centuries covers four particular episodes in four separate regions: 'the Spanish conquest of Mexico; the British near-extermination of Tasmanian Aborigines; the white American dispossession of the Apache; and the German subjugation of the Herero and Nama of South West Africa' (Cocker, 1998:xiii). Cocker (1998:366) believes these represent the first and last phases of European military expansion and in documenting these episodes, he sought to portray 'a connective tissue of parallels, of recurrent echoes and reverberations' of the confrontations between 'the civilised and the savage' (1998:xiv). While the 'repetitions are seldom truly exact' in their replication, Cocker (1998:xiv) argues that the 'one indisputable thread running through the many tragedies' is that we fail to learn from the past.

Or maybe we don't want to learn from the past. As Fitzmaurice (2007:2) observes, 'the justice of dispossession of Indigenous peoples from their lands has become one of the most important political questions of the post-colonial world' and that reconciliation cannot be pursued without asking the key historical question of 'whether and how colonisation was justified'. Fitzmaurice

[97] Pearson (1994:3).

also argues that *Mabo (No. 2)*[98] needs to be understood within a 'clearly continuous … western judicial tradition' of 'rescuing liberty (or, in this case, liberal democracy) from the threat posed by the dispossession of colonised peoples' (Fitzmaurice, 2007:15). In other words, it is about how nation states account for their seizure of foreign lands 'in such a way that their authority as sovereign is not undermined' (Povinelli, 2011:18) and in the context of this thesis, the British Empire in particular.

Australia is the only British colony where there was no official acknowledgement of pre-existing Indigenous property rights or of an Indigenous polity (Buchan and Heath, 2006:7).[99] And where land was acquired from Indigenous peoples through purchase in exchange for a fee (i.e. by the Port Phillip Association led by John Batman in what became Melbourne[100]), governments refused to recognise the transaction on the grounds that only the Crown had an exclusive right to pre-emption (Reynolds, 1992:127).[101]

This chapter explores the roots of how Australia came to be in the predicament of not formally recognising the prior rights to territory of its Indigenous peoples from 1770 to 1992 and the dilemmas arising from that history that are continuing to reverberate through Australian society and polity. The origin of this predicament lies in the evolution of western property theory and concepts from the seventeenth to the nineteenth centuries which significantly influenced the British Empire in its colonial endeavours and how it dealt with these issues (Part 2.2). What happened in New South Wales (NSW) from the late 1700s to the mid-1800s with respect to how the Crown's sovereignty over land dealings was justified and why this was difficult to dislodge is examined (Part 2.3). The Judiciary's role in relation to the interaction between Aborigines and white society prior to *Mabo (No. 2)* is also examined (Part 2.4). In response to Aboriginal land rights campaigns, several statutory Aboriginal land rights schemes were established prior to *Mabo (No. 2)*, only partly addressing Aboriginal peoples' concerns (Part 2.5). In *Mabo (No. 2)* the HCA used the notion of *terra nullius* (a land belonging to no-one)[102] as the 'scapegoat' for

[98] *Mabo (No. 2) v the State of Queensland* (1992) 175 CLR 1.

[99] At this point is important to note that the 'Doctrine of Discovery' developed by Chief Justice Marshall in *Johnson v McIntosh* (1823) (Marshall J, 8 Wheat, 586; 21 U.S. 259; 8 Wheat, 543, 592; 21 U.S. 261) in the United States of America was not adopted into Australian law (Behrendt, 2010:179). The Doctrine of Discovery is discussed in more detail in Part 3.2.3 of Chapter 3 of this thesis.

[100] See Attwood (2009) and Boyce (2011). NSW Governor Richard Bourke declared the Batman Treaty as void on 26 August 1835 on the basis that the Wurundjeri people did not have the right to deal with land that belonged to the Crown (Boyce, 2011:116).

[101] See also Attwood (2009:72); Boyce (2011:133); L.C. Johnson (2018c:112-130).

[102] Fitzmaurice (2007:13) argues that the terms *terra nullius* and territorium nullius have been misunderstood by jurists and have become 'confused and then fused', and that researchers have an obligation to unravel why they have become so misunderstood and misused. 'Territorium' implied a sense of 'territory', while 'terra' implied a question of earth, land. J. King (1986:81) argues that the 'nullius' in '*terra nullius*' refers to the absence of other European powers. These meanings are significant given that the term 'territorium' was used in connection with the occupation of Africa because the local native peoples had established extensive property rights in the land and the other term was believed to be appropriate to polar regions inhabited by European subjects or

the lack of recognition of the ancestral land rights of Aboriginal peoples in Australia (Part 2.6). The final part of this Chapter examines the changing nature of the Aboriginal estate from prior to 1788 through to the present (Part 2.7), before drawing some general conclusions (Part 2.8).

2.2 Western property theory in colonial times

The west coast of Australia had been explored by the Dutch (Willem Jansz in 1606) and named 'New Holland' by the Dutch East India Company, but no attempt had been made to establish a colony (Gerritsen, 2015). The north had been visited by Macassans who formed trading relationships with the Aboriginal and Torres Strait Islander peoples with no thought of conquest or cession[103] (Macknight, 1969; 1976).[104] On a scientific voyage to the South Pacific Ocean in 1770, Lieutenant James Cook[105] laid claim to the east coast of 'New Holland' for the British Empire. Lieutenant Governor Arthur Phillip was despatched from the United Kingdom (UK) in 1787 with the first shiploads of convicts and became Australia's first Colonial Governor to establish the colony of NSW, arriving in January 1788.[106]

While Cook was serving two masters for his voyage on the *Endeavour* to observe the transit of Venus from the South Pacific, the Royal Society and the British Government had both given Cook the same instructions with respect to Indigenous peoples: that if he 'arrived in any populated places, known or unknown, the residents were to be treated as owners of the land' (Banner, 2005a:97)[107] and that if the land was inhabited that he take possession 'with the consent of the Natives' (Bennett and Castles, 1979:254).

The Royal Society's instructions to Cook were to exercise 'the utmost patience and forbearance with the Natives' (Douglas, 1768) (**Figure 2.1**). The instructions could hardly have been

not inhabited at all (Fitzmaurice 2007:13). Thus the term *terra nullius* implicitly referred to an absence of both property and sovereignty:

> *'The notion of territorium nullius conceded the possibility of property existing without sovereignty having been established. It thus could allow colonisers to establish imperium, or sovereignty, over territories while acknowledging local property rights. What was at work in this taxonomy was a progressive anthropology (which began to be elaborated in the sixteenth century) in which peoples were placed on a developmental ladder. Their position on that ladder would determine the degree of colonial intervention that could be justified'* (Fitzmaurice, 2007:13).

[103] 'Conquest denotes that the territory has been seized by force against the will of its previous Sovereign' (Lindley, 1926:2). 'Cession is necessarily a bilateral; it requires the consent of the ceding as well as of the acquiring Sovereign' (Lindley, 1926:2).

[104] See also Langton *et al* (2006); Glaskin (2017:19).

[105] Later Captain.

[106] Arthur Phillip was 48 years of age at the date of his appointment on 12 October 1786. 'When endowed with the absolute powers which he held in the settlement, his actions, even when under gross provocation, were always tempered with tact and forbearance towards his subordinates' (Commonwealth of Australia, 2014:xvii). 'Governor Phillip retained the entire confidence of the English authorities throughout his administration and was the only one of the early Governors, whose actions were not called into question. … When Phillip's character and life are fully studied, he will be recognised as the father of Australia and the best of the early Governors of New South Wales' (Commonwealth of Australia, 2014:xxiv-xv).

[107] P.G. McHugh (2006:263) regards Stuart Banner as 'one of – if not the most – versatile Anglo-American legal historians'.

surprising to Cook because British Imperial policy for the occupation of new lands was well established: If new land was found suitable for colonising and it was inhabited, then Britain would purchase it from the natives, as was the case in North America (Banner, 2005a:97-98).[108]

James Douglas' instructions to Lt James Cook, 1768

To exercise the utmost patience and forbearance with respect to the Natives …

To have it still in view that shedding the blood of these people is a crime of the highest nature: - They are human creatures, the work of the same omnipotent Author, equally under his care with the most polished European; perhaps … more entitled to his favour.

They are the natural, and in the strictest sense of the word, the legal possessors of the several Regions they inhabit.

No European Nation has a right to occupy any part of their country, or settle among them without their voluntary consent.

Conquest over such people can give no just title; because they could never be the Aggressors.

Figure 2.1 Extract from the Instructions of James Douglas, the 14th Earl of Morton and President of the Royal Society, to Lieutenant James Cook, 1768

Source: Beaglehole (1955:514).

By the late eighteenth century 'the British legal system had accepted that the Indigenous peoples of North America had legally well-established rights to their land, and that British colonisation could only proceed after title had been acquired through conquest or cession' (Borch, 2001:228). Buchan (2007:390) maintains that the Earl of Morton's instructions 'were a direct expression of a long tradition of Royal Society instructions to travellers and correspondents on how to observe and what to report on the lives of Indigenous peoples throughout Britain's fast-growing Empire'.

There is a long history in international law of recognising the territorial rights of Indigenous peoples:

> *'… extending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one'* (Lindley, 1926:20).

[108] See also Banner (2005b:12, 49; 2007:11, 14).

Lindley (1926) and Marks (1991) argue this can be traced back to contact between the Spaniards and the Native Americans in the early sixteenth century, 'noting the doctrinal contribution of Francisco de Vitoria[109] … and the role of Bartolome de Las Casas[110] … in support of the rights of [Native American] Indians' (Marks, 1991:4). Lindley (1926:12) credits Vitoria and de Las Casas for 'opposing the notion that "backward territory" can be considered as *terra nullius* on the basis that the inhabitants are barbarians and infidels'. Marks (1991:28) argues that British sovereignty over Australia was asserted by occupation. Lindley (1926:2) asserts that 'Occupation can be commenced by a unilateral act of relatively simple nature and consummated in a comparatively short time', but he also argues that it is important to 'determine the conditions that characterise territory that is open to acquisition by occupation'.

Sir William Blackstone, an English jurist and politician is most noted for writing the *Commentaries on the Laws of England* (Blackstone, 1765 to 1769)[111], which provided a complete overview of English law at the time of Cook's endeavours and about twenty years before Lieutenant Governor Phillip was despatched to establish a convict colony in 'New Holland' (Lavery, 2015:133). Blackstone was also writing in the wake of the *Royal Proclamation* of 1763 by King George III,[112] the purpose of which was to consolidate Great Britain's colonial possessions in North America and to stabilise relations with the Native Americans (Joyner, 1978:31; Lavery, 2015:132).

In Chapter 4 of Blackstone's *Book the First*,[113] he was not writing about the modes of acquisition of foreign territories. Blackstone was writing about those places over which British sovereignty already extended[114] and the reception and application of the laws of England in those places (Blackstone, 1765/1992:105). Blackstone draws a distinction between how the laws of England will apply where territory has been 'claimed by right of occupancy' because it was 'desart and uncultivated'[115] and 'peopled from the mother country', and how the laws apply where the territory was 'already cultivated' and was gained 'by conquest, or ceded to us by treaties' (Blackstone, 1765/1992:104).

[109] According to Sanders (1983:5) Francisco de Vitoria was 'one of the fathers of international law'.
[110] According to Sanders (1983:5) Bartolome de Las Casas was 'the greatest publicist'.
[111] Hereafter cited as the Commentaries.
[112] Hereafter cited as the Royal Proclamation.
[113] Titled '*Of the Countries Subject to the Laws of England*', Blackstone (1765/1992).
[114] Including Wales, Scotland, Ireland (Blackstone 1765/1992:93), the Isle of Man (Blackstone 1765/1992:102), the islands of Jersey, Guernsey, Sark, Alderney and their appendages (Blackstone 1765/1992:104), and over 'our more distant plantations in America, and elsewhere' (Blackstone 1765/1992:104).
[115] In relation to these terms, Bennett (G.I. 1978:628-9) notes that: 'The words "desart" and "uncultivated" were Blackstone's own, and were taken to include territories inhabited by so-called "primitive peoples".'

Blackstone (1765/1992:104-105) also states that if uninhabited country is discovered and planted (cultivated) by English subjects, then through their birthright as English subjects all the English laws 'are immediately in force', but this comes 'with very many and very great restrictions'. English subjects carry with them only so much of the English laws that is applicable to their own situation and the conditions of their infant colony.[116] 'The artificial refinements and distinctions incident to the property of a great and commercial people', policing, revenue, support for the clergy and a range of other matters are 'neither necessary nor convenient for them' are therefore not in force. What shall be admitted or not admitted is a matter for the local judicature and 'subject to the revision and control of the King in council' (Blackstone, 1765/1992:105).

In conquered or ceded countries that already have their own laws, the king may alter or change those laws, but until the king does so, 'the ancient laws of the country remain' (Blackstone, 1765:105). Blackstone also comments that the:

> *'American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall at present not inquire) or by treaties. And therefore, the common law of England has no allowance or authority there, they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the parliament, …'* (Blackstone, 1765/1992:105).

Blackstone's bracketed comments 'with what natural justice I shall at present not enquire', shows his implicit but undoubted disapproval (Prest, 2009:11). Blackstone also acknowledges the Native Americans are 'distinct (though dependant) dominions', reflecting his earlier comments about territories that already have their own laws and that, as a result of conquest and session, the king may alter those laws via the parliament.

As Lavery (2015:131) points out, Blackstone's *Book the First* is not about the circumstances of English law applying to territories already inhabited by New World peoples. These issues are addressed in Blackstone's *Book the Second* (Blackstone, 1766/1992).

In Chapter 1[117] of *Book the Second*[118], Blackstone embraces the principle of a right to seize upon and occupy new territories to supply the necessities of life from uncultivated nations that have

[116] For example, general rules of inheritance and protection from personal injuries.
[117] Titled '*Of Property, in General'*, Blackstone (1766/1992).
[118] Titled '*The Rights of Things'*, Blackstone (1766/1992).

never been formed into civil states and the right of migration by the mother-country to find new habitations when she is overcharged with inhabitants *' … so long as it was confined to the stocking and cultivation of desart uninhabited countries, it kept strictly within the limits of the law of nature'* (Blackstone, 1766/1992:6-7).

Here, Blackstone also questions the justification for the seizure of 'countries already peopled' and the morality of 'driving out or massacring the innocent and defenceless natives, merely because they differed from the invaders in language, religion, customs, government, or in colour'.[119] Blackstone asserted that 'how far such conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilising mankind' (Blackstone, 1766/1992:7). A foreboding statement, given he was writing only a few years before what was about to unfold in the antipodes over the coming years with Lieutenant Cook's voyage on the *Endeavour* in 1770 and more than two decades before Lieutenant Governor Phillip's journey to establish a colony in 'New Holland'. Later in this chapter we will see how Blackstone's *Commentaries* have been misquoted by the judiciary in Australia to justify colonisation by the British.

It is possible that Blackstone was influenced by several philosophical thinkers on law and property, including Francisco de Vitoria[120], Bartolome de las Casas[121], Hugo Grotius[122], Thomas Hobbes[123], William Petty,[124] Samuel von Pufendorf[125], John Locke[126], and Emer de Vattel[127] (Buchan and Heath, 2006:8; R. King, 1986:77-79). Indeed, Blackstone cites Grotius, Pufendorf and Vattell in various places in the *Commentaries*.

Vattel, writing in 1758, believed that it was possible to colonise new lands without necessarily dispossessing the original occupants (Borch, 2001:235). Vattell is credited with advancing Locke's (1690 [Laslett, 1967]) agriculturalist argument that there is a duty to cultivate the land, but not to such an extent as to deny the Indigenous inhabitants any rights to the land (Borch

[119] Lavery (2017:71) describes Blackstone's comments here as 'deeply humanist' and 'obviously abhorrent' to Blackstone because it was 'contrary to the law of nature, to reason and to Christianity'.
[120] Francisco Vitoria, c.1483-1546, regarded as the founder of the tradition in philosophy as the School of Salamanca and best known for his contributions on the theory of just war and international law (Padgen, 1991).
[121] Bartolome de la Casas, c.1484-1566, a noted defender of the rights of the Native Americans (Marks, 2000).
[122] Hugo Grotius, 1583-1645, a jurist and philosopher and author of one of the most important legal doctrines about the freedom of the seas (Neff, 2012).
[123] Thomas Hobbes, 1588-1679, best known for his works on political philosophy (Sacksteder, 1982).
[124] William Petty, 1623-1687, an inventor, entrepreneur, physician and a progenitor of modern political economy (Bhandar, 2018:39).
[125] Samuel von Pufendorf, 1632-1694, German jurist, political philosopher, economist, statesman and historian, best known for his commentaries and revisions of the natural law theories of Hobbes and Grotius (Tully, 1980).
[126] John Locke, 1632-1704, regarded as the most influential thinker and known as the father of liberalism (Tully, 1980).
[127] Emer de Vattel, 1714-1767, Swiss philosopher, diplomat and legal expert, best known for his work on the law of nations according to scientific methods (Vattel, 1758/2008).

2001:234). Vattell believed on the basis that the Native Americans 'occupy more land than they need under a system of honest labour', they would have no grounds to complain if others settled on part of their land, particularly if it was land which the Native Americans 'have no special need of and are making no present and continuous use of'. If European style agriculture was not being practiced, it therefore 'followed that the land was unowned, "waste" and available for industrious use' (Borch, 2001:234). However, Vattell also believed that it was not justifiable to dispossess the Native Americans of the land on which they lived. Borch (2001:234) argues that Vattell 'did not sanction the wholesale takeover of Indigenous land' because Vattel hastened to add:

> '*But let us repeat again … that the savage tribes of North America had no right to keep to themselves the whole of that vast continent; and provided sufficient lands were left to the* [Native American] *Indians, others might, without injustice to them, settle in certain parts of a region, the whole of which the* [Native American] *Indians were unable to occupy*' (Vattell 1758/2008).[128]

Vattell, like John Locke (1690 [Laslett, 1967:303-320]) many years before him, had opened up the possibility that land could be acquired through occupation and settlement, as opposed to conquest, because it 'was not based on an absolute denial of the rights of existing inhabitants' and that they 'nevertheless recognised that peoples like the Native Americans had a right to their land which was based on the law of nature' (Borch, 2001:235). Borch also argues that while Vattel and Locke had been seen as the strongest promoters of the idea that indigenous land was there for the taking, they did not argue that such land should or could be equated with *terra nullius* (Borch, 2001:235).

However, Locke (1690 [Laslett, 1967:308-309] ss.32-34) argued that 'as much land as a man tills, plants, improves, cultivates and can use the products therefrom, is his property'.[129] Locke also asserted that the taking of land for productive use was not prejudicial to other people, since 'there was still enough, and as good left; and more than the yet unprovided could use' (Locke, 1690 [Laslett, 1967:309] s.33). Locke's view was that the Native Americans had no organised state, no effective sovereignty and no way of showing ownership of land and without these, Locke saw them as 'exemplifying the state of nature' (Buchan and Heath, 2006:8). Thus, the basis of English colonialism in the Americas and Australia was the 'peaceful agrarian settlement, not war' transmitted by the works of Vattell and Blackstone (Kane 2007:3) and 'so powerful was

[128] Cited in Borch (2001:234).
[129] I do not condone the sexist nature of Locke's language, but this reflects the prevailing social attitudes and values of the time.

the Lockean theory … that even its eventual rejection had to be founded on its plausibility' (Kane 2007:17).

By the latter half of the eighteenth century, land that was already occupied could be colonised without the consent of the 'occupants' because their ownership could not be recognised (Buchan and Heath, 2006:8). European culture and society represented the highest known standard of civilisation (Bowden, 2004:33; Buchan, 2005:181), and that where land was 'unowned' and not being put to productive use, it was available for European style agriculture. 'It was this kind of understanding of what constituted a "savage" people that informed the British colonisation of Australia in 1788' (Buchan and Heath, 2006:9).

'Savages' were seen as 'a sort of zero in the thermometer of civilisation – a point from which there is a gradual rise towards perfection' (Senior, 1837:87). These images were used 'not simply to *describe* an actually existing condition, so much as to *sustain* a project of hypothetical reasoning' (Buchan, 2007:386, emphasis in original). Especially, the 'more deeply entrenched assumptions in European thought that tribes of so called "savage" peoples did not constitute sovereign polities or possess rights of ownership' (Buchan 2007:387, emphasis in original). Colonisation was therefore seen as 'a process by which "savages" were "rescued from the state of nature"' (G. Bennett, 1834:43, cited in Buchan and Heath, 2006:13).

Consequently, 'Indigenous peoples were rendered "subjects of the Crown" not by conquest or cession, but as a consequence of the colonial construction of Indigenous Peoples as "savage": without society, sovereignty or private property' (Buchan and Heath, 2006:9). This provided a racial basis for colonialism and justification for the subordination of Indigenous peoples and nations by the colonists. Bhandar (2018:96) argues that the 'figure of the Savage' was seen as a 'continual threat to civilisation and security' which made Aboriginal peoples' rights to their land a 'non-question'. The doctrine of *terra nullius* enabled the colonists to render the land as being '*tabula rasa*' (vacant) and 'as a commodity entirely divorced from the people living on it', thereby enabling the imposition of a system of private property ownership that precluded 'any consideration of what was there before' displacing 'the concept of the prior, and prior ownership, from the juridical sphere' (Bhandar, 2018:96). Bhandar (2018:96) concludes this was 'the ultimate violence of abstraction' on the Aboriginal peoples of Australia.

The legitimacy of occupation as the mode of acquisition of Australia and its orthodoxy is 'wholly compromised and cannot be sustained in the native title era' because Australia was 'replete with

many systems of laws and customs' (Lavery, 2017:77). Lavery asserts that 'the Occupation of Backward Peoples doctrine was not accepted State practice in the late 18th and early 19th centuries, and was never within the corpus of the international law' (2018:33). Lavery concludes therefore that any such claims are 'clumsy sophistry' and 'a soiled and threadbare disguise' (2018:31) that 'remains open to contestation' (2018:33).

Indeed, Lindley (1926:12) and Lavery (2017:53) argue that the doctrines of *terra nullius* and *Backward Peoples* are therefore premised on a falsehood: the superiority of European peoples and discrimination towards Indigenous peoples based on race. As Pearson (1994:3) asserts 'Racial ideology justified the rapacious dispossession of Indigenous people' and this is 'a troubling inheritance' that still infects Australia's national psyche. This is why Mr Goldsmith's statement in the Epigraph to this thesis, is so pertinent because he turns these notions upside down.

2.3 New South Wales in the late 1700s and early 1800s – What happened?

So what happened in the case of NSW? How did the notion of *terra nullius* become the 'scapegoat' (Banner 2005a:96, 98; Buchan, 2007:388) in *Mabo (No. 2)* for the occupation of Australia when it was not a standard feature of colonial policy at the time?

The reports prepared by Lieutenant James Cook[130], Joseph Banks[131] and James Matra[132] after their exploration of the east coast of Australia indicated they had encountered very few Aboriginal peoples and had formed the view that the Aboriginal peoples had only 'attained the "first stage" of civilisation' (Frost, 1980:520; R. King, 1986:76). R. King (1986:83) contends that these reports presented a picture

> *'of a people in the most primate state of society, few in numbers, without any form of government or idea of religion, without any understanding of commerce, ignorant of the most basic arts, incapable of making any but the most simplest and clumsy tools, weapons, clothing or shelter, hardly above the brutes in intellectual ability, and so timorous as to be capable of being frightened off by the sudden beating of a ship's drum, … no idea of property rights, or of buying or selling'* (R. King, 1986:80).[133]

[130] Later, Captain.
[131] Later, Sir.
[132] One of Cook's officers on the Endeavour.
[133] See also Banner (2007:18-19).

The proprietary rights of the Aboriginal peoples to their land could therefore be disregarded (R. King, 1986:81). R. King (1986:80) also argues that King George III's Instructions to Lieutenant Governor Phillip on 27 April 1787 were 'left vague' and that 'the well-being of the colony took precedence over that of the Aborigines' (see **Figure 2.2**).

King George III's Instructions to Lt. Gov. Phillip, 27 April 1787

'You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them.

And if any of our subjects shall wantonly destroy them, or give them unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.

You will endeavour to procure an account of the numbers inhabiting the neighbourhood of the intended settlement, and report your opinion to one of our Secretaries of State in what manner our intercourse with these people may be turned to the advantage of this colony.'

Figure 2.2 Extract from King George III's Instructions to Lieutenant Governor Phillip, 25 April 1787

Source: J. King (1985:139-140). See also MoAD (2016).

King George III's *Royal Proclamation* of 1763 recognised the land rights of the Native Americans and changed the legal method of acquiring land from them by placing such purchases in the hands of the government (Banner 2005:104). Under the doctrine contained in the *Royal Proclamation*, King George III would have assumed the exclusive right to purchase land from the Indigenous peoples, and by implication, they would also have the right to refuse to sell their land (R. King, 1986:81). 'The safeguards of Aboriginal personal and property rights laid down in the *Royal Proclamation* were never referred to in New South Wales' (R. King 1986:89) and were not included in the Instructions to Phillip, 'probably because of the impression given by the *Endeavour* voyagers that the natives of New South Wales had no idea of property rights, or of commercial transactions' (R. King, 1986:81; Banner, 2007:17-19).

Lieutenant Governor Phillip reported that there were many more Aboriginal inhabitants than he had been led to believe and that they were not particularly pleased with the presence of the colonists (Borch, 2001:235; Banner, 2007:28). Borch (2001:236) maintains that Phillip lacked any previous experience in establishing a new colony which left him ill-prepared for developing a relationship with the original inhabitants and that he failed to reach the conclusion, or to suggest, that 'a settlement ought to be made with the original inhabitants about the land on

which the colony was placed'. Given that Australia was a penal colony and was thousands of kilometres from Britain, communication between the new colony and Britain was slow. Britain would have been pre-occupied with the French Revolution in 1789 and the Napoleonic wars that followed from 1803-1815, and so would not have been overly concerned about what was happening in NSW at the time (E. Scott, 1940:9; Borch, 2001:236). There was also intense competition between the European empires for land and empire building in the new world (Keal, 2003:84-112).

Several other influences were also at work over the course of the late seventeenth and early eighteenth centuries. For example, when first British possession of the Australian colony occurred, the Aboriginal peoples were not seen to be in a position of strength to be regarded as free and independent tribes and they were not recognised as having any sovereignty over their lands (Borch, 2001:236; Banner 2007:27-28). The original misunderstanding that New Holland was 'so sparely inhabited as to be practically empty was translated into a legal fiction which served to justify British colonisation of a group of peoples whose political and legal organisation remained unfathomable to colonial officials' and that land inhabited by Aboriginal peoples 'who subsisted on hunting and gathering' could be regarded as 'ownerless and therefore taken possession of as if it had been uninhabited' (Borch, 2001:237).

The transition from natural law[134] to legal positivism[135] rejected the possibility that Indigenous societies could have the same rights or legal standing as European people (Borch, 2001:238; Borch, 2004:292; Keal, 2003:107) and 'repressed adequate legal debate about the morality of the law affecting Indigenous people' (Malbon, 1997:2). There was a rise in the Lockean/Vattel 'agriculturalist argument' among those in favour of colonial expansion and developing new theories about economic and political evolution of human society stemming from the biological differences between people, dividing them into different racial categories with different characteristics and abilities (Borch, 2001:238). These notions gave rise to the notion of European superiority as providing some form of legitimacy for the doctrine that 'land could be regarded as uninhabited merely because the inhabitants did not cultivate the land or conform to Western notions of political and legal organisation' (Borch, 2001:238). Colonisation was

[134] A philosophy of law that derives from the nature of human beings and the nature of the world.
[135] A philosophy of law that it is socially constructed, made by legislators or arising from case law.

therefore seen as 'an unalloyed good, the humanitarian thing to do and a way of bringing to others the benefits of European civilization' (Banner, 2005a:126).

Pascoe (2014:13) argues that the colonists were not here 'to marvel at a new civilisation; they were here to replace it' and that in order to understand the history we have to today, we have to understand the assumptions the colonists brought with them. Britain was convinced that its 'superiority in science, economy and religion' and its industrial success gave its 'colonial ambition a natural authority' to spread their version of 'civilisation and the word of God' and to 'capture the wealth of the colonised lands in return' (Pascoe, 2014:12). While Charles Darwin's theory of evolution was still to come, 'the first British visitors sailed to Australia contemplating what they were about to find, and innate superiority was the prism through which their new world was seen' (Pascoe, 2014:12). But the British also saw Australia as a place to dump convicts (Borch, 2004:74-80). Three factors influenced the development of colonial land policy in NSW at the time of British occupation: the presence of agriculture (or lack thereof), the degree of local Indigenous political organisation (or lack thereof), and the relative speed of white settlement and the establishment of imperial control (Banner, 2007:318). Banner (2007:46) maintains that the British colonial authorities got some things wrong[136], and other things right[137]. The problem in NSW, was that settlement and occupation proceeded without purchasing the land from the Aboriginal people and without negotiating any kind of agreement, as required in America by the *Royal Proclamation*.

Banner believes that Australia 'was treated as *terra nullius* from the start, by design' (2007:3) and attributes its staying power to two factors (2005a:124). Firstly, that there was another side to the debate in that 'for every bit of land not in the possession of Aborigines was one more bit available for settlement'. The colonisers required the land in order to attract settlers (McAuslan, 2007:255). Secondly, and perhaps more importantly, that the remedies for the injustices of *terra nullius* included compensating the Aborigines by setting aside parcels of unallocated land as permanent Aboriginal reserves, but noting that the critics[138] of *terra nullius* were not necessarily arguing in favour of recognising Aboriginal peoples' property rights as the true owners of their land or their sovereignty (Banner, 2005a:126). The eighteenth-century critics[139]

[136] That the Aboriginal population was not very large, that they had no conception of property.
[137] That the Aboriginal people were not farmers in the European sense and would not offer any military resistance to white settlement as the British had encountered elsewhere in the Pacific and in Africa and the Americas.
[138] Banner (2005a) identifies the 'critics' of *terra nullius* as including Earl Grey, the Secretary of State for the Colonies in the late 1840s; John Bede Polding, the Roman Catholic Archbishop of Sydney in the 1840s; and Saxe Bannister, the former Attorney General of NSW 1824-1826; and merchant George Fife Angas, one of the founders of SA.
[139] Predominantly missionaries, clergymen and other humanitarians, see Reynolds (1998:22).

of *terra nullius* refrained from seeking to have it abolished and limited themselves to arguing for compensation. It is not clear why they did not try to persuade the colonial governments of the day to treat the Aboriginal peoples as the owners of their tribal lands (Banner, 2005a:129).

The British also brought with them the cadastral system of dividing the land into 'counties, shires, parishes, and "hundreds", down to the level of individual agricultural fields' (D. Byrne 2003:172). D. Byrne (2003:172) found that 'the colonial cadastral grid made an "instantaneous" appearance in the Aboriginal landscape' and without any recognition of 'pre-existing Aboriginal boundaries or spatial conventions' or 'to any form of pre-existing Aboriginal land title'. Land tenure surveys were also carried out as a precursor to white settlement, thereby creating 'the orthogonal grid of property boundaries' and enabling 'land to be granted and sold by the Crown and for landholders to obtain title or leases' (D. Byrne 2003:173).[140] 'The frontier, the survey and the grid' (Blomley, 2003a:121)[141] were part of the colonialist endeavour for the foundation and operation of a Western property regime in the colonial settlements and were merely the beginning of a continuous and unending process of dispossession and marginalisation of Aboriginal peoples from their traditional lands (D. Byrne, 2003:173).[142] These processes 'evolved as if Aboriginal peoples were absent from those spaces' and 'intruded into their everyday lives in many guises' (Howitt, 2006:54). Those tools were 'never employed to support the land interests and enable the livelihoods of Aboriginal people' (L.C. Johnson, 2018b:102), they became the tools of dispossession. Our planning laws and institutions derive from this era, which is not widely acknowledged in the texts on the history of planning in Australia.[143]

As the policy of not negotiating and dealing with the Aboriginal peoples as owners of their land was underway, it was extraordinarily difficult to reverse or dislodge because every British landowner in Australia depended on it, which was a powerful political force to keep that policy in place:

> *'The land titles of every single landowner in Australia were based on a purchase from the Crown. Every landowner had either obtained his land from the government or occupied the final link in a chain of conveyances that had originated with a grant from the government. And the Crown's title to the land rested on the legal fiction that the Crown had instantly become the owner of all the continent in 1788. In short, every landowner in Australia had a vested interest in terra nullius. To overturn the doctrine would be to upset*

[140] See also Porter (2018c:61-69).
[141] See also Bhandar (2018:39-61).
[142] Jackson (2018b:72).
[143] Until fairly recently, see in particular L.C. Johnson (2018a).

> *every white person's title to his or her land. The result would be chaos – no one would be sure of who owned what'* (Banner, 2005a:129).

In 1833, the British Government had been advised by law officers that it did not have the power to alienate land in its colonies and that 'unless a right to deal with waste and unoccupied land was specifically reserved in an agreement or treaty of protection, no such right could be allowed in a protectorate, and even in respect of waste and unoccupied land, it was not clear whether it could be alienated' (McAuslan, 2007:255). It appears this advice was never followed. While reversing colonial land policy would have posed an administrative problem for settlers and their government, Banner (2005a:130) maintains that it would not have been administratively 'insuperable', it nevertheless would have been 'politically infeasible'. As Howitt (2019:2) concludes 'In Indigenous territories, *terra nullius* was always a self-serving myth of violent theft, conquest and barbarism', as I have already alluded to earlier in this Chapter.

2.4 The Judiciary's view prior to *Mabo (No. 2)*

The law and the judiciary have played 'an important, but hardly creditable, part in the interaction between Aborigines and white society' (Cranston, 1974:60).[144] From 1788 English law conferred on Aboriginal people the privilege of being a British subject, but at the same time it deprived them of their land and destroyed their cultural connection to their country and their traditions. Later, the law confined Aboriginal people to reserves or missions to which many of them often had no cultural connection, deprived them of their civil rights and justified their inferiority (Cranston, 1974:60).

Over the years between colonisation by the British in 1788 and the HCA's decision in *Mabo (No. 2)* in 1992, Australian courts have had to consider Australia's colonisation and how we came to be under British law and sovereignty. Over this period there were several such cases in the Australian courts[145] and one before the Judicial Committee of the Privy Council in the UK on appeal from the Supreme Court of NSW. **Table 2.1** identifies twenty-eight particular cases that stand out because of the nature of the issues raised and considered, with more of the particulars

[144] The 'Law' that Cranston (1974:60) refers to includes the following statutes by jurisdiction and year, all of which hail from the 'protective/segregation era': **New South Wales:** *Aborigines Protection Act 1909-1963*; *Aborigines Act 1969*. **Victoria:** *Aboriginal Affairs Act 1967-1970*. **Queensland:** *Aboriginals Preservation and Restriction of the Sale of Opium Act 1897 to 1934*; *Aboriginals Preservation and Protection Acts 1939 to 1946*; *Aborigines' and Torres Strait Islanders Affairs Acts 1965 to 1967*; *Aborigines Act 1971*. **South Australia:** *Aborigines Act 1911*, *Aborigines Act 1936-1939*; *Aboriginal Affairs Act 1962-1968*. **Western Australia:** *Aborigines Protection Act 1886*; *Native Welfare Act 1905-1960*; *Native Welfare Act 1963*. **Northern Territory:** *Aboriginals' Ordinance 1918-1953*; *Welfare Ordinance 1953-1963*; *Social Welfare Ordinance 1963-1972*. See Cranston (1974:60-78) and Chesterman and Galligan (1997) for a discussion of the 'protective-segregative' era.

[145] Including *Mabo (No. 1)* and *Mabo (No. 2)*.

of each case presented in **Appendix B**.[146] The nature of the specific issues raised and considered by the Australian courts and the Privy Council that impacted adversely on Aboriginal peoples' rights and interests (especially with respect to equality before the law and dispossession and denial of their ancestral land rights and interests), can be classified into five categories, as follows:

> **Issue A:** The extent to which English law was received into NSW (and the other colonies) and their application to Aboriginal people for offences committed between themselves, for offences committed against non-Aboriginal people, or to non-Aboriginal people for offences committed against Aboriginal people (Issue A).
>
> **Issue B:** The classification of NSW as a "settled" colony as distinct from a conquered or ceded territory.
>
> **Issue C:** Whether the Crown acquired exclusive Crown ownership of all land in the colony upon first settlement.
>
> **Issue D:** Whether Aboriginal peoples' right to country is capable of being recognised by the common law of Australia.
>
> **Issue E:** Recognition of the (land) rights of Aboriginal and Torres Strait Islander people as being a matter of simple equality.

Many of the early decisions of the courts in New South Wales owed much to the local circumstances, rather than to 'the received legal traditions of England' (Kercher, 1995:ix). The contribution of legal historians such as Bruce Kercher, Henry Reynolds, John McCorquodale and David Neal[147] were instrumental in bringing attention to many of these early cases that present a contrary view about how the laws of England were adapted to the presence of the Aboriginal peoples and the needs of the penal colonies (Kercher, 1995:xxi).

[146] There are many more cases that could have been included in this analysis, but these 28 cases are certainly the most pertinent cases relevant to this thesis. The list also includes two cases decided by the High Court of Australia concerning Indigenous land matters in Papua while Papua New Guinea was an external Territory of Australia. These two cases are included because they are indicative of the High Court's thinking on Indigenous land related matters prior to its decision in *Mabo (No. 2)*. Arguably, this analysis could have been extended to include many of the subsequent landmark native title cases by the Federal and High Courts of Australia after *Mabo (No. 2)*. The primary objective of the analysis of these historical cases was to ascertain how the courts dealt with Aboriginal peoples and their ancestral land rights prior to reaching the point where all five of the criteria discussed in this Chapter were assessed by the Court in a single case. In this respect, *Mabo (No. 2)* becomes a significant turning point, from which there is no retreat. Many of the landmark cases following *Mabo (No. 2)* are authoritatively analysed by Strelein (2009a) and Brennan *et al* (2015) and it was therefore deemed unnecessary to analyse them further in this thesis. However, some of them are cited elsewhere in this thesis, where relevant.

[147] See Kercher (1995, 1998a, 1998b and Kercher and Salter, 2009), Reynolds (1987, 1992, 1998, 1999 and many others); McCorquodale (1987); D. Neal (1991).

Table 2.1 Analysis of selected court cases between 1788 and 1992

Case	Jurisdiction	Issues Raised and Considered				
		A	B	C	D	E
R v Cooper (**1825**) NSWKR 2	SC NSW	**A**		**C**		
R v Broadbear and Broadbear (**1826**) NSWSupC 34	SC NSW	**A**				
R v Lowe (**1827**) (Unreported)	SC NSW	**A**				
R v Ballard or Barrett (**1829**) (Unreported)	SC NSW	**A**				
R v Farrell, Dingle and Woodward (**1831**) 1 Legge 5	SC NSW	**A**				
Macdonald v Levy (**1833**) 1 Legge 39	SC NSW	**A**				
R v Steel (1834) 1 Legge 65	SC NSW		**B**	**C**		
R v Jack Congo Murrell (**1836**) 1 Legge 72	SC NSW	**A**				
R v Bonjon (**1841**) (Unreported)	SC NSW	**A**				
R v Wewar (**1842**) *The Inquirer,* 12 January 1842.	CQS WA	**A**	**B**			
Hatfield v Alford (**1846**) 1 Legge 330	SC NSW		**B**	**C**		
Attorney-General (NSW) v Brown (**1847**) 1 Legge 312	SC NSW		**B**	**C**		
Doe dem Wilson v Terry (**1849**) 1 Legge 505	SC NSW		**B**			
R v Peter (**1860**) (Unreported)	SC Vic	**A**				
R v Jemmy (**1860**) (Unreported)	SC Vic	**A**				
M'Hugh v Robertson (**1885**) 11 VLR 410	SC Vic	**A**				
Cooper v Stuart (**1889**) 14 App Cas 286	PC UK		**B**	**C**		
Williams v Attorney-General for New South Wales (**1913**) 16 CLR 404	HCA	**A**		**C**		
Geita Sebea v Territory of Papua (1941) HCA 37 (Unreported)	HCA			**C**		**E**
Council of the Municipality of Randwick v Rutledge (**1959**) 102 CLR 54	HCA			**C**		
Wade v New South Wales Rutile Mining Co. Pty. Ltd. (**1969**) 121 CLR 177	HCA			**C**		
Milirrpum v Nabalco Pty Ltd (**1970**) 17 FLR 141 (Also known as the *Gove Land Rights Case*.)	SC NT			**C**	**D**	
Administration of the Territory of Papua v Daera Guba (1973) HCA 59, 130 CLR 353	HCA		**B**	**C**		
New South Wales v Commonwealth (**1975**) 135 CLR 337 (Also known as the *Seas and Submerged Lands Case*.)	HCA			**C**		
R v Wedge (**1976**) 1 NSWLR 581	SC NSW	**A**	**B**			
Coe v Commonwealth (**1979**) 53 ALJR 403	HCA		**B**		**D**	
Mabo v Queensland (No. 1) (**1988**) 166 CLR 186	HCA					**E**
Mabo v State of Queensland (No. 2) (**1992**) 175 CLR 1	HCA	**A**	**B**	**C**	**D**	**E**

Most of the cases before the Supreme Court of NSW in the first half of the nineteenth century were primarily criminal matters involving offences committed between Aboriginal people themselves (otherwise known as '*inter se*' matters), most of them involving the serious crime of murder. These cases raised questions about the extent to which English law had been received into the colony and whether English law applied in particular circumstances involving Aboriginal people (Issue A).[148] Generally, the Court held that English law had been received into Australia and that it applied to all settlers and Aboriginal people as if they were subjects of the Crown. Interestingly, William Blackstone's comments in *Book the First*[149] of his *Commentaries* are cited in argument in eight of the cases. Mistakenly out of context in my view, as his comments in *Book the Second*[150] would have been more appropriate. I return to these issues in Part 5.3 of Chapter 5.

One of the very early cases stands out for particular mention. Willis J sitting in Port Phillip under the jurisdiction of the NSW Supreme Court in 1841 held that English law does not apply to offences committed between Aboriginal people themselves because Aboriginal people have their own system of laws (See **Vignette No. 1** in **Figure 2.3**). Bonnell (2017:167-191) casts a different interpretation of Willis J's decision in *Bonjon* and concludes that while it may have been 'conceived of ambition and spite', it was nevertheless a 'humane, enlightened and progressive judgment' (Bonnell, 2017:241, 191). At a time when there was 'a tacit expectation that a colonial judge would support his administration, Willis J embarked on a quixotic mission to entrench the principle of judicial independence' by demonstrating that he had a better grasp 'of an important and complicated point of colonial law superior to that of the Full Court in Sydney' (Bonnell, 2017:191).

Bonnell (2017:174) maintains that Willis J's decision in *Bonjon* ought to have been

> *'recognised as a landmark in Australian jurisprudence for its careful demolition of the terra nullius fallacy, and its acknowledgement that the Indigenous people were entitled to govern themselves by their own laws and customs, which by law survived colonisation, were articulated 150 years before the High Court of Australia (HCA) reached very similar conclusions in* Mabo v Queensland (No. 2)*.'*

[148] *R v Broadbear and Broadbear* (1826); *R v Lowe* (1827); *R v Ballard or Barrett* (1829); *R v Farrell* (1831); *MacDonald v Levy* (1833); *R v Jack Congo Murrell* (1836); and *R v Bonjon* (1841); *R v Wewar* (1842); *R v Peter* (1860); *R v Jemmy* (1860).
[149] Blackstone (1765/1992).
[150] Blackstone (1766/1992).

Willis J's decision 'ought not to have been neglected' because it was a 'brave, scholarly opinion' which 'history has vindicated' (Bonnell, 2017:175).[151]

Vignette No. 1: *R v Bonjon* (1841) Unreported, Supreme Court of NSW

In *R v Bonjon,* Willis J chose to ignore a previous case (*R v Jack Congo Murrell* (1836)) which held that English law does apply to offences committed between Aboriginal people themselves. Willis J declared that he was not bound by the previous decision and stated that the Aboriginal people of the district had distinct 'laws and usages' of their own and that treaties should have been made with them (S. Davies, 1987:328). Willis J also claimed that their existing status 'was unclear and the question of land occupancy lay at its base' (S. Davies, 1987:328). He also claimed that he had been motivated in his ruling to have the matter clarified, although Davies (S. 1987:328) believes this was 'a premeditated act, perhaps primarily intended to upset his judicial and governmental adversaries'.

While Willis J doubted his propriety to assume that the laws of England applied to Aborigines for offences among themselves, he also questioned the manner in which the colony was acquired. Willis J declared that 'the colonists and not the aborigines are the foreigners; the former are exotics, the latter the indigenous, the latter the native sovereigns of the soil, the former the uninvited intruders' (cited in Bonnell, 2017:172).

But this ruling brought him into conflict with his fellow judges, and he was condemned by the NSW and British governments (Barker, 2005:792). Chief Justice Dowling 'asserted that the decision in *R v Jack Congo Murrell* (1836) had set a legal precedent that had not been challenged before Willis J expressed his "very strange opinion"' (S. Davies, 1987:329). Chief Justice Dowling regarded him as a 'fidgety, restless, self-opinionated fellow "whom some people thought cracked"' (S. Davies, 1987:329). Willis J was aware that his decision in *Bonjon* (1841) did not meet with the Governor's and the Chief Justice's approval, so he sent it to the Law Officers of the Crown in London (Behrendt *et al*, 2009:16). While Willis J was removed from office in 1843 'for other, mad conduct' (Barker 2005:792), Lord Stanley, the British Secretary of State for War and Colonies, insisted that the 1836 decision 'was still in effect; those who made it being "the best and most competent judges"' (S. Davies, 1987:329).

[N.B.: S. Davies (1987:329) cites the following as sources for these statements: Sir James Dowling to Sir George Gipps, 1 January 1842, and Lord Stanley to La Trobe, 2 July 1842, N.S.W. Executive Council Minutes and Memoranda, 5737/36, NSWSA; 'Sir James Dowling', ADB, Volume 1, p.319.]

Figure 2.3 Vignette No. 1: *R v Bonjon* (1841)

Source: *R v Bonjon* (1841) Unreported; Kercher (1998:411, 417-425); Bonnell (2017:167-191).

[151] Gummow J's reference to *Bonjon* in *Wik Peoples v Queensland* (1996) 187 CLR1 'appears to be the only Australian decision, in a century and a half after Willis J published his opinion, that acknowledged it in any way' (Bonnell, 2017:174). Bonnell (2017:238) maintains that Willis J 'deliberately raised a clamour on several occasions' in his life, especially when Willis J believed that he needed to do so 'as a necessary warning against abuse'. In defending his argument against the establishment of unicameral legislatures in the colonies, Willis J wrote:

> '*If it be urged that what has been said may tend to excite an outcry, the answer is, that I am of the opinion of those gentlemen who are against disturbing the public repose. I like a clamour when there is an abuse. The fire-bell at night disturbs your sleep, but it keeps you from being burned in your bed. The hue and cry alarms the county, but it preserves all the property of a province*' (cited in Bonnell, 2017:238).

Any lingering doubts about the application of the laws of the colony to Aboriginal people, regardless of whether the crimes committed were *inter se* or not, were dispelled by two cases in Victoria in 1860.[152] Since that time 'it has been generally accepted that the courts must treat Aborigines equally with other citizens in the absence of statutory provision' (Cranston, 1974:63).

There were several cases between 1825 and 1889 that involved settlers challenging Crown land claims. These cases raised significant questions about land ownership and whether NSW was classified as a 'settled' colony (Issue B).[153] None of these cases involved Aboriginal people or were concerned with Aboriginal peoples' prior ownership of the land. The issues were primarily about the Crown's right to control land dealings and disputes about ownership. In each of these cases, the Court held that NSW was a 'settled' colony. Four of these cases also determined that the Crown acquired all of the land in the colony upon colonisation (Issue C).[154]

Notably, in *Attorney-General (NSW) v Brown* (1847)[155] Stephen CJ held that 'We are of the opinion then that the waste lands of this colony are, and ever have been, from the time of first settlement in 1788, in the Crown' because 'there is no other proprietor of such lands'.[156] To support his claim, Stephen CJ stated that the colonists brought the common law of England with them, citing Blackstone's statements in the *Commentaries* that the rules of inheritance are received in a settled colony.

On appeal from the Supreme Court of NSW, the Judicial Committee of the Privy Council in the UK in *Cooper v Stuart* (1889) also determined that NSW was classified as a "settled" colony and that the Crown acquired exclusive ownership of all land in the colony.[157] The issue of how Australia came to be classified as "settled" did not arise in the hearings of this case before the Supreme Court of NSW (Ritter, 1996:9).

In 1913, the HCA in *Williams v Attorney General for New South Wales* (1913) affirmed the reception of English law into Australia and the Crown's full ownership of all land in the colony when it was established in 1788, and the exclusive Crown ownership of all land in Australia upon

[152] *R v Peter* (1860) and *R v Jemmy* (1860).
[153] *R v Cooper* (1825); *R v Steel* (1834); *R v Wewar* (1842); *Hatfield v Alford* (1846); *Attorney-General of NSW v Brown* (1847); *Doe dem Wilson v Terry* (1849).
[154] *R v Cooper* (1825); *R v Steel* (1834); *Hatfield v Alford* (1846); *Attorney-General of NSW v Brown* (1847).
[155] 1 Legge 316.
[156] Issue C in Table 2.1.
[157] Issues B and C in Table 2.1.

first settlement by the British was affirmed by the HCA in three separate cases prior to *Mabo (No. 2)* in 1992.[158]

It is important to note that none of the cases cited above involved Aboriginal or Torres Strait Islander peoples' rights to their traditional lands, and none of those cases were brought by Aboriginal or Torres Strait Islander people. It wasn't until the late 1960s that Aboriginal people brought their first case before the courts to consider whether Aboriginal peoples' land rights were capable of being recognised and enforced under the common law of Australia.

In 1968, the Yolgnu people commenced proceedings in the Supreme Court of the Northern Territory against the Nabalco Corporation who had secured a twelve-year bauxite mining lease on part of their traditional country. In *Milirrpum v Nabalco Pty Ltd* (1970)[159], the Yolgnu people asserted they were the traditional owners of the Gove Peninsula in Arnhem Land in the Northern Territory, and that they had occupied the area since 'time immemorial'[160], and that 'at common law, communal occupation of land by the aboriginal inhabitants of a territory acquired by the Crown is recognized as a legally enforceable right'.[161]

In 1970, Blackburn J concluded in *Milirrpum*, that the acquisition of territory by the Crown falls into two classes: conquered or ceded territory and settled or occupied territory, and whether a colony comes within one or other category is a matter of law. Blackburn J concluded that:

> *' … in my opinion there is no doubt that Australia came into the category of a settled or occupied colony. This is established for New South Wales by an authority which is clear and, as far as this Court is concerned, binding: Cooper v Stuart (1889).'* [162]

And that:

> *' … it is beyond the power of this Court to decide otherwise … '*[163]

Blackburn J therefore rejected any re-opening of the issue of how NSW became "settled". In referring to binding authority, Blackburn J cited *Cooper v Stuart* (1889)[164] before the Judicial

[158] *Council of the Municipality of Randwick v Rutledge* (1959); *Wade v New South Wales Rutile Mining Co. Pty. Ltd.* (1969); *New South Wales v Commonwealth* (1975). Issues A and C in Table 2.1.
[159] (1970) 17 FLR 141 (hereafter cited as Milirrpum). For an in-depth analysis of the case by W.E.H. Stanner, see Manne 2009:225-245.
[160] (1970) 17 FLR 141, Blackburn J, 142. For a discussion of the origins and meaning of this term in the English common law context and its relevance to Indigenous rights, see Dorsett (2002) and L. Weir (2013).
[161] (1970) 17 FLR 141, Blackburn J, 198. Issues C and D in Table 2.1.
[162] (1970) 17 FLR 141, Blackburn J, 242, 249.
[163] (1970) 17 FLR 141, Blackburn J, 244.
[164] *Cooper v Stuart* (1889) App Cas 286.

Committee of the Privy Council in Britain[165] in a matter on appeal from the Supreme Court of NSW[166]. In the Privy Council's decision, Lord Watson stated:

> *'The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to the circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own Legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done; the law of England must (subject to well established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute.'*[167]

Lord Watson held that the British laws of real property had to apply in NSW because '[t]here was no law or tenure existing in the Colony at the time of its annexation to the Crown …'.[168] Clearly, even in the late nineteenth century there was still no appetite for the fact that Aboriginal peoples continued to have their own laws and customs that includes a system of land ownership and tenure.

Ritter (1996:15) describes *Milirrpum* as a "crisis of truth" because at the time of this case, Australia's "truths" about Aboriginal peoples were changing. Racism and social Darwinism were becoming discredited. In 1962 the Australian Electoral Act was amended to give Aboriginal and Torres Strait Islander people the right to enrol to vote and to vote as electors of the Commonwealth. In 1967, s.51(xxvi) of the Australian Constitution was amended to give the Australian Parliament power to make special laws for Aboriginal people (Expert Panel, 2012:31). And Aboriginal peoples were campaigning for their rights, especially their land rights (Attwood and Markus, 1999:170-173).[169] While Blackburn J acknowledged some of the fresh historical "truths" about Aboriginal peoples, the Court remained locked in concepts imported with colonialism (Reynolds, 1992:178).

[165] At that time, the Privy Council was the supreme judicial tribunal of the British Empire.
[166] *Cooper v Stuart* (1886) NSWLR 7 (Equity Reports).
[167] *Cooper v Stuart* (1889) App Cas 286, 291.
[168] *Cooper v Stuart* (1889) App Cas 286, 292.
[169] For example, the formation of Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) in the late 1950s and early 1960s, the Freedom Ride in NSW led by Charles Perkins Gurindji walk off by Aboriginal stockworkers on Newcastle Waters and Wattle Downs pastoral stations in the Northern Territory in May and August 1966.

Blackburn J held that: '… from the moment of the foundation of a settled colony English law, so far as it was applicable, applied in the whole of the colony', that 'the doctrine [of communal native title] does not form, and never has formed, part of the law of any part of Australia' and that 'On the foundation of New South Wales, therefore, and of South Australia[170], every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown'.[171]

On the advice of Edward Woodward (1989, cited in Lavery, 2017:76)[172], the plaintiffs did not appeal Blackburn J's decision because Woodward had no confidence in the HCA as it was then constituted not to overturn Blackburn J's decision that the plaintiffs had 'an elaborate and vital system of traditional laws and customs which ordered their society' (Lavery, 2017:56).[173] The Doctrine of Backward Peoples acquired 'an enduring … unique stronghold in Anglo-Australian jurisprudence' because Blackburn J's decision was not appealed. Lavery (2017:77) asserts that because Blackburn J also found that the plaintiffs had an elaborate system of laws and customs, the prevailing orthodoxy about Australia's sovereignty 'became implausible' and was 'in need of a fundamental re-working'.

The second case brought by an Aboriginal person was by Mr Paul Coe, a Wiradjuri man from Cowra in NSW and a Sydney-based lawyer. This was the first time the matter of how Australia came to be "settled" and whether Aboriginal peoples' sovereignty and right to country was capable of being recognised and enforced under the common law of Australia was to come before the HCA. In *Coe v Commonwealth* (1979)[174], Mr Coe submitted that in 1788 Australia had not been *terra nullius*, but rather had been occupied by a sovereign Aboriginal nation, and accordingly, that Australia had become a British colony by conquest.[175] While the statement of claim was resoundingly condemned by the Court, the Court held that the validity of the British claim to sovereignty could not be disputed (Lumb, 1988:274).[176] On the classification of how Australia came to be "settled" the four judges divided evenly, but regardless of whether

[170] The Northern Territory was separated from South Australia in 1911.
[171] *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141, Blackburn J, 244-45.
[172] See Footnote 101 in Lavery (2017:76).
[173] Lavery (2017:76) argues that an appellate review of Blackburn J's decision may have uncovered some of his honour's errors *'in particular the dubious legitimacy of the "not-purely-of-law" Occupation of Backward Peoples doctrine that he adopted, one which purportedly permits a territory inhabited by "uncivilized inhabitants in a primitive state of society" — so-called "backward peoples" — to be lawfully dispossessed of their territories and occupied by 'more advanced peoples'.*
[174] *Coe v Commonwealth* (1979) 53 ALJR 403.
[175] Issues B and D in Table 2.1.
[176] Lavery (2017:66) believes that Lumb's assessment was incorrect on a number of levels, citing E. Evatt (1968:25).

Australia was "settled" or not, the judges were unanimous in declaring that the question of whether native title rights existed under Australian common law was still an open question (Ritter, 1996:18).

Ritter describes this case as 'the Apogee of the Crisis', marking 'the zenith of the rupture' caused by *Milirrpum* between 'truth' and 'power' within legal 'discourse'[177] in Australia (Ritter, 1996:19). The issues of truth and power are discussed further below.

In 1982, Eddie Mabo, David Passi and James Rice, from the Murray Islands (the most easterly) in the Torres Strait commenced proceedings against the State of Queensland in the HCA, asserting that since 'time immemorial' (Dorsett, 2002:38; L. Weir, 2013:383)[178] the Meriam people had continuously inhabited and exclusively possessed the Murray Islands in Torres Strait, had established settled communities with a social and political organisation of their own and that they had rights in the land of the islands. They also claimed that upon the annexation of the islands by the Crown they became part of the Colony of Queensland from 1 August 1879, but that the Crown's sovereignty was subject to the land rights of the Miriam people based upon local custom and traditional native title. They sought declarations from the HCA of the existence of their land rights.

Part way through the case, the Queensland Government passed the *Queensland Coast Islands Declaratory Act 1985* (Qld), Section 3 of which:

> *'declared that upon the islands being annexed to and becoming part of Queensland and subject to the laws in force in Queensland … the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland'.*

Section 5 of the Act declared that no compensation was payable in relation to any rights that existed prior to annexation. The Queensland Government stated that the object of the Act was to extinguish any native title that might otherwise have existed upon annexation (Bartlett, 1993:237-38).

[177] 'Discourse: a body of evolving thought or ongoing conversation in which there is agreement between those who are party to it about underlying ontological, epistemological and moral assumptions' (Keal, 2003:85).

[178] Dorsett (2002:38) argues that 'the common law is still often described as owing its validity and continuing force to its origins in 'time out of mind'; that concept of 'time immemorial' remains doctrinally central to parts of the common law, notably to the validity and enforceability of local custom'. L. Weir (2013:383) argues that '"Time immemorial" has operated as a legal fiction in the discourse of colonization, performing a genealogical function in the construction of "antiquity" and "legal memory" in English law, and repurposed in Indigenous rights cases in Canada'.

In November 1986, the hearings in the Mabo case before the Supreme Court of Queensland were adjourned so the HCA could consider a demurrer by the plaintiffs to the defence of the State in so far as they were relying on the *Queensland Coast Islands Declaratory Act 1985* (Qld).

In *Mabo (No. 1),*[179] six of the seven Justices concurred that the Queensland statute was intended to extinguish native title, and four of the Justices ruled that the statute must 'fail' because it contravened the *Racial Discrimination Act 1975* (Cth) and because it 'abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands'[180]. This was the first time the Australian courts were able to 'regard the recognition of the rights of the traditional owners of the land as being a matter of simple equality' (Bartlett, 2015:18).[181]

The pre-existing ancestral land rights of the Indigenous inhabitants of Australia were finally recognised by the HCA in *Mabo v the State of Queensland [No. 2]* in 1992.[182] This judgement is examined in Part 2.6 below and in more detail in Chapter 3.

2.5 Acts of 'grace or favour'

In response to the Aboriginal land rights campaigns of the 1960s, 70s and 80s (Foley and Anderson 2006), several State Governments and the Australian Government enacted statutory Aboriginal land rights schemes. Currently there are 24 such statutes operating across Australia.[183] The form of title under these schemes are generally inalienable freehold or leasehold titles, noting that there are significant differences within and between jurisdictions (Wensing, 2016a; 2017a).

In conceptual terms there are three types of schemes. Firstly, general land legislation which allows governments to create reserves, freehold title, or leases for the specific use and benefit of Aboriginal people. Secondly, land rights legislation which generally grants an inalienable freehold title to traditional owners[184] and/or Aboriginal residents of an Aboriginal community. And thirdly, the Commonwealth's NTA which provides for the recognition and protection of common law native title, which are the communal group or individual rights and interests of

[179] *Mabo v the State of Queensland (No. 1)* (1988) 166 CLR 186.
[180] Per Brennan, Toohey and Gaudron JJ, 218. Ironically, the validity of the *Racial Discrimination Act 1975* (Cth) relies on the external affairs power in the Constitution for its validity.
[181] Issue E in Table 2.1.
[182] For a summary of the case at the time of the HCA's judgment, see Bartlett (1993).
[183] Excluding the Commonwealth's NTA but including the Commonwealth's Act establishing the Indigenous Land Corporation (ILC).
[184] Who in this context are identified in accordance with traditional laws and customs and are communal land holders.

Aboriginal peoples under their traditional laws and customs in relation to specific land or waters (ATSISJC 2005:81).

The various schemes are acts of 'statecraft' (J.C. Scott, 1998:77) or of 'grace or favour' (Wensing and Porter, 2015:4) by the state because in most cases the state was grasping for a quick and easy solution to a complex problem for not having recognised the pre-existing land rights and interests of the Aboriginal peoples at the time of colonisation.

There are some subtle but significant differences between the schemes. For example, the statutory land rights scheme introduced by the Commonwealth in the Northern Territory (NT) in 1976 is different from the schemes established by the other jurisdictions. The scheme in the NT enables 'traditional Aboriginal owners' to claim their traditional lands based on the local descent group's common spiritual affiliations and a primary spiritual responsibility for their land which entitles them by Aboriginal tradition to forage as of right over that land.[185] The statutory land rights schemes in the other jurisdictions do not require the same level of traditional connection (Sutton, 2003:xiv, 18).[186] As Mantziaris and Martin (2000:6-8) argue, the definition of 'Aboriginal traditional owner' in the NT might have effected a 'translation' between '(i) the principles of Indigenous systems of law and custom defining the relations between groups and land, and (ii) an anthropologically informed statutory category'. In contrast in SA and WA, a trust arrangement was established whereby Crown land is held in trust as a reserve 'for the use and benefit of Aboriginal inhabitants'.[187]

As background research for this thesis, a comparative analysis of the various schemes was undertaken. In particular, the ability of title holders to deal[188] in the land including private sale, leasing or sub-leasing, and mortgaging (Wensing, 2016a; 2017a). This comparative analysis was undertaken because the Australian Government has for the past decade been urging the States to undertake reforms of their Aboriginal statutory land rights schemes to enable the

[185] See Section 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
[186] Other than native title under the NTA.
[187] The term 'for the use and benefit of Aboriginal inhabitants' in the WA context arises from the proclamation of a reserve under s.25(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) or the vesting of a reserve under Part 4 of the *Land Administration Act 1997* (WA). The Aboriginal Land Trust arrangement in WA is discussed in more detail in Chapter 7 and **Appendix C**.
[188] In the Australian context, dealing is a specific term used for registration of matters affecting land. Dealing is the legal processes through which land is bought and sold or otherwise transferred, also known as conveyancing. It involves the preparation of hard copy documents as evidence of a land transaction between parties.

individuation of land titles for the purposes of economic development and/or private home ownership on Aboriginal lands (FaHCSIA, 2010a).[189]

Table 2.2 (Wensing 2017a) shows that in 21 of the schemes the land is inalienable and cannot be privately sold, transferred or otherwise dealt with, except in accordance with the provisions of the relevant legislation. **Table 2.2** also shows that in 21 of the schemes a legislative basis already exists (generally with conditions attached) enabling leasehold interests to be created, and in 16 of the schemes it is possible to use the leasehold interest as security for a mortgage. There are no situations where there are no statutory restrictions on dealings in the land (Wensing, 2016a:31).

From the perspectives of both economic engagement and social justice, perhaps the ideal situation is a 'no' in the sale column, and a 'yes' in the leasing and mortgaging columns. This would protect the underlying tenure of Aboriginal ownership from alienation, while also allowing use of the land as equity or security for finance. Indeed, the analysis shows this is already possible in 15 of the schemes. However, all statutory land rights schemes are also subject to native title rights and interests, which means that such land is not able to be sold, leased or mortgaged without first dealing with the native title rights and interests (Wensing, 2017b). This is discussed in more detail in Chapter 3.

The success of these schemes is highly debatable. The essential problem is that they are unable to 'fix and stabilise' (Porter and Barry, 2016:23) the claims that Aboriginal peoples are making on the Settler state. The schemes fall well short of recognising the sovereignty and prior ownership of Australia by its Aboriginal peoples (McNeil, 2013:145) and the state is 'largely unable to deal with the inter-connected nature of the demands for cultural recognition and economic redistribution' (Porter and Barry, 2016:23; Fraser, 1995:69)). This becomes evident from the analysis in Chapters 6 and 7.

[189] Discussed in more detail in Chapter 3.

Table 2.2 Summary of dealing provisions in the *Native Title Act 1993* (Cth) and the statutory Aboriginal and Torres Strait Islander land rights grants/transfer/reserve schemes around Australia (as at 14 January 2017)

	Statute	Landowner	Form of title	Is private sale permitted?	Is leasing or subleasing permitted?	Is mortgaging permitted?
CTH	*Native Title Act 1993* (Cth) (NTA)	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**
CTH	*Aboriginal and Torres Strait Islander Act 2005 (Cth) – Part 4A – Indigenous Land Corporation (ILC) and Aboriginal and Torres Strait Islander Land Account*	ILC upon acquisition on the open market and then grant title to an Aboriginal or Torres Strait Islander corporation in a reasonable period of time	Generally freehold or leasehold depending on location and purpose and State/Territory land tenure conditions	**No**	**Yes, with conditions**	**Yes, with conditions**
ACT	*Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth)	Community Council	Vested in the council and compulsory lease back to Commonwealth as national park	**No**	**Yes**	**Yes of leasehold interest**
NSW	*Aboriginal Land Rights Act 1983* (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	*National Parks and Wildlife Act 1974* (NSW)	Local Aboriginal Land Councils or NSWALC	Freehold and compulsory lease to NSW Government as national park	**No**	**No**	**No**
NT	*Aboriginal Land Rights (Northern Territory) Act 1976* (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	*Pastoral Land Act 1992* (NT)	Aboriginal Association or Corporation	Restricted freehold	**No**	**Yes, with restrictions**	**Yes, with restrictions**
QLD	*Aboriginal and Torres Strait Islander Land (Providing Freehold) Act 2014* (Qld)	Specified Aboriginal or Torres Strait Islander people	Freehold	**Yes, subject to conditions**	**Yes**	**Yes**
QLD	*Aboriginal Land Act 1991* (Qld)	RNTBCs, trustees or Aboriginal people	Inalienable freehold or leasehold	**No**	**Yes**	**No**
QLD	*Torres Strait Islander Land Act 1991* (Qld)	RNTBCs, trustees or Torres Strait Islander people	Inalienable freehold or leasehold	**No**	**Yes**	**No**

QLD	*Aborigines and Torres Strait Islanders (Land Holding) Act 2013* (Qld)	Specified Aboriginal or Torres Strait Islander people	Leasehold	**Transferable, but not sale**	**Yes**	**No**
QLD	*Land Act 1994* (Qld)	Trustee	Reserve or fee simple in trust	**No**	**Yes**	**No**
SA	*Aboriginal Lands Trust Act 2013* (SA)	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	*Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA)	Anangu Pitjantjatjara body corporate representing all TOs	Inalienable freehold — vested in perpetuity	**No**	**Yes, subject to conditions**	**No**
SA	*Maralinga Tjarutja Land Rights Act 1984* (SA)	Maralinga Tjarutja body corporate representing all TOs	Inalienable freehold — vested in perpetuity	**No**	**Yes, subject to conditions**	**Yes**
TAS	*Aboriginal Land Rights Act 1995* (TAS)	State-wide Aboriginal Land Council	Inalienable freehold — vested in perpetuity	**No**	**Yes**	**Yes on lease or licence**
VIC	*Aboriginal Lands Act 1970* (Vic)	Aboriginal Trust	Inalienable freehold — vested in perpetuity	**No**	**Yes, subject to conditions**	**Yes**
VIC	*Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* (Vic)	Aborigines Advancement League Inc.	Crown grant, unspecified	**No**	**Yes**	**Yes**
VIC	*Aboriginal Lands Act 1991* (Vic)	Specified Aboriginal corporations	Conditional fee simple	**No**	**No**	**No**
VIC	*Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) (at the request of the Victorian Government)	Specified Aboriginal corporations	Freehold	**No**	**Yes**	**Yes**
VIC	*Aboriginal Land (Northcote Land) Act 1989* (Vic)	Aborigines Advancement League Inc.	Conditional freehold	**No**	**Yes**	**Yes**
VIC	*Traditional Owner Settlement Act 2010* (Vic)	Traditional Owner groups	Inalienable fee simple	**No**	**No**	**No**
WA	*Aboriginal Affairs Planning Authority Act 1972* (WA)	Aboriginal Lands Trust	Crown reserve for the 'use and benefit of Aboriginal inhabitants'	**No**	**Yes, subject to conditions**	**Yes, subject to conditions**
WA	*Land Administration Act 1997* (WA)	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	*Land Administration (South West Native Title Settlement) Act 2016* (WA)	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. Source: Wensing (2017a).

2.6 204 Years after 1788 – *Mabo (No. 2)*

Mabo (No. 2) is a judgement from which there can be no retreat, because for the first time an Australian court comprehensively considered all five issues (A, B, C, D and E) as discussed in Part 2.4 above.[190] The HCA made clear what it thought about how English law was (mis)applied to Aboriginal peoples,[191] how the colony of NSW was settled,[192] how the Crown acquired exclusive ownership of all of the land,[193] how Aboriginal peoples' rights to land are capable of being recognised by the common law of Australia,[194] and how the recognition of Aboriginal peoples' rights to their ancestral lands is a matter of simple equality.[195] There is no disputing that *Mabo (No. 2)* changed the course of Australian history forever.

Given the legal constraints and following frenzied public debate following the HCA's decision, the Australian Government enacted the NTA which came into force on 1 January 1994, 'some 204 years after they [the Aboriginal peoples] should have been recognised' (K. Williams, 2008:46). The *Mabo (No. 2)* case is widely regarded as having rejected or reversed the 'doctrine of *terra nullius*'. Indeed, the HCA found that the doctrine should not have constituted a hurdle for the Court to reach its conclusion that the Indigenous inhabitants held a form of title to land capable of being recognised under Australian common law. But Ritter (1996:5) maintains that one of the most contentious aspects of the case was the HCA's treatment of the 'doctrine of *terra nullius*'.

The plaintiffs' case was based on the proposition that irrespective of the way in which the colony was acquired by the British, the pre-existing 'native interests in land were preserved as a burden upon the title of the Crown' (Ritter, 1996:20). The plaintiffs further proposed, relying on *Calder v Attorney-General (British Columbia)* and other North American authorities,[196] that 'the effect of annexation was not to abolish the pre-existing rights' and 'that a doctrine of native title was known to the common law' (Ritter, 1996:20). In fact, the term *terra nullius* was not mentioned in any of the plaintiff's submissions and nor was it mentioned during substantive argument

[190] Bradbrook *et al* (2011:3) argue that the most significant development in the evolution of real property law in Australia was the HCA's decision in *Mabo (No. 2)* because it revised fundamental concepts relating to the holding of land in Australia.
[191] (1992) 175 CLR 1, Brennan J, 31-38; Deane and Gaudron JJ, 79.
[192] (1992) 175 CLR 1, Brennan J, 51, 57, 59; Deane and Gaudron JJ, 81, 95-99.
[193] (1992) 175 CLR 1, Brennan J, 26, 30-31.
[194] (1992) 175 CLR 1, Brennan J, 58-63; Deane and Gaudron JJ, 81-95.
[195] (1992) 175 CLR 1, Brennan J, 30, 58.
[196] *Calder v Attorney-General (British Columbia)* [1973] SCR 313; *United States v Alcea Band of Tillamooks* [1946] 329 U.S. 40; *Guerin v The Queen* [1984] 2S.C.R. 35; and others, see *Mabo (No. 2)* for more details.

before the HCA (Ritter, 1996:20).[197] Indeed, Keon-Cohen (2013:169)[198] maintains that discussion about *terra nullius* was 'merely "background noise"', and that 'The real question was: Did English common law, when introduced into the (Torres) Strait in 1879, recognise pre-existing traditional land rights as enforceable legal rights?'

Ritter (1996:6) argues that when Australia was colonised in 1788, neither *terra nullius* nor any other legal doctrine was used to deny the recognition of the pre-existing rights of its Aboriginal and Torres Strait Islander inhabitants. Ritter maintains that the denial of recognition of any pre-existing land rights of the Indigenous inhabitants was based on the colonists' definition of them as being 'intrinsically barbarous and without any interest in land' and thus a legal doctrine was not required to explain why they were not being recognised. Ritter (1996:6) also argues that by the time the *Milirrpum* case came about in 1971 'the "truths" about Aboriginal peoples that were held by non-Aboriginal Australian society had changed' and that 'traditional Aboriginal society was no longer seen as having been mendicant and without laws, and Aboriginal people were no longer seen as backward or inferior'.

In *Milirrpum*, in the absence of any precedent, the court 'fashioned a doctrinal explanation for why Aboriginal rights to land were not recognised by the common law'. This was seen as discriminatory and that by the time of the *Mabo* case the HCA had inherited a 'crisis of legitimacy' in terms of answering the question of whether Aboriginal peoples possessed a common law right to land (Ritter, 1996:6). While acknowledging the shift towards including Aboriginal experiences in Australian historiography, the decision in *Milirrpum* also constituted a 'discursive breakdown, a moment in Australian legal history when the law seemed to no longer reflect the "truth", creating a disjuncture between the truth and power within Australian legal discourse' (Ritter, 1996:16). However, as a justice in the Supreme Court of the Northern Territory, Blackburn J was compelled to follow precedent, not to make it and his decision was not appealed to a higher court, as discussed earlier.

Ritter sums up the dilemma for the HCA in *Mabo (No. 2)* as follows:

> *' … even if it rejected Milirrpum as precedent and recognised the doctrine of native title, this would not be enough to solve the discursive crisis that Milirrpum had triggered. That is, if the reasoning in Milirrpum was held to be wrong, then the Australian judiciary would*

[197] See also and Secher (2007:2).
[198] Bryan Keon-Cohen was junior counsel for the plaintiffs in *Mabo (No. 2).*

> *be left without any doctrinal explanation at all for why Aboriginal rights to land had not been recognised under Australian law'* (Ritter, 1996:6).

The solution the HCA adopted was to find that the 'doctrine of *terra nullius'* was 'doctrinally irrelevant' as to whether native title existed under Australian common law. By doing so the HCA was able to use it as a scapegoat to 'demolish the stage edifice' that it had become and redeem the good name of the Australian legal system (Ritter, 1996:6-7). Ritter (1996:20) argues that as a result of *Milirrpum* 'truth and power were no longer synchronised' and that 'the law lagged behind the evolution of the "truth"' which 'questioned the very legitimacy of the Australian nation state itself'.

According to Hocking (1993:205), the HCA in *Mabo (No. 2)* 'corrected a past misinterpretation in Australia of well-established common law doctrines' and that once the defective links between previous decisions of the courts in Australia could be linked, 'it can be seen that the common law of Australia would have become racist in theory as well as in application if the law concerning the recognition of the prior native title' of the Aboriginal peoples of Australia 'had not at last been correctly interpreted and applied'. K. Williams (2008:47) agrees that what the HCA did in *Mabo (No. 2)* was to drag Australia into the 20th century by recognising what had already been recognised in other colonialized lands[199] and that it was time for Australia to 'finally catch up, in the eyes of the law, to the rest of the world'.

In rejecting the doctrine of *terra nullius*, the HCA was also rejecting its discourse (Ritter, 1996:30). That is: 'the High Court was rejecting as no longer appropriate or legitimate the configuration of power and knowledge that had legitimated the colonial dispossession of Aboriginal people'. What the HCA also did was to 'reiterate the inviolate nature of Australian sovereignty and the legality of the white-Australian nation state' (Ritter, 1996:32) by holding to its earlier decision in *Coe v Commonwealth* (1979) that Australian sovereignty is not justiciable in a municipal court.[200]

Coe and Lewis (1992:142-3) argued that the HCA's mandate emanates from the establishment of the colonies and subsequently their federation into Australia as a nation state. Therefore, the HCA could 'only rule in a certain way, it could not rule itself out of its jurisdiction, out of existence' by acknowledging 'the freehold title of Aboriginal people who've never had their rights to land

[199] That the original inhabitants of these British colonies had pre-existing rights. For example, the rights of Canada's first peoples were recognised by the Royal Proclamation of 1763 (and in subsequent common law cases). In New Zealand/Aotearoa, the *Treaty of Waitangi* in 1840 recognised Maori rights to land prior to acceding sovereignty (K. Williams, 2008:47).
[200] *Coe v Commonwealth* (1979) 53 ALJR 403, 408 and 410.

and property extinguished by any Act of Parliament or any act of acquisition by the Australian Government' (Coe and Lewis, 1992:142-3).

While the HCA 'boldly and courageously' held that the denial of the Aboriginal peoples' pre-existing rights to land 'had been based upon the erroneous application of the common law' (McNeil, 2004:273), Ritter (1996) argues that the 'erroneous application of the common law' has never been taken to its fullest extent. If the rejection of the 'doctrine of *terra nullius'* had been taken to its logical conclusion, then 'white settlement in Australia would have been held to be unlawful' (Ritter, 1996:32) and the HCA would also have had to reject the basis of its own authority. The HCA did not do so, arguing instead that questions of sovereignty were outside its jurisdiction and therefore 'non-justiciable'.[201] In the end, the HCA 'allowed the Australian judicial system to once again appear to reflect the relevant "truths" in Australian society; by realigning truth and power to reinforce the legitimacy of the white Australian nation' (Ritter, 1996:33).

According to Ritter's analysis, the HCA's decision in *Mabo (No. 2)* was 'stage-managed' in such a way that it rejected the notion of *terra nullius* on the one hand, while on the other, it also reinforced the 'legitimacy of the white Australian nation' and that (para-phrasing) only 'some things changed in order for other things to remain the same' (1996:33). Aboriginal peoples' rights to their ancestral lands in Australia were not denied on the basis of any legal doctrine, but rather on the basis of 'the operation of various discourses of power', which explains why the common law failed to recognise them (Ritter 1996:9).

Coe and Lewis (1992:143-144) asserted that the HCA had 'no choice' but to 'do away' with the notion of *terra nullius* because it was an international embarrassment to Australia, and that the HCA 'went about it in such a way that they gave nothing away. They threw away a name but retained the substance', and that the decision still 'renders Aboriginal people as landless, as being powerless and there's still no equality under the colonial law'. In Coe and Lewis's view the 'illegal theft' of land in Australia is still continuing (1992:146).

While *Mabo (No. 2)* went some way towards rectifying the misrepresentations of the past in rejecting the idea that Australia was *terra nullius* in 1788, the fact that the method of acquisition was 'invented', somewhat retrospectively, makes the legal justifications for white settlement very precarious and serves to highlight the injustices of dispossession and the continuing denial

[201] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1, Brennan J, 31.

of Aboriginal and Torres Strait Islander peoples' ongoing ancestral land rights and interests (Borch, 2001:239). I concur with Borch's (2001:239) conclusion that a better understanding of the legal history of how the British acquired the land that became Australia 'leads to a questioning of the very foundations of the nation, a problem which can only be addressed by a mobilisation of the political will to negotiate'. I return to the need for treaties and negotiation over land ownership, use and tenure in Chapters 6, 8 and 9 of this thesis.

From a long view, the judges in *Mabo (No. 2)* were seeking to realign the law with the 'new "truths" in Australia' to legitimate the existing power relations between Aboriginal and Torres Strait Islander peoples and the state (Ritter, 1996:31). While the Aboriginal and Torres Strait Islander peoples of Australia made huge 'legal gains' in relation to their land rights, these gains have been 'achieved within and acknowledging the supremacy of the liberal, Anglo-Australian rule of law framework' (Ritter, 1996:32). In that way, '*Mabo* expressly reiterated the inviolate nature of Australian sovereignty and the legality of the white-Australian nation state' (Ritter, 1996:32).

The problem is that throughout the eighteenth century the acquisition of inhabited land was regarded as falling within the category of conquest or cessation, and that neither British law and policy nor international law at that time, 'supported the proposition that inhabited land could be dealt with as if it was uninhabited or *terra nullius'* (Borch, 2001:239). Borch (2001:239) argues that sometime in the late eighteenth and early nineteenth centuries the extended doctrine of proclaiming land inhabited by hunters and gatherers to be ownerless became fairly widespread, and suggests that 'the establishment of New South Wales played an important role in this development.' Borch (2001:239) concludes that given Australia's prominence in establishing the extended doctrine, legal writers went to great lengths to find precedents, because it was 'of vital importance for the common law system to appear firmly rooted in past practices and not to be subject to whimsical change' (Borch, 2001:239). While the common law therefore remains 'rooted in its precedents' (Borch, 2001:239), this is not to say that the common law cannot adapt. Indeed, as Hocking (1993:205) argues, the common law 'is a living law that can adapt to changing circumstances, especially in those cases that involve fundamental basic "values of justice and human rights (especially equality before the law)"[202] of the societies of which it is a part'.

[202] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1, Brennan J, 19.

Mabo (No. 2) also needs to be seen as consistent with a five-hundred-year tradition of employing natural law, and in particular the idea of *terra nullius* to consider the justice of colonisation (Fitzmaurice, 2007:14). Fitzmaurice (2007:15) asserts that the entire experience of European expansion was permeated on the basis of attitudes about the exploitation of nature and the belief that property is created by use, which Fitzmaurice maintains explains why 'the legal history that produced *terra nullius* was able to stand for some time as a reasonable account of how Europeans justified colonisation in Australia' (Fitzmaurice, 2007:15). Indeed, Webb (2016:116) notes Kane's (2007) observation that the HCA in *Mabo (No. 2)* remained 'curiously dependent on Lockean assumptions' because Brennan J noted that 'Gardening was of the most profound importance to the inhabitants of Murray Island at and prior to European contact'.[203] The Meriam Peoples were gardeners, not hunter-gatherers.

Indeed, Mansell (1992:6) summed up the outcomes of *Mabo (No. 2)* by stating that:

> *'The Court did not overturn anything of substance, but merely propounded white domination and superiority over Aborigines by recognising such a meagre Aboriginal form of rights over land. … If Mabo represents the best the legal system has to offer, then Aborigines will be put off by the effort and costs involved in litigating for such a puny reward. Mabo offers something for those who are grateful for small blessings, but nothing in the way of justice.'*

Perhaps the Judges in *Mabo (No. 2)* were doing no more than 'easing their own conscience' for the 'guilt they feel for maintaining white supremacy' (Mansell, cited in Foley, 2007:131). *Mabo (No. 2)* is therefore regarded as 'not good history' and 'not very good common law', because 'it is clearly continuous with a Western judicial tradition that attempted to rescue liberty (or, in this case, liberal democracy) from the threat posed by the dispossession of colonised peoples' (Fitzmaurice, 2007:15).

The implications for Aboriginal peoples have been significant and are ongoing. Patrick Dodson[204] maintains that the greatest injustice was committed during negotiations over the Australian

[203] (1992) 175 CLR 1, Brennan J, 17-18.

[204] Notes of meeting with Patrick Dodson, 13 December 2016. Held on file by the author. Patrick Dodson is a Yawuru Man from Broome in the Kimberley region in North West Australia, with over 40 years' experience in Indigenous development and advocacy at the state/territory, national and international levels. From 2010 to 2016 Patrick Dodson was Chairman of Nyamba Buru Yawuru Ltd, the operational arm of the Yawuru Native Title Holders corporate group (discussed in more detail in Chapter 7 and Appendix E of this thesis). It was in this capacity that I interviewed Patrick Dodson on several occasions as part of my research for this thesis. It is also relevant to note Patrick Dodson's stature in Australia and internationally. Patrick Dodson was ordained as Australia's first Aboriginal Catholic Priest in 1975. After leaving the priesthood, Patrick worked in Alice Springs in the Northern Territory as Director of the Central Land Council and became a leading spokesperson for Aboriginal groups across Australia. In 1989 Patrick was appointed as a Royal Commissioner into Aboriginal Deaths in Custody, analysing the issues affecting the imprisonment rates of Indigenous peoples across Australia. In 1991 he was appointed as the founding Chairperson of the Council for Aboriginal Reconciliation. He resigned in 1997 following the refusal of the Howard Government to apologise to the Stolen Generations. From that time on, Patrick Dodson has been regarded as the Father of Reconciliation in Australia (Keeffe, 2003). In 2010 Patrick was appointed Co-Chair of the

Government's response to *Mabo (No. 2)* when the Aboriginal negotiating team agreed to validate past acts[205] in the NTA, especially those prior to 31 October 1975[206] when the Aboriginal people had the option of pursuing the Australian and State Governments for compensation for the loss of native title rights and interests. Patrick Dodson maintains this needs to be revisited.[207]

2.7 The Aboriginal estate

Gumbert (1984:10-15) and Altman (2014:3)[208] have documented and mapped the extent of Aboriginal land in Australia at key points in time. **Figure 2.4** shows four maps of Australia. Prior to 1788 (top left) the Aboriginal people owned all of Australia. By 1965 (top right) they owned none of it. There was no legal recognition or protection of Aboriginal peoples' pre-existing ownership of their ancestral lands in Australia and there was a prolonged period of 'land grabbing' which resulted in the Aboriginal peoples being completely legally dispossessed of their lands by 1965 (Altman and Markham, 2015:129).[209] The bottom two maps in **Figure 2.4** show the extent of land granted or transferred under the various statutory Aboriginal land rights schemes up to 1993 (bottom left) prior to *Mabo (No. 2)*, and the 2013 map (bottom right) shows the growth of Aboriginal held land from 1993 to 2013, primarily as a result of the enactment of the NTA.[210]

Expert Panel for Constitutional Recognition of Indigenous Australians. Patrick also served as a member of the ANU Council from 2014 to 2016. In April 2016, Patrick Dodson was chosen by the Parliament of Western Australia under section 15 of the Australian Constitution to represent that State in the Senate, following the resignation of Senator J. Bullock. Patrick Dodson was elected to the Senate for Western Australia in the 2016. From 27 March 2018, Senator Dodson is Joint Chairperson of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples.

[205] A 'past act' is an act that took place over an area where native title existed before 1 July 1993 and consisted of the making, amendment or repeal of legislation, or any other act that took place before 1 January 1994, over an area where native title existed and was invalid due to the existence of native title. S.228 NTA.

[206] The date when the *Racial Discrimination Act 1975* (Cth) came into effect.

[207] Notes of meeting with Patrick Dodson, 13 December 2016. Held on file by the author.

[208] See also Altman and Markham (2015:133).

[209] In 1966 the South Australian Government was endeavouring to acknowledge some part in its failure to comply with the *1836 Letters Patent* to create the Province of South Australia that stated the only way the colonists could acquire land from the Aboriginal people was by way of treaty or bargain (Berg, 2010:5). The then Minister for Aboriginal Affairs, Don Dunstan, established the Aboriginal Lands Trust (ALT) under the *Aboriginal Lands Trust Act 1966* (SA) which sought to return to the promises contained in the *1836 Letters Patent* by establishing a Trust to hold the title and take over the administration of all the existing Aboriginal Reserves for the benefit of the Aboriginal people (NAA undated (a)). The *Aboriginal Lands Trust Act 1966* (SA) received the assent of the Governor of South Australia on 8 December 1966.

[210] Since 1966 the Australian and State Governments have enacted over 30 separate pieces of legislation (Wensing, 2016a:33-34) that have enabled 'the recognition, grant, transfer or acquisition of title to land by or for Indigenous Australians' (Altman, Buchanan and Larsen, 2007:5). Altman *et al* (2007) termed this the 'Indigenous estate' and concluded that the estate has been formed through five key mechanisms: the creation of Aboriginal reserves in the protectionist era (c.1880 to c.1940, Altman and Rowse, 2005:160); the various Aboriginal land rights statutes enacted since the late 1960s; other land legislation which allows the transfer of ownership or the granting of leases to Aboriginal organisations (or individuals) as inalienable forms of tenure; various land acquisition programs since the late 1960s; and the recognition of native title rights and interests following the HCA's decision in *Mabo (No. 2)* in 1992, including native title determinations, registered claims and Indigenous Land Use Agreements (ILUAs) under the NTA (Altman, Buchanan and Larsen, 2007:5). This estate is concentrated in three jurisdictions (NT, SA, WA), almost all of it is in geographic locations that are classified as 'remote' or 'very remote' (Wensing, 2016a:83), they were enacted at different times for different reasons and have resulted in a myriad of statutes/instruments that vary in size, location, property rights and land values (Altman, 2013:123-125).

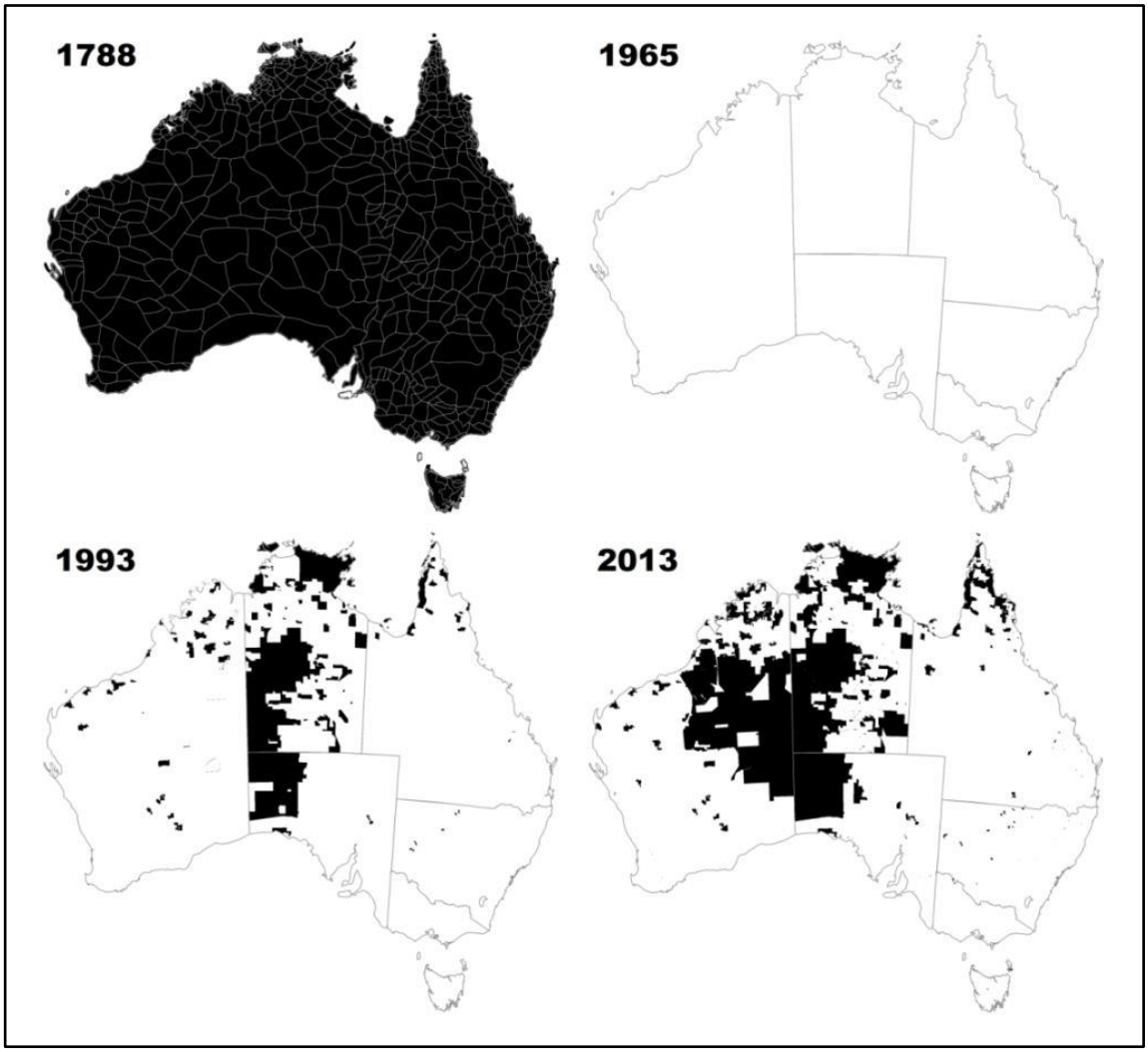

Figure 2.4 A snapshot of Indigenous held land from 1788 to 2013

Source: Altman (2014:3).

Altman (2014:5) argues that these developments have created an 'Indigenous land titling "revolution"' resulting in approximately 33 percent of terrestrial Australia coming under some form of Aboriginal ownership, control or management (Altman and Markham, 2015:133).[211] While the proportion of land in Aboriginal ownership, control or management will continue to increase under the current legislative and policy settings (Altman, 2014:7), the reality is that governments continue to hold the upper hand with the power to revoke such arrangements or

[211] There is no comprehensive or authoritative dataset of Indigenous held lands in Australia (Altman and Markham, 2015:133) and the nature of the land title and the extent to which the landholder has control over land use and access, especially by others, varies significantly both within and between jurisdictions (ATSISJC, 2005:67-80). The closest thing resembling anything like a comprehensive dataset of Indigenous held lands in Australia is a report prepared by Dillon *et al* (2015) for the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) on the '*Development of the Australia's Indigenous forest estate (2013) dataset*'. At the time of writing, this dataset was being updated with a new report to be finalised by the end of 2018.

to exercise their compulsory acquisition powers should a better land or resource use come along.[212]

2.8 Conclusion

This chapter explored the roots of how Australia came to be in the predicament of not having formally recognised the prior rights of its Aboriginal peoples from 1770 to 1992 by briefly examining how Western property theory of the late eighteenth and early nineteenth centuries was applied in Australia. Emerging theories and concepts of western property from Pufendorf, Locke and Vattell along with the paradigms of social evolution that were prevalent in Europe at that time were very influential on the colonial constructs of property. As a consequence, the Aboriginal peoples in Australia were viewed as subjects of the Crown by virtue of their being seen as 'savages' without society, sovereignty or property and that the humanitarian thing to do was to bring them the benefits of European civilisation.

The influences on the development of land policy in the early decades of the colony in NSW were also examined. Despite advice by law officers of the British Government that without an agreement or treaty the Crown has no right to alienate Aboriginal peoples from their lands, the policy of not negotiating with the Aboriginal peoples was extraordinarily difficult to reverse or dislodge because every British landowner in Australia depended on the Crown for their land grant and therefore had a vested interest in the policy. While not administratively insuperable to undo, it was nevertheless politically infeasible as time passed.

The way in which the judiciary considered the interactions between Aborigines and white society from the commencement of the colony in 1788 up to 1992 can be categorised into five specific issues. A total of 28 cases were examined. All of these cases contributed in some way to the momentum for a landmark case to overturn over two hundred years of erroneous law and policy.

In response to prolonged Aboriginal land rights campaigns from the 1960s to the 1980s, the state's responded with acts of grace or favour by creating a variety of statutory land rights

[212] See for example, the KLC's news article about the WA Government's 'Notice of Intention to Take' over Barnicoat Island, part of the Mayala native title claim (KLC, 2017).

schemes that still fell well short of dealing with Aboriginal sovereignty and the inter-connections between cultural recognition and economic redistribution.

The landmark case for Aboriginal land rights came in the form of *Mabo (No. 2)* which was the first time the HCA considered all five issues in a single case. While *Mabo (No. 2)* was ground breaking in some respects, it was also a case that only went part of the way in realigning the law with the truth of what has been happening since 1788. *Mabo (No.2)* also gives rise to several 'disjuncts', which are explored in more detail in Chapter 3.

What this analysis reveals, is that it took over 200 years to overturn the history of misconception of Aboriginal peoples as barbarians without society, sovereignty or property, and when that history of denial and dispossession was finally dispelled in *Mabo (No. 2)*, their rights are still subject to the supremacy of the Australian legal framework.

Chapter 3
MABO (No. 2): Continuing disjuncts, dilemmas and challenges

> *'There is a troubling disjuncture in the reasoning of the High Court in the Mabo decision. On the one hand* terra nullius *was overturned because it failed to recognise the social and political constitution of Indigenous people. Yet the recognition of native title was premised on the supreme power of the state to the exclusion of any other sovereign people.'*
>
> Dr William Jonas (2002:9).

3.1 Introduction

In order to gain recognition of their native title rights and interests, Aboriginal peoples must endure a complex process under the Australian legal system, a system that is a part of continuing colonial domination, while 'settler law not only remains unquestioned but also retains the authority to rule over the acceptability of Indigenous claims' (B. Smith and F. Morphy, 2007:7 citing B. Morris, 2003).

Recognition of native title rights and interests and securing the benefits that flow to native title holders under the NTA have to be pursued through the FCA. But the FCA is highly constrained in delivering positive determinations[213] and the claimed native title must be shown not to have been extinguished by legal acts by governments (Strelein, 2009a).[214] The level and onus of proof required and the conditions for extinguishment[215] create a hurdle for the owners under Aboriginal law and a gap between their understanding of the extent of their relationship with their land and what is accepted by Western law. Within that gap lies the matter of conventional land tenure and titling systems[216] and the land use and planning systems[217] (Wensing and Small, 2012:1).

Without a conventional form of land title, native title holders are severely constrained in using their land to participate in the economy. If native title holders want to use their native title lands to obtain equity for economic development or home ownership purposes, most financial

[213] Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Western Australia v Ward* [2002] HCA 28, 2 and 16, state that the NTA 'lies at the core of native title litigation', a point which Pearson (2003:3) argues is 'destroying the opportunity for native title to finally settle the outstanding question of indigenous land justice in Australia' because the Court is 'misinterpreting fundamental provisions in the Act' through 'flawed discriminatory conceptualisation' of native title. See Pearson (2003; 2004:9); McNeil (2004:300); and Wensing and Small (2012:165).
[214] See also Duff (2014); Bartlett (2015).
[215] Discussed in Part 3.2.2 below.
[216] i.e.: Torrens titling by registration, discussed in Chapter 4.
[217] i.e. statutory and strategic land use plans and related instruments, discussed in Chapter 4.

institutions require a conventional and secure form of land title, such as freehold, so that it can be held as equity and repossessed by a financial institution in the event of default on the loan.[218]

There are several reasons why native title rights and interests are so constrained, and this chapter explores those disjuncts, examines the dilemmas arising from the Commonwealth's pursuit of Indigenous land tenure reforms and the numerous declarations by Aboriginal peoples of the need for a treaty/ies to address the outstanding grievances.

3.2 Disjuncts: 'Fracturing skeletal principles'

In discharging the HCA's duty to declare the common law of Australia, Brennan J[219] stated that:

> '*the Court is not free to adopt the rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency'.*[220]

In other words, recognition of native title could not happen if it was going to fracture any of the skeletal principles of Australia's legal system.[221] A notion that Pether (1998:131) views as a 'sinister metaphor for the illegal colonisation of Australia' and a 'poignant Catch-22'[222] (Pether, 1998:131). Indeed, the 'troubling disjuncture' in the statement by Jonas (2002:9) cited at the beginning of this Chapter, in my view, are in fact four 'troubling disjuncts' which in their combination present serious challenges for Aboriginal peoples and for Australia that require careful re-examination.

The first two disjuncts, sovereignty[223] and the state's monopoly power to extinguish native title rights and interests, are closely intertwined because the imposition of sovereignty also includes the sovereign's power to extinguish (Adams, 2016:12, 31). The HCA's assertions that native title rights and interests are 'inalienable' other than to the Crown is the third disjunct. And the

[218] The registration of native title determinations and how this relates to the Crown's land title registration system is discussed in Part 4.2.4 of Chapter 4.
[219] (1992) 175 CLR 1, Brennan J with whom Mason CJ and McHugh J agreed, at 16-76. Brennan J's judgement is commonly regarded as the leading judgement.
[220] (1992) 175 CLR 1, Brennan J, 29-30.
[221] (1992) 175 CLR 1, Brennan J, 43, by which Brennan J meant the doctrine of tenure and estates derived from English common law. See Brennan J, 31. See also Devereux and Dorsett (1996) for a discussion of the doctrines of estates and tenure in this context.
[222] A double bind.
[223] In this thesis, I apply Adams' (2016) definition of sovereignty to mean 'a state of affairs where an entity has the coercive power to immediately regulate the possession of land and the behaviour of its inhabitants', with 'immediacy' meaning that 'no obstacle remains in the way before the entity can exercise sovereign power' (Adams, 2016:11). It is noted that Besson (2011:1, 152-156) argues the concept of sovereignty is a pivotal principle of modern international law and points to four difficulties: the subjects of sovereignty; their relationship; their autonomy in relation to the legitimate authority of international law; and the legitimacy of minimal international human rights and democracy standards. Besson (2011:156) concludes that 'The legitimacy of those standards is usually in reciprocal tension in a domestic polity'.

statutory protection of native title from debt recovery processes and the inability to use it as collateral for finance is the fourth disjunct. Each of these disjuncts are examined below.

3.2.1 The denial of sovereignty

In *Mabo (No. 2)*, the HCA found that 'Upon annexation, sovereignty passed to the British Crown' and this transfer of sovereignty 'did not have the effect of extinguishing those interests in land which existed before annexation'[224]. Indeed, Brennan J held that 'a mere change in sovereignty does not extinguish native title to land.'[225] Regardless of whether the Murray Islands were 'settled, ceded or conquered, or otherwise acquired' the HCA held that the native title interests of the Murray Islanders 'continued without the need for any act of recognition until lawfully extinguished'. [226] The Court also held that: 'Native title does not depend on sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned.'[227]

Concerning sovereignty, Brennan J[228] found that the Crown's acquisition of sovereignty over (several parts of) Australia cannot be challenged in an Australian municipal court and that native title survived the Crown's acquisition of sovereignty and the radical title[229] the Crown acquired with sovereignty. The HCA viewed the assertion of sovereignty by Lieutenant James Cook in 1770 (and by Lieutenant Governor Arthur Phillip in 1788)[230] as 'a singular, finite event' that 'is not justiciable in the courts established by the sovereign' and is, therefore 'elevated beyond limit' (Motha, 2005:113), but the courts established by the sovereign have 'the ultimate responsibility of declaring the law of the nation'[231]. Motha (2002:323) maintains that 'imperial assertions of sovereignty do not found legal systems (or) nations' and argues there is an element of 'undecidability' that lies at the centre of the HCA's declaration that 'though the question whether territory has been acquired by the Crown is not justiciable, those courts have

[224] (1992) 175 CLR 1, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 8.
[225] (1992) 175 CLR 1, Brennan J, 57.
[226] (1992) 175 CLR 1, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 8.
[227] (1992) 175 CLR 1, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 8.
[228] (1992) 175 CLR 1, Brennan J, 32 and 69.
[229] A form of title to territory or imperium, as distinct from beneficial title which is possession or *dominium* (per Brennan J, 44). Radical title is therefore a form of title to land that 'creates no beneficial entitlement to the land to which it relates' and 'is no more than political or governmental power which enables the sovereign to grant interests in land and to appropriate ownership of land to itself' (Secher, 2014:38). Borrows (2018, forthcoming) goes much further:

> '[The] *assertion of Crown sovereignty leading to radical Crown title rests on an "inanis justificationem": an empty justification. It is a restatement of the doctrine of terra nullius despite protestations to the contrary. The assertion of radical title retroactively affirms the Crown's appropriation of Indigenous legal interests without their knowledge or consent. In some other contexts, this would be called stealing – at the least it would be considered dishonest to say you own something when it previously belonged to someone else*' (Cited in Bhandar, 2018:74).

[230] See Motha (2002:313) for a brief discussion of these events.
[231] (1992) 175 CLR 1, Brennan J, 29 and 32.

jurisdiction to determine the consequences'.[232] Motha (2002:323) argues that it is not possible to separate the foundation of law from its iteration within the law by a single sovereign event. Motha (2002:323) argues that:

> *'The High Court had to re-treat (to) the foundation in order to re-inscribe a difference to be recognised as being in existence at the origin. This re-treatment of the origin introduced the distinction between radical and beneficial title and made possible the common law's recognition of indigenous interests in land.'*[233]

Mansell (1992:8) describes as 'palpably absurd and unsustainable' and 'pure hypocrisy' the HCA's conclusion that Aboriginal peoples' loss of sovereignty was beyond the Court's purview but the use of an unjust and discriminatory doctrine (such as *terra nullius*) could no longer be accepted as the justification for refusing to recognise their land rights and interests.

The question of sovereignty was also canvassed in later cases, namely, *Fejo v Northern Territory,*[234] and in *Members of the Yorta Yorta Aboriginal Community v Victoria*.[235] In *Fejo*[236] the HCA articulated the common law's recognition of native title rights and interests as 'an intersection of traditional laws and customs with the common law' and in *Yorta Yorta,*[237] this metaphor was elaborated further. However, the discussion in *Yorta Yorta* confirmed that 'there can be no parallel law making systems' (Motha, 2005:123). Gleeson CJ[238] stated thus:

> *'Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign…'*

And:

> *'...But what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible. Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new*

[232] (1992) 175 CLR 1, Brennan J, 32.
[233] See also Motha (2002:317) for an elaboration of this point.
[234] *Fejo v Northern Territory* (1998) 195 CLR 96.
[235] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58 (hereafter cited in text as Yorta Yorta).
[236] *Fejo v Northern Territory* (1998) 195 CLR 96, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, 128.
[237] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58, para 38.
[238] Supported by Gummow and Hayne JJ.

> *sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.'*[239]

Motha (2005:124) concludes therefore that the 'monistic conception of sovereignty' applied by the HCA in these cases 'insists on a singular normative order as the source of Indigenous rights and interests' and that in instituting a postcolonial system of law it is reasserting a singular normative system. According to Dorsett (2005:20), the HCA

> *'simply refused itself permission to recognise the possibility' of a parallel normative system or legal order and that any 'possibility of re-settlement, post-colonial or otherwise, would continue to depend on the relationships of jurisdiction, if not also sovereignty and territory'*.

In *Yorta Yorta*, the HCA did not recognise the sovereignty of the Yorta Yorta people (Moreton-Robinson, 2004:6) and imposed a European valuation to their approach in deciding the matter (Godden, 2003:73). Pether (1998:118) regards the HCA's refusal to address the issue of sovereignty as 'both a critical ethical blind spot in the judgment and curiously symptomatic', stating that:

> *'The High Court's protection of the source of its own (illegitimate?) power as the judicial arm of Australia's national government and its act of containment masquerading as recognition are both symptoms of the covert yet insistent assertion of its own (colonial) power. That the 'Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court'*[240] *was the one thing on which the entire court agreed.* (Pether, 1998:118-119).[241]

Jonas (2002:10) believes that the assertion of 'supreme and exclusive sovereign power residing in the state' has led to the denial and erasure of Indigenous sovereignty[242] from native title and that as a consequence, 'the state's power to extinguish native title is supreme.' The HCA effectively divested the law of any responsibility for finding a legal resolution to Aboriginal peoples' claims to sovereignty such that they 'become no longer cognizable in legal discourse' and hence 'silenced' (Otto, 1995:93).

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[239] *Members of the Yorta Yorta* Aboriginal *Community v Victoria* (2002) HCA 58, Gleeson CJ, Gummow and Haynes JJ at 43 and 44 respectively.

[240] *Mabo v the State of* Queensland *(No. 2)* (1992) 175 CLR 1, Brennan J, 2.

[241] Pether (1998:118-19) supported his argument by adding: 'The Commonwealth Attorney-General, Dr Gavan Griffith QC, suggested in a speech at St Paul's College at the University of Sydney on 22 September, 1997, that the High Court's decision in Mabo operated as a denial of responsibility on the part of the common law for the colonisation of Australia. If this insider perspective is taken on trust, here again we see recognition of the occlusion by the Court of its own Constitutional status as an arm of Australian Government and its concomitant governmental power. Dr Griffiths' analysis also suggests the profoundly ethically problematic denial by the High Court that they make the common law; so too does the language of the refusal to address the sovereignty issue.'

[242] Jonas (2002:10) defines Indigenous sovereignty as 'the political, social and economic systems that unite and distinguish Indigenous people as a people'.

There is a perverse paradox operating here. On the one hand *Mabo (No. 2)* refuses to recognise the pre-existing sovereignty of Aboriginal peoples, while on the other hand native title claimants are required to demonstrate the continuing existence of a system of law and custom to validate their land rights. In the words of the Report of the Parliamentary Select Committee of the House of Commons on Aboriginal Tribes in 1837, 'the rights of the Aborigines in Australia as sovereigns remain "utterly disregarded"' (British House of Commons Parliamentary Select Committee, 1837:125).[243]

Mabo (No. 2) raises serious questions about why the denial of the sovereignty of the Aboriginal peoples has never been properly addressed.[244] In particular, Lavery (2015) argues that the continuing denial of the existence of another system of law and custom at the time of colonisation by the British is 'increasingly implausible' (2015:23) and 'unsustainable' (Lavery 2015:27). The issues of sovereignty and jurisdiction cannot continue to be ignored as they remain an integral part of Indigenous peoples' historical grievances and their continuing struggle for justice and recognition of their pre-existing sovereignty (Marks, 2004:32). The continuing reliance on the 'inglorious [Occupation of Backward Peoples] doctrine renders the orthodox theory of Anglo-Australian sovereignty as an extremely fragile construct and at tipping point' (Lavery, 2018:1). The mode of acquisition of sovereignty by the occupiers is crucial to determining 'what property law rights and interests might inure in an indigenous society after an acquisition' (Lavery, 2018:5). The questions that must be asked therefore are: 'What constitutes sovereignty and why the Aboriginal nations lacked it when the [British] Crown asserted its sovereignty' (Adams, 2016:33) and why are we not dealing with how the assertion of sovereignty in Australia became legal?[245]

Langton (2002:2) referring to the 'ancient jurisdictions' of Aboriginal polities, argues that 'if, as now held at common law, native title survives, Aboriginal jurisdictions, that is the juridical and social spaces in which such laws are practiced must also survive.' Hence, Langton (2002:7) concludes that:

[243] Cited in Marks (1991:29).

[244] This body of opinion comprises many academics, researchers and key players both domestically and internationally. I regard the following (predominantly Australian) authors as among the most vociferous contributors to this debate and the following is just a small selection: Mansell (1992), Otto (1995), Kerruish and Purdy (1998), Pether (1998), Kerruish (2002), Pearson (2003), Motha (2002; 2005), Secher (2014), I. Watson (2002a; 2002b; 2015).

[245] Adams (2016:28) raises this question in relation to sovereignty in Canada following several recent cases in the Supreme Court of Canada, in particular the minority opinion of Binnie J in *Mitchell v MNR*, 2001 SCC 33.

> *'It is an abiding principle in the modern age that the idea of civitas cannot be a racialised one in a modern nation. In the Australian context, it follows that outdated and unjust theories of race must be replaced by a recognition of the civil polity of Aboriginal life'.*

Every determination by the FCA that native title exists (either wholly or partly) is an affirmation of a normative system of Aboriginal law and custom that clearly survived the imposition of sovereignty by the British (Lavery, 2015:21). And conversely, every determination that native title no longer exists is a denial of their continuing law and custom and their sovereignty and is yet another form of dispossession (Foley and Anderson 2006:86). The starting point for this analysis is the significance of Aboriginal peoples' connection to their ancestral lands and their customary law, culture and sovereignty and the fact that they do not relate to the concept of extinguishment. This is explored in more detail below and in Chapters 5 and 6.

3.2.2 The Crown's monopoly power of extinguishment

While the HCA in *Mabo (No. 2)* was not required to adjudicate on an actual question of extinguishment, the Court nevertheless had to adjudicate on the Crown's power to recognise and extinguish native title.[246] Having decided to confer legal recognition on the traditional rights to land of the native title holders which pre-existed the imposition of British sovereignty, the Court had 'to reconcile the fact of colonial history and the accumulation of rights and titles on the part of the colonists and their descendants' (Pearson, 2004:84). The Court also had to decide what the legal consequences would be when friction (if any) occurs in the interactions between native title and Crown grants or other official action (S. Brennan, 2010:257). According to S. Brennan (2010:257) 'Those consequences lie on a spectrum between total extinguishment at one end and no effect at the other.'

The ordinary meaning of the word 'extinguish' means to 'put out; to put an end or bring to an end.' The term is defined in s.237A of the NTA[247] as follows:

> *'The word extinguish, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect'.*

[246] (1992) 175 CLR 1, Brennan J, 63, 69-70.
[247] This definition only applies to the types of extinguishment provided for in the NTA.

In *Mabo (No. 2)* Brennan J[248] argued that sovereignty carries with it the power to create and to extinguish private rights and interests in land within its territory, and

> *'It follows that, on a change in sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power'*.

In other words, the acquisition of sovereignty exposes native title to extinguishment by the valid exercise of sovereign powers that are inconsistent with the continued right to enjoy native title.[249] In particular, Brennan J[250] concluded that where the Crown has validly granted freehold or leasehold interests to third parties and where that grant is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.

Similarly, where the Crown has validly appropriated land and dedicated it, set it aside or reserved it through some valid means for public roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of native title, Brennan J[251] concluded that native title is extinguished to the extent of the inconsistency. In exercising the Crown's power to extinguish native title rights and interests, Brennan J[252] said it 'must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or the Executive'. These parameters are consistent with the instructions that Cook and Phillip were given and in King George III's proclamation of 1763 (discussed earlier) to recognise the rights of the Indigenous peoples and to procure land through agreement or purchase so as to effectively extinguish their rights to the land.

Strelein (2009a:17) asserts that the Court's findings in *Mabo (No. 2)* with respect to extinguishment meant that the Crown has the power to extinguish native title rights and

[248] (1992) 175 CLR 1, Brennan J, 64, supported by Deane and Gaudron JJ, 111, 114 and 119, and Toohey J, 195-196 and 205.
[249] (1992) 175 CLR 1, Brennan J, 64 and 69; Deane and Gaudron JJ, 89, 101, 110-112. But as noted by McNeil (1997:365), Deane, Gaudron and Toohey JJ were of the view that the Crown would have acted wrongfully by making an inconsistent grant, and might be liable to pay compensation, but the majority disagreed: see per Mason CJ and McHugh J, 15. S. Brennan (2010:253) maintains that native title holders were deprived of the benefit of two orthodox principles applicable to property rights, namely, protection against impairment by subsequent Crown grant, and the common law presumption that compensation is payable when property rights are extinguished. In support of the common law presumption, S. Brennan (see Footnote 85 in 2010:253), cites French CJ in *Wurridjal v Commonwealth* (2009) 237 CLR 309, 355, confirming the existence of a common law principle 'long pre-dating federation that, absent clear language, statutes are not to be construed to effect acquisition of property without compensation'. See also discussion in Secher (2014:140).
[250] (1992) 175 CLR 1, Brennan J, 69-70.
[251] (1992) 175 CLR 1, Brennan J, 69-70.
[252] (1992) 175 CLR 1, Brennan J, 64.

interests by legislation or executive action 'unilaterally' and 'without consent' (of the native title holders), and that this is 'a clear assertion of colonial sovereign power'.

In *Wik*[253], the majority held that native title is only extinguished to the extent that it is inconsistent with the rights of the grantee, particularly for pastoral leases, but that the grantees rights prevail over the rights of the native title holders. However, the Court left open the question of whether the inconsistent rights of the native title holders might be suspended for the duration of the inconsistency or whether they may be lost forever (Secher, 2014:182).

In *Fejo*[254], the HCA made it clear that at common law, a grant in fee simple extinguishes the native title rights and interests permanently as a result of their inconsistency. This is because a grant in fee simple 'is the greatest estate known to the common law' (Secher, 2014:185), or as North J stated in *State of Western Australia v Ward*:

> *'Where the Crown makes an unqualified grant in fee simple the duration of the rights created by the grant is limitless. There is therefore a necessary absolute temporal inconsistency between the rights created by the law or act and native title, and native title is extinguished.'*[255]

In *Wik* and *Fejo* the HCA missed an opportunity to reconcile the common law with the continuing law and authority of the Aboriginal peoples of Australia, and since *Mabo (No. 2)* the Court has continued to accommodate non-Indigenous interests to the detriment of the interests of Aboriginal peoples (Strelein, 2009:43). Strelein (2009a:43) contends that the HCA could have confirmed the rights and interests of fee simple title holders as taking priority over the native title rights and interests as the HCA had done in *Wik* concerning pastoral leases. Respect for native title rights and interests could have been shown over freehold land 'for the recognition of traditional custodianship; that is, the right to be acknowledged as the first peoples and first owners of that land', regardless of its tenure history in Australian law. 'Respect for the law of Indigenous peoples and their struggle for survival could have been celebrated by recognising that native title cannot be extinguished absolutely in the Australian legal system where it continues to exist in Indigenous law' (Strelein, 2009a:43). However, in recent cases[256] we have seen some relaxing of the strictness that was applied in the earlier cases.

[253] *Wik Peoples v* Queensland [1996] 187 CLR 1, Toohey, Gaudron, Gummow and Kirby JJ, 190.
[254] *Fejo v Northern* Territory (1998) 195 CLR 96, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, [43].
[255] *State of Western Australia v Ward* [2000] FCA 191, North J, 684.
[256] For example, *Akiba v Commonwealth* [2103] HCA 33; *Western Australia v Brown* [2014] HCA 8; *Rrumburriya Borroloola Claim Group v Northern Territory of Australia* [2016] FCA 776; and more recently, *Warrie v State of Western Australia* [2017] FCA 803.

Wensing and Small (2012) have previously argued that the logic of Aboriginal ownership implies that the Aboriginal rights holders should have a right of veto against development proposals comparable to that which is the operational power of urban and regional planners over all types of land tenures, including freehold land. We argued that:

> *'Planning is effectively the right, held by the government against private landholders, to control land uses. Since customary owners hold superior title to the government, it is consistent that they are not only exempt from most normal actions of planning control, but also merit some level of involvement in the planning process by virtue of the nature of their rights to the land. By allowing customary owners the right of veto in land use planning, no right is being removed from western freehold landholders and 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'* (Wensing and Small, 2012:12).

Land use planning matters to Aboriginal and Torres Strait Islander peoples because it has the potential to impact adversely on their aspirations for just and sustainable futures and the survival of their culture and identity (Wensing, 2017d:2 and 8; Hoehn, 2018:976).

In Australia local government has primary responsibility for local land use planning, as in Canada, from where we can draw some lessons. In Canada, the Canadian Supreme Court[257] has determined that 'the Crown has a duty to consult and accommodate' Aboriginal peoples' rights, consistent with the Crown's obligation arising from the Royal Proclamation of 1763 to protect Aboriginal people from exploitation (Hoehn and Stevens, 2018:977; Hoehn, 2012:51). In *Haida Nation v British Columbia (Minister of Forests)*, the Supreme Court stated that s.35 of the *Constitution Act 1982* (Canada) represents a promise of rights recognition. As a corollary to that Act, the Crown must 'act honourably in defining the rights it guarantees and in reconciling them with other rights and interests' which in turn 'implies a duty to consult and, if appropriate, accommodate'.[258]

The two main objectives of the duty to consult are to protect Aboriginal rights from adverse Crown conduct and to promote reconciliation (Hoehn, 2018:978). While the Supreme Court of Canada has yet to consider whether or how the duty to consult and accommodate Aboriginal peoples' rights applies to local government in Canada, Hoehn (2018:976) argues there are strong

[257] See for example: *Mikisew Cree First Nation v. Canada (Minister for Canadian Heritage)*, 2005 SCC 69; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74; *Haida Nation v. British Columbia (Minister for Forest)*, 2004 SCC 73, [2004] 3 SCR 511. Cited in Hoehn, 2012:51.

[258] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] at para 20.

legal, practical and policy grounds for subjecting local governments to the duty to consult and accommodate Aboriginal rights. Hoehn (2018:976-7) contends that whether local governments 'bear the Crown's duty to consult should be consistent with the honour of the Crown, which arises from the Crown's assumption of sovereignty over lands and resources formerly held by the Indigenous nation'. Hoehn (2018:977) also argues that:

> *'The powers delegated to local governments are the same powers assumed by the Crown over lands formerly controlled by Aboriginal peoples and therefore when exercising those powers, local governments should do so in a manner consistent with the honour of the Crown.'*

Recent cases by the Supreme Court of Canada indicate that the Court is favouring a broad conception of the 'Crown' as including all governmental powers when considering the Crown's duties to Aboriginal peoples (Hoehn, 2018:976).[259]

The issues associated with decision making in land use planning in Australia in the context of an intercultural contact zone between two systems of land ownership, use and tenure are explored in Chapter 9.

Returning to the discussion on the concept of 'extinguishment', others have also expressed concerns. Most notably, French J[260] and Neate (2002:118), who see extinguishment as a metaphor for placing limits upon the extent to which recognition will be accorded to Aboriginal people under Australian law, notwithstanding the subsistence of rights and interests in land according to the traditional law and custom of the relevant Aboriginal people for a particular place.[261]

More recently, French CJ and Keane J stated that:

> *'"Extinguishment" describes the result of applying principles by which common law recognition is withheld or withdrawn in the face of legislative or executive acts affecting the land or waters in which native title is said to subsist*.'[262]

[259] *Grassy Narrows First Nation v Ontario (Natural Resources*), 2014 SCC 48, [2014] 2 SCR 447 at para 39; *Clyde River* (Hamlet) v Petroleum Geo-Services Inc, 2017 SCC 40, [2017] 1 SCR 1069 at para 29; *Chippewas of the Thames First Nation v Endbridge Pipelines Inc.* 2017 SCC 41, [2017] 1 SCR 1099, para 29.
[260] As he then was in the FCA. In *The Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v State of Queensland* [2001] FCA 414, per French J, 45.
[261] For more discussion, see French (2002:143-149) and Neate (2002:118).
[262] In *Queensland v Congoo* [2015] HCA 17, French CJ and Keane J, 14 [31].

Aboriginal peoples therefore continue to hold their native title rights and interests 'at the sufferance of the state' (Tobin 2014:101).

Maybe, as Godden (2003:79) has observed, it is time to give Brennan J's skeletal principles 'a material body.' By this Godden (2003:80) is asserting that 'Native title will remain vulnerable to the exigencies of sovereign extinguishment' because that power 'cannot be dislodged' and that the 'law has only performed a partial exhumation of native tide' by turning away from 'its unfinished task of discovering the buried intentionality of property law'. Godden concluded:

> *'Only in the barest of terms has law set about re-constituting a history of the dispossession and decimation of aboriginal communities, and in retracting one legal fiction, it has reinstituted property as the proper ground for law'* (Godden, 2003:80).

Irene Watson (2015:112-113) takes a harsher view, asserting that 'The extinguishment of native title is another example of a covert form of genocide, so covert that it is dressed up as a form of recognition', and that the 'mythical skeletal principles' that Brennan J relied upon in *Mabo (No. 2)* 'precluded recognition of First Nations as peoples in international law'.

Peter Yu[263] asserts that:

> *'The biggest injustice is how the state recognises native title with no compensation for past acts, … and then also maintains the ability under Western law to extinguish native title, rather than negotiating some other form of arrangement which recognises the cultural and other characteristics that have been determined through the recognition of our native title rights and interests'.*

Hence, Yu (2016a:2) asserts that '"Repugnant" captures the pervasive Aboriginal view of extinguishment.'[264]

[263] Peter Yu, notes of interview with the author, 2 December 2015. Held on file by the author. Peter Yu is the CEO of Yawuru Corporate Group (discussed in more detail in Chapter 7 and Appendix E of this thesis). It was in this capacity that I interviewed Peter Yu on several occasions as part of my research for this thesis. It is also relevant to note Peter Yu's stature in Australia and internationally. Peter Yu is a Yawuru Man from Broome in the Kimberley region in North West Australia with over 35 years' experience in Indigenous development and advocacy in the Kimberley and at the state, national and international levels. Peter Yu was a key negotiator on behalf of the Yawuru Native Title Holders with the Western Australian State Government and Shire of Broome over the landmark 2010 Yawuru Native Title Agreement and is the current CEO of the Yawuru Corporate Group. Peter Yu was Executive Director of the Kimberley Land Council (KLC) during the 1990s and had a national leadership role negotiating the Federal Government's response to the High Court of Australia's decision in *Mabo (No. 2)*. Peter Yu's former roles include Deputy Chair of the Indigenous Land Corporation (ILC), Chair of the WA Aboriginal Housing Board, a member of the Board of the WA Museum, the National Museum of Australia (NMA) Board where he led the 2015-16 British Museum and NMA exhibitions of Australian Indigenous cultural objects. He is currently a Board Member of the North Australian Indigenous Land and Sea Management Alliance Ltd (NAILSMA Ltd), Deputy Chair of the AFL Aboriginal Advisory Committee, Deputy Chair of Broome Future Ltd and Trustee on the Princes Trust Australia. Peter Yu is also currently a Member of the ANU Council.

[264] On the strength of this statement, it may be possible to conceive native title as proving to be remarkably more resistant to commensurability with Settler state law than we care to realise. A point that is beyond the scope of this PhD, but may be worthy of further research by others.

3.2.3 The inalienability of native title

A third constraint is that in *Mabo (No. 2)* the HCA regards native title as inalienable.[265] That is, native title cannot be bought or sold in the open property market. In his lead judgement in *Mabo (No. 2)*, Brennan J concluded that in relation to the inalienability of native title:

> *'Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the indigenous people, have a relevant connexion with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs. If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner.'*[266]

Brennan J's reasoning for reaching that conclusion are captured in **Figure 3.1**. In his reasoning, Brennan also gave recognition to native title as a property right, albeit held communally or as a group[267], and that unlike ordinary freehold title as a proprietary right, native title is not alienable to people outside the native title clan or group, other than to the Crown. In recognising native title as a proprietary right, Brennan J is tacitly acknowledging that native title is a parallel system of land rights, albeit embedded in another system of law and custom.

[265] (1992) 175 CLR 1, Mason C.J, and Brennan, Deane, Gaudron and McHugh JJ, 4.
[266] (1992) 175 CLR 1, Brennan J, 70.
[267] S.223(1) of the NTA states that 'native title or native title rights and interests means the *communal, group or individual* rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land or waters' (original emphasis removed; new emphasis added). And s.225 of the Act requires the Court to determine 'who the persons, or each group of persons, holding the common or group rights comprising the native title are'. While the Act may operate to recognise or protect a native title holder's individual native title rights and interests, it will always be in reference to the communal or group rights because it is a collective right held by all members of an Aboriginal or Torres Strait Islander nation or group. Individuals or groups may have rights and interests that could be said to be pendant or carved out of the communal or group title. I am indebted to Lisa Strelein for this insight, personal comments, 9 February 2016.

Brennan J's reasoning in *Mabo (No. 2)* on the inalienability of native title rights and interests

'It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of "property" which require alienability under the municipal laws of our society. The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners. True it is that land in exclusive possession of an indigenous people is not, in any private law sense, alienable property for the laws and customs of an indigenous people do not generally contemplate the alienation of the people's traditional land. But the common law has asserted that, if the Crown should acquire sovereignty over that land, the new sovereign may extinguish the indigenous people's interest in the land and create proprietary rights in its place and it would be curious if, in place of interests that were classified as non-proprietary, proprietary rights could be created. Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory. The fact that individual members of the community, like the individual plaintiff Aborigines in Milirrpum[1]*, enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title.'* ((1992) 175 CLR 1, Brennan J, 51)

And:

'… [U]nless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for the alienation of interests in land to strangers, the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived.' ((1992) 175 CLR 1, Brennan J, 59)

And:

'*Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). …*

'It follows that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired outside those laws and customs only by the Crown. … The native title may be surrendered on purchase or surrendered voluntarily, whereupon the Crown's radical title is expanded to absolute ownership, a plenum dominium, for there is then no other *owner.'* ((1992) 175 CLR 1, Brennan J, 60, emphasis in original.)

Figure 3.1 Extracts from Brennan J's judgement in *Mabo (No. 2)*: The inalienability of native title rights and interests

Godden and Tehan (2007:263) argue that while recognition of native title has generally proceeded on the basis that what is 'recognised' as native title may constitute a 'property-like' interest, 'there remains confusion about the exact parameters of its proprietary characteristics'. They argue that property interests in Australia are constructed as relationships denoted by rights of exclusivity, control and access; and that native title is constructed 'by reference to factually contingent relationships that have a direct possessory anchoring in a particular place or that are linked to an identified group or community' (Godden and Tehan, 2007:270). In Godden and Tehan's view, native title is in tension with these measures of Australian property (2007:278) and therefore remains extremely vulnerable (2007:282-283). Perhaps native title's vulnerability arises from its 'sui generis'[268] nature and when viewed by the courts as a 'bundle of rights', that bundle can be too easily eroded by inconsistent acts by others.

Deane and Gaudron JJ[269] similarly viewed native title as being 'inalienable outside the common law native title system' (except by surrender to the Crown) because it was 'merely a personal and usufructuary right.' Deane and Gaudron JJ[270] also stated that:

> *'[The limitation on alienation] is commonly expressed as a right of pre-emption in the Sovereign, sometimes said to flow from 'discovery' (i.e. in the European sense of 'discovery' by a European State).*[271] *The effect of such a right of pre-emption in the Crown is not to preclude changes to entitlement and enjoyment within the local native system. It is to preclude alienation outside that native system otherwise than by surrender to the Crown. The existence of any rule restricting alienation outside the native system has been subjected to some scholarly questioning and criticism.*[272] *In our view, however, the rule must be accepted as firmly established.'*[273]

In support of their arguments about inalienability, Dean and Gaudron JJ[274] cite *Johnson v McIntosh* (1823)[275] from the United States of America. *Johnson v McIntosh* (1823) contained the 'doctrine of discovery' in which Chief Justice Marshall concluded that the Europeans acquired ownership of all 'discovered lands.' 'Discovery converted the Indigenous owners of discovered lands into tenants on those lands' and 'the underlying title belonged to the discovering sovereign. The Indigenous occupants were free to sell their 'lease', but only to the landlord' and they could

[268] (1992) 175 CLR 1, Deane and Gaudron JJ, 89.
[269] (1992) 175 CLR 1, Deane and Gaudron JJ, 90, 91.
[270] (1992) 175 CLR 1, Deane and Gaudron JJ, 88.
[271] Citing *Johnson v McIntosh* (1823), 8 Wheat. 543, at p. 592 and *Reg. v Symonds*, [1847] NZPCC, at pp. 389-391.
[272] Citing McNeil (1989:21). But see also McNeil (2016).
[273] Citing *Nireaha Tamaki v. Baker,* [1901) A.C., at p. 579; *Attorney-General (Quebec) v. Attorney-General (Canada),* [1921] 1 A.C., at pp. 408, 411; *Administration of the Territory of Papua and New Guinea v. Daera Guba* (1973), 130 CL.R., at p. 397.
[274] (1992) 175 CLR 1, Deane and Gaudron JJ, 88.
[275] Marshall J, 8 Wheat, 586; 21 U.S. 259; 8 Wheat, 543, 592; 21 U.S. 261.

be evicted by the landlord at any time (Robertson, 2005:x).[276] This assertion hinges on the legal positivist view that effective occupation and use by the Crown expunges or overrides any Indigenous claims to the same land and that no remedy is required.

According to McAuslan (2007:247), Marshall CJ asserted that no European coloniser, other than England, had given its full and unequivocal 'assent' to the principle of discovery, and 'somewhat disingenuously' (McAuslan 2007:250). McAuslan concludes:

> *Thus, on the basis of a fraudulent land purchase, a collusive action, questionable and deficient history, disingenuous reasoning and a personal interest, the great Chief Justice Marshall rewrote the land law of early America and so facilitated the dispossession, dispersal and degradation of the Native Americans, which took place at an ever increasing pace in the nineteenth century. He set aside all the evidence of almost two hundred years of attempted honest and straightforward dealing on the basis of law between the Native Americans and the colonists, preferring to support and give legal authority to those who had ignored the law as it had clearly been laid down and who had refused to accord full recognition to the Native Americans or their rights to their own land. His judgement opened the way for the use of land law as the primary tool for the forcible displacement of native inhabitants, the removal of their rights to their land and their replacement as colonial settlers, the whole given justification by references to the superior civilisation of the colonists when compared to that of the natives.'* (McAuslan 2007:251)

The history of *Johnson v McIntosh* (1823) is replete with 'unexpected events and consequences' that suggest the landmark nature of this case needs re-thinking (Robertson, 2005:144). Robertson (2005) tells the 'exceedingly convoluted backstory' (Konkle, 2008:311) of this case. Robertson's research sought to 'establish just what was on the minds of the participants in the case at the time it was drafted, pleaded, argued and decided.' He also sought to 'expose the process of judicial lawmaking in the early republic' because the Supreme Court was still in the process of formation in terms of its jurisdictional role at that time (2005:xii).

According to Robertson (2005:xiii), the decision in *Johnson v McIntosh* (1823) was not seen as significant at the time it was made and the case only achieved its landmark status as a result of political circumstances unrelated to the origins of the case. The State of Georgia 'seized upon the formulation of the discovery doctrine' by Marshall J in *Johnson v McIntosh* (1823) to support the State's legal claim of its right to forcibly remove the Cherokee Native Americans from their land within the State of Georgia. Removal of Native Americans from their land had always been possible, but only voluntarily. 'If the tribes did not want to exchange or sell their lands, the

[276] This is a useful analogy, but is inconsistent with the way radical title is applied in Australia. See Footnote 229.

United States would not force them to do so. That changed in the 1820s, when Georgia began aggressively to engineer the ouster of the Cherokees' (Robertson, 2005:119). These events, Robertson (2005:118) claims, also led to the First Session of the Twenty-First Congress to pass the *Indian Removal Act of 1830*.

Marshall CJ did not foresee that the doctrine he developed would be used to justify the removal of the Native American people from their traditional lands. Although in *Cherokee Nation v Georgia* (1831) and *Worcester v Georgia* (1832)[277] Marshall CJ modified his decision in *Johnson v McIntosh* (1823) (McNeil, 2016:710), these decisions were later ignored by the Supreme Court and 'the discovery doctrine survived because it facilitated [Native American] Indian removal' (Robertson, 2005:143). Strelein (1998:90) makes the point that the enforceability of court decisions largely rest on other arms of government for their implementation and that the Cherokee were forcibly removed from their lands because the decision in *Worcester v Georgia* (1832) was not implemented. [278]

Robertson (2005:xiii) maintains that 'The removal policy itself has since been excoriated.[279] Consequently, what we now embrace is a repudiated rule revived to support an excoriated policy' and that it is time 'to reassess the jurisprudential legacy of *Johnson v McIntosh* (1823) in light of this procedural and political history'. Robertson also expressed concern that the decision's 'reach has been global' because it has been used in the decision of the HCA in *Mabo (No. 2)* and decision of the Supreme Court of Canada in *Guerin v The Queen* (1984)[280] to recognise the discovering European sovereign to be the owner of the underlying title to Indigenous lands (Robertson, 2005:144). [281] Secher (2014:252) similarly questions the proposition that native title in Australia is inalienable except to the Crown.

While it appears that the native title holders may possess nothing more than an entitlement to use and occupy the land, the HCA was also clarifying that native title rights and interests are not

[277] *Worcester v Georgia* (1832) 31 U.S. 515.

[278] While the then US President, Andrew Jackson, is credited with responding to Marshall J's decision in *Worcester v Georgia* (1832) by saying '*John Marshall has made his decision, now let him enforce it*' (Greeley, 1864), there are conflicting accounts about its veracity, see James (1938:603-4) and Cole (1993:114). Banner (2005b:221) argues there is a pervasive misunderstanding of the case. The Court's decision had imposed a legal obligation on the State of Georgia and it was not within President's purview to enforce the decision. While Banner (2005b:223) asserts that Jackson's 'apocryphal quote' makes no sense legally, it captures the President's refusal to intervene on the Cherokee's behalf. Kades (2000:1118) asserts that Marshall's decision gave the federal government the power to act to prevent state actions that were inconsistent with the national interest, but Jackson merely chose not to exercise his power against Georgia. The end result was that the Cherokee were eventually forcibly removed from their lands. See A. Wallace (1993) and Robertson (2005) for more discussion.

[279] 'Excoriate': to strip off or remove the skin from; to flay verbally; denounce; censure.

[280] *Guerin v The Queen* [1984] Supreme Court of Canada, 2 S.C.R. 335

[281] Indeed, McNeil (2016:702) also contends that the doctrine of discovery as formulated by Marshall CJ in *Johnson v McIntosh* (1823) is 'seriously flawed' and that it has been 'misapplied' in other jurisdictions.

'illusory'[282] and should be accepted as being 'sui generis' or quite 'unique'.[283] As the Crown has a monopoly over the acquisition and extinguishment of native title rights and interests, Gover, 2012) asserts that the Crown also has '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.'

Behrendt (2010:179) notes that the 'Doctrine of Discovery' as developed by Marshall CJ in *Johnson v McIntosh* (1823) was not adopted into Australian law.[284] Lavoie (2016:1001, 1029) argues that 'the force of justifications' for placing restrictions on the alienation of Indigenous lands that arose from the colonial invasion and settlement in Australia has run its course and can no longer be justified. Under the current prevailing legal regime in Australia the inalienability of native title rights means that native title holders can only fully realise their property rights in their negation through alienation (Nichols, 2017:13), 'giving them the right only to sell' (Deloria Jr. 1988, cited in Nichols, 2017:13).

In arguing that the current settings on the inalienability of native title have run their course, it is acknowledged that safeguards will need to be put in place to protect the underlying communal title that Indigenous forms of land ownership often entail. While neoliberal market ideologies espouse free alienability with positive economic outcomes, experience in other jurisdictions outside Australia show that Indigenous peoples have endured significant losses from the alienation of their lands to non-Indigenous people/entities and to the Crown. For example, in the mid-nineteenth century the New Zealand Government waived Crown pre-emption and allowed direct dealing which resulted in significant reductions in land owned by the Maori people in Aotearoa (Ward, 1999:95-103). Ward (1999:171) suggests some important principles for ensuring coexistence over land between Maori and other people, such as affirmative cooperation and partnership and dealing with each other in good faith. The necessary attributes of a model for coexistence are explored later in this thesis, along with research in the Australian context by Godden and Tehan (2010) and Terrill (2016)[285] on measures to protect Indigenous communal interests in land.[286]

[282] (1992) 175 CLR 1, Deane and Gaudron JJ, 91.
[283] (1992) 175 CLR 1, Deane and Gaudron JJ, 89.
[284] I return to this point in Part 3.2.4 below.
[285] See also earlier works by Godden and Tehan (2007) and Terrill (2009, 2010, 2011a, 2011b, 2015a, 2015b).
[286] In Part 3.3 of Chapter3, Part 5.4 of Chapter 5, Parts 8.2 and 8.3 of Chapter 8 and Part 9.4 of Chapter 9.

3.2.4 The statutory protection of native title from debt recovery

A fourth constraint is that land subject to native title rights and interests is statutorily protected from debt recovery under the NTA. The extent to which a prescribed body corporate (PBC)[287] can assign leases over land still subject to native title rights and interests may be constrained by the NTA.

Section 56 of the NTA deals with the FCA's determination that native title rights and interests be held in trust. Sub-section (4) deals with other matters relating to a trust PBC that may be dealt with by regulation, including in sub-clause (iii) 'the circumstances in which the rights and interests may be surrendered, transferred or otherwise dealt with'. Sub-section (5) provides for the protection of native title from debt recovery processes.[288] It provides that native title rights and interests held by a trustee body corporate are not able to be 'assigned, restrained, garnisheed, seized or sold', nor are they able to be 'made subject to any charge or interest' or 'affected as a result of the incurring, creation or enforcement of any debt or other liability of the body corporate or any act done by the body corporate'. Section 56(6) provides that Sub-section (5) 'does not apply if the incurring of the debt, creation of the liability or doing of the act was in connection with a dealing with the native title rights and interests authorised by regulations for the purposes of paragraph (4)(c).' Regulation 6(1)(e) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) provides that a PBC may perform functions 'relating to the native title rights and interests as directed by the common law holders'. Regulation 8(2) provides that a trustee PBC must consult with and obtain the consent of the common law holders before making a decision that may affect the native title rights and interests, such as their surrender or transfer, or dealing with the Crown.

Keane CJ (2011:6-7)[289] notes that amendments made to s.56(4) of the NTA in 2007, unrelated to this discussion *per se*, resulted in an anomaly whereby the reference to paragraph (4)(c) in s.56(6) should now refer to s.56(4)(a)(iii). While Keane CJ speculates as to why the amendments to

[287] A body created by native title holders to hold and manage their native title rights and interests either in trust or as an agent. For profiles of PBCs/RNTBCs see: http://www.nativetitle.org.au/ (Accessed 30 April 2018).

[288] 'Protection of native title from debt recovery processes etc.

(5) Subject to subsection (6), native title rights and interests held by the body corporate are not able to be:
(a) assigned, restrained, garnisheed, seized or sold; or
(b) made subject to any charge or interest; or
(c) otherwise affected;
as a result of:
(d) the incurring, creation or enforcement of any debt or other liability of the body corporate (including a debt or liability owed to the Crown in any capacity or to any statutory authority); or
(e) any act done by the body corporate.'

[289] At the time of this keynote address to the National Native Title Conference in 2011, Justice Patrick Keane was Chief Justice of the FCA.

s.56(4) were made, he maintains that the Explanatory Memorandum for the relevant Bill in 2007 (Parliament of Australia, 2007) did not intend that debt should no longer be recovered for the surrender, transfer or otherwise dealing of native title rights and interests. It is not clear why this anomaly has not been rectified.

Storey (2007:61-63) posits that the trustee provisions of the NTA and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) contemplate the possibility of dealings which involve assigning native title rights and interests, in whole or in part. Whereas Keane CJ (2011:7) maintains that two actions are necessary 'to be confident about the ability of PBCs to bring native title rights and interests to engagement with the broader economy.' Firstly, that the legislative mandate available to trustee PBCs in ss.56(4), (5) and (6) needs to be clarified, and that 'at the practical level, there needs to be an available body of expertise to ensure that the PBCs operate efficiently, responsibly and responsively to the interests of native title holders' (Keane, 2011:7). Secondly, Keane CJ (2011:7) also warns that

> *'to the extent that trustee PBCs do afford a vehicle whereby native title may be brought into the broader economy, the issue is whether the relevant native title group chooses to use it for that purpose: responsibility and opportunity must rest with the native title holders for whose benefit the trustee PBC holds the title'.*

Nevertheless, Wensing and Taylor (2012:25) argue that s.56(5) of the NTA 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 under a lease (by native title holders or otherwise).

Significantly, the provisions of s.56(5) of the NTA are not about inconsistency or about extinguishment, but rather about the Crown retaining a monopoly power over the acquisition of land from native title holders. The provisions of s.56(5) of the NTA can be seen as a restatement of the doctrine of Crown pre-emption, whereby 'discovering European countries' become the sole power and authority to buy land from the Indigenous peoples and governments which also 'prevented or pre-empted any other European government from buying the discovered land' (Miller, 2010:7). Arguably therefore, the way in which the doctrine of Crown pre-emption was applied by the 'discovering European country' meant that Indigenous peoples

were protected from alienating their lands to private interests. The problem in Australia was that one of the other elements of the doctrine of discovery was not applied by the British, and that was the recognition of pre-existing native title.[290] That is, after discovery by a European country, Indigenous peoples 'were considered by European legal systems to have lost their full property rights and ownership of their lands. They only retained their occupancy and use rights' which 'could ostensibly last forever if they never consented to sell' their land (Miller, 2010:7). But they could only sell to the Crown, as the Crown holds the power of pre-emption over their lands. The point here is that the utility of the provisions in s.56(5) of the NTA in the context of the case studies examined later in this thesis requires serious examination, especially if these provisions were inserted as some form of remnant of the doctrine of Crown pre-emption.

The complexity of the issues at stake with s.56(5) should not be under-estimated and are discussed in more detail elsewhere (Wensing and Taylor, 2012:22-27), but the argument remains that the NTA alters the common law by enacting the non-extinguishment principle[291] and applying it to specified future acts.[292] The reality is, in striking contrast to other citizens, that native title holders cannot enter the market to realise the value of their property rights by leasing, mortgaging or selling them, because the Crown has a monopoly over the acquisition and extinguishment of those rights (Gover, 2012). The provisions of s.56(5) of the NTA, while intent on supporting inalienability in light of potential mis-dealings, is in practice a significant impediment to development by Aboriginal peoples who hold native title rights and interests (Wensing and Taylor, 2012:20).

To facilitate economic development and/or home ownership on lands subject to native title rights and interests, State/Territory governments are requiring native title holders to agree to the permanent extinguishment of their native title rights and interests as a pre-condition to a

[290] Of course, until the HCA's decision in Mabo (No. 2). As already discussed in Chapter 2, from the time of settlement by the British in 1788 the Aboriginal peoples of Australia were regarded as savages or barbarians without any system of laws or governance and the notion of *terra nullius* was applied instead of the doctrine of discovery (Behrendt, 2010:179-185).

[291] Section 238 NTA. The non-extinguishment principle means that an act done over an area where native title exists will not, either wholly or partly, extinguish native title. However, native title is suppressed by any acts to which the non-extinguishment principle applies that are inconsistent with the native title rights and interests, until the inconsistent act ceases to have effect. When the inconsistent act ceases to have effect or is removed, the native title rights and interests will again have full effect.

[292] Section 233(1) NTA. A future act is an act in relation to land or waters that either: consists of the making, amendment or repeal of legislation and takes place after 1 July 1993; or is any other act that takes place after 1 January 1994; and is not a past act nor an intermediate period act; and either validly or invalidly affects native title. To be a future act the act must affect native title. That is, the act must either validly or invalidly occur in an area where native title exists and it must affect native title in that area. For example, native title may exist in relation to unallocated Crown land or a National Park, even where there are no native title holders or registered native title claimants. An act affects native title if it extinguishes native title rights and interests or impairs native title rights and interests because it is wholly or partly inconsistent with their continued existence, enjoyment or exercise.

freehold or leasehold land title under the conventional land tenure systems.[293] State/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'[294] for any loss, diminution, impairment or other effect of that act on the native title rights and interests (Wensing and Taylor, 2012:24).

It is difficult to establish from the public record why State/Territory governments are requiring native title holders to agree to the permanent extinguishment of their native title rights and interests before they will issue a freehold or leasehold title of exclusive possession over such lands. Their position is not reflected in any of their publicly available policy statements on native title matters. It appears that State/Territory governments are adopting this position because the HCA in *Western Australia v Ward*[295] 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 the same land (Government of WA, 2007).

In 2015, the then WA Attorney-General, the Hon. Michael Mischin, MLC, gave a much clearer indication of the Western Australian Government's position concerning native title and the State's requirement for extinguishment. In a speech to a native title seminar in Perth in June 2015, the former 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*

[293] 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 2016.
[294] As per s.53 of the NTA and Paragraph 51(xxxi) of the Australian Constitution.
[295] *Western Australia v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002).

> *economic activity and development proposed by either native title holders or other proponents"* (Mischin 2015:8-9).

The former Attorney-General 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 being finalised between the Noongar People of South West WA and the WA Government.[296] The Attorney-General stated he believed the lack of interest in agreements was because the underlying terms of the Noongar agreement(s) required the surrender and permanent extinguishment of all native title rights and interests (Mischin 2015:4). What is interesting about this statement by the then Attorney-General, is that it was the first time in more than a decade that a State Government has made its policy position on the requirement for extinguishment so clear and on the public record.

What these constraints mean is that native title holders are not able to use their property rights to participate in the economy in the same way (or in different ways) as other property holders are. As a consequence, different approaches are required[297] so that native title holders will have more equitable opportunities for using their land to participate in the economy through economic development or home ownership on their lands on their terms and at their choosing, rather than on someone else's terms (Wensing and Taylor, 2012:20).

It is reasonable to ask therefore, whether native title holders are feeling somewhat frustrated or disillusioned because, following a positive determination, they are not able to use their land to engage in the economy without having to permanently extinguish their hard-won native title rights and interests. D. Smith (2001:2) likens this to replacing 'the historical fiction of *terra nullius* with the legal fiction of extinguishment.'[298]

The issues arising from *Mabo (No. 2)* and the NTA need to be viewed within the wider policy context of Indigenous land tenure reforms in Australia and these issues are outlined below.[299]

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[296] For details of the Noongar Settlement, see Department of Premier and Cabinet (2015a; 2015b); SWALC (2014). For an alternative view of the Noongar case, see McGlade (2017).

[297] Either within or outside existing land tenure frameworks

[298] It is worth noting that the issues of native title extinguishment and discriminatory treatment were considered by the Full Court of the Federal Court of Australia (FCAFC) in *McGlade v Native Title Registrar* [2017] FCAFC 10, para 66, with the FCAFC noting that the protective function of the ILUA provisions in the NTA 'should not be lightly overridden'. The issues of extinguishment and compensation are intertwined, as is starkly evident in the 'Timber Creek case' currently before the HCA (*Northern Territory of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor*, Case Nos. D1/2018, D2/2018 and D3/2018 (see: http://www.hcourt.gov.au/cases/case_d1-2018 appealing the FCAFC decision in *Northern Territory of Australia v Griffiths* [2017] FCAFC 106).

[299] As part of the background research, I documented the chronology of key events relating to the Australian Government's Indigenous land tenure reform agenda from 1997 to 2017, an analysis of the land dealing provisions in each of the 25 statutory

3.3 Dilemmas: The Commonwealth's pursuit of Indigenous land tenure reforms

In 1997 Prime Minister John Howard instigated a review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ARLA (NT)), which was conducted by John Reeves QC. Reeves' final report included considerable discussion on the issue of private ownership on Aboriginal communal land in the NT (Reeves, 1998:500). This discussion did not attract much attention in the immediate aftermath of the Review, but therein lay the seeds of a debate that was to erupt later. In 2005 two Aboriginal leaders, Noel Pearson[300] and Warren Mundine (2005; 2017) and the neo-liberal think-tank, the Centre for Independent Studies[301], released statements or papers supporting the dismantling of communal forms of tenure in favour of introducing individuated private freehold titles into Aboriginal communities as the only way to enable private home ownership and economic development on Aboriginal lands.

At this point the Australian Government weighed into the debate because it viewed the various forms of communal tenure and native title[302] as the antithesis of individual property rights and the effective operation of land markets (Dale, 2014:126). Communal title was portrayed as an obstacle to the expansion of government-backed home ownership programs and economic development and as an untapped resource for economic development (FaHCSIA, 2010a).[303]

In 2007-08, the Commonwealth, through the Council of Australian Governments (COAG), sought to implement an Indigenous land tenure reform agenda,[304] requiring the States to reform their statutory Aboriginal land rights schemes by inserting specific provisions into the National Indigenous Reform Agreement (NIRA)[305] and the National Partnership Agreements on Remote

Aboriginal (and Torres Strait Islander) land rights schemes around Australia, including the NTA, and how each of the States have responded to the Australian Government's Indigenous land tenure reform agenda (Wensing, 2016a, 2017a, 2017b).

[300] See Pearson and Kostakidis-Lianos (2004a, 2004b); Pearson (2005).

[301] See Hughes and Warin (2005); Cleary (2005).

[302] Where they have been recognised to exist, wholly or partly.

[303] It is not widely known or appreciated that that there could be up to $10 billion in investable assets in the Indigenous Estate, much of which is held in trusts (Taylor and Fry, 2016:23).

[304] From 2004 to 2017, successive Australian Governments of both political hues have been pursuing an 'Indigenous land tenure reform agenda', noting that Terrill (2016) uses the term 'Indigenous land reform agenda', which is primarily aimed at reforming the statutory Aboriginal land rights schemes and land held under native title determinations to enable private home ownership or private economic development on such lands. I use the term 'Indigenous land tenure reforms' to refer to reforms of the statutory Aboriginal land rights schemes, but not reforms to the NTA because most reforms to the NTA to date have only made procedural changes or diminished native title holders' rights and interests, not strengthened them.

[305] The NIRA is an overarching framework for 'Closing the Gap' on Indigenous disadvantage (Wensing, 2016a:25). 'Closing the Gap' is used in this thesis as a short-hand way of referring to the commitments that COAG made in the NIRA to close the gap in certain social and economic measures of the disparities between Aboriginal and Torres Strait Islander peoples and the rest of the population. The Overcoming Indigenous Disadvantage Report outlines the COAG targets (Steering Committee for the Review of Government Service Provision, 2009:4.1-4.3). One of the shortcomings with the 'Closing the Gap' 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.

Indigenous Housing (NPA-RIH) and Remote Service Delivery (NPA-RSD).[306] The land tenure reform objectives that were inserted into these Agreements were aimed at improving asset security for government investments, facilitating private home ownership, attracting private investment by enabling land to be used as security against debt, and changes to land tenure and land administration to enable the development of commercial properties and service hubs. Some States have taken steps to implement some of the reforms.[307] But, as Terrill (2010:6) notes, the States do not necessarily share the same level of enthusiasm as the Australian Government for such reforms given their histories of treatment of Aboriginal peoples and the differences in the way their respective statutory land rights schemes or trust arrangements have developed.

An added difficulty for the States is that the focus of the Australian Government's Indigenous land tenure reform agenda has not remained constant with several policy shifts over the period from 2004 to 2016 (Terrill, 2015a:25-28; 2016:12-13). The Howard Coalition Government's focus was on enabling the individuation of Aboriginal lands for private home ownership and economic development. The Rudd-Gillard Labor Government's focus shifted to securing tenure for government investments in housing and infrastructure and other public assets. The Abbott Coalition Government's focus was on the 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 individual home ownership and private economic development on Aboriginal lands (Wensing, 2016a:42). Terrill concludes that the debate has been flawed and that it has been 'harmful for both understandings of land reform and debate about Indigenous policy more generally' (2016:153). The debate has tended to centre on the merits of individual versus communal or group ownership for private home ownership and economic development,[308] rather than the need for better policy outcomes for Aboriginal landholders and working through the reform process carefully and methodically (Terrill, 2016:294).

[306] These agreements were signed by COAG in November 2008 (SCFFR, 2008; 2009a; 2009b).
[307] For example, Queensland, the Northern Territory and Western Australia in particular. See Wensing (2016a; 2017a; 2017b) for a more detailed analysis.
[308] See for example Bradfield (2005); M. Dodson and McCarthy (2006); Hughes and Warin (2005); Hughes *et al* (2010); Terrill (2009; 2010; 2011a; 20011b); Godden and Tehan (2010); Wensing and Taylor (2012).

Despite the apparent hiatus, the policy reform process continues, to a point. At the behest of Queensland and the Northern Territory, COAG renewed its interest in 'Indigenous land tenure reforms.' In late 2014, COAG announced that it would conduct

> *'an urgent investigation into Indigenous land administration and use to enable traditional owners to readily attract private sector investment and finance to develop their own land with new industries and businesses to provide jobs and economic advancement for Indigenous people'* (COAG, 2014).

A Senior Officers Working Group (SOWG)[309] and an Expert Indigenous Working Group (EIWG)[310] were established by the Department of the Prime Minister and Cabinet to undertake this investigation. The EIWG produced its own Statement of Intent on 'how Indigenous land and waters can be better utilised to promote self-determination and economic development for Indigenous land owners and native title holders' and a set of principles (SOWG, 2015:5, 11-12). The EIWG reflects the same concerns that many Aboriginal people have expressed about their connections to their ancestral lands. Namely, that 'the fundamental inalienable character of Indigenous land and native title should be maintained to preserve communal and intergenerational interests and strengthen the Indigenous estate' and that 'the principle of free, prior and informed consent should underpin any decision to delegate, streamline or pre-authorise decision-making' (SOWG, 2015:11-12).

In its consultations with Aboriginal peoples and communities, the EIWG was cautioned that there is potential for the COAG Investigation to be nothing more than a 'Trojan horse' through which governments and industry would seek to further weaken Aboriginal land rights legislation in the interest of promoting Indigenous economic development through more efficient processing of land use proposals for third-party interests (SOWG, 2015:5). The EIWG also expressed serious concerns about the direction of the Indigenous land tenure reform agenda and that it needed to go in a different direction. The EIWG invoked the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN, 2007)[311] to support its claims that Indigenous

[309] The Senior Officers Working Group (SOWG) was established by the Department of the Prime Minister and Cabinet 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.

[310] 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 Murrandoo Yanner and Mr Djawa Yunupingu.

[311] In particular, Article 19 of the UN *Declaration on the Rights of* Indigenous *Peoples* provides that: 'States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'. The *Declaration on the Rights of Indigenous Peoples* was endorsed by the general Assembly of the UN on 13 September 2007 by a vote of 144 in favour, 4 against and 11 abstentions (Hohmann and Weller, 2018:1). The only four countries to vote against the Declaration were Australia, Canada, New Zealand and the United States of America. Their opposition to the Declaration was

peoples must be 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' (SOWG, 2015:5).

When the SOWG reported to COAG in December 2015, it identified five key areas for governments to focus their efforts to support Indigenous peoples' use of their rights in land and waters [312] for economic development (COAG, 2015). Including: gaining efficiencies and improving effectiveness in the process of recognising rights; supporting bankable interests in land; improving the process for doing business on Indigenous land and land subject to native title; investing in the building blocks of land administration; and building capable and accountable landholding and representative bodies (SOWG, 2015:3, 8-10).

COAG's only response to the SOWG Report was to state that: 'To better enable Indigenous landowners and native title holders to use rights in land for economic development, jurisdictions will implement the recommendations of this report subject to their unique circumstances and resource constraints' (COAG, 2015: 2-3). In other words, there is nothing the Australian Government could do to advance the Indigenous land tenure reform agenda.

However, there is an interesting twist to the reforms of the State-based statutory Aboriginal land rights schemes. Land granted or reserved for the benefit of Aboriginal people under Australian, State/Territory land rights legislation is deemed by the Full Federal Court of Australia (FCAFC) and by s.47A of the NTA not to have extinguished native title rights and interests. As Lockhart J stated in *Pareroultja v Tickner* (1993)[313] 'In my opinion, when grants of land to which there is native title are made to Land Trusts under the Land Rights Act, the native title is not extinguished; and such grants are not inconsistent with the continued existence of native title to the land' and is not in breach of the *Racial Discrimination Act 1975* (Cth). It is clear from this decision of the FCAFC that a grant of land to a land trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), does not affect[314] native title.[315] Therefore, any dealings in

surprising because all four countries are common law countries that uphold the rule of law and are part of the English common law system that respects human rights (Miller, 2010:1).

[312] For a discussion of the legal recognition of native title in relation to freshwater, see Duff (2017).

[313] 117 ALR 206, per Lockhart J, 214; 42 FCR 32 at 54. With the support of O'Loughlin and Whitlam JJ. An appeal to the HCA (*Pareroultja and Others v Tickner and Others* No. S 156 of 1993) was dismissed in April 1994 with the HCA expressly reserving its position on the relationship between native title and statutory title under the *Aboriginal Land Rights (Northern Territory) Act 1975* (Cth) (ALRA (NT) (Cth)) (Nettheim, 1994:28).

[314] 'An act ***affects*** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise' (s.227 of the NTA).

[315] 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

land held under statutory Aboriginal land rights schemes or reserve arrangements must also take into account the native title rights and interests for the dealings to be valid[316] (Wensing and Taylor, 2012:22). What this means for WA, is that the native title rights and interests of the relevant traditional owners most likely still exists on all lands held on trust or in reserve 'for the use and benefit of Aboriginal inhabitants' or leased to an Aboriginal person/entity.[317]

Australia has made very little effort to make the necessary changes to recognise Aboriginal native title rights and interests as another form of property interest that can co-exist alongside the Crown's property interests in land (Strelein, 2013:87). Instead, Australia has developed a native title system that has several 'inherent limitations' which mean that non-Indigenous titles are privileged over native title rights and interests. Or, as Noel Pearson identifies it, 'A troubling inheritance' (1994:3). 'Somewhere along the line our obligation not to discriminate and to avoid boxing native title into a common law tenure has provided the foundation for just the kind of discrimination that was said to be unjustified in *Mabo*' (Strelein, 2013:87). Therefore, any land tenure reform in Australia 'must support the continued operation of customary title and the allocation of traditional ownership rights recognised through native title, rather than undermine them' (Strelein, 2013:87).[318]

An analysis of Indigenous and Western concepts of 'property' and 'ownership' and the 'intercultural contact zone' between them are examined in Chapter 5 and subsequent Chapters.[319] However, the policy developments on Indigenous land tenure reform discussed above, are why this thesis is timely and highly relevant and pertinent to the research questions posed in Part 1.4 of Chapter 1.

3.4 Challenges: Declarations for reshaping Australia

In many respects, *Mabo (No. 2)* started reshaping the Australian identity. As Sharp (1996:223) observed:

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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.

[316] 'Valid' includes having full force and effect (s 253 of the NTA).

[317] The term 'for the use and benefit of Aboriginal inhabitants' in the WA context arises from the proclamation of a reserve under s.25(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) or the vesting of a reserve under Part 4 of the *Land Administration Act 1997* (WA), subject to the provisions of the NTA relating to past acts, intermediate period acts and s.223.

[318] These observations are particularly pertinent to the Research Questions in Part 1.4 of Chapter 1 and explored in more detail in Chapter 6 of this thesis.

[319] Especially Chapter 6, which seeks to answer the critical questions posed in Part 1.4 of Chapter 1 of this thesis.

> *'The High Court decision is itself a step in the reshaping of identity, albeit, conservative and qualified: European law is no longer a universal statement of law, but it is qualified by interests of a kind partly known to English law. In the long era of terra nullius, the powers that be were complicit in a silence created by their incapacity to contemplate that a culturally meaningful social life existed on the other side of the wall they had built for the "inmates". Whatever the conclusions of the fact-finding judge about the absence of a 'real law' among the Meriam people, the latter have been able to stand up and say, "There are two laws. Our law gives us the right to say: Hands off. You are trespassing on our law"'.*

Sharp's point here is that despite the underlying cultural differences in the legal systems that were operating when the colonisers arrived, the colonisers should have shown more respect toward the other than they did.

Dean and Gaudron JJ in *Mabo (No. 2)*[320] noted that:

> *'Obviously, where the pre-existing native title interest was 'of a kind unknown to English law', its recognition and protection under the law of a newly settled British colony would require an adjustment either of the interests into a kind known to the common law or a modification of the common law to accommodate the new kind of interest'.*

But the recognition of Aboriginal peoples' pre-existing land rights and interests did not prompt such an accommodation and modification of the Australian legal system that was initially expected following the HCA's decision in *Mabo (No. 2)*.

This chapter explored how the notion of *terra nullius* became the 'scapegoat' in *Mabo (No. 2)* for this lack of recognition. Four substantial 'troubling disjuncts' (Jonas, 2002:10) were explored, including the HCA's ambivalence about fracturing 'skeletal principles' of Australia's legal system, including the denial of Indigenous sovereignty, the Crown's monopoly powers to extinguish native title rights and interests, the inalienability of native title and its protection from debt recovery.

The 'disjuncts' emerged because, as Dorsett (1998:294) asserts, native title had to be 'squeezed' into the Australian legal system. There are several elements of injustice arising from these 'disjuncts' because, yet again (and similar to the notion of *terra nullius*), the Crown seeks to exert its dominance over the ancestral land rights of Aboriginal peoples. Ever since the enactment of the NTA in January 1994 and significant amendments made to the NTA in 1998, there has been ongoing commentary about the limited outcomes from current processes for recognising and

[320] (1992) 175 CLR 1, Deane and Gaudron JJ at 87.

protecting Aboriginal peoples' rights to land and resources (S. Brennan *et al*, 2015). The way in which the NTA is currently being applied by governments and interpreted by the courts means that 'native title interests remain subordinate to those of white Australians' and can only be recognised 'if it does not alter the shape of the common law' (Dorsett, 1998:280, 293). Indeed, 'the placement of native title outside (and beneath) the range of European property concepts is racist' (R. Hunter, 1993:499)[321]. To which I add that the extinguishment[322] and extinguishing provisions[323] in the NTA reproduce the conditions for ongoing dispossession that were deeply embedded in the notion of *terra nullius*.

M. Dodson[324] summarises Aboriginal peoples' grievances with the nation as follows:

> *'No consent was given to the colonisers to occupy and settle this land. What the colonisers did was wrong in so many ways. And the nation-state continues to refuse to address these wrongs comprehensively within a human rights framework'.*

M. Dodson sees this as the 'unfinished business' and believes: 'We can fix your problem. Sit down and talk to us about it. Let's negotiate our way through this'. And therein lies the need for a treaty or 'Makarrata'.[325]

Calls for a treaty are not new. As discussed in Chapter 2, both Lt. James Cook and Lt. Governor Arthur Phillip were instructed to make an agreement with the Aboriginal peoples on their contact with the locals. It is no coincidence therefore that Indigenous Australians have, over the past 80 years, been pressing the case for a treaty or treaties to resolve the 'unfinished business' of past legacies and realigning of relationships between Aboriginal peoples and governments (M. Dodson, 2003:31; P. Dodson, 2000:192), including over land.[326]

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[321] Summarising Mansell (1992:6).
[322] Past acts and intermediate period acts. See Glossary of terms in Appendix F for definitions.
[323] Certain future acts.
[324] Professor Mick Dodson, Concluding Remarks at the National Centre for Indigenous Studies annual HDR Research Retreat, 21 October 2016, ANU, Canberra. Notes of proceedings held on file by the author.
[325] 'Makarrata' is a Yolngu word from north-eastern Arnhem Land sometimes translated as 'things are alright again after a conflict' or 'coming together after a struggle' (Hiatt, 1987:140). Hiatt (1987:140) discusses the origins of the use of the term 'Makaratta' as a form of agreement making and argues that perhaps 'garma' may have been a better choice because it means 'getting together of minds in order to reach complete accord'.
[326] Indeed, the Victorian, South Australian and Northern Territory Governments have initiated treaty negotiations with the Aboriginal and Torres Strait Islander peoples in their respective jurisdictions, and Western Australia has committed to establishing a new independent office for Aboriginal people. For details, see the following links:
Victoria: http://www.vic.gov.au/aboriginalvictoria/treaty.html
South Australia: https://statedevelopment.sa.gov.au/aboriginal-affairs/aboriginal-affairs-and-reconciliation/initiatives/treaty-discussions
Northern Territory: https://dcm.nt.gov.au/supporting-government/office-of-aboriginal-affairs/our-priorities
Western Australia: http://www.sbs.com.au/nitv/nitv-news/article/2017/06/19/treaty-conversations-be-elevated-wa-aboriginal-affairs-roundtable-concludes

A summation of eleven (11) declarations for land rights, constitutional recognition and redress for past injustices, especially by way of a treaty, are shown in **Table 3.1**. Each of these declarations includes demands for the recognition of Aboriginal peoples' prior ownership, continued occupation and sovereignty, and affirming their human rights and freedoms including over their ancestral lands and waters, as shown with 'traffic light' indicators in the column on the right.[327] These declarations are also a vivid demonstration of Aboriginal peoples' willingness to negotiate with non-Indigenous Australia about the continued occupation of their lands.

[327] For a discussion of agreement making in Australia, see the Report of the Expert Panel, 2012:191-204.

Table 3.1 Declarations by Aboriginal peoples for land rights, constitutional recognition, redress for past injustices and more – 1937 to 2017[328]

Year	Event	Details	Land Rights?
1937	Petition to King George VI	In the mid-1930s William Cooper, the Secretary of the Australian Aborigines League, gathered 1,814 signatures for a petition to King George V, seeking representation in parliament, citizenship and land rights for Aboriginal people (NAA, undated (b); Brigg and Maddison, 2011:2). But the then Prime Minister of Australia, Joseph Lyons, decided to refer the petition to Cabinet which decided in February 1938 that no good purpose would be gained by submitting the petition to the King (see NAA 1933-1949: A431, 1949/1591, folios 94–98). McKenna (2018:3) recalls Cooper's response to Lyons: '*White men … claimed they had "found" a "new" country – Australia. This country was not new, it was already in possession of and inhabited by millions of blacks, who, while unarmed, excepting spears and boomerangs, nevertheless owned the country as their God given heritage Every shape and form of murder, yes, mass murder, was used against us and laws were passed and still exist, which no human creature can endure. Our food stuffs have been destroyed, poison and guns have done their work, and now white men's homes have been built on our hunting and camping grounds. Our lives have been wrecked and our happiness ended. Oh! Ye whites! … How much compensation have we had? How much of our land has been paid for? Not one iota. Again we state that we are the original owners of the country. In spite of force, prestige, or anything else you like, morally the land is ours.*'	**Yes**
1963	Bark Petitions	The Yolngu People from Yirrkala in eastern Arnhem Land in the NT sent two bark petitions to the Australian Government and Opposition (MoAD, undated), the first such document to straddle two laws with the text in English and the Gumatj language of the Yolngu Peoples. They were framed by paintings that were a 'far cry from being merely decorative', comprising of 'sacred clan designs communicating the ancestral narratives of creation and the land and sea estates of the Yolngu' and 'were the essence of their statement of claim to land' (Brigg and Maddison, 2011:1-2).	**Yes**
1972	Larrakia Petition to Queen Elizabeth II	In 1972 the Larrakia people from the land around Darwin in the NT organised a petition to Queen Elizabeth II (NAA, 1972a). The petition called for recognition of Aboriginal peoples' land rights and a treaty. Community representatives attempted to present it to Princess Margaret during her visit to Darwin, but it was torn during a struggle with Police. The petition was eventually forwarded to Buckingham Palace who then forwarded it to Governor-General before being placed on file in the Department of Aboriginal Affairs (NAA, 1972b).	**Yes**

[328] The criteria for inclusion in this Table is that the Declaration was prepared by Aboriginal and/or Torres Strait Islander people only.

Year	Event	Details	Land Rights?
1979	National Aboriginal Conference	In 1979 the National Aboriginal Conference (NAC), established by the Australian Government in 1977 to provide a forum for the expression of Aboriginal views, requested a Treaty of Commitment be executed between the Aboriginal Nation and the Australian Government, which they termed a 'Makarrata' to avoid confusion with the international connotations associated with the term 'treaty' (NAC 1981). The NAC set up an Aboriginal Treaty Committee to ask Aboriginal people what they would like to see in the Makaratta. The Committee called for the inclusion of provisions for land rights throughout Australia and compensation for the loss and damage to traditional lands.	**Yes**
1988	Barunga Statement	In 1988 the then Prime Minister, Bob Hawke was presented with two paintings and a statement by Galarrwuy Yunupingu and Wenten Rubuntja calling for Indigenous rights to be recognised. This became known as the 'Barunga Statement' (AIATSIS, 1988).	**Yes**
1993	Eva Valley Statement	In the first week of August 1993, more than four hundred Indigenous people from around Australia gathered at Eva Valley, near Katherine in the Northern Territory. The meeting was called in response to concerns about Commonwealth proposals for legislation on native title in the wake of the *Mabo (No. 2)* decision by the High Court of Australia in June 1992. The participants issued the Eva Valley Statement insisting that a national standard of rights be given to all Aborigines (ATNS, 2005).	**Yes**
1995	Social Justice Package	In early 1994, the A/g Prime Minister sought the views of the Aboriginal and Torres Strait Islander Commission (ATSIC) on further measures that the Australian Government should consider to address the dispossession of Aboriginal and Torres Strait Islander peoples. ATSIC responded by producing a report (ATSIC, 1995) which included several specific recommendations for inclusion in the Social Justice Package as part of the Government's response to the 1992 HCA decision in *Mabo (No. 2)*. The Social Justice Package never came to fruition (ATSISJC, 2009a:46).	**Yes**
1998	Kalkaringi Statement	Two months before the 1998 Constitutional referendum 800 or so Aboriginal people gathered at Kalkaringi, well west of Katherine, NT. Developed by the Constitutional Convention of the Combined Aboriginal Nations of Central Australia in the context of a proposal to make the Northern Territory a State under the Australian Constitution, the Statement calls for the land rights of Aboriginal people to be fully respected and afforded effective constitutional protection (Kalkaringi Statement, 1998).	**Yes**
2015	Kirribilli Statement	The Kirribilli Statement was presented by forty Aboriginal and Torres Strait Islander leaders to the Prime Minister and the Leader of the Opposition on 6 July 2015. The Kirribilli Statement called on the government to establish a mechanism for negotiations between Aboriginal and Torres Strait Islander people and the government and parliament in relation to more extensive constitutional reforms, including a Makaratta (Kirribilli Statement, 2015).	**Yes**

Year	Event	Details	Land Rights?
2017	Referendum Council	The Referendum Council was established in response to the Kirribilli Statement to advise the Prime Minister and Leader of the Opposition on progress and next steps towards a referendum to recognise Aboriginal and Torres Strait Islander people in the Constitution. The Referendum Council held a series of Dialogues with Aboriginal and Torres Strait Islander peoples around Australia and held a National Constitutional Convention in May 2017 from which the 'Uluru Statement from the Heart' was made, calling for a Makarrata (Referendum Council, 2017b). The Referendum Council's Final Report reinforced previous calls for recognition of land rights and the need for a Makarrata and includes a set of ten Guiding Principles (see Figure 3.4 below) (Referendum Council, 2017a:20-21).	**Yes**
2018	Yolngu Leaders Declaration of Sovereignty	On the occasion of HRH Prince Charles' visit to Australia to open the Commonwealth Games on the Gold Coast in April 2018, Prince Charles also visited Arnhem Land. On 9 April 2018, the local Member for Nhulunbuy in the NT Legislative Assembly, Yingiya Mark Guyula, and many Yolngu clan leaders (convened by Dennis Wanambi and Waka Mununggurr) met with His Royal Highness Prince Charles at the Buku – Larrŋgay Mulka Centre in Yirrkala and presented HRH with a Letterstick and a Declaration of Yolngu Sovereignty. The Member for Nhulunbuy made the following declaration: '*This here is Yolngu Land, we are sovereign people and we live by Yolngu law. We have many difficulties with the Australian Governments because they do not recognise our sovereignty. We need to correct this situation, for the sake of our children and their children, for our cultural survival, – for our ancestors. We are the oldest living culture in the world.* *I request, on behalf of the people standing before you, and the Yolngu nations that you intervene on our behalf and take a strong position to acknowledge our sovereignty and promote a pathway to Treaty.* *We are the only indigenous people of a Commonwealth country that does not have the respect or dignity of a Treaty with our people. Will you advocate on our behalf for our justice?* *Please accept this letter stick and create a diplomatic passage for this letter stick from your highly respected position to the Prime Minister of Australia, in order to help our sovereign nations reach Treaty*.' (Guyula, 2018; C. Graham, 2018; ABC News, 2018).	**Yes**

When His Royal Highness, Prince Charles, visited Australia for the opening of the Commonwealth Games on the Gold Coast in April 2018, Prince Charles also visited Arnhem Land in the NT. During that visit, the Yolngu People presented Prince Charles with a Message Stick which included a declaration of their Sovereignty. The Yolngu Leaders requested that Prince Charles 'accept the letter stick and create a diplomatic passage … to the Prime Minister of Australia, in order to help

our sovereign nations reach Treaty' (Guyula, 2018). The inscription on the Letterstick is reproduced in **Figure 3.2** and the text of the Declaration of Yolngu Sovereignty is reproduced in **Figure 3.3**.[329] The images in **Figures 3.2** and **3.3** demonstrate the sincerity and seriousness of the Yolngu peoples' statements of claim about their sovereignty and commitment to negotiating a treaty with the state.

The point here is not to argue over the merits or otherwise of a treaty,[330] but rather to draw attention to the fact that the Aboriginal peoples of Australia have, for several decades but perhaps always, been openly stating the need to sit down and negotiate these matters through a treaty or treaties in a civil and peaceful way. Australia is the only Commonwealth country not to have a treaty with its Indigenous peoples,[331] and what recent history is now telling us is that these deep-seated issues of sovereignty, self-determination and the need for a treaty can no longer be ignored or denied. That said, the challenge that lies ahead is that treaty negotiations be on the basis of sovereign-to-sovereign and not on terms predicated by the state/State.[332]

These themes are also reflected in the Guiding Principles that the Referendum Council distilled from the Dialogues the Council conducted with Aboriginal peoples around Australia in the lead-up to the National Constitution Convention in May 2017 (see **Figure 3.4**).[333] While these principles were applied by the National Constitutional Convention to assess which Constitutional reform proposals should proceed, they are equally relevant to the debate about land tenure reforms because they reflect some very important aspirations and directions. Most notably, the principle of self-determination which is included in the UNDRIP (UN, 2007).

The relevance of the UNDRIP is discussed in more detail in Chapters 8 and 9. The point here is to note that Aboriginal peoples are seeking a deeper and more meaningful relationship that captures their 'aspirations for a fair and truthful relationship with the people of Australia' and

[329] The presentation of this Declaration by Yolngu Leaders to Prince Charles was not reported in mainstream media, including the ABC (ABC News, 2018). New Matilda can be credited with reporting the event (C. Graham, 2018). Prince Charles graciously accepted the Letterstick and the Declaration of Sovereignty, however as C. Graham (2018) notes, Prime minister Turnbull's reaction is unlikely to be 'quite so gracious'.

[330] Or treaties.

[331] The British and colonial governments made many treaties with Indigenous peoples in Canada (up to 1920), New Zealand (in 1840) and the United States (up to 1871) (Aboriginal Victoria, 2017).

[332] It is noted that the Commonwealth has the power under the Australian Constitution to pass laws to 'recognise' the status of Aboriginal law and sovereignty, and this is what the Referendum Council (2017b:2) has recommended in its final report to the Australian Government, but that is not the same as a treaty developed on the basis of sovereign-to-sovereign negotiations. The treaty negotiations currently underway in Victoria and the Northern Territory are pertinent here, and it will be interesting to see how they deal with the land and related issues. These matters are canvassed in Chapter 9 of this thesis.

[333] Noting that the primary focus of the National Constitution Convention was on recognition of the Aboriginal and Torres Strait Islander peoples' as the First Peoples of Australia in the Australian Constitution.

which recognises the integrity of their law and custom, including with respect to land, as the *Uluru Statement from the Heart* (Referendum Council, 2017b) makes clear.

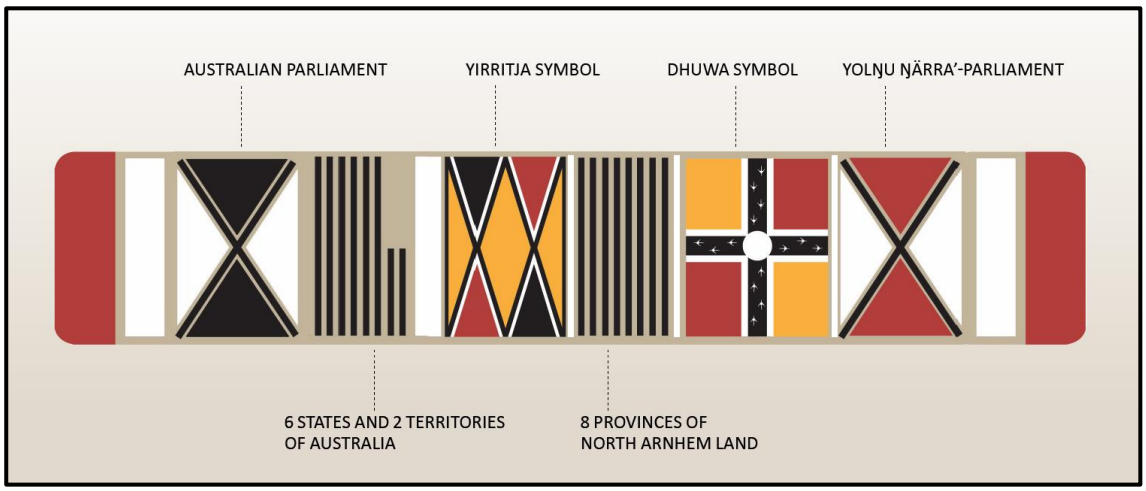


Figure 3.2 Graphic of the Letterstick presented to His Royal Highness, Prince Charles, by the Yolngu People of Arnhem Land on the occasion of HRH's visit on 9 April 2018

Source: Guyula (2018). Reproduced with permission.

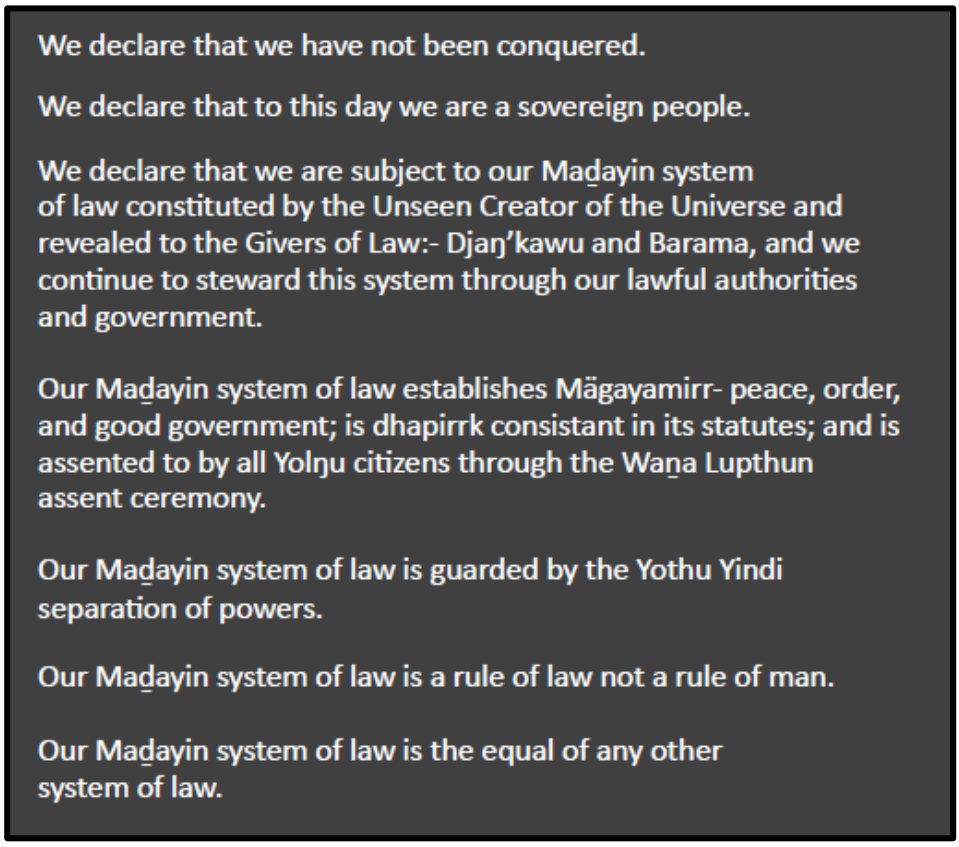


Figure 3.3 Text of Yolngu Peoples' Declaration of Sovereignty presented to HRH Prince Charles on 9 April 2018

Source: Guyula (2018). Reproduced with permission.

Guiding Principles

The following guiding principles have been distilled from the Dialogues. These principles have historically underpinned declarations and calls for reform by First Nations. They are reflected, for example, in the Bark Petitions of 1963, the Barunga Statement of 1988, the Eva Valley Statement of 1993, the Kalkaringi Statement of 1998, the report on the Social Justice Package by ATSIC in 1995 and the Kirribilli Statement of 2015. They are supported by international standards pertaining to Indigenous peoples' rights and international human rights law.

The principles governing the assessment by the Convention of reform proposals were that an option should only proceed if it:

1. *Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.*
2. *Involves substantive, structural reform.*
3. *Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.*
4. *Recognises the status and rights of First Nations.*
5. *Tells the truth of history.*
6. *Does not foreclose on future advancement.*
7. *Does not waste the opportunity of reform.*
8. *Provides a mechanism for First Nations agreement-making.*
9. *Has the support of First Nations.*
10. *Does not interfere with positive legal arrangements.*

(Referendum Council, 2017:22).

Figure 3.4 Guiding Principles developed by the Referendum Council, 2017.

Source: Referendum Council, 2017a:22.

The chronology of declarations from 1937 to 2018 reveals there is still argument about the facts that have been created on the ground since colonisation: That the prior occupation, ownership and sovereignty of the Aboriginal peoples' has not been recognised and that the instructions issues to both Lt. James Cook and Lt. Governor Phillip have not been honoured. These issues remain to be addressed. The statutory and rights schemes and the NTA 'have done more to limit and extinguish Indigenous claims to land than facilitate them' (B. Morris, 2003:143). I concur with Taiake Alfred (2009:165) when he says that the colonising nation states must 'move towards a true and lasting foundation for justice that will result in meaningful changes in the lives of Indigenous peoples and in the return of their lands' (Alfred, 2009:165).

The need for a shift toward restitution rather than recognition as currently defined and constrained by the NTA and the statutory land rights schemes will become more apparent following the analysis of the case studies in Chapter 7 and the analysis that follows in Chapters 8 and 9.

3.5 Implications

This Chapter demonstrates that native title is a 'highly circumscribed recognition space' (Howitt, 2006:51), a highly constrained creation of the courts and the Federal Parliament. A native title determination by the HCA is not recognition of Aboriginal peoples' land ownership and tenure laws *per se*. It is recognition by the common law of Australia of the existence of another system of law and custom. Therefore, the so-called 'recognition space' is also a highly constrained, contrivance of white colonial control – recognition on the colonists' and settlers' terms, not on Aboriginal peoples' terms and not on terms agreed between the parties.

The concepts of 'extinguishment', 'non-extinguishment', 'alienability' 'inalienability' and the rather 'slippery notion of coexistence' as an 'abstract conceptualisation of legal interests in property that could exist together' (Howitt, 2006:51),[334] as embodied in the NTA, are nothing more than an extension of the Crown's ability to continue imposing its version of truth and power on the Aboriginal peoples of Australia. In this way, the NTA continues to be a racist instrument of colonisation and dispossession.

The inalienability of native title rights and interests and the Crown's monopoly on extinguishment mean that:

> *'a desire on the part of native title holders to deal with their interest in land by lease or mortgage or sale in order to realise its commercial value, is always and everywhere inconsistent with the observance of the fundamental customs and traditions of the land holders, so that acting upon that desire would result in the immediate extinguishment of native title.'* (Keane CJ, 2011:3-4).

As Keane CJ observes, taking such a strict view of native title denies native title holders the opportunity to use their property rights in ways that are available to holders of other forms of land title. Such a strict view also casts an aspersion that Aboriginal law and custom is 'fixed and

[334] As interpreted by the HCA in *Wik*.

immutable', a view that many non-Indigenous Australians would certainly not accept about Australian law and custom (Keane CJ, 2011:4).

The NTA 'hardly delivers justice' (Howitt, 2006:52) to the Aboriginal peoples of Australia. The NTA also fails to engage with the 'embodied geographies, emplaced polities and visceral coexistences' between the two systems of law and custom (Howitt, 2006:52). It is time therefore to 'puncture some legal orthodoxies' (McHugh 2011:68, 328-339) relating to land ownership, use and tenure and in particular in relation to the inalienability, extinguishment and non-extinguishment of customary Aboriginal rights to land (Wensing, 2016a:51). These issues therefore give rise to the research questions in Part 1.4.2 of Chapter 1 about how two systems of land ownership use and tenure can coexist, what their distinguishing features are, what their characteristics are that lend themselves to commensurability, what characteristics may be counterproductive to coexistence, and what attributes are necessary for coexistence on equal and just terms. The remainder of this thesis seeks to answer those questions. Chapter 4 explores the implications of the preceding analysis for the concepts of 'property' and 'ownership', focussing in particular on the differences between Indigenous and Western conceptions and the interactions between them.

CHAPTER 4
KEY CONCEPTS: Unpacking and unsettling the 'taken-for-granted'

> *'When people confront the world with their claims, desires, projects and plans, the world they perceive does not consist of a mass of value–free (brute) facts. We all begin situated within a network of social relations and interactions. Our perceptions are coloured by a host of value-laden assumptions. Some of these assumptions are local and passing, others are more pervasive and permanent facets of human association. Any of them may, one way or another, be raised to the level of conscious apprehension and then, perhaps, challenged. The bulk of them, however, provide a taken-for-granted background for all that we think and say. The latter are the organising ideas of daily life.'*
>
> J.W. Harris (1996:63).

4.1 Introduction

Several concepts relating to land and property are problematised, discussed and refined in this thesis in order to develop an analysis of the interactions or contact zone between two culturally distinct systems of land ownership, use and tenure. As such, there are several elements about property and the way we organise our relations with property that 'provide a taken-for-granted background', as J.W. Harris refers. Before exploring the theoretical ideas around 'property' and 'ownership' in Chapter 5, it is necessary to clarify my approach to several elements or concepts relating to land and property that are critical to the analysis in this thesis. The point here is not to argue about the concepts, but to unpack and perhaps unsettle the things we take for granted and lay the foundations for the comparative analysis that follows in later Chapters.

Chapter 4 therefore unpacks the following elements or concepts: property in land (Part 4.2), land use and planning (Part 4.3), land tenure (Part 4.4), Land titles and Torrens title (Part 4.5) the Native Title Register (Part 4.6), native title as a recognition space (Part 4.7), coexistence (Part 4.8), equality and justice (Part 4.9), and dialogue (Part 4.10) with concluding comments (Part 4.11).

4.2 Property in land

Our general understanding of a Western notion of 'property' is that it implies ownership and control over a thing. More recent interpretations embrace the idea that 'property' is about the

relationship we have with things and the power we have over things, including land. For example, Blackburn J in *Milirrpum*[335] said that 'property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate'.

Indigenous peoples around the world have very different conceptions of 'property' that do not necessarily align with Western concepts. For example, the Aboriginal peoples in Australia tend to view land or waters, not as individual 'property', but rather as part of an ethical, spiritual and legal matrix of rights, obligations and community relationships with and for their ancestral Country (Small and Sheehan, 2008:106). Aboriginal peoples also place much greater emphasis on origins and obligations of property within an understanding of community (Small and Sheehan, 2005:1) over time and through generations.

The differences between cultures affects the way we look at ourselves and our relationships with land. Physically, 'land is ever present', but culturally, land is always 'subject to considerable adaptation' (Fisher, 2016:214). The differing conceptions about land as something 'worth holding' (Fisher, 2016:214) requires thinking simultaneously about the physical and cultural dimensions of land (Bakker and Bridge, 2006:8), as well as through space and time (Fisher, 2016:217). As stated in Chapter 1, ever since *Mabo (No. 2)* there are two systems of law and custom relating to land operating in Australia, each emanating from different cultures. As Rudyard Kipling observed so astutely in 1892 when comparing different customs in Africa, that 'Every single one of them is right' (Kipling, 1892, cited in Linklater, 2015:5). If Australia is to 'avoid repeating or perpetuating the pattern of dispossession of its Indigenous peoples' (Bright and Dewar, 1998:8), then new understandings of property in Australia are necessary to accommodate those distinctly different cultures.

Chapter 5 explores these ideas and argues that because property is fundamental to all societies, there are common understandings that underpin the way every society uses, controls and transmits its property in land which provide a platform for coexistence.

[335] *Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia* [1971], per Blackburn J, at 272.

4.3 Land use and planning

Land use and planning[336] are essentially about the relationships between people, land and the uses to which land and its resources can be put in urban and non-urban contexts (Wensing and Small, 2012:2). As L.C. Johnson (2018a:42) states, land use planning is 'a purposeful intervention' aimed at 'formulating a better future.'

Land use planning's rationale and legitimacy is largely based on maintaining or improving the common good, on the assumption that the Crown holds the ultimate control of all land in Australia, including the power to grant or transfer land in whatever form of tenure and to control what landholders do with their land. The essence of planning is not in the individual elements of our environment or in land ownership *per se* although it is 'intrinsically important to planning' (Porter, 2017c:59), but in their combination and their interactions with each other.

Planning's contribution lies in optimising the connections and linkages, the functional as much as the visual, within a structured landscape. Planning is an ongoing process of setting objectives, exposing connections, presenting alternatives and their likely consequences, guiding and making choices, monitoring and reviewing progress, and re-visiting the objectives and outcomes in a timely manner. Planning's praxis includes specific zoning and development controls that shape the environment (Huxley and Yiftachel, 2000:334). Planning matters therefore to everyone, because it affects everybody's everyday lives, including Aboriginal peoples regardless of whether they live in urban centres or not (Wensing, 2017d).

While planning's rationale of maintaining or improving the common good continues to give it some legitimacy, its control over what land owners (public and private) can or cannot do has to be seriously questioned following the HCA's decision in *Mabo (No. 2)*, because, arguably, the Crown now shares its interests in land with native title holders. These issues are explored in the following Chapters.

[336] In the context of this thesis, the term 'land use planning' involves 'the scientific, aesthetic and orderly disposition of land, resources, facilities and services with a view to securing the physical, economic, social and environmental efficiency, health and well-being of urban and rural communities' (CEMAT, 2007:17) and 'planning practice' as 'an activity of spatial planning undertaken by … professionals trained in disciplines including planning, architecture, engineering, surveying, public administration and technical drafting' (Hillier, 2010:3).

4.4 Land tenure

'Tenure' is both a generic construct and a doctrinal body of laws in British common law. The word 'tenure' derives from the French verb 'tenir', which means 'to hold', and 'tenant' is the present particle of 'tenir' (Payne and Durand-Lasserve, 2012:7). The term 'land tenure' refers to a mode of holding land whereby one person (the tenant) holds land from (or 'of') another subject to the performance of certain obligations (Edgeworth *et al,* 2013:174). The point of the following discussion is to highlight the distinctively western ancestry of the term 'tenure' and my reasons for applying a much wider interpretation of the term in the context of this thesis.

The doctrine of tenure[337] has its genesis in medieval feudalism in England from the time of the Norman Conquest in 1066 (Butt, 2010:73; Edgeworth *et al,* 2013:174). After the Conquest, William the Conqueror as sovereign confiscated the land of the English landowners and asserted his power to grant landholdings to his supporters and to Englishmen in return for their loyalty (Edgeworth *et al*, 2013:174, Bradbrook *et al*, 2011:42). In turn, the 'tenant in chief' could grant part of the land to another person, who in turn would be required to fulfil certain conditions (Bradbrook *et al*, 2011:42). This process could be repeated many times, creating a pyramid of obligations with the king at the top supposedly owning all the land (Bradbrook *et al*, 2011:42). Those holding land directly from (or 'of') the Crown were known as 'tenants in chief', and 'it followed that only the Crown "owned" land absolutely, as it alone held of no other' (Edgeworth *et al*, 2013:174). The essence of the doctrine of tenure was that the king 'owned' all the land or had paramount title to it (Bradbrook et al, 2011:55). Of course, the land tenure systems in England have been reformed many times since the Norman Conquest, but as a consequence of that history[338] the doctrine of tenure and the notion that all land is held 'of the Crown' have persisted over time.

The points relevant to this thesis are the how the doctrine of tenure came to be applied in Australia, how the Crown came to be the source of all land titles in Australia, [339] and how these

[337] It is noted that the doctrine of tenure also lays 'the groundwork for the division of interests in land in ways other than pursuant to a tenurial relationship' (Bradbrook, *et al*, 2011:56), such as on the basis of time, giving rise to a doctrine of estates. The doctrine of estates is not discussed in this thesis because it relates to estates in freehold – i.e. fee simple, fee tail and life estates (Bradbrook *et al*, 2011:56-61).

[338] And that history is well documented by others. See for example, Butt (2010:73-87); Bradbrook *et al* (2011:41-50); Edgeworth *et al* (2013:174-177); Edgeworth (1994).

[339] The notion that all land in Australia is (or was) 'held of the Crown' stems from Stephen CJ's decision in *Attorney General (NSW) v Brown* (1847) 1 Legge 312 at 39 in which he held that:

> 'The waste lands of this colony [New South Wales] are, and ever had been, from the time of first settlement in 1788, in the Crown; that they are, and ever have been from that date, (in point of legal indictment), without office found, in the Sovereign's possession, and that, as his or her property, they have been and may now be effectually granted to subjects of the Crown'.

issues were dealt with by the courts in *Mabo (No. 2)* (see **Figure 4.1** below) and subsequently.[340] These matters are well documented and analysed by others[341] and there is no intention to revisit that analysis here. What follows is a synopsis of that analysis and its relevance to the research questions this thesis seeks to address.

Edgeworth (1994:398) asserts that 'the foundational concept of tenure as understood and defined in English land law was inappropriate and inadequate to describe the legal nature of landholdings in Australia from the earliest days of settlement'. Put simply, Edgeworth (1994:431) argues that from the time of the Norman Conquest the doctrine of tenure has gained 'a dramatically enlarged conception of royal power and authority' (Edgeworth, 1994:431). In this enlarged doctrine 'the Crown was seen to be … the absolute beneficial owner of all lands' within its dominion. In both the English context and in other jurisdictions (such as Australia), 'the law supposes that all lands were at one time vacant, and that the Crown took them as occupant' (McNeil, 1989:106). While it has always been possible in our land administration systems in Australia, in principle at least, to establish the "true" owner of a parcel of land by means of tracing the chain of title back to the original Crown grant (Edgeworth, 1994:408), the reality is that the Crown in Australia does not have a record of its title (Secher, 2014:253). The case put by the plaintiffs in *Mabo (No. 2)* meant that absolute ownership of all the land in Australia by the Crown was a fiction, which created the need for another fiction (Edgeworth, 1994:431-432) – *terra nullius* – as discussed in Chapter 2.

Brennan J's treatment of the doctrine of tenure in *Mabo (No. 2)* is documented in **Figure 4.1**.

K. Cohen (2007:31) argues that the Crown's 'residual right to absolute ownership of land is a feudal nonsense' and 'is unenforceable in any practical way against the population in general'. Fry (1947:158) argues that

> 'The Crown could have confirmed the title of the aboriginal natives of Australia to the lands they had previously possessed, subject only to the new paramount title of the Crown; but in fact it did not recognise any aboriginal legal rights to land on the Australian mainland. However, when the Crown became the paramount landlord of the lands of Papua New Guinea more than a century later, it confirmed the aboriginal natives of those Territories in their ownership of legal rights to the lands they had previously possessed, subject however to the new paramount title of the Crown' (*Geita Sebea v Territory of Papua* (1941) HCA 37).

[340] Bradbrook *et al* (2011:55) argues that while there has been a strong shift away from away the doctrine of tenure, it has not been formally abolished. Many writers have suggested that an allodial system would better suit Australian conditions, citing Edgeworth (1994); Devereux and Dorsett (1996); Buck (1994, 1996); Hepburn (2005a; 2005b); to which I would add Lilienthal and Ahmad (n.d. and 2017).

[341] Especially by Secher (2006a, 2006b, 2014); Devereux and Dorsett (1996); Buck (1994, 1996); Fry (1947).

Brennan J's treatment of the Doctrine of Tenure and native title in *Mabo (No. 2)*

Brennan J on the doctrine of tenure:

> *'A basic doctrine of the land law is the doctrine of tenure, to which Stephen CJ referred in* Attorney-General (NSW) v. Brown*, and it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency. It is derived from feudal origins.'* ((1992) 175 CLR 1, Brennan J, 45)

And:

> *'The land law of England is based on the doctrine of tenure.* ***In*** *English legal theory, every parcel of land in England is held either mediately or immediately of the King who is the Lord Paramount; the term "tenure" is used to signify the relationship between tenant and lord, not the relationship between tenant and land. … When the Crown acquired territory outside England which was to be subject to the common law, there was a natural assumption that the doctrine of tenure should be the basis of the land law*.' ((1992) 175 CLR 1, Brennan J, 46)

And:

> *'It is not surprising that the fiction that land granted by the Crown had been beneficially owned by the Crown was translated to the colonies and that Crown grants should be seen as the foundation of the doctrine of tenure which is an essential principle of our land law. It is far too late in the day to contemplate an allodial or other system of land ownership. Land in Australia which has been granted by the Crown is held on a tenure of some kind and the titles acquired under the accepted land law cannot be disturbed.'* ((1992) 175 CLR 1, Brennan J, 47)

The doctrine of tenure does not apply to native title:

> *'The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant. The English legal system accommodated the recognition of rights and interests derived from occupation of land in a territory over which sovereignty was acquired by conquest without the necessity of a Crown grant.'* ((1992) 175 CLR 1, Brennan J, 48-49)

And:

> *'Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived*.' ((1992) 175 CLR 1, Brennan J, 59)

And:

> *'… native title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, …'* ((1992) 175 CLR 1, Brennan J, 61)

Figure 4.1 Extracts from Brennan J's judgement in *Mabo (No. 2)*: Treatment of the Doctrine of Tenure and native title

What Brennan J recognised, was that the enlarged version of the doctrine of tenure 'operated to deny recognition of [the] pre-existing land rights' (Edgeworth, 1994:419) of the Aboriginal peoples. The majority of the Justices in *Mabo (No. 2)* therefore applied 'some radical surgery to

the enlarged, fictional definition of the doctrine' and 'accorded the Crown in Australia [with] a significantly more modest role in the structure of land law' (Edgeworth, 1994:432). That is, that the Crown in Australia only acquires the beneficial ownership of Aboriginal land where the Aboriginal owners' rights are extinguished in favour of the Crown.

The re-fashioning of the doctrine of tenure by the majority in *Mabo (No. 2)* was deliberately intended to afford at least some level of protection to the Aboriginal peoples' pre-existing land rights and to bring the 'common law of Australia' into line with contemporary values about Indigenous peoples' rights at that time (Edgeworth, 1994:432). As discussed in Chapter 3, there are several disjuncts, dilemmas and challenges arising from *Mabo (No. 2)* and the native title system[342] that remain to be addressed if we are serious about restoring a level of equality (or parity) and justice between two distinct systems of land ownership, use and tenure, as this thesis contends.

The reality is that in Australia, the Aboriginal peoples' pre-existing land rights and practices were ignored or subjugated by the colonial settlers through a variety of means. Regardless of the means by which that was done, Aboriginal law and its links to their land rights and interests continues to exist (I. Watson, 2009:30; Tobin, 2014:100; Dodson, 1997:1). Hence, this thesis argues that the two distinct systems of land ownership, use and tenure should be given equal recognition through an 'intercultural contact zone' between two property systems.[343]

As noted in Part 1.1 of Chapter 1, 'tenure' is one of the three constitutive elements of property in land that I use in this thesis to extrapolate the common features of how different cultures deal with land.[344] It is acknowledged that the term 'tenure' in the modern Australian context embraces four standard typologies: private, public (state-owned), communal/social or traditional, and open access tenures, the latter embracing public access but not being a legal form of tenure that denotes any degree of ownership or control (J. Wallace, 2010:34). These types of tenures are defined by law in Australia in the various jurisdictions, including the rights and responsibilities or restrictions that apply, such as planning, building and environmental controls as well as access by officials in certain circumstances (J. Wallace, 2010:35). As Wallace (J. 2010:35) rightly observes, the restrictions or responsibilities are often forgotten or

[342] As enacted under the *Native Title Act 1993* (Cth).
[343] As argued in Chapters 8 and 9 of this thesis.
[344] As Wallace (2010:26) notes: 'Every country or group must manage core land processes of tenure, value, use and development'.

overlooked,[345] especially in the context of discussions about Indigenous land tenure reforms, but they are of immense interest to land administrators because tenures are both a legal and economic construct in contemporary land administration systems around Australia.

As Wallace (J. 2020:33) notes 'tenures are multifaceted concepts involving legal rights, informal systems, physical realities, [and] opportunities to access land and resources' and 'all tenures depend on conceptual, abstract and intellectual ideas.' What is important here is to acknowledge that there are more ways of recognising the kinds of relationships that peoples have with their lands, than the formalised typologies of the current contemporary land administration systems. These issues are explored in more detail in Chapter 9.[346]

I therefore use the term 'tenure' in this thesis to transcend the cultural divide between Indigenous and Western conceptions of property and embrace a much wider conception of the relationship between land and people, whether it be legally or customarily defined, as noted by the Food and Agriculture Organisation (FAO 2002:7):

> *'Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. … Land tenure is an institution, i.e., rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.'*

4.5 Land titles and Torrens title

Bradbrook *et al* (2011:3) contends that land tenure systems in Australia are peculiarly Australian and cannot be understood unless it is recognised that they are fundamentally and conceptually different to the English feudal system. Right from the outset of the colonial endeavor in 1788, a system for recording land interests 'had to respond to the vast spaces and a less structured social system' (Bradbrook *et al*, 2011:3). But it is also true that the problem of recording or

[345] The notion of 'my home is my castle' is explored in more detail in Part 5.4 of Chapter 5.
[346] Noting that this thesis does not endeavour to explore whether or how Aboriginal peoples hold land within a particular group, clan or family.

regulating the transfer of interests in land 'has perplexed governments for centuries', and in many respects, still does (Edgeworth *et al*, 2013:417).[347]

When the Imperial (British) Parliament enacted the *Australian Courts Act* in 1828, s.24 provided that all the laws in force in England on 25 July 1828 also applied to all of NSW 'so far as the same can be applied within the colony'.[348] This meant that the English law as to land tenure also applied in Australia, 'as far as it was applicable' (Fry, 1947:159). What happened with respect to registration of land interests in the early years of the colony is well documented by others,[349] suffice to say for the purpose of this thesis that the systems that were in place by the mid-19th century were in desperate need of reform.

In the 1850s, Robert Torrens, who later became the first Registrar-General for South Australia, devised the Torrens system of conveyancing (G. Taylor, 2005), principally because his interest was in a simpler conveyancing system (Croucher, 2009:212). The Torrens system of 'title by registration' provides that the matter of title to land is a government responsibility and conventional forms of title in Australia are generally registered as a Torrens title (Butt, 2010:745).[350] Initially, the Torrens system applied to private property only, and was later extended to apply to Crown land interests. By 1875, all of the colonies in Australia had adopted a title-by-registration system for all land granted by the Crown (Bradbrook *et al*, 2011:18; G. Taylor, 2005:29) and over the years each jurisdiction has developed their own statutes governing rights and interests in land and waters. As a result, across Australia there is a bewildering array of tenures (Fry, 1947), perpetuating 'the idea of land as a productive, enduringly valued thing', delineating land as a 'self-evident, permanent form of space and as a fixed site of material sustenance' and as an 'especially durable, "freeze-framing" form of territory' (Fisher, 2016:220, 221, 214).

The term 'land title' has three distinct senses in Australian land law. Primarily, it denotes 'ownership' – to the extent that 'ownership' of land is possible and consistent with the notion that land is held 'of the Crown'.[351] Firstly, when a person has 'title' to land, the accepted meaning is that the person 'owns' the land, and the title is guaranteed by the Crown. Secondly,

[347] To wit, the purpose of the research for this thesis. Recognition of Indigenous interests in land continues to bedevil not only the CANZUS group of common law countries, but other countries as well, for example, South Africa and Malaysia.
[348] At that time, NSW comprised all land within the colony now within all of the States except WA (Fry, 1947:158).
[349] See for example, Fry (1947); G. Taylor (2005); Croucher (2009); Edgeworth et al (2013:417-427).
[350] See also Edgeworth *et al* (2013:422).
[351] See Footnote 340.

and in a looser sense, 'title' denotes the various acts and events, which go towards proving ownership. The instruments and events are sometimes referred to cumulatively as 'the title' to the land: hence the term 'title deed', meaning a document that is 'proof' of the history of dealings with the land. The title deed also records all other interests in the land such as mortgages, leases or sub-leases and easements. Thirdly, and in some instances only, it documents the bundle of rights and responsibilities that go with being the landowner. In all jurisdictions, land use and environmental management controls are generally applied through land use planning and natural resource management regimes under separate legislation from the statutes governing land administration and land titling arrangements (Thompson and Maginn, 2012; J. Byrne *et al*, 2014).

4.6 The Native Title Register

In *Mabo (No. 2)* the HCA found that native title is 'sui generis' or 'unique'.[352] Nevertheless, the Australian orthodoxy of registering titles was extended to native title. So when the FCA determines that native title exists, wholly or partly in a particular area of land or waters, the details of the determinations are entered in a National Native Title Register held by the Native Title Registrar[353] and the Registrar is required to notify the Land Titles Office in the relevant jurisdiction(s)[354] when such registrations occur. The current arrangements are confusing for third parties and for governments. Furthermore, as Stephenson and Tehan (2015:253) note, there is no comprehensive up-to-date recording of Indigenous owned, managed or controlled land currently in place in Australia.[355]

Stephenson and Tehan (2015:236) argue that systems for recording Indigenous land interests in Australia are becoming critically important for more effective land management of their interests, and that the current land titling systems are in urgent need of reform. This thesis therefore explores whether a form of leasehold instruments can be used by native title holders to exercise a greater degree of control over their lands and enable them to use their land to

[352] (1992) 175 CLR 1, Brennan J, 11; Dawson J, 133; Deane and Gaudron JJ, 89.
[353] A statutory position established under s.95 of the NTA to, among other powers, maintain the various Registers created by this Act.
[354] Under s.199 of the NTA the Native Title Registrar must, as soon as is practicable after including details of a determination or decision in the National Native Title Register, advise the relevant land titles office of the determination or decision.
[355] During the course of the research for this thesis, I was contacted by the Department of Agriculture, Fisheries and Forestry in the context of updating of the *Indigenous forest estate dataset* for the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) which was last undertaken in 2015, but based on 2013 data (Department of Agriculture, 2015). A revised edition of the *Indigenous forest estate dataset* was due for release by the end of 2018.

engage in the economy on their terms and at their choosing. These issues are explored in more detail in Chapters 6, 7 and 9.

4.7 Native title as a 'recognition space'

'Native title' is the term used by Brennan J in *Mabo (No. 2)*[356] to 'conveniently describe the interests and rights of Indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants'. Native title rights and interests are therefore defined in s.223(1) of the NTA as meaning:

> *'the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*
> *(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
> *(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
> (c) *the rights and interests are recognised by the common law of Australia.'*[357]

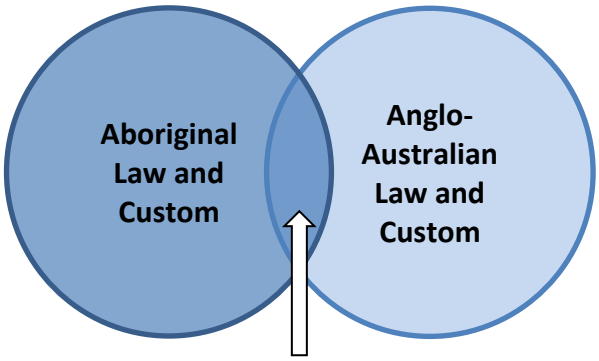
A native title determination by the FCA does not create new rights and interests in land called 'native title'. The FCA's determination is referring to rights and interests that find their origin in pre-sovereignty law and custom, not rights or interests which are a creature of the NTA.[358]

For a short time following *Mabo (No. 2)*, Noel Pearson (1996) saw native title as a potential 'recognition space' between two sets of rights and interests – a space within which two legal systems appear to overlap and give formal recognition to each other in terms of their relationship.[359] The concept was portrayed visually by Pearson (1996) and Mantziaris and Martin (2000:9) with one circle representing Aboriginal law and custom and the other circle representing Anglo-Australian law and custom (**Figure 4.2**), with the 'recognition space' being where the two systems interact with each other (**Figure 4.3**).

[356] (1992) 175 CLR 1, Brennan J, 57.
[357] S.223(1) NTA.
[358] Gleeson CJ, Gummow and Hayne JJ in *Members of the Yorta Yorta Aboriginal Community v Victoria* ('Yorta Yorta') at 45.
[359] See also Pearson (1998); Mantziaris and Martin (2000:9).

Figure 4.2 Two systems of law and custom with respect to land – pre-*Mabo (No. 2)*

Source: Mantziaris and Martin (2000:9).



Where the two circles overlap is the potential 'Recognition Space' between the two sets of laws and customs.

Figure 4.3 Two systems of law and custom with respect to land – post-*Mabo (No. 2)*

Source: Mantziaris and Martin (2000:9).

Mantziaris and Martin (2000:10) viewed the 'recognition space' as both an analytic and heuristic device and applied it specifically to the management of native title rights and interests following a positive determination by the FCA, specifically in relation to the nature and role of Prescribed Bodies Corporate.[360] They acknowledged that the concept provided a useful tool for examining the legal and anthropological context, but not 'the articulation of life worlds' (D. Martin, 2003:3).

Each determination of native title by the FCA is different with its own characteristics because it has to take account of the laws and customs of the particular native title claimants[361] and of the

[360] A Prescribed Body Corporate (PBC) is required under the NTA to be established to hold or manage the determined native title rights and interests.
[361] With the result sometimes being a denial of recognition.

Australian legal system which, despite their broad similarities, are quite different in each jurisdiction.[362] Therefore, the 'recognition space' in this context is a dynamic one – it is situational and to some measure, unpredictable, because every native title determination depends on local circumstances.

I also used the concept of the 'recognition space' in training materials that I developed for local government as a way of explaining the relationship between native title and the Crown's land tenure system (Wensing, 1999; 2002). Pearson's and Mantziaris and Martin's intersecting circle diagram in **Figure 4.3** above was extrapolated into a three-layered table (**Table 4.1**) to show the interface between the two distinct sets of laws and customs (Wensing, 1999; 2002) and portrayed diagrammatically in **Figure 4.4**.[363]

Table 4.1 is divided into columns A, B and C. Column A is Aboriginal traditional law and custom, and Column C is the Australian law and custom. Columns A and C are divided into three layers. The top layer compares the more general features of their respective legal systems, histories and sources of sovereignty and governance systems. The middle layer compares their respective approaches to land ownership, management, use and planning. The bottom layer compares their respective land uses and methods of control.

Column B is the 'recognition space' and represents the space where the two systems of law and custom interact. The factors governing the recognition space from the Australian legal system include precedent from other common law countries,[364] the decisions of the HCA and the FCA, the Australian Constitution and statutory laws of the Australian and State Governments. The factors governing the recognition space from Aboriginal law and custom are unknown and we do not have a good understanding of them, largely because of the dispossession of Aboriginal peoples from their ancestral lands and the fiction of *terra nullius* (Muir, 1998; Wensing, 1999) and because we never asked them about their laws and customs.[365] For example, we do not know whether Aboriginal law and custom can recognise another system of law and custom, and

[362] And sometimes even within jurisdictions. For example, in relation to matters such as land tenure, land use planning, environmental and natural resource management, Aboriginal and Torres Strait Islander and other natural, historic and/or cultural heritage protection and management and local government. The extent of extinguishment is also quite different in each jurisdiction, given their different tenure histories and prevailing circumstances.

[363] Table 4.1 and Figure 4.4 were first created in 1999 in the context of developing training materials for the Australian Local Government Association as part of a project assisting local government to work with native title. Table 1.1 was initially published in a Discussion Paper by the Australia Institute (Wensing, 1999) and updated to 2002 (Wensing, 2002). See also Manuscripts in the AIATSIS collection at the end of the Bibliography to this thesis.

[364] i.e.: UK, Canada, NZ and USA.

[365] Table 4.1 was drawn up in 1999 in the context of preparing the native title training materials for local government following the completion of the '*Working with Native Title*' Guide (ALGA *et al*, 1999). I would write it differently now, as I do in Chapter 9.

if so on what basis. And how Aboriginal law and custom may have adapted to account for Australian and international law. As a consequence, the institutional settings and powers of the Australian legal system dominate over Aboriginal law and custom. As Muir (1998:3) observes 'This assertion of dominance has little to do with the inherent characteristics of the laws; rather it has more to do with the weight behind the hammer'.

I never thought I would return to this concept, but as I argue in Chapter 6, it is time to move beyond 'recognition' and view the interactions between two culturally distinct systems of land ownership, use and tenure as an 'intercultural contact zone'. The ideas and concepts embedded in **Table 4.1** and **Figure 4.4** are applied in Chapter 9 to form the basis for a Model for Parity and Coexistence between the two systems.

Table 4.1 Interface between two sets of laws and customs*

<table>
<tr><th colspan="4">THE INTERFACE BETWEEN TWO SETS OF LAWS AND CUSTOMS</th></tr>
<tr><td rowspan="2">Column A
Aboriginal and Torres Strait Islander Traditional Laws and Customs</td><td colspan="2">Column B
The Recognition Space</td><td rowspan="2">Column C
Australian Legal System</td></tr>
<tr><td>Column B1
Indigenous laws and customs</td><td>Column B2
Common Law</td></tr>
<tr><td>Box A1
Indigenous law and custom
E.g. Estimated to be at least 60,000 years old (Lawlor, 1991); traditions through art, dance etc.; decision making by consensus.</td><td rowspan="3">As a consequence of terra nullius, the traditional laws and customs of Aboriginal and Torres Strait Islander peoples were ignored for over two hundred years.</td><td rowspan="3">The common law with respect to native title is informed by the following:

<u>Precedent</u> from other Common Law countries: (i.e. NZ, USA, Canada, UK).

<u>High Court</u> decisions including for example: Mabo, WA v Commonwealth, Wik, Fejo, Yanner, Yarmirr, Ward v WA (Miriuwung and Gajerrong), Yorta Yorta, Anderson v Wilson.

<u>Federal Court</u> decisions, including for example: Fourmile, Hayes.

<u>Constitutional Law</u>
The Constitution (S.51 (xxxi)).

<u>Statutory Law</u>
Native Title Act 1993 (Cth) & complementary State and Territory legislation, Racial Discrimination Act 1975 (Cth).
.</td><td>Box C1
Australian law and custom
E.g. Commenced in 1788; written tradition; sovereign government based on democracy.</td></tr>
<tr><td>Box A2
Traditional land and water management techniques
E.g. Land is integral to belief system; spiritual and physical connections; collective/communal responsibility for country; decisions made by those with connection to and responsibility for ancestral country.</td><td>Box C2
Australian land and water management techniques
E.g. Land is viewed as an economic commodity and can be used as collateral for finance; title system is governed by land and real property acts; title system guarantees priority of interests & security of title; planning and other acts regulate land use.</td></tr>
<tr><td>Box A3
Content of Indigenous rights and interests in land and waters
E.g. Varies from location to location and between groups and tribes; may include more than hunting, fishing and living on the land or waters.</td><td>Box C3
Content of statutory land use and development controls
E.g. Content of planning controls clearly identify permissible uses; and distinguish between public and private rights and interests.</td></tr>
</table>

* Aboriginal and Torres Strait Islander peoples do not view things in a hierarchical fashion. This Table does not purport to reflect an Indigenous Australian view. Reproduced from Wensing (1999), updated (2002). Since this Table was created in 199, the HCA has stated that the starting point for determining native title is the *Native Title Act 1993* (Cth) (In *The Commonwealth v Yarmirr, Yarmirr v Northern Territory* [2001] HCA 56, para 7).

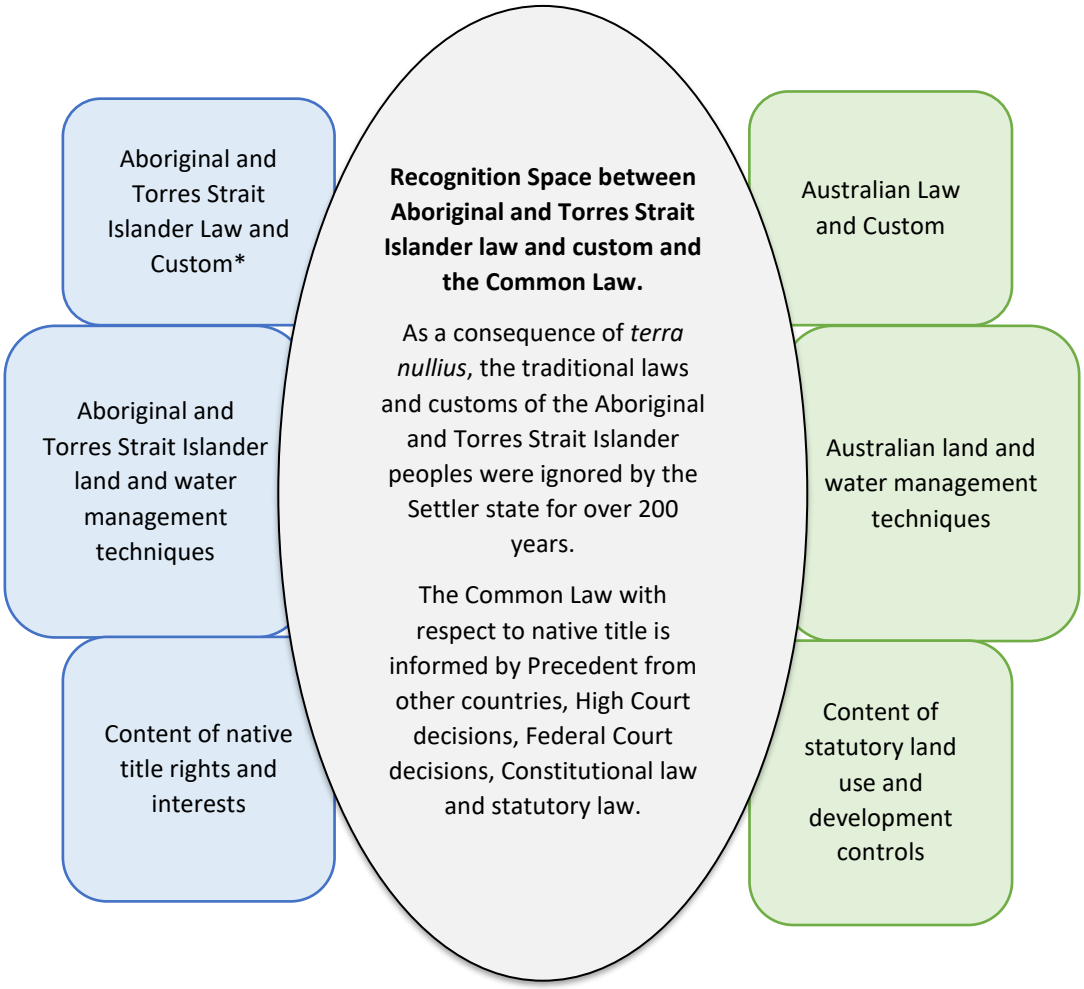


Figure 4.4 Diagrammatic representation of the interface between two sets of laws and customs*

* Aboriginal and Torres Strait Islander peoples do not view things in a hierarchical fashion. This presentation does not purport to reflect an Indigenous Australian view. © Ed Wensing 2002.

4.8 Coexistence

The Aboriginal peoples have long accepted the need for coexistence between their system of land ownership, use and tenure and that devised by the Crown. Indeed, coexistence is now deeply embedded in Aboriginal peoples' perceptions of how the two systems should interact with each other (Howitt, 2006:64; Brigg and Murphy, 2011:26; Behrendt, 2003:112). The three statements by Aboriginal and Torres Strait Islander people at the very beginning of Chapter 1 reflect their desire for a more equal relationship between the two systems of law and custom, and they want that coexistence to be on equal terms, not one always prevailing over the other.

Clearly, the Aboriginal peoples are not referring to the 'slippery' (Howitt, 2006:51) notion of co-existence as introduced by the High Court of Australia in *Wik Peoples v State of Queensland*,[366] whereby the recognition of native title was predicated on the basis of 'remnant possibilities' (B. Walker, 2015:19) after priority was given to the Crown's land tenures over native title rights and interests merely because the two sets of rights and interests could not be exercised at the same time (Strelein, 2009a:35). I agree with Howitt 2019:7), who contends that

> *'Coexistence, in the sense of being together-in-place, is not just the abstract experience of sharing place at planetary scale, but also at the many scales at which sharing, contesting, occupying and belonging occur. Coexistence is foundational in the ongoing challenge of recognising, respecting and accommodating human diversity*.'

Coming from my own professional practice of land use planning, a key challenge is acknowledging that coexistence is not just about the abstract of sharing a common planetary space, but it is also about where 'sharing, contesting, occupying and belonging occur' (Howitt, 2019:7). In a planning context, we all bring different sorts of claims, relationships and understandings to the same spaces and with each other, and all of these factors have implications for just, equitable and sustainable decision making in planning systems (Howitt and Lunkapis, 2010:109).

The application of the concept of coexistence demands that we confront the realities of our mutual responsibilities held by both sides of the debate over land justice – colonial-settler societies and Indigenous societies – 'responsibilities that arise from living together in shared spaces that demand an unsettling of deep colonial power relations' (Porter and Barry, 2016, 19). It also demands 'an acceptance of multiple and overlapping jurisdictions' where our 'plural relations to and governance of place all have relevance and standing' (Porter and Barry, 2016:5-6). Furthermore, it is also about a 'mediation on discomfort' as Irene Watson (2007a:30) states, in that it demands 'acknowledging uncomfortable questions' about how lawful Australia's sovereign status is and how Australia established its legal system that Brennan J in *Mabo (No. 2)* held 'cannot be destroyed'[367] or the skeletal principles of which cannot be 'fractured'.[368]

[366] (Pastoral Leases case) [1996] HCA 40, (1996) 187 CLR 1.
[367] (1992) 175 CLR 1, Brennan J, 30.
[368] (1992) 175 CLR 1, Brennan J, 43. As discussed in Chapter 3.

The concept of coexistence applied in this thesis is a 'fragile but potentially hopeful space' (Porter *et al*, 2018:214) where two or more parties can articulate how they can share the same space in ways that are more just, equitable and sustainable. It means challenging the power asymmetry between the parties and respecting the parity of two distinctly distinct approaches to land ownership and governance and negotiating their interaction with each other through agreements on matters of mutual concern (Wensing, 2016a:51).

4.9 Equality and Justice

Concepts of equality and justice are also applied to the analysis in this thesis. Given there are significant differences between the things being compared with respect to land ownership, use and tenure, the comparison also pivots on what constitutes parity and what constitutes justice, especially in terms of who gets to say what goes and what does not, when and where.

Equality is a contested concept and a difficult philosophical issue (Dworkin, 2000:2). Whereas justice in the 'Keynesian-Westphalian frame' is about relations among fellow citizens, their claims for socio-economic redistribution and legal or cultural recognition and redress within and by the nation state (Fraser, 2009:13).

Aristotle (350BC)[369] noted that justice is equality, but not for all persons; and that inequality is also thought to be just, but not for the unequal. Aristotle argued we come to these conclusions because we are making judgements about ourselves and that we are generally bad judges where our own interests are involved. While justice is relative to people, we tend to disagree about to whom it applies (Aristotle, 350BC).[370] Fraser (2009:25) argues that the Keynesian-Westphalian frame of justice sweeps Indigenous peoples (and other disparate communities) 'under the carpet' (2009:94) by truncating their legitimacy and that it is time to develop a post-Westphalian frame of justice that takes a multi-dimensional and multi-level frame encompassing 'not only redistribution and recognition, but also representation' (Fraser, 2009:21). To which I would add restitution if we are to address the dislocation and dispossession that was inflicted upon the Aboriginal peoples of Australia. The crux of the problem is that 'Something was stolen, lies were told and they have never been made right' (Alfred, 2009:166).

[369] Aristotle, 350 BC *Politics*:1280a7-a20; in T.J. Saunders (1981:195).
[370] Aristotle, 350 BC *Politics*:1280a7-a20; in T.J. Saunders (1981:195).

It is arguable that a society's basic institutions are charged with advancing the interests of all members of society, that a just society advances the interests of all persons in it and that it does so equally (Christiano, 2008:12). As Christiano (2008:12) argues 'Equality in political rights is grounded in the principle of equality in the advancement of the interests of its members'. Governments cannot therefore turn their backs on equality because if they fail to show equal concern for the fate of their citizens 'from whom they claim allegiance', their legitimacy can be brought into question (Dworkin, 2000:1).

Dworkin (2000, 1) claims that it is a 'sovereign virtue' of a political community to be concerned about equality because 'without it government is only tyranny'. He argues that the distribution of wealth is a product of the legal order and that a citizen's wealth depends on the laws enacted by governments, including laws governing ownership of property. In enacting such laws, a government sustains one set of circumstances rather than another and it is predictable that some citizens' lives will improve, while others will be worsened. Dworkin (2000:1) asserts that in prosperous nations where a nation's wealth is unequally distributed, we must be prepared to explain why people are being treated unequally, otherwise our concern for equality is suspect.

In the context of this thesis, restitution becomes an important consideration because justice has been denied to the Aboriginal peoples. Arguably, the injustices can be routed back to the failure of the Colonists to satisfy the instructions of King George III to Governor Phillip in 1787 'to live in amity[371] and kindness with them [the Natives]' (MoAD, 2016). Alfred (2009:166) argues that restitution is 'the first step towards creating justice and a moral society', followed by what constitutes full equality. This is especially pertinent to Aboriginal peoples' and the State's relationship to the ownership, use and tenure of land, and not some form of 'lessening of inequality' (Dworkin, 2000:3) by further acts of 'grace or favour' (Wensing and Porter, 2015:4) by the state, as was discussed in Chapters 2 and 3. Restitution is therefore an important consideration in creating a just and moral society where two systems of land ownership, use and tenure can coexist with relative autonomy and equality.

To be clear, however, I use the term parity in this thesis to denote the ordinary meaning of the word. That is, symmetry in amount, status or character and equivalence in value or stature. (Macquarie Dictionary).

[371] Meaning 'friendship; harmony; good understanding, especially between nations'.

4.10 Dialogue

A dialogue is a conversation between people who have different beliefs and values. By having a dialogue, they develop a better understanding each other's perspectives, more trusting relationships and begin to see new opportunities for interaction and action (Herzig and Chasin, 2006:3). At least that is what should be hoped for, especially where identities, values, rights and interests 'mix, mingle and clash in inchoate ways' (Benhabib, 1996a:5), especially in relation to land and where there are long-standing grievances that remain to be addressed.

In the context of two distinct approaches to land ownership, use and tenure, what is at stake 'is the very configuration of power relations' around which the two societies are structured and the challenges associated with making decisions about land where they both have interests (Bond, 2011:178). As Bond (2011:173) observes 'the relationship between rationality and power is key'.

According to Matunga (2017:643), the 'problem definition' phase about Indigenous land rights and planning is well and truly over and the process of 'reconciliation, resolution and partnership, leading to collaborative planning with Indigenous [Aboriginal] communities, and then action' is long overdue. Matunga (2017:643) argues that what is required is 'true dialogue' with Aboriginal peoples. It follows therefore that dialogue needs to occur between the parties to discuss the unfinished business and to explore new relationships, especially with respect to land.

For true dialogue to occur, a 'dialogic space' (Schneekloth and Shibley, 1995; Forester, 1999:63) must be created for collaborative decision making where the substantive issues and the relationships that link the parties can come together and enter into genuine discussions. But it has to be a 'safe space' (Forester, 1999:248) where Aboriginal peoples, the state and land users can come together to raise serious concerns and work creatively and collaboratively to develop mutually agreeable and workable solutions.

A recent example of a dialogic approach to native title negotiations in Australia is the statewide Indigenous land use agreement negotiations in South Australia providing 'South Australians with opportunities to actively engage in the politics of place to rebuild place relations and interests in fair and just ways across and within multiple scales' (Agius *et al*, 2007:195). The process

commenced in 1999 at a time when the native title debate was generally hostile and divisive.[372] The idea of undertaking a statewide negotiating strategy emerged from discussions between the Aboriginal Legal Rights Movement representing the Aboriginal peoples in SA, the State Government of South Australia, and the peak bodies representing miners and farmers. Once the process of negotiating a statewide agreement began, these stakeholders were joined by the South Australian Local Government Association and the peak body for the fishing industry. The process has largely been driven by four strategies: firstly, focussing on a set of principles embracing respect for process, relationships and standing or positionality; secondly, recognising, respecting and supporting old, new and emerging Indigenous jurisdictions; thirdly, engaging and transforming non-Indigenous scales of action by introducing new scales of Indigenous action at the scale of the claim area and the Congress of Native Title Management Committees; and fourthly, shifting the native title debate away from issues of legal technicalities, towards issues of people and relationships and dealing holistically, sustainably and justly with the multiple interests, values and meanings now embedded in the Australian landscapes' (Agius *et al*, 2007:197-98).[373] What this demonstrates is that it is possible to establish a dialogic space 'to rebuild place relations and interests in fair and just ways across and within multiple scales' (Agius *et al*, 2007:195).

While parties may have conflicting views about land ownership, use and tenure in any particular locality, the 'entangled power relations' (Bond, 2011:179) inherent in Indigenous/Western relations over land demand a new approach to such deliberations. The following considerations are relevant. Dialogue must be underpinned by a 'universal moral respect' which 'considers participants to be equal and free beings, equally entitled to take part in those [deliberations] which determine the norms that are to affect their lives' and a 'principle of egalitarian reciprocity' whereby 'each individual has the same symmetrical rights to various speech acts, to initiate new topics, to ask for reflection about the presuppositions of the conversations, and so on' (Benhabib, 1996b:78). A communicative approach to dialogue 'requires a plurality of perspectives, speaking styles, and ways of expressing the particularity of social situations' and must include 'both the expression and the extension of shared understandings, where they exist, and the offering and acknowledgement of un-shared meanings' (I.M. Young (1996:132-33). I understand this to

[372] See for example, Goot and Rowse (1994) and Povinelli (1998).
[373] See also Agius *et al* (2004:203-219) for a more detailed discussion of the statewide agreement process in SA.

mean ‘an engagement with disagreement and conflict, rather than avoidance and fearfulness’ (Bond, 2011:179.

In suggesting there be a dialogic space between two distinct forms of land ownership, use and tenure, I am conscious that dialogue does not occur in a vacuum, but rather takes place ‘within specific and continually changing contexts’, which ‘raises questions about the terms and terrain’ upon which this occurs (Rose-Redwood *et al*, 2018:112). I agree with Rose-Redwood *et al* (2017:112) that all dialogue ‘is an embodied practice, replete with its own power asymmetries and social hierarchies of class, race, gender, sexuality, age, (dis)ability, language, and geographical location’ and that its forces cannot be taken for granted (Wright, 2018:128). In relation to land matters, there may well be circumstances where a refusal to engage in dialogue may be justified. I return to these issues in Chapter 9.

4.11 Conclusion

The discussion of the various concepts/elements in this Chapter provides clarity in understanding their application and a framework for the analysis that follows. Chapter 5 explores the common understandings of property that all societies share, Indigenous and Western theories of property and ownership, and how differently the two cultures approach perpetual obligations pertaining to property over time and through generations.

CHAPTER 5
THEORISING 'PROPERTY' AND 'OWNERSHIP': A common understanding?

> '*The idea of individual, exclusive ownership, not just of what can be carried or occupied, but of the immovable, near-eternal earth, has proven to be the most destructive and creative cultural force in written history. It has eliminated ancient civilisations wherever it has encountered them, and displaced entire peoples from their homelands, but it has also spread an undreamed-of degree of personal freedom and protected it with democratic institutions wherever it has taken hold.'*
>
> Andro Linklater (2015:5).

5.1 Introduction

Indigenous and Western societies have differing theories of 'property'[374] and 'ownership' and this Chapter explores whether a common understanding of property is necessary if we are to achieve a level of co-existence between two distinct systems based on parity and justice. There are recognised and significant differences in the way 'property' is understood in Indigenous cultures compared to Western cultures (Rolnik, 2012:13).[375] Simply put, Western land tenure systems view 'property' as a commodity, as a set of material rights that are notionally comparable to other material values. Whereas for the majority of Indigenous peoples around the world the relationship between the right to cultural difference and land ownership, use or tenure is inextricably linked. Indigenous approaches to property cannot therefore be readily evaluated in material terms (Small and Sheehan, 2005:1).

Marcia Langton (2008:76) sums up the comparison between the two systems as follows:

> *'Western property systems privilege ownership as a construct that bestows rights, such as the right to exclude and the right to alienate. By contrast, Aboriginal constructs illuminate a social world where the fundamental nature of the proprietary interest is a spiritual bequest linking with the sacred ancestral past where the duties and responsibilities are transmissible across generations.'*

Therefore, as Small (2000:114) contends, it is necessary to look beyond the modern West's cultural perspectives to understand the formal foundations of appropriate social relations

[374] Property in the context of this thesis refers to property in land only (sometimes referred to as 'real property'), and not money or other goods and chattels (sometimes referred to as 'personal property' or 'intangible property').
[375] See also Small and Sheehan (2005; 2008).

concerning property in land. Further investigation of the differing theories and understandings of property and ownership can deepen our understanding of the issues at stake. Therefore, an analysis of the intercultural differences to property and ownership and the possibilities for coexistence requires an analysis of their ontological basis (Bryan, 2000:4), their respective worldviews and not from only one or the other perspective.

I am not taking for granted that my way of viewing the world-at-large is *the* way to relate to it. Researchers must be mindful of not[376] eradicating or subsuming Aboriginal values and theories of property into Western values or theories of property through rationalising our way of conceiving the world-at-large in the researcher's terms (Bryan, 2000:5). My research is not about assessing whether one worldview is better or worse than another, but rather it is about tolerance and respect and developing a sense of parity between two differing worldviews. But I am taking responsibility for the legacies of earlier disciplinary failure (Howitt, 2019:1; Porter, 2017a, 2018b; Wensing and Porter, 2015).

Chapter 1 raised concerns about assuming that Aboriginal peoples' theories of property can be 'squeezed' into the dominant society's theories of property 'without their consent and with little or no respect for their beliefs, institutions and traditions' (McLaren *et al*, 2005:296). The Aboriginal peoples of Australia have consistently tried to engage with rest of Australia over their land rights through various means as discussed in Chapter 3.[377] The analysis in Chapter 3 also showed that there are several disjuncts and dilemmas arising from the way in which Aboriginal peoples' land rights and interests are being recognised in Australia.

The existing statutory land rights schemes and the current significantly compromised native title scheme merely 'allow' some kind of tacit acknowledgement or 'lessening of inequality' (Dworkin, 2000:3) between Aboriginal and other land rights and interests. We must go well beyond these steps if there is to be a mutually respectful level of coexistence between two distinct approaches to land ownership, use and tenure.

Property in land is fundamental to all societies and a common underpinning the way society uses, controls and transmits its property are explored (Part 5.2). It is not an exhaustive or comprehensive assessment of the literature, but rather, acts as a preface to the discussion that follows on Indigenous and Western theories of property and ownership in the Australian context

[376] Inadvertently or otherwise.
[377] This includes declarations, petitions, calls for constitutional change, self-determination and treaties (Brigg and Maddison, 2011:5).

(Parts 5.3 and 5.4 respectively). Both theories of property include obligations that that can be described as perpetual, in that they transcend time and generations, and the complementarity of approaches to perpetual obligations is also explored (Part 5.5). This Chapter concludes with a discussion of the implications for a common understanding of property and ownership (Part 5.6).

5.2 A common understanding of property (in land)?

A peoples' beliefs about their origins often form the basis of their understandings about property (Small, 2003a:3). For example, for Indigenous cultures, their way of life is grounded in their origins and this invariably involves a discussion about spirituality, including a story of creation and a relationship between the creator, the people and the land on which they live (Small, 2003a:3). These belief systems illustrate what Aristotle (350BC, in Apostle, 1979:12-17) views as the 'metaphysics' of life, the first science, the beginnings of understanding upon which all other understandings are built. Witt (1989:23-24) describes the application of metaphysics as an explanation of the most knowable first or highest principles and causes. By grasping the first principle it is possible to have an understanding of everything, and hence also be able to develop a common understanding (Witt, 1989:24). The point here is that these matters are resolved fundamentally differently between Indigenous peoples and Western peoples. The questions have to do with what things exist, how they came to exist, the existence or reality of things that are not concrete, such as how we relate to a finite resource, including land, for our survival over time and through generations.

Property in land is the connection between a defined three-dimensional part of the earth's surface and a person or a group of persons. In general terms 'connection' implies an inter-dependent relationship between the things connected. Such as a person's heart or any other vital organ are connected and life would not be possible without them. Applied to external things, the strong and necessary connection between a person and an external object that constitutes real property rights is more difficult to observe. While people need access to air, water, food, shelter, etc. to survive, they have no necessary connection to any particular quantity or item of them. Air, for example is freely available, so in general it is meaningless to speak about property in air. In the absence of some socially defined convention about access to land, the same can be said for real property in land.

Philosophically, how we define/control access to land has been recognised since the earliest times with Plato and Aristotle dealing with it in detail. Plato[378] recognised the importance of private property for the productive and entrepreneurial classes, but was suspicious of it for the political leaders, whom he considered should be comfortably supported by the common property of the state but hold no private property. Aristotle[379] developed Plato's pragmatic treatment of property to the conclusion that 'For, while property should up to a point be held in common, the general principle should be that of private ownership'. These ideas can be very usefully applied to the question of the commercial or other transactional use(s) of Aboriginal lands.

Despite their discussion of private property in land, Plato and Aristotle recognised that there did exist private property in external things that was natural to the human person. Products of human effort, such as tools or houses, had at least some component that was naturally and necessarily connected to their maker. By considering the various causes of products, their origin can be traced to a variety of factors including the raw materials that people then used to make things. Given that people naturally own their own labour, the labour components in products are the natural property of their makers. Indigenous peoples implicitly recognise this natural property in products in their creation stories that tend to attribute the land to the productive agency of creator spirits, who are the original owners of land and who gave it to particular peoples, usually conditional on them observing the laws and customs that the creative agencies also transmitted to them. Western property theory has no place for notions of natural property, and focuses only on the facts and systems of title and tenure in operation in a particular legal regime, as discussed in Chapter 4. As such, it tends to ignore concepts of origin and social duty when considering property in land.

The concept of connection implies a relationship between the connected things that also includes rights and responsibilities or duties. For example, a property owner may put their land to some use, but they have a duty not to impact adversely on their neighbours. Connections also imply limitations on everything else, especially concerning leaving the connection in place. For example, the incidence of ownership means that property cannot be taken from someone without their consent or fair payment. The connection between a person or a group of persons and land means that the person or group of persons who enjoy that connection has authority

[378] Plato, 380 BC Republic, 415-427; in Santas (2010:62, 194-95).
[379] Aristotle, 350 BC *Politics*: 1263a21; in T.J. Saunders (1981:114).

over the use of the land by themselves and by others. The authority to exclude all others (including exclusivity and trespass), the ability to transfer all or part of the land to others (including alienability and hereditability) and to use land give meaning to 'ownership' (N. Graham, 2011:263). There can also be other forms of connection that include different aspects of the relationship between a person or a group of persons and their land. For example, in Western terms the ability to extract value from the land, through rent or in the production of goods and/or services. Otherwise 'the very idea of ownership seems pointless' (N. Graham, 2011:261).

Often, the person or group of persons involved will feel compelled to defend their connections by some claim of liberty or justice. For example, Peter Yu[380] states that Aboriginal peoples have a system of protocols for accepting visitors to their lands, and a system of reciprocity for accessing food, water and other resources either for short or long periods of time, depending on circumstances and local conditions. These connections between people and property are vital to their overall wellbeing and are an important part of the realm of human social action and interaction (Small, 2003a and 2003b). Therefore, as Bryan (2000:6) argues, property operates in everyone's daily life:

> *'by creating a world through which they must necessarily interact: it defines what kinds of relations are possible among individuals, as well as the relationships that individuals have with the natural environment. Because property captures this relationship by mapping out areas of social practice, it is a primary manifestation of a culture's ontology. Specifically, because property sets out both the individual's and the group's relationship to things in general by defining what they are, how they are procured, and what purposes they serve, the legal institution of ownership operates metaphorically by identifying the constitutive elements of how a culture defines its members' agency relations among what it takes to be the important things in nature. In this way, an analysis of rules of property is an analysis of the metaphors of the ontological structure of a culture. We must, however, be careful of the way we use language in approaching such metaphors'.*

Harris (1996:3) argues that property is both 'a complex organising idea' and an 'institution'. Harris (1995:3) also extrapolates a spectrum of 'ownership' extending from 'mere property' at one end to full ownership at the other. The former embracing an open-ended set of access and use privileges; the latter embracing a formal relationship between a person and a parcel of land with unlimited privileges of use, control and transmission. Harris (1995:3) believes the items on the spectrum are united in three respects: a juridical relation between a person (or group) and

[380] Peter Yu, notes of interview with the author, 2 December 2015. Held on file by the author.

a resource; the privileges and powers which they comprise are open-ended and cannot be concretely listed; and 'self-seeking' behaviour on the part of the individual or group to whom they belong. However, Harris also argues that 'the content of ownership interests is a function of cultural assumptions' (1995:3) and 'varies enormously in time and place and [is] nowhere static for long' (1996:3).

I initially trained as a cartographer and a geographer[381] but my disciplinary and professional practice for the past 40 years has been in land use and environmental planning. Based on my experience, I can see that planning and land tenure are 'inextricably entangled' (Blomley, 2016:2)[382] with property through the 'allocation, distribution and alteration of property rights' (Jacobs and Paulsen, 2009:135) relating to land use. I agree with Harris (1996:4) who sees property (in land) as performing a dual function: as a mechanism for 'controlling the use of things' and for 'supervising or directing the allocation of wealth'. How these dual functions play out over time and place varies according to the cultural values and ideologies of differing societies and their body politic. Property in land is therefore, as Harris (1996:3) asserts, 'a point of reference intervening between the brute facts of a person's situation, on the one hand, and his/her claims, desires, projects and plans, on the other hand.' Or as Henry George[383] put it in 1879: 'The ownership of land is the great fundamental fact which ultimately determines the social, political and consequently the intellectual and moral condition of a people' (George, 1879:267 [2017]). The link between land and prosperity is true of any society, but the base measure depends on how society views and measures the wellbeing of its members/citizens.

[381] I hold a Land and Engineering Survey Drafting Certificate from the Canberra TAFE (1976) and BA (Hons. A Division), majoring in Geography and Political Science from ANU (1989). 'Cartography' refers to Cartesian cartography based on mathematical coordinates (Reilly, 2004:236), or as Harley (1989:3) asserts 'A body of theoretical and practical knowledge that map-makers employ to construct maps as a distinct mode of visual representation'. The trade of surveying dates back to 1530 and in the early 17th century Thomas Gunter provided surveyors with the twenty-two-yard chain that became their definitive tool (Linklater, 2015:33). Almost every major city founded in the 19th century in the USA, Canada, New Zealand, Australia and South Africa has streets measuring one and a half chains wide (Linklater, 2015:33). According to Birtles (2013), registered surveyors in Australia were 'held pride of place in exploration, demarcation and the opening up of country labelled as "Crown land" for private purchase as real estate by colonial settlers. This … process of transfer of land parcels, or "cadastres", from direct government ownership and control was legally regarded as "alienation" of land title from the public domain. "Cadastral" or surveyed boundaries were measured and pegged by surveyors who then carefully plotted details to scale on a survey plan. Each field book and plan constituted an official document that might, on occasion, be used in court to settle dispute over land entitlement'. The cadastral map is therefore seen by J.C. Scott (1998:35) as 'the crowning artefact' of simplifying land ownership and tenure and an 'abstract conceptualisation of property (Bhandar, 2018:96) and space (Blomley, 2003b). Mount (2014:13) observes, 'the original inhabitants had as much reason to fear the white man's theodolite and chain as his guns and musket'.

[382] See also Krueckeberg, 1995:301.

[383] Henry George wrote *Progress and Poverty* in 1879, arguably the most famous book of its time (Peddle and Peirce, 2017). 'That this single work, from a journalist, no less, a mere popularizer, whose knowledge of economic theory came through an appreciation of the writings of the classical economic thinkers and not through any formal academic training, should generate such intense international interest and no small amount of consternation is a testament to the power of the message, if not the messenger' (McCann, 2008:67).

Land is a tangible, immovable spatial reality. You can't take it with you wherever you go, but you have to have a relationship with it because it sustains your reality. Winston Churchill[384] captured the primary and fundamental nature of land in a campaign speech in 1909 when he said that 'land … is a necessity for all human existence, … is the original source of all wealth, … is strictly limited in extent, …is fixed in its geographical position' (cited in Linklater, 2015:12) and these factors set it apart from all other forms of property. As Linklater (2015:12) concludes: 'the way you own the earth requires the agreement of your neighbours, the society you live in, and the government of your country' and therefore land 'is the glue that holds a community together.'

The common understanding of property in land that is applied in this thesis therefore is that property is an essential component of any society and how society controls, uses and transmits its property in land determines the nature of its ubiquity[385] among a society's members or a nation's citizens and ultimately the wellbeing of the planet. Indigenous theories of property and ownership are explored in the next part of this Chapter, before turning to explore Western theories.

5.3 Indigenous theories of 'property' and 'ownership'

Indigenous theories of property and ownership in land pre-date modern Western theories of property. They have 'not been broken by colonisation' (Brigg and Maddison, 2011:9). The following discussion is not intended to provide a definitive view of Indigenous theories of property and ownership, but rather to provide a broad outline. Aboriginal Australians comprise several hundreds of tribes, clans, family or descent, language or other groups recognised as such in accordance with Aboriginal laws and customs. There is not one single theory that can therefore be said to be the same throughout, but there are many similarities or common threads, as the following discussion shows.

In the Final Report of his study of the problem of discrimination against Indigenous Populations around the world for the UN Commission on Human Rights in 1983, the Special Rapporteur, Jose Martinez Cobo stated that:

[384] Winston Churchill, 'Land and Income Taxes in the Budget', speech, King's Theatre, Edinburgh, 17 July 1909.

[385] Ubiquity: the state or capacity of being everywhere at the same time; omnipresence (Macquarie Dictionary). However, by 'ubiquity', I also mean that land is the thing that comes into existence without human interference (Risse, 2008:4) and the thing that all living things depend on and are subject to for our collective survival (N. Graham, 2011:261), along with air and water. The way we manage our interactions with land is an abstract thing of human creation (N. Graham, 2011:261).

> '*For Indigenous peoples, land does not represent simply a possession or means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. It is also essential to understand the special and profoundly spiritual relationship of Indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture'* (Martinez Cobo, 1983:67).

Martinez Cobo found there needs to be an increased understanding of the 'profound sense of deprivation' that Indigenous peoples experience 'when the land to which they, as peoples, have been bound for thousands of years is taken away from them.' He concluded that 'No one should be permitted to destroy that bond' (Martinez Cobo, 1983:67).

Since that time, Indigenous peoples' cultural relationships to their ancestral lands have been recognised internationally and are reflected in the International Labor Organisation *Convention No. 169 Indigenous and Tribal Peoples* (Article 13) (ILO 1989) and in the United Nations *Declaration on the Rights of Indigenous Peoples* (Article 25) (UN, 2007). I return to the relevance of these international instruments to Aboriginal peoples' land and development rights in Chapters 8 and 9.

In the Australian context, the eminent anthropologist, W.E.H. Stanner, developed a deep respect for the bonds that Aboriginal people have with their traditional country. Stanner observed that Aboriginal peoples' relationship with their traditional country was 'fundamentally a religious relation' and 'as a union of earth, sky and water on the one hand with spirit, body and personality on the other.' Stanner also noted that their connection between land and territory was 'inextinguishable' and 'inalienable' (Stanner [1962], 2009:88).

In 1969 Stanner prepared a paper for the plaintiffs in the Gove Land Rights case[386] in which he posed the following questions: 'What substance can attach to the clans' contention that they "own" the lands in issue? Do they conceive of land as "property"? Do they have a conception of "title", "right", "estate" and "possession" which are sufficiently analogous to or coincident with ours to merit consideration? What does land signify to them?' (Stanner, 1969a:1). Stanner makes allowances for the fact that Aboriginal words and the ideas that attach to those terms often cannot be translated into strictly equivalent English words and, conversely, that there is little point in looking for exact equivalents of English words and ideas. Nevertheless, Stanner

[386] *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141). According to Rigsby (1998:31) this was not submitted to the NT Supreme Court and according to K. Williams (2008:203) could not be published because they were *subjudice* but was presented at a private seminar at the ANU in February 1969.

found 'sufficient coincidence of underlying ideas' to justify his conclusion that Aboriginal peoples and culture had a conception of 'estate' in land (Stanner, 1969a:5). With all due respect to Stanner, perhaps he came to this conclusion because of the context in which he was preparing this paper, i.e. for the lawyers arguing for the plaintiffs, whereas a philosopher acquainted with Platonic or Aristotelian thought may not have come to the same conclusion.[387]

In particular, Stanner concluded that:

> '*It is unquestionable that all the aboriginal peoples … adequately had a conception of land as property. The three ideas necessary to the conception demonstrably co-existed. That is, (a) an idea of ownership under right of title, (b) an idea of corollary right of possession, and (c) an idea of correlative or connected rights of occupation and use. There were also customary rules determining with whom rights properly lay and by whom they could be properly exercised.*
>
> *In aboriginal understanding land was much more than property in our sense; ownership was more intrinsic; title, right and possession were embedded in different doctrines; and use and occupation were articulated into a highly distinctive body of social habits; but there was a sufficient coincidence between their underlying ideas and ours in relation to all these matters to justify the use of European terms, provided there are accompanying explanations.*
>
> *The three ideas mentioned were at the foundation of aboriginal society insofar as it involved land. Taken together, they support an inference that there was a real if unverbalised conception of 'estate' in land, and that there was a true 'system' of land-holding, occupation and usage in rational connection with the circumstances of aboriginal society*.' (Stanner, 1969a:2).

Stanner (1969b:2) argued that 'certain axioms of aboriginal thought' had to be made clear to understand 'the facts, principles and rationality of the resultant system.'

Firstly, in Aboriginal understanding there is a duality in the relation of ownership between persons and land at the same time: that 'a relation to land is in *annimum* and simultaneously a relation *in rem*' (Stanner, 1969a:3 emphasis in original).[388] In other words, the relation has both spiritual and material dimensions at the same time. Or as Rigsby (1998:32) asserts:

[387] The point I am making here is that Stanner was preparing an affidavit that could stand up to scrutiny in a court of law, rather than trying to develop a philosophical position on property that would fit with the Yolgnu peoples' view of the world and might align with Plato's or Aristotle's philosophies of property.

[388] This is partially a modern take on the meaning and significance of *annimum* and *rem*. *Animum* refers to an immaterial thing, whereas *rem* refers to a material thing with an objective existence. *Rem* here means a material thing as though *animum* has no concrete existence.

> '*The root*[389] *of Aboriginal title derived from the "historic-genetic" relation of the owning group to particular land* in animam (sic) (i.e. part-to-whole)*, and the group's* in rem *relationship* (i.e. its ownership of the land) *resulted from it and depended upon it'* (emphasis in original).

Rigsby (1999:2) also speaks of linked propositions 'that Aboriginal people belong to the land and the land belongs to Aboriginal people', because 'they share spirit in common with it' and because their 'spirit does not come from anywhere: it comes from a specific country or place.'

Secondly, that 'the clearest, most unequivocal, most enduring and most perfect ownership-relation between persons and land' was that 'between a patrilineal descent group (clan) or similar group and a more or less definite tract or region or set of localities or places' (Stanner, 1969a:3). Rigsby (1998:32) argues that in classical and contemporary Aboriginal society 'significant property rights are vested in groups, but at the same time, people are linked to land and one another through multiple, cross-cutting ties.'

Stanner also asserted these axioms are dependent on several postulates or truths 'which no aboriginal conceived of as being open to question' (Stanner, 1969a:3). Firstly, that 'human corporeal life was indivisibly in pair with spiritual life' from the time of conception, persisting until after his or her death (at least for a time) and manifesting at a particular place. Secondly, that place was the source of their birth and they are 'inseparably connected with it'. Thirdly, that the corporeal and spiritual elements were so indissoluble that 'each person was "with" or "of" a locality, or locality was "with" or "of" him or her' (Stanner, 1969a:3).

The conceptions of "person" and "clan" or similar groups thus included "land" or "territory" as intrinsic to their definition'; and that each member of an ownership group was related to their land jointly 'with every other member of the group, without distinction of sex, age, status or another criterion. The relation was truly joint, as distinct from common or several, in a sense closely analogous to the "four unities" of joint tenancy' (Stanner, 1969a:4).

Stanner noted that all four unities of joint tenancy (title, possession, interest and time) (Butt, 2010:228) were met, with the exception that the unity of time in Aboriginal ownership extends 'to the unborn and the dead as well as the living' (Stanner, 1969a:4). Stanner also found that the estate is not diminished by the deaths of any of the joint owners, did not pass to the next

[389] 'The "root" of a title is the historical event that gives rise to it' (Rigsby, 1998:39).

generation through inheritance, and could not be 'disinherited', but remains in the dual 'spiritual-corporeal' stream of life (Stanner, 1969a:8). Stanner (1969b:9) concluded therefore 'that the rights were vested, not severally in individual persons, or in common between persons, but jointly in a particular kind of kinship group.'

In his fourth Boyer Lecture titled 'Confrontation', Stanner summarises the links between Aboriginal people and their traditional country as follows:

> *'No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word "home", warm and suggestive though it be, does not match the Aboriginal word that may mean "camp", "hearth", "country", "everlasting home", "totem place", "life source", "spirit centre" and much else all in one. Our word "land" is too sparse and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. …. To put our words "home" and "land" together into "homeland" is a little better but not much.*' (Stanner, 1969b:44)

This insightful observation by Stanner communicates some of the richness of Aboriginal peoples' relationship to the land. It also reveals the sterility in Western thinking regarding the centrality of the supernatural agency in the creation and existence of the material world and what it can mean for human society.

Professor Mick Dodson (2008:v),[390] believes Stanner's observations to be 'spot on.' M. Dodson summarises Aboriginal peoples' connection to their traditional lands as follows:

> *'When Aboriginal people talk about "country" we mean something very different from the conventional European understandings. We might mean homeland or tribal or clan area. But we are not necessarily referring to a place in a merely geographical sense. Rather, the word "country" is an abbreviation of all the values, places, resources, stories and cultural obligations associated with that area. Certainly, to talk of country is to talk of its resources: the use to which these might be put, and their proper distribution. In this sense, to understand country is also to understand its crucial importance to the customary Indigenous economy and governance. However, the word best describes the entirety of a people's ancestral inheritance. It is Place that gives meaning to creation beliefs. The stories of creation form the basis of Indigenous law and explain the origins of the natural world. To speak of country is to speak both of the economic uses to which it may be put and of a fundamentally spiritual relationship that links the past to the present, the dead to the living and the human and non-human worlds. Country is centrally about identity*' (M. Dodson, 2008:v).

[390] Professor Mick Dodson was Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) and a long-time campaigner for Aboriginal rights.

M. Dodson's reference to the dual functionality of land, its use and distribution, is significant because of the potential of these facets to act as markers for the commonalities of property in land and the commensurability between two culturally distinct theories of property and ownership. These issues are explored in more detail in Chapters 6 and 9.

Sutton (1995, 1998 and 2003) has undertaken considerable research in the area of Indigenous land rights since *Mabo (No. 2)* and he makes some interesting observations pertinent to this discussion. Sutton (2003:1) argues that the NTA is an attempt at recognising Indigenous land rights by translating them into legal terms and that native title is a 'recognition space' (citing Pearson, 1997).[391]

Following Stanner, Sutton (2003:21) also finds that Aboriginal country is inalienable, is held communally and that Aboriginal land rights flow from their spiritual connection to country. More significantly, Sutton (2003:23) argues the principles of co-ownership of country and distinguishing one's own country from that of other clans exists in tension with each other in Aboriginal society across Australia. The latter being an exercise in autonomy and manifested by the right to ask for permission to visit and use the resources of another's country (Sutton 2003:23; see also Watson, 2015:35-36). Sutton noted that:

> *'This is not to say that Aboriginal land tenure is "just grist for the mill" of symbolic activity, because the land and waters of one's own region were also, until recently, the only source of the basic necessities of life. Under new conditions they may continue to have economic importance, not only because of bush tucker but also because of royalties and rents received as owners, or because of compensation arrangements. If we make no distinction between economies of meaning and economies of economics, we have lost an important distinction'* (Sutton 2003:23).

The significance of this distinction between economies should not be underestimated for essentially two reasons. Firstly, because of western society's predilection with personal wealth creation and secondly, because in this context land takes on a different set of values, especially regarding its natural resources and their potential for exploitation including at a cost to present and future generations.

The ability of many Aboriginal peoples to live in a balanced sustainable relationship with their ancestral lands has been severely disrupted by colonisation (I. Watson, 2015:34). However, their

[391] This was discussed in Chapter 4.

connections to and responsibility for their ancestral country have not been severed or extinguished, because 'the idea of extinguishment to First Nations' laws is alien to Indigenous Peoples' knowledge frameworks' (I. Watson 2015:40).

Indigenous peoples' relationships to land are difficult to explain in the English language because, as I. Watson (2015:34) points out, the term 'owner' has different meanings across different cultures:

> *'Ownership is often not viewed in regard to material goods, but as relating to values: knowledges, business, a relationship, a problem, a dispute, a ceremony. Ownership may be exclusive to the individual but may be collectively held. And 'ownership' does not define the owned object as a commodity; instead, it defines the concern of a limited group of people who stand in a particular relationship to the owner and whose various responsibilities depend on that relationship'* (I. Watson, 2015:34).

In presenting their case in *Mabo (No. 2)*, the claimants explained their link to land is two-sided: 'people both own land *and* belong to it, and it is a dual relation of right and responsibility' (I. Watson, 2015:34, emphasis in original). One of the claimants in *Mabo (No. 2)*, the Reverend David Passi explained his relationship to his ancestral lands in the following terms 'It's my father's land, it's my grandfather's land, it's my grandmother's land. I'm related to it, which also gives me my identity' (Sharp, 1996:164).

In writing about 'Murray River Country', J. Weir (2009:13) noted that 'Aboriginal people describe how respecting and understanding the life and agency of the river country is important for the continuation of all life.' J. Weir (2009:13) observed that Aboriginal peoples' 'intimate relationship' with country is 'in stark contrast' to Western views of 'country and water as physical objects for human use'. Yorta Yorta man, Lee Joachim, expresses the 'sentience' of his relationship with the River Murray as follows:

> *'The importance of the river is to ensure it is seen as a continuing living being. That it is respected like any other person should be respected. It has got the ability to cleanse itself. It has got the ability to nurture itself. And it has got the ability to ensure that the life that touches upon also has an ongoing process'* (Joachim, cited in J. Weir, 2009:53).

J. Weir (2009:53) believes that Joachim's statement 'grasps a dynamic world in which humans and other beings participate' because he 'brings the river into the foreground' and 'moves away from a world where humans transcend nature.' Noting however, that Aboriginal people include 'diverse issues of utilitarian needs, law, economy, health and more when they talk about the

importance of country' (J. Weir, 2009:13). J. Weir cites Kinnane, an Indigenous academic, who asserts that the:

> *'… totemic understanding of human relationships to country does not disregard land used for utilitarian purposes, but operates in a way that is restricted by overarching spiritual and cultural imperatives. The concept of country does not allow for a separation of people, land and waters. In an Indigenous vision of country, economy, spirituality, knowledge and kin are all related and interconnected. Country is not seen as being 'owned' as in the Western tradition. Rather, country is held in a reflexive, obligatory way*' (Kinnane, 2002 cited in J. Weir, 2009:13).

Peter Yu (2013:26), the CEO of Nyamba Buru Yawuru Ltd, argues that the Yawuru native title determination is recognition under Australian law of Yawuru's legal responsibility to 'look after' Yawuru land and sea Country. The purpose of which is 'to ensure the ongoing practice of customary tradition and connection to country for current and future generations, so that Yawuru native title is not diminished or extinguished through the disappearance of Yawuru traditional life' (Yu, 2013:26).

Yu (2016b:8) notes with concern however that 'The dispossession of Indigenous peoples from their traditional lands in favour of a private land owning regime that views nature solely for profit and gain has had catastrophic ecological consequences.' The impacts of 'ecological destruction' are causing an alarming loss of habitat and species and 'a new wave of dispossession' (J. Weir, 2009:57). I. Watson (2015: 37) argues that 'Aboriginal law teaches about the interrelationships between all things: the land, people, law, the natural world and the cosmos.' In particular, that

> *'the philosophical underpinnings of law differ from the "West's" approach which centres [on] individual rights and property ownership, while Nunga [Peoples'] laws centre [on] the collective being in relationships to, belonging to and being responsible to the lands of our ancestors and for future generations'* (I. Watson, 2015: 37).

These observations by Yu, Watson, Joachim and many other Aboriginal people raise an important feature of Indigenous approaches to property: the nature of obligations on present generations to look after country for future generations. This responsibility imposes what I regard as 'perpetual obligations' on the custodians of country, to use it with care and to leave it in a condition that will support the next and future generations. The concept of 'perpetual obligations' is explored in more detail in Part 5.5, following the discussion below on Western theories of property and ownership.

5.4 Western theories of 'property' and 'ownership'

Much has already been written about the origins and evolution of western theories of 'property' and 'ownership', emanating from the fifteenth century to the present that I briefly examined in Chapters 2 and 3. The following discussion focusses on some of the more salient points in the literature concentrating on the issues at the heart of the conundrum of comparing theories of 'property' and 'ownership' based on differing worldviews.

Our general understanding of the Western notion of 'property' is that it implies ownership and control over a thing or a resource, including land, but with an absence of obligations. We view our land as something that comes without obligations to others which is reflected in the adage that '*a man's house is his castle*' (Coke 1603 and 1644 cited in Singer, 2006:309). The notion that as landowners we are generally free to do as we wish in our homes is deeply embedded in our psyche and used as a metaphor for conceiving a property owner as having the ability 'to exercise a virtually unlimited power' (Penlaver, 2006:2972) over his/her property. The 'castle' metaphor has a long history and remains alive and well in popular conception of property around Australia.[392] The full statement reads as follows:

'*For a man's house is his castle, et domus sua cuique tutissimum refugium?*'

According to Singer (2006:309), the Latin means: 'and where shall a man be safe if it be not in his own house?' The statement was made by Sir Edward Coke[393] who used it in the *Semayne's Case*[394] in 1603 and documented it in his *Third Institute of the Laws of England* (Coke, 1644 [Hargraves and Butler, 1832]). And so it became enshrined into the law in England.

In the 1829 *Commentary on the Pandects*, Van der Linden (1829 [1955:263]) writes:

[392] The phrase 'For a man's house is his castle' or the more modern version of 'I can do what I like with my land' was often recited to me in the context of training workshops I was conducting for the Australian Local Government Association all over Australia from 1999 to 2003 on local government's responsibilities for risk management in relation to native title rights and interests following the 1998 amendments to the NTA. Perhaps because the 'Castle' metaphor was given a revival in 1997 as the title of an Australian comedy-drama film, titled 'The Castle'. The film was directed by Rob Sitch and starred Michael Caton as Darryl Kerrigan and Anne Tenney as Sal Kerrigan, his wife, and was about a working-class family from Melbourne who decides to take on the authorities after being told they must vacate their beloved family home to allow for an expansion of the airport adjoining their home. The film was executed from inception to final cut in just five weeks as a satirical shot at the Australian Government with the Darryl Kerrigan drawing an explicit parallel between his struggle and Aboriginal peoples' struggles over the lack of compensation on just terms for the loss of their land rights. However, as N. Watson (2007:21) observes 'Unlike *The Castle*, where justice was achieved in a matter of minutes, Eddie Mabo and his lawyers battled against Goliath for ten years before finally succeeding in the High Court'.

[393] Sir Edward Coke is best known for his thirteen volumes of law reports and the four volume '*Institutes of the Lawes of England*', published between 1628 and 1644 (Bodet, 1970).

[394] 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B.). In this case, the statement reads as follows: 'That the house of everyone is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose'.

> *'Yet since every man's home is his surest refuge, and the same applies to the very church in the case of all persons in distress, the rule was therefore adopted that no one could be summoned either from his home or from the church.'*

This statement is in Book II, Title 4 of the 'Paris' edition of the *Commentary on the Pandects* which deals with summons. In particular:

> *'In every summons to law regard had to be taken of place, time and persons, since not everybody could be summoned, nor at any time nor from any place.'* (Van der Linden, 1829 [1955:263])

The full statement and explanation demonstrates that the first part of Sir Edward Coke's statement has been taken out of its original context about the right to privacy and the ruler's authority to serve a summons, and not about rights to property *per se*. The problem is that the first part of Sir Edward Coke's statement has become so imbued into our understanding of 'property' without reference to the second part. As a consequence, lawyers and laypersons have shared a wide-spread belief that there is 'a unitary concept of property, unqualified in scope and ungradable in intensity' (Gray and Gray, 1999:12). This is not the case.

Gray and Gray (1999:12) believe that an unwitting source for this mythology around property may have been William Blackstone in his *Commentaries on the Laws of England* in 1766. Following the '*Introduction*' and having dealt with *The Rights of Persons* in *Book the First* (Blackstone, 1765 [1992]), Blackstone turns his attention to *The Rights of Things* in *Book the Second* (Blackstone, 1766 [1992]).

In Chapter 1 of *Book the Second*, Blackstone deals with *Of Property, in General*, and he opens with the following statement:

> *'There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'* (Blackstone, 1766:2 [1992]).

The suggestion in this oft-cited statement views property as some form of 'exclusive dominion' or 'bulwark against third parties … and the state' (Penlaver, 2006:2973) and puts aside the earlier medieval traditions in which property ownership came with obligations or duty to provide defence, public infrastructure and domestic law and order (C.M. Rose, 1998:603).

But Blackstone needs to be read further than just his opening paragraphs in Chapter 1 of *Book the Second* (C.M. Rose, 1998:601). Immediately following his initial statement about the right of property comprising 'that sole and despotic dominion'[395], Blackstone expressed anxiety about the foundations of existing property rights in England at that time:

> *'And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built*' (Blackstone 1766:2 [1992]).

Blackstone went on to state:

> *'… not caring to reflect (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his deathbed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him*' (Blackstone, 1766:2 [1992]).

C.M. Rose (1998:601) concludes that Blackstone's work elicited some 'canonical strategies for scholarly property-talk' which have continued to resonate in scholarly works over the years because of the way he took up his arguments – 'the posing of doubts, the utilitarian justification, and the doctrinalist deflection.' But Blackstone was making a very astute observation about the nature of property for his time. Blackstone (1765:119 [1992]) viewed rights as being absolute or relative. Absolute rights being those that every person is entitled to as an individual and not because of their membership of a society. Relative rights being those that belong to members of society and result from the formation of states and society (R.P. Burns 1986:71-72).

While Blackstone saw life as 'the immediate gift of God' (Blackstone 1765:125 [1992]), he defined the absolute right of property as consisting of a person's 'free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land' (1765:134). However, according to R.P. Burns (1986:73) Blackstone's claim that the basis of property in nature is far more tentative, because Blackstone (1765:134 [1992]) also posited that while 'the origin of property is probably founded in nature', the 'modifications' under which the system operated at the time, 'the method of conserving it in the present owner, and of

[395] Which Mount (2014:11) refers to as 'That Disturbing Devil'.

translating it from man to man, are entirely derived from society; and are some of the those civil advantages, in exchange for which every individual has resigned a part of his natural liberty'. Thus, while property may have its origins in nature, its characteristics 'are extremely indeterminate until shaped by the wisdom and will of the legislature' (R.P. Burns, 1986:77).

But more importantly, Blackstone (1766:8 [1992]) was questioning how property came to be vested by asking 'what … gave man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to everybody, but particularly to nobody'. In doing so, Blackstone was making some thoughtful reflections on the flaws in that thinking by questioning how it came to be so and how property is passed from one generation to the next. Blackstone may not have been a great philosopher (R.P. Burns, 1986:69), but he was asking some poignant and pointed questions about property and its qualities.

The evolution of Western society's approach to property has made a distinction between property rights as a natural thing or a positive thing. A natural thing is something that is essential. A positive thing is something that is an arbitrary fact. About property this might best be explained by posing some questions. What does 'property' have to be for it to exist as property? If, for arguments sake, we take a parcel of land as being a 'thing', how does that thing become 'property'?

In Western society, there is nothing necessarily or irrevocably binding a person to any particular parcel of land (Small, 2003b:2). A person can be a person without any particular connection to any particular area of land. For property in land to become meaningful to people in Western society, it is a convention rather than a necessity, with certain natural attributes. And Western society thinks up a system of property to make relations between people around things more ordinary and more productive, depending on cultural origins and aspirations. While a certificate of title in a property registration system might show such a connection, it is nothing more than a social artefact and meaningful only within a particular social context. Nevertheless, in that social context Linklater (2015:105) argues that paper-based private property systems 'harness the legal resources of an entire society … direct them at a particular parcel' and 'offer financial rewards for success' that 'simply overwhelmed the oral, local and conservative systems of communal land ownership that stood in their way'.

The rise of capitalism and the privatisation of land accompanied the colonisation of new countries by various European nations. As the quote from Andro Linklater at the start of this

Chapter notes, the idea of exclusive land ownership that accompanied colonisation 'has proven to be the most destructive and creative cultural force' that has 'eliminated ancient civilisations' and 'displaced entire peoples from their homelands' (Linklater, 2015:5). The creation of markets for land which became a source for capital accompanied the colonisation of places like North America, Canada, New Zealand and Australia (Linklater, 2015:64, 186). For example, James Ruse, one of the early convicts turned free-settler in Australia managed to capitalise on several land grants.[396] While James Ruse died with 'little land and few possessions' (Murray and Frijters, 2017:9), his exploits underscores the need for prudent decision making when it comes to land ownership and management, a matter I return to in Chapters 7, 8 and 9.

With the introduction of the Torrens land titling system in South Australia in 1850s,[397] there followed a clear and simple system for establishing private ownership of land and the means of using land for capital (G. Taylor, 2005). It also blocked out and legally invalidated the history of Aboriginal ownership of the land (Bhandar, 2015, 2018; Keenan, 2017). Add liberal democracy and the increasing emphasis on the market and individual choice, the toxic mix that results are the conditions for a neoliberal property regime.

It is arguable that neoliberal[398] economics places too much emphasis on two property regimes with ownership vested in private individuals/corporations or vested with an institution of the state (C. M. Rose, 1986:720). Neoliberalism holds that social good can be maximised by bringing 'all human action into the domain of the market' (Harvey, 2005:3). This perspective ignores the fact that outside the purely private/public divide there is also a class of property which C.M. Rose (1986:720) describes as 'inherently public property.' That is, 'all assets as to which there

[396] Murray and Frijters (2017:8-9) cite the experience of James Ruse, a convict sent to Australia on the First Fleet in 1788. Not knowing each convict's sentence, Governor Phillip had to rely on the diligence, good behaviour and trustworthiness of the convicts themselves to determine their release from prison. Governor Phillip's power lay in being able to grant land to soldiers and convicts based on their performance in the new colony. By 1790, James Ruse was granted Australia's first parcel of land, 30 acres in Parramatta, recorded as No. 1 on the Land Grants Register. Five years after arriving he sold that parcel of land for 40 Pounds. Murray and Frijters (2017:9) estimate that over the period from 1788 to 1819, Ruse managed to obtain over 286 acres of land through direct grants at the discretion of the Governor, about 20 years' wages in land value in his lifetime or about $1.5 million in today's terms.

[397] Discussed in Chapter 4.

[398] 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's action have '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'.

is a public right of access, whether title is vested in private owners or public agencies, or whether trespassory rules are altogether absent' (Harris, 1996:109[399]). C.M. Rose (1986:720) asserts therefore that the design of property institutions should not be conceived as limiting choices to one or other form of exclusive ownership and/or managerial control (Harris, 1996:109), bearing in mind that 'some form of common or public property[400] preceded the introduction of individual property' (Reeve, 1986:29).

As a social institution, property is a 'legal, economic and political phenomenon' and lawyers, economists and political theorists attach different meanings for different purposes (Reeve, 1986:9-10; Harris, 1996:6). Lawyers are primarily interested in who may legitimately do what, to whom and in what circumstances, and they can work out a practical result without having to answer the questions about 'what is property' or 'what is ownership?' (Reeve, 1986:13, 23). Economists approach property from the perspective of a causal relationship between a set of property rights and the incentives for achieving an optimal level of economic return or performance (Reeve 1986:23, 26). Political theorists, since the time of Plato and Aristotle, have long argued about the agency and legitimacy of property and ownership, especially in land. 'Property has been attributed to a large class of entities: the public, God, the state, the community, corporations and business firms, churches, charities and the family' (Reeve, 1986:30). Property is therefore informed by its history, historical contingency (Reeve, 1986:10) and its contemporary setting.

The relationship between the history of property and its legitimacy is not about a particular view on a desirable property arrangement. Rather, it is about the 'logical gap between what *is* and what *should be* the social practice', and that 'what *has been* is likely to figure in a story of what s*hould be*' (emphasis in original) (Reeve, 1986:74). As a social institution (in Western society), property comprises many elements and the content of those elements varies enormously over time and place (Harris, 1995:1).

[399] Footnote 27 in Harris (1996:109).

[400] The term 'public' is an 'elusive unit' because its membership is elusive as against the membership of a specific organisation which rests on specific qualifications. (Reeve, 1986:32). 'Common property' is often 'used as a synonym for some form of group or communitarian property', referring to both an asset which is vested in a public authority but 'the discharge of the function for which it is so vested requires access to be afforded to members of the public on most occasions'. In English common law, the term refers to land which is subject to the rights of common (such as grazing) for a defined class of persons, or land which is or was part of the land of a manor which was subject to public rights of access and recreation. In either case, there is an 'owner' of the land with a registered title who retains the residual rights in the soil which are subject to the rights of commoners or the general public, but are protected by trespassory rules against unlawful interference with the land (Harris, 1996:109).

Property in land is better understood as a convention. The problem is that while any practical property system appears as a conventional institution, its legitimacy relies on several underlying principles that for current Western property systems are rather weak. For example, in the Australian context the most obvious conventional property institution is the Crown's Torrens land titling system which was founded on the now dubious assumption that all land in Australia was, until *Mabo (No. 2)*, held of the Crown.[401]

Conventions do not exist independently of a social system, but rather due to social acceptance. Perhaps the 'elusive' (Harris, 1996:6; Engle, 2010:276) nature of property and development arises from people's cultural beliefs and their sense of fair play when dealing with land. As stated earlier, while lawyers, economists and political philosophers and other disciplines have their differing theories of property and ownership (Harris, 1996:6), we tend to have an 'unreflective attitude' (Reeve, 1986:4) toward property and we do not give much thought to its foundations. That is, until we might want to undertake development or change its use and we are required to seek the approval of the local authorities and the support or consent of our neighbours before we can proceed. Our expectations that 'our home is our castle' may be challenged or unfulfilled because our land use or development proposals may not meet with their approval. Hence, Blackstone's concern about property becoming a 'despotic dominion' because of the way in which it was being exploited by a few at the expense of the many and without any apparent regard for future generations.

In Western liberal societies such as Australia, the pervading view of property in land is that it 'assumes a single owner identifiable by formal title' who 'enjoys all the rights associated with ownership – including the right to exclude others, to right to transfer or sell the land and the right to use the land as they see fit' (Blomley, 2005:126). The owner is set against others, including the state even though the state may intervene through environmental and planning laws and building health and safety laws to limit the use of land if it threatens to harm others or is a danger to its occupants/users.[402] But the owner is always motivated by self-interest, trying to maximise the land's productivity through development based on its 'highest and best use'[403]

[401] See Part 4.4 and Footnote 340.

[402] A process which Porter and Barry (2016:47) describes as '"unsettling" the primacy of private property by purposefully intervening in struggles over who can do what, where they can do it, and who gets to say', even though the enjoyment of private property rights depends on 'the security and certainty of the rights of the property owner vis-a-vis the certainty and stability of a broader public interest'.

[403] See Wensing and Small (2012:10-11). The notion of 'highest and best use' simply refers to the rational economic assumption that the landowner or winning bidder will seek to use the property for its most profitable use. The notion comprises three dimensions: what is physically possible, what is financially feasible and what is legal. These may not always be in harmony and more often than not, the negative externalities are generally ignored (Rabianski, 2007:45).

or higher returns through leasing or sale (N. Graham, 2011:262). Property in land and land ownership has therefore taken on a very restricted model 'exerting a powerful imaginative hold, shaping our understandings of the possibilities of social life, the ethics of human relations and the ordering of economic life' (Blomley, 2005:125). The terms 'property' and 'private property' have become synonymous with the single-family house as the 'archetype' with its 'comforting images of privacy and domesticity', and behind which 'hides the corporation' (Blomley, 2005:126).

However, land ownership is not as simple as Blackstone described. Rather it is 'a complex set of legal relations in which individuals are interdependent' (D.R. Johnson, 2007:251). And because ownership is relational 'no person can enjoy complete freedom to use, possess, enjoy, or transfer their assets; conflicts and interferences with rights are unavoidable' (D.R. Johnson, 2007:251). Property in land is as much a social institution as well as a legal institution and it performs a dual function, governing both the use of the thing as well as its allocation (Harris, 1996:4).

Private property in Western societies, including Australia, is viewed as a key institution because of a belief that ownership of property (especially in land) is essential for wealth creation (Edgeworth *et al.*, 2013:1). The Western property system allocates private rights to land and sets arbitrary rules to govern the rights and responsibilities attached to that allocation, such as exclusivity, trespass, alienability and hereditability, care and management, and quiet enjoyment.

Modern Western theories of property only view property for its dispensable material objects that can be effectively measured by money and captured privately though the exclusion of others. The social and moral dimensions of property that insert obligations which are owed to the wider community, are omitted. Whereas Indigenous theories of property capture this wider spectrum of obligations, including obligations to future generations which are only just beginning to be discovered by the emerging Western ecological sensitivity.[404] These values are more difficult to sense and not so dispensable to life and the wellbeing of present and future generations.

In the Australian context, 'the legal imaginary of *terra nullius*' enabled the creation of a property system – land disposal and titling, settlement and land use planning – as if the pre-existing land

[404] Discussed in Part 5.5 below.

rights and interests of the Aboriginal peoples simply did not exist (Howitt, 2006:50). Planning's nascent practices of surveying, mapping, bounding, selecting, zoning, naming, regulating and town-building activities that constituted the colonial endeavour, were applied from the very beginnings of colonial settlement in Australia (D. Byrne, 1996)[405] which resulted in the theft of land from the Aboriginal peoples (Borrows, 2018). For the past 20 years, several Australian planning researchers, educators and scholars[406] have been arguing that planning's praxis of ignoring Aboriginal peoples' interest in land is no longer tenable and that planning in Australia needs to come to terms with its colonial history and continuing contribution to the dispossession of Aboriginal peoples from their ancestral lands. I explore the role of land use planning in addressing these issues in more detail in Chapter 9.

The model of land ownership and planning in Australia reduces property rights to two types of owning: private and public. Private owners are individuals who maintain a legally enforceable claim that excludes all others from use and enjoyment of a particular parcel of land. Public ownership holds land in 'common good' by the state for the benefit of the general public at large but remains a right exercised by individuals. Under this ownership model, both private property and common property are conceived as individual rights, held by either natural (private) individuals or artificial persons (states and corporations).

Given the 'troubling disjuncts'[407] and the dilemmas[408] arising from *Mabo (No. 2)*, native title holders are expected by the state to give up their 'inalienable' land rights in perpetuity to extract the 'exchange' value in land. The 'exchange' value is available only after the Indigenous ancestral land rights have been 're-calculated into the grid of capitalist accumulation through investment and development' (Porter, 2014:12). The conversion of Indigenous ancestral land rights into private freehold is the pointy end of the deal that has the potential for Indigenous peoples to lose their ancestral land rights and interests for future generations. I return to these thorny issues in Chapters 6 and 7.

[405] See also D. Byrne (2003); Porter (2018a:61-69); Jackson (2018b:73); Bhandar (2018:39-61).
[406] These include Jackson (1996a; 1996b; 1997a; 1997b); Kliger and Cosgrove (1999); Howitt (2006); Howitt and Lunkapis (2010); Porter (2010; 2017a; 2017b; 2018a; 2018b); Porter and Barry (2014; 2016); Wensing (1999; 2002; 2007; 2012; 2014e; 2017d); Wensing and Sheehan (1997); Wensing and Small (2012); Wensing and Porter (2015).
[407] Discussed in Chapter 2.
[408] Discussed in Chapter 3.

5.5 Perpetual obligations

A critical test for parity between the two approaches to property is the nature of their perpetual obligations, especially over time and through generations. For example, Western property systems create reserves or parklands for public benefit, whereas Indigenous property systems embrace the notion of a 'custodial' relationship entailing a responsibility to 'care for country' for present and future generations (N. Graham, 2011:264; M. Graham 2008:187). The following discussion compares the differences between Western and Indigenous approaches to perpetual obligations pertaining to property in land.

The history of 'Crown land' holdings in Australia can be traced back to the arrival of the colonists in 1788 when the colonial government instituted a system of land grants as a way of regulating the allocation and use of land and setting limits on the extent of the colony (Butt, 2010:918). When the squatters began settling beyond these limits, despite being illegal in the eyes of the Crown, the government responded by allowing the squatters to take up annual leases. The system of 'Crown lands' that developed in NSW was effectively replicated in each of the other colonies that followed.

The Crown land system in Australia[409] established a land use and allocation system that enables land to be held in public ownership for the wider public or common good, as well as in private ownership.[410] All the Crown land tenure systems around Australia enable the state to create Crown reserves, often on the basis that the land represents a form of 'wilderness' (D.B. Rose, 1988:384). That is, to identify land as a park or a reserve, thereby prescribing it as 'public property' in the sense that any indeterminate member of the public enjoys rights of use. The title does not rest with the people who use the park, it is retained in some form of public ownership by the state. Through the land use planning system, the Crown is also able to zone land for public purposes or reserve land for future use.

However, the extent to which these land classification instruments and planning processes sufficiently bind present generations to take full account of the 'exhaustibility of resources relative to the level of use' (Reeve, 1986:181) and for ecological damage and disaster, as well as the form in which subsequent generations will receive it, is highly debatable (Freyfogle, 2011; N. Graham, 2011). Nicole Graham (2011:268) asserts that Western society is only just beginning

[409] The dubious assumption that all land in Australia was (until *Mabo (No. 2)*) 'held of the Crown' was discussed in Chapter 4.
[410] As discussed in Part 5.4 above.

to understand the inherent connections between the limits of Earth's physical capacities and responsibility for human actions through land ownership and use.

By way of comparison, Aboriginal peoples have always had a crucial and legitimate stake in the use and occupancy of their traditional lands for many thousands of years. Before European invasion and colonisation, the Aboriginal peoples of Australia developed and applied three important principles in caring for their ancestral 'Country'. The three principles are: a deep understanding of the exhaustibility of resources relative to the level of use, sensitivity to long term ecological damage and respect for the form in which subsequent generations will receive the land. These ideas have been with them for thousands of years.

As Tom Trevorrow, a Ngarrindjeri Elder, states in the Murray Darling Basin Plan:

> '*Our traditional management plan was: don't be greedy, don't take more than you need and respect everything around you. That's the management plan – it's such a simple management plan, but so hard for people to carry out'* (Trevorrow, 2010a).

And as Irene Watson states:

> '*We live as a part of the natural world; we are in the natural world. The natural world is us. We take no more from the environment than is necessary to sustain life; we nurture ruwe*[411] *as we do our self*.' (I. Watson, 2015:15)

And:

> *'The First Nations relationship to ruwe was not recognised, understood or respected by the muldarbi when they first arrived on our shores, so the colonisers lost the opportunity to learn about another way, an ancient way, a way their own ancestors had perhaps known at a time in their own history but from which they had departed'* (I. Watson, 2015:35).

These statements by Trevorrow and Irene Watson reflect a deeper understanding of a duty and 'the necessity of being responsible for something greater than oneself, that is, the earth itself' (Nichols, 2017:11).

The principles are also reflected by Bill Gammage in his book, '*The Biggest Estate on Earth*':

> '*Ensure that all life flourishes. Make plants and animals abundant, convenient and predictable. Think universal, act local*.' (Gammage, 2011:4).

[411] I. Watson (2015:10, note 23): 'Ruwe means the territories of First Nations Peoples' in Ngarrindjeri language.

The inference in Tom Trevorrow's statement between the simplicity of the plan and the difficulty with carrying it out is a direct criticism of how the colonists and settlers have misunderstood Aboriginal peoples' stewardship of the land over many thousands of years and even more generations. The inference in Irene Watson's statement about Western people having departed from their own ancient and ancestral responsibilities is a direct criticism of the West's commodification of property over stewardship for future generations and the future of the planet. The colonists failed to appreciate the significance of the way Aboriginal peoples viewed land and water as important sources of life for present and future generations.

How land and people came to exist has a natural and permanent influence on how people and land are related (Rigsby, 1999; de Mori, 2017). Small and Sheehan's (2008:103) research into the metaphysics of Indigenous ownership found that it is incomparable to Western conceptions of property value. Small and Sheehan (2008:103) also found that Indigenous peoples 'place greater emphasis on the origins and obligations of property within an understanding of community that is alien to modern culture', including the necessity for the sustainable use of the land's resources and their inter-generational responsibilities.

In Aboriginal philosophy everything in the universe is interrelated and interdependent and it is through the multiplicity of relationships with country that life and creation are sustained and renewed (Kwaymullina and Kwaymullina, 2010:196, 201). The nature of Aboriginal peoples' existence determines the nature of their relationships and the practical laws and customs applied to them, either in harmony with these or not. For Aboriginal people their property institutions will always reflect the non-material relationships that are central to their very being (i.e. their very existence). These values are reflected in the '*Ulruru Statement from the Heart*' released at the conclusion of the First Nations National Constitutional Convention on 26 May 2017.

'Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs.

This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one-day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?'

Figure 5.1 Extract from the 'Uluru Statement from the Heart

Source: Referendum Council (2017b).[412]

There is an implicit dynamism in this extract from the *Uluru Statement from the Heart* about the misrecognition of Aboriginal peoples' identity and sovereignty over their Country which cannot be decoupled. The challenge is not merely one of cultural recognition or economic redistribution (Fraser, 2000), but also one of finding parity between the two cultural paradigms and ways of articulating with each other on equal and mutually respectful terms and their uniqueness (Wensing, 2016a:51). In other words, a way of bringing the underlying conflict between the two systems to the fore.

In essence, the *Uluru Statement from the Heart* challenges the untenable assumptions of European imperialism and domination that the British brought with them in 1788 when they invaded and colonised Australia. Tully (1995:3) describes the struggles of the Aboriginal peoples of the world for cultural survival and recognition as an 'enlightening example' of the 'strange multiplicity' of cultural voices that are 'demanding a hearing and a place … in the constitution of modern political association.' Such demands for cultural recognition are aspirations for self-determination, but the laws and institutions of nation states and 'their authoritative traditions of interpretation' are 'unjust' because they 'thwart the forms of self-government appropriate to the recognition of cultural diversity' (Tully, 1995:4-5). The question is whether the legitimate demands of cultural diversity can be recognised in such a way that renders the members of the

[412] The reference to sovereignty in the Statement includes a footnote referring to the International Court of Justice in its Advisory Opinion on *Western Sahara* (62) (1975) ICJ Rep, [85] - [86], cited in *Mabo (No. 2)* at 40.

diverse cultures their due regarding mutual recognition and status. Perhaps we need to tend to the 'strange multiplicities' that Tully (1995) so eloquently describes, because all attempts at trying to ingrain cultural uniformity in Australia have failed. As Tully states (1995:98), 'cultural diversity is the face of human beings'. A policy of legal pluralism[413] was actively pursued in the early years of colonial settlement in Australia (Ford, 2010:30; Neal, 1991:17) because, as discussed in Chapter 2 of this thesis, the early colonial establishment treated crimes among the Aboriginal peoples differently than crimes among the settlers.[414]

Indigenous law and custom preceded Western law and custom, and we need to recognise and accept its continuing existence (Tobin 2014:xvii). Aboriginal peoples' law and custom in Australia has survived over two centuries of 'marginalisation, repression, disdain and attempts at their destruction by colonial and Settler state governments' (Tobin, 2014:1), especially through the application of the (now discredited) notion of *terra nullius*. Tobin (2014:210) argues that Indigenous customary law 'is not to be got around, ignored or denigrated' because it is a 'formal part of the law' and 'it is binding.'

Settler society needs to be open to viewing these systems as having some parity. Settler society needs to shake off its assumptions and predilections about Western law being superior to the 'customary law of Indigenous peoples and come to an acceptance that Western law has not eradicated Indigenous customary law' (Tobin 2014:xxi, 7). It is time to look outside the constraints of the Western legal system. It is time to find 'a new legal philosophy to ground our relationship with one another and with the planet' (Tobin, 2014:xxi) because we are 'putting at risk the future safety and well-being of humankind' (Engel and Mackey, 2011:313).

While the Western property system in Australia 'is devoid of a vocabulary of responsibility to and for land', in complete contrast, Aboriginal land law 'takes the concept of custodianship as the foundation of their systems' (N. Graham, 2011:268). In other words, Western systems of land ownership, use and tenure have rendered 'the physical capacities and limits of the Earth' as 'invisible and irrelevant' (N. Graham, 2011:269). There is a lot we can learn from 'the long-established and successful' (N. Graham, 2011:267, 262) Aboriginal systems of law relating to

[413] Legal pluralism is defined by Sage and Woolcock (2012:1) as the coexistence of multiple legal systems within a given community of socio-political space. They argue that legal pluralism is a ubiquitous phenomena which is either blindly ignored or seen as a constraint or defective condition that must be overcome in the name of modernisation (Sage and Woolcock, 2012:1), but also acknowledge that some of these assumptions are beginning to be re-examined, especially in circumstances where there are formal state systems and informal community systems operating alongside each other.

[414] Until such time as the courts set the precedent in *R v Jack Congo Murrell* in 1836 that the laws of England applied to the Aboriginal people as well as the settlers, despite Willis J's conclusions to the contrary in *R v Bonjon* in 1841.

land given their custodial responsibility of caring for their ancestral country and knowledge accumulated over many thousands of years (M. Graham, 2008:183).

Perhaps Margaret Thatcher had a point when she said 'No generation has a freehold on the earth. All we have is a life tenancy – with a full repairing lease' and that her Government 'intends to meet the terms of that lease in full' (Thatcher, 1988, cited in McCormick, 1991:60).[415] Thatcher was moving from a position of hostility or indifference toward the environment to becoming a champion of environmentalism (McCormack, 1991:62), contributing to the global movement and the United Nations Conference on Environment and Development (UNCED), the 'Earth Summit', in Rio de Janeiro in June 1992 and Agenda 21.[416]

Australia must come to terms with the fact that Aboriginal peoples' legal regimes have successfully sustained their lives and livelihood for many centuries. The Aboriginal peoples 'have something to teach us about the underlying philosophical bases for developing and maintaining a symbiotic relationship with the earth' (Tobin, 2014:xxi). These facts beg the obvious proposition for 'complementary legal regimes' between Aboriginal law and Australian law whereby Aboriginal law is 'given equal standing with Australian common law' (Black, 2011:170). Chapter 6 explores this possibility, specifically in relation to land ownership, use and tenure. These issues are explored further in Chapter 8.

5.6 Implications

This Chapter began with a discussion of the common understandings of property (in land), noting that property is a legal, economic, social and political phenomenon, performing a dual function in the use and distribution of resources and hence influencing a person's/peoples' wealth and wellbeing. How these play out over space and time varies according to the cultural values and

[415] This statement by The Rt. Hon. Margaret Thatcher MP FRS FRIC, former Prime Minister of the United Kingdom from 1979 to 1990, was made in her keynote speech to the Conservative Party Conference in Brighton (UK) on 14 October 1988 (McCormick, 1991:60). It was this commitment by Mrs Thatcher that, in no small part, subsequently led the United Nations to holding the Earth Summit in 1992 and developing an international commitment to sustainable development. The first part of Mrs Thatcher's statement is included as the Epigraph of the Executive Summary of the Australian Industry Commission's Inquiry into Ecologically Sustainable Land Management in 1998. (Industry Commission, 1998:1).

[416] In Rio, Governments adopted three major agreements aimed at changing the traditional approach to development:

- Agenda 21 — a comprehensive programme of action for global action in all areas of sustainable development;
- The Rio Declaration on Environment and Development — a series of principles defining the rights and responsibilities of States;
- The Statement of Forest Principles — a set of principles to underlie the sustainable management of forests worldwide.

And two legally binding Conventions aimed at preventing global climate change and the eradication of the diversity of biological species were opened for signature at the Summit, giving high profile to these efforts:

- The United Nations Framework Convention on Climate Change; and
- The Convention on Biological Diversity. http://www.un.org/geninfo/bp/enviro.html (The CBD Secretariat, 1992).

ideologies of differing societies and their body politic. Different understandings of property and ownership have therefore wreaked havoc on Aboriginal land ownership and use in Australia since the arrival of the British in 1788.

Indigenous and Western theories of property and ownership were explored and contrasted. Indigenous approaches to property embrace a relationship based on an indeterminable and inalienable spiritual connection to land and exclusive possession through their bloodline. Indigenous peoples also have a much deeper relationship with land that sustains connections between all living and non-living things, including the necessity for sustainable use of the land's resources for present and future generations into perpetuity. In contrast, Western approaches to property embrace a relationship based on a dispensable material connection to land. Western society also believes that a person can be a person without any particular connection to any particular area of land by allocating private rights to land and setting arbitrary rules governing the rights and responsibilities attached to that allocation. I conclude therefore that Indigenous approaches have a much deeper commitment to property that include respect for its natural limits and how land is passed to future generations.

The current configurations between the two systems of land ownership, use and tenure in Australia as discussed in this and the preceding Chapters therefore give rise to the hypothesis and critical questions at the heart of this thesis as articulated in Part 1.4.2 of Chapter1, and which are addressed in the following Chapter.

CHAPTER 6
APPLYING THE HYPOTHESIS: Answers to the critical question(s)

> *'Unless it is accepted that Australia has two founding cultures, not one; unless Aboriginal and Torres Strait Islander culture and identity are valued in everything government says and does; and unless they are welcomed into the very centre of the way we do things in this country, nothing will change. Aboriginal [peoples] and Torres Strait Islanders will continue to be perceived, and know they are perceived, as an alien and resented minority, a problem to be managed with a seemingly endless stream of tax-payer funded programs, but never solved.'*
>
> Raelene Webb QC (2016:125)[417]

6.1 Introduction

When Lt James Cook carved the date of his landing on the east coast of Australia in 1770 and left his name and the name of his ship, the statement of legal claim for the British Empire was a 'violation of laws far more ancient than those governing the colonial powers of Europe' (Kwaymullina and Kwaymullina, 2010:195). The 'clash of cultures' that initially occurred in 1770 is 'yet to be resolved' (I. Watson, 2015:160). The practical problem at the heart of this confrontation is 'the relation between the establishment of western societies and the pre-existence and continuing resistance of Indigenous societies on the same territory' (Tully, 2000:37).

Tully (1994:155-56) has long argued that all of the classical theorists[418] constructed and used three premises to justify European settlement and the dispossession of the Aboriginal peoples from their traditional lands. Namely, that before establishing a society and a legal system of property, people were in a state of nature; that individuals had a set of shared and authoritative traditions and institutions derived from European history; and that these factors bound a community together. Tully (1994:156-57) also argues that a theory of property which begins from any of these three premises cannot be justly applied to countries such as Canada and the United States of America because 'the premises misrecognize and occlude the initial conditions of property in North America.' The same can be said of Australia, because as argued in Chapter 2, the colonisation and settlement of Australia was based on the convenient and expanded legal

[417] President, National Native Title Tribunal.
[418] From Grotius to John Locke to Adam Smith and Immanuel Kant (Tully, 1994:156).

fiction of *terra nullius* (Borch, 2001:237). The basis of this premise in Australia also misrecognised and occluded the Aboriginal peoples' prior sovereignty and ownership of Australia under their systems of law and custom.

Australia's Aboriginal peoples have fought long and hard to protect and preserve their unique cultural identities and their intrinsic connections to country because they do not believe they can be extinguished by the acts of others (Rigsby, 1999:3). The battlefield of Indigenous land rights in Australia is littered with many examples, too many for me to repeat here in any detail and well documented by others.[419] Each of these events (and many others) have become synonymous with Aboriginal peoples' struggles to defend their inherent rights to their ancestral Country.

Australia is at a pivotal point in its relations with its Indigenous peoples. 2017 marked several anniversaries, including the 50th anniversary of the 1967 Constitutional referendum that gave the Commonwealth (in addition to the States) the power to make laws regarding Aboriginal peoples and that they be counted in the census (Expert Panel, 2012:31); the 26th anniversary of the Royal Commission into Aboriginal Deaths in Custody (RCADC, 1991a); the 25th anniversary of the High Court's decision in *Mabo (No. 2)*; and the 20th anniversary of the *Bringing Them Home* report on the Stolen Generations (HREOC, 1997).

As the Waitangi Tribunal in New Zealand has observed, the time for ongoing conflict between the Crown and Maori is well and truly over (Waitangi Tribunal, 2011:xviii). The same is true of Australia, as Raelene Webb's (2016:125) statement cited at the beginning of this Chapter, demonstrates. That statement was originally made by the Waitangi Tribunal in its Report into the WAI 262 Claim concerning the ownership of, and rights to, Maori knowledge in respect of Indigenous flora and fauna (Waitangi Tribunal, 2011:xvii). Ms Webb adapted the statement to the Australian context.

[419] For example, see Chesterman and Galligan (1997); Attwood and Markus (1999); Attwood (2005); Foley and Anderson (2006); Foley (2007). Suffice to recall some of the more significant events over the last fifty years: the Gove Land Rights Case (*Milirrpum v Nabalco Pty Ltd)* which was the first instance of Aboriginal people using the laws of the state to achieve recognition of their pre-existing rights and title to land (Curthoys *et al*, 2008:3), the establishment of the Aboriginal Tent Embassy on the lawns in front of (old) Parliament House in Canberra (Dow, 2000; Brisbane City Enterprises and The Mirri Centre, 2003; Foley *et al*, 2014), the Woodward Inquiry into *Aboriginal Land Rights* (Woodward 1973, 1974) and the subsequent passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) through the Australian Parliament, and the Meriam people's successful native title claim before the High Court of Australia in *Mabo (No. 2)* and the subsequent negotiations between Aboriginal leaders and the Australian Government and other stakeholders over the content of the NTA, creating the 'first collective rights to land in the Australian legal system' (M. Davis, 2006:37).

As history has unfolded in Australia since 1788, it is arguable that one culture is living on the land of the other culture and is consequently 'living within' the other. The resultant reality is that Western law and culture is exerting its dominance over Indigenous law and culture, not, as noted earlier, because of the inherent characteristics of the law, but rather because of 'the weight behind the hammer' (Muir, 1998:3) of the governmental institutions of Australia.[420]

Tully (1994:157) believes that Western property theories are not necessarily invalid because they 'misrecognised and occluded … in a biased manner' the conditions on which the West asserted its property relations on Indigenous peoples. He offers a 'third view' between those who argue that the West's property systems are unjust and should be overthrown and those who argue that no remedy is required by virtue of the legal positivist principle of effective occupation. Tully (1994:157) agrees with the first view that 'many grave injustices' have been and continue to be committed by the West in the taking of land from Aboriginal peoples and that 'the principle of effective occupation and use applies in the first instance to the Aboriginal peoples, rather than to the land claims of the Canadian and U.S. governments'. However, he also asserts that it does not necessarily follow 'that justice demands the overthrow of the present system of property' (Tully, 1994:157).

A theory of property 'will be just only if it begins from the Aboriginal and common law conceptual framework as its premise' (Tully, 1994:179). Tully argues that the 'Aboriginal and common law system[421] is a normative framework that is just by both Aboriginal and non-Aboriginal standards' (Tully, 1994:157) in the North American context because both sides support this framework through the treaties that were negotiated to redress the conflicting claims to property (Tully, 1994:158). But Tully takes issue with property theorists who 'either ignore the foundations of property … by uncritically assuming that European-American institutions and traditions are exclusively authoritative and applying one or more of the three premises' mentioned above, or 'mistake Aboriginal property for a problem of recognizing a cultural or minority difference within the sovereignty of a liberal or communitarian framework' (Tully, 1994:179-180).

[420] Namely, the Australian Constitution, The Parliament, the Executive, the High Court of Australia at the federal level and similarly at the State and Territory levels.

[421] Tully (Footnote 5 in 1994:154) explains that 'The "Aboriginal and common-law system" as referring to both the Aboriginal and common-law modes of argument, authoritative traditions, and concepts, *and* the institutions of property and practices of cross-cultural negotiation these modes of argument are associated with'.

In either case, the sovereignty of non-Aboriginal institutions and traditions are taken for granted and 'the Aboriginal peoples are subjected to it without their consent, thereby unwittingly perpetuating a form of conceptual imperialism in legal and political philosophy' (Tully, 1994:180). He concludes that Western property theories should only be applied '*within* the Aboriginal and common law framework' (Tully, 1994:180).[422] Cultural diversity needs to be negotiated through agreements 'on their ways of association over time in accord with the conventions of mutual recognition, consent and continuity' (Tully, 1995:184), a theme I return to in Chapters 8 and 9.

While it may be ambitious to expect Western culture to be greatly influenced by Aboriginal culture, the truth is that Western culture has been greedy and all Australians are using the material resources of Aboriginal culture without the Aboriginal peoples' 'free, prior and informed consent.'[423] Hence, there is a difficult discussion to be had about Western society's flawed conceptions about property, including Australia's failure to understand property as a social construct that must adapt to societal needs. Rights to property are not a natural right, as Blackstone states (1766/1992:6). In Australia, a discussion is required about the lack of recognition and respect for the priority of Aboriginal peoples' connection to their ancestral lands, the emphasis on individual materialism and the lack of environmental stewardship by present generations at the risk of jeopardising the wellbeing of future generations and the future of the planet (Alfred, 2016). As the case studies discussed in Chapter 7 of this thesis will highlight, respecting Aboriginal peoples' innate connections to their ancestral lands becomes pivotal to our collective futures.

The EIWG made a similar statement in their report to COAG in 2015. The EIWG concluded that the property rights and traditional ownership of land by Australia's first peoples that have existed for thousands of years need to be recognised and respected, and that the next phase of land rights and native title reforms must deliver positive economic outcomes and social advancement for Indigenous Australians (SOWG, 2015:6-7).

The preceding discussion in Chapters 1 to 5 and above therefore give rise to the hypothesis and critical question(s) for this research. This Chapter applies the hypothesis and provides some

[422] Emphasis in original.
[423] As per Article 19 of the UN *Declaration on the Rights of Indigenous Peoples* (UN, 2007). Discussed in more detail in Chapters 8 and 9.

answers and identifies some of the necessary conditions for a model and just form of coexistence.

6.2 Hypothesis and Critical Question(s)

As stated in Chapter 1, ever since the HCA's decision in *Mabo (No. 2)* and the enactment of the NTA there are effectively two legally recognised and distinct systems of land ownership, use and tenure operating in Australia, albeit based on distinct systems of law and custom. This situation gives rise to the following hypothesis:

- If native title is an 'intercultural contact zone' between two distinct cultures where land ownership, use and tenure must find a way of respecting the cultural hierarchy, then it will evidence not only contestation, but also potential alignments that are conducive to a respectful and just co-existence and opportunities for Aboriginal landholders to engage in the economy on their terms and at their choosing.
- And, if two distinct land ownership, use and tenure systems can co-exist alongside each other respectfully and justly, I am asserting that native title holders do not always have to agree (or be required by others) to the surrender and permanent extinguishment of their native title rights and interests to participate in the economy.

The critical question is:

- How can the two systems of land ownership, use and tenure co-exist alongside each other and what legal and practical conditions are necessary for this to happen, with parity based on mutual understanding, respect, reciprocity and justice?

This question raises a set of inter-related research questions within the specific operating environment of native title:

1) What are the distinguishing contemporary features of both the Aboriginal and Australian land tenure systems? In particular, in what ways are they similar or dissimilar?
2) In the context of there being a native title 'intercultural contact zone' between the two systems of land ownership, use and tenure, are there identifiable characteristics in each of the two systems and in their interactions with each other that enables constructive alignment, commensurability and a respectful and just co-existence?

3) Or are there characteristics that will generate unpredictable, counterproductive contestation or incommensurability regarding a respectful and just co-existence?

4) Therefore, what conditions or attributes are necessary for a mutually respectful and just form of coexistence, and is there any evidence to support this?

As stated in Part 1.4 of Chapter 1, the focus in the research questions is on the tensions between the Aboriginal customary system(s) vs the Crown's system(s) of land ownership, use and tenure and what I am terming the 'intercultural contact zone' between them. While the case study analysis in Chapter 7 will explore the frictions between the native title system established under the NTA and the Crown's Aboriginal Land Trust arrangements in WA, the analysis that follows in this Chapter explores the commensurabilities and incommensurabilities between the two culturally different approaches to land ownership, use and tenure.

In the context of this research therefore, incommensurability' means a limitation on being able to render one person's comprehension in one system of meaning upon the concepts, terms and meanings of another system of meaning, especially in the absence of a common scale or reference point between them 'without loss of meaning or force' (Mantziaris and Martin, 2000:30). Whereas 'commensurability' means being able to apply the same measure or being measurable by the same standard (Mantziaris and Martin, 2000:30).

The following discussion highlights the distinguishing features between two land ownership, use and tenure systems, drawing out the incommensurabilities and commensurabilities before identifying a common understanding of property which may provide a basis for co-existence on more mutually respectful and just terms. My motive here is to identify the common spaces over property and ownership, use and tenure in land with the express aim of finding how they can coexist respectfully, justly and peacefully alongside each other.

6.2.1 Distinguishing features: dissimilarities, similarities and a common understanding?

Each and every tribe, group or clan of Indigenous peoples' will have their own values or tenets as to how they approach their relationships with their ancestral lands. While the following observations are not intended to over-generalise the multiplicity of such circumstances, the distinguishing features of Indigenous approaches to property in land are that Country is at the heart of every Aboriginal society and person and land is intrinsic to their very identity and culture

as Indigenous peoples and to the wellbeing of all living and non-living things for past, present and future generations. It is a relationship based on an indeterminable and inalienable spiritual and inherent connection to land and exclusive possession through their bloodline. As Irene Watson (2015:21) observes, the overriding principle is 'a relationship of custodianship between the land and the Nungas'.[424]

The distinguishing feature of Western approaches to property in land is that it is a commodity, 'a non-living entity' (I. Watson, 2015:34) for personal (and corporate) wealth creation and present consumption ahead of, and without apparent concern for, humanity's necessities for the ongoing wellbeing of all living things for present and future generations. It is a relationship based on a dispensable material connection to land.

Western society believes that a person can be a person without any particular connection to any particular area of land by allocating private rights to land and setting arbitrary rules governing the rights and responsibilities attached to that allocation. Whereas Indigenous peoples have a much deeper relationship with land that sustains connections between all living and non-living things, including the necessity for sustainable use of the land's resources for present and future generations into perpetuity.

Roulac (2008:219) views these divergent perspectives as spirituality versus commerce and characterises the dichotomy as being between 'property culturists' and 'property modernists.' A 'property culturist' is defined by Roulac (2008:219) as recognising and honouring 'the idea that each particular property has a particular connection to a particular people'. And a 'property modernist' as 'subordinating cultural considerations to one's own objectives, desires and aspirations' (2008:221-2). In the 'property modernist' context 'people are interchangeable, their involvements are denominated in financial currencies; ownership roles, tenancies, and building associations are transferred exchanged, replaced, without consequence or even comment' (Roulac, 2008:220).

Central to Roulac's (2008:220) dichotomy between these perspectives is that for property culturists', people cannot be separated from their property, referring especially to Indigenous peoples because their connections stretch over many thousands of years and because land is such an innate part of their existence. Perhaps more accurately, Aboriginal peoples' connection

[424] 'Nungas' is a term Professor Irene Watson uses to refer to First Nations Peoples in Australia.

to their ancestral lands could be described as 'property naturalists' because their relation to land is integral to their existence. It does not come primarily from their culture, but from the way things are. Whereas for property modernists 'people are hardly relevant' because everything concerning property is expressed in terms of its utility and financial value (Roulac, 2008:219). And 'property modernists' are 'coolly unsentimental about who a property's owners, occupants, and service providers are' (Roulac, 2008:219-20).

A key difference is that under Western liberal philosophies, ownership gives the individual (or corporation) control over resources and their ability to trade, 'terminable by his/her own decision' (Reeve, 1986:163). Whereas under Indigenous philosophies, Aboriginal people have an 'indissoluble tie' to their land and there is no 'conception of land as a tradeable item' (Sharp, 1996:213) because their connections and responsibilities extend through time and rest with their bloodline in perpetuity.

Native title determinations under the NTA, by their very nature, are a form of 'spatial bounding – determining a highly uneven spatiality of Indigenous recognition' (Porter and Barry, 2016:154). As Gummow J noted in *Wik,*[425] the content of native title varies from one case to another and must be specified by reference to the law and custom of the clamant group(s). Bern and Dodds (2000:172)[426] note that one of the virtues of *Mabo (No. 2)* was that it 'did *not* specify a unique set of native title rights and interests' for all native title holders in Australia. However, almost all native title determinations result in a 'Swiss cheese' arrangement. Most determinations will include three types of classifications:

- Areas where native title has been extinguished by 'past acts'[427] or 'intermediate period acts'.[428]
- Areas of non-exclusive possession where native title coexists with other property interests which prevail over the remaining native title rights and interests that are being recognised.

[425] *Wik Peoples v State of Queensland* (1996) 187 CLR 1, at 169; see also Toohey J at 126-27.
[426] Emphasis in original.
[427] See s228 NTA.
[428] See s232A NTA. Noting that the Federal Court may also decide that native title no longer continues to exist in an area, due to such factors as the native title holders ceasing to exist; the Aboriginal and Torres Strait Islander people ceasing to observe their customary laws and traditions on which their title is based; loss of continuing connection with an area; or the Aboriginal and Torres Strait Islander people surrendering their native title rights and interests to the Crown, possibly in exchange for other benefits (NNTT, 2009).

- And areas where native title exists as exclusive possession, but which is always subject to extinguishment through compulsory acquisition by governments if the Crown decides the land is required for other purposes.

Reilly (2004:236) argues that the proclivity of native title determinations only reinforces the translation of Aboriginal places into forms that can be measured and assessed through cadastral maps reflecting the 'rhetorical imperative of certainty and final resolution', forgetting that any conception of property embraces more than just its spatial elements.[429] And where native title is extinguished, 'it disappears from the Land Tenure map, though the relationships underlying the native title claim may still exist' (Reilly, 2004:236).

As Wensing and Porter (2015) have shown, extinguishment and non-recognition of the continuing customary laws of native title claimants are spatially intense in our capital cities and major regional centres (built-up areas) where the demands of certainty and security by Western private property rights prevail to the exclusion of the native title holders. These spatial outcomes are underpinned by 'A persistent rendering of Western cultures as modern, fluid progressive and forward-looking, and of Indigenous cultures as traditional located in the past, static and unchanging' (Porter and Barry, 2016:154). Putting the comparison more succinctly, while western conceptions of property are viewed as being 'highly rationalistic', Aboriginal conceptions 'eschew categorisation' and are a 'highly nuanced and different way of understanding the worldliness' of human existence (Bryan, 2000:3). In some respects, these distinguishing features could not be more opposite or incommensurable.

The tensions between Indigenous and Western conceptions of property and ownership and the mechanisms for allocating rights and responsibilities are forcing us to take a cold hard look at what property is, given that Indigenous customary approaches to land have been around for many thousands of years longer than Western approaches to land, and are 'going to be around for a long time to come' (Tobin, 2014:208).

The rise of capitalism and the greatest levels of economic development have been in those countries where absolute private property is at the heart of their commerce (i.e. USA, UK and

[429] Harley (1989:5-7) makes the same observation, noting that the scientific rules of mapping are influenced by 'the rules governing the cultural production of maps', and that it is necessary 'to read between the lines' of the technical procedures of their production as much as the content of the map. Harley (1989:5-6) asserts that 'Cartographic discourse operates a double silence' through adherence to the 'rule of ethnocentricity' and the 'rules of social order' in the construction of maps, and that 'like art, maps become a mechanism "for defining social relationships, sustaining social rules and strengthening social values"' (Harley, 1989:7, citing Geertz, 1983:99).

Australia). Which is where we now find the greatest internal polarisation of wealth among a few at the expense of the wider population (Small, 2003b). Perhaps the notion of absolute private property in Western societies 'has reached its zenith' (Small, 2003b:3). The Global Financial Crisis in the opening decade of the 21st century and the impacts of global climate change on the World are painful evidence of the dissonance between humans and the earth's limited resources, including land. Recent developments with 'sustainable development' (Brundtland, 1987)[430] and the 'economics of climate change' (Stern, 2007, 2010) may be forcing us to re-think our approaches to land use and resource limitations. Tobin (2014:195) argues that if we are to stop and redress the damage already done, then addressing them with the 'same stale discredited positivist legal tradition that has brought the World to the crisis it now finds itself in is not going to work'. Alfred (2016) believes 'tinkering with … existing institutions and relationships are useless' and that we need to 'shift away from a conquest mentality to a frame of mind that places human beings in real and lasting relationships with each other and the natural environment.'

The Torrens land title systems, cadastral mapping (J. Wallace *et al*, 2010:82-84) and contemporary land use planning are manifestations of the state's 'vastly simplified and uniform property regime that is legible and hence manipulable from the centre' and an 'impenetrable thicket' that is 'decipherable only to those who have sufficient training and a grasp of the state statutes' (J.C. Scott, 1998:35). As J.C. Scott (1998:35-6) asserts 'Its relative simplicity is lost on those who cannot break the code, just as the relative clarity of customary title is lost on those who live outside the village.' Mantziaris and Martin (2000:30) argue that systems of meaning constitute a person's metaphysical, epistemological and moral belief systems which are not necessarily absolute or static, they evolve over time because they are formed and sustained through communication and lived-experiences. They also argue there may be areas of both commensurability and incommensurability between different systems of meaning.

[430] Brundtland (1987) defined 'sustainable development' as: 'Development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. The Australian Government adopted the term 'ecologically sustainable development' or ESD, defined as: 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained and the total quality of life, now and in the future, can be increased' (Commonwealth of Australia, 1990). This approach focuses on improving the scientific management of particular places or species for their landscape or biodiversity value with a primary focus by conservationists on maintaining their 'wilderness' or 'wild' values (MacGregor, 2004:603; Pickerill, 2009:68). Consequently, there is a juxtaposition between the Aboriginal and other Australians' views of the environment, with Aboriginal understanding of the environmental and cultural domains as inseparable, and other Australians' understanding of the environment as something to be kept apart from humans' interference while also acknowledging humans' interconnectedness with it through concepts of 'sustainable development' (Pickerill, 2009:68).

While the gulf in understandings between Western and Indigenous approaches to property and land ownership 'can seem vast', they are 'not impassable' (Kwaymullina and Kwaymullina 2010:206). Rather than continuing to see the two systems as always being adversarially in competition and incommensurable with each other, we need to take a different approach based on a sense of parity between the two systems. Coexistence is not about Aboriginal approaches becoming incorporated into the Crown's dominant land tenure system without that system changing (Porter and Barry, 2016:26).[431] It is about devising a new order, a different configuration of making decisions about land use, allocation and distribution of resources and their mutual co-existence because 'We are all here to stay' (Porter and Barry, 2016:20).[432] Neither of us is going to simply 'go away' (Cornell, 2011:vi). Indeed, as Dodson (M. 1997:1) asserts 'Aboriginal customary law will not go away no matter how hard our colonisers try'. Dodson (M. 1997:2) also asserts that the only way forward is to have two systems of law to coexist, parallel and complementary to each other.

Almost 50 years ago Stanner (1969a:55) formed the view that we were misreading and under-valuing Aboriginal peoples' 'will to survive' and 'come to terms with us' when he observed that:

> *'There are many, perhaps too many, theories about* our *troubles with the Aborigines. We can spare a moment to consider* their *theory about* their *troubles with* us*. Two of their strongest ideals are to be "one company", to join with others for a purpose, and to "go level", to be "one company" on equal terms. Their theory is that we are unwilling really to be "one company" and to "go level" with them. It has an historical candour and simplicity that are hard to shake, and it makes an interesting comparison with many theories we have developed about them and their motives and capacities'* (Stanner, 1969a:57).[433]

Maybe we are misreading the concessions that Aboriginal peoples are already making and we should see these offerings as the 'foundation of the indigenous perspective of … a peaceful co-existence' (Alfred, 2016). These ideas are explored in more detail in Chapters 8 and 9.

It is arguable that the statutory land rights schemes and the current native title regime are very poor forms of accommodating Aboriginal customary land rights and interests into the Crown's property and land tenure systems because in both instances, the Crown continues to prevail

[431] See also Bhandar (2015) and Keenan (2017).
[432] This is the oft-cited statement made by Justice Lamer in *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010, a watershed decision on the recognition of Indigenous rights in British Columbia, Canada. Cited in Porter and Barry (2016:19).
[433] Emphasis in original.

over the Aboriginal customary rights and interests and almost always to their detriment. This does not always have to be the case.

The following discussion focusses on how native title in Australia can be seen as an 'inter-cultural contact zone' which could form the basis for a more constructive alignment and genuine co-existence, rather than ongoing contestation.

6.2.2 Native title as an 'intercultural contact zone'?

Here, I argue that it is time to move beyond 'recognition' and view the interactions between two culturally distinct systems of land ownership, use and tenure as an 'intercultural contact zone'. Not with the intention of creating a space where Aboriginal peoples' rights and interests merge with the mainstream system. But rather, as a space where the two sets of laws and customs are seen as having an equal level of autonomy (Morphy and Morphy, 2013:176) and are able to challenge the status quo and transform the power relations (Bond, 2011:163) over land that are producing the inequalities between the two systems.

I am proposing that a native title determination is an 'intercultural contact zone' and can be seen as an emergent and unpredictable space, yet conducive to both contestation and alignment. I also explore what conditions are necessary for a relatively equal level of autonomy for a just and respectful co-existence between the two land ownership, use and tenure systems. In this context, land becomes an intercultural phenomenon around which 'Indigenous people's values and practices are brought to bear' as well as where 'these values and practices are contested, adapted and transformed' (D. Martin, 2003:3-4).

As discussed in Part 4.7 of Chapter 4, D. Mantziaris and Martin (2000:2-12) applied Pearson's (1997) concept of the 'recognition space' where the two systems of land ownership, use and tenure interact with each other 'in accordance with the highly structured principles of Australian law' (D. Martin, 2003:3). Mantziaris and Martin's application of this heuristic device was specifically about the legal and anthropological aspects of the frameworks required for the management of native title following a positive native title determination by the courts.

This thesis applies the same heuristic device, but as an emergent and unpredictable 'intercultural contact zone' which is conducive to both contestation and alignment [434] and where the two sets of laws and customs have, as noted above, a relatively equal level of autonomy (Morphy and Morphy, 2013:176).

Following the HCA's decision in *Mabo (No. 2)*, the Australian Government enacted the NTA as a way of enshrining the HCA's dictum into Australian law.[435] These events raised expectations of better outcomes for Indigenous Australians regarding land rights and their social and economic circumstances. But twenty-five years after this historic judgment, the NTA as originally passed by the Australian Parliament in 1993 has been considerably weakened by various amendments and administrative fiats as well as the oppositional approaches to settlement by governments. Indeed, it is arguable that the settlement reached in *Mabo (No. 2)* was already a compromise for the failure of the colonisers to have recognised the prior sovereignty of the Aboriginal peoples of Australia. The resultant NTA continues the discriminatory treatment of Aboriginal peoples' rights to their lands, especially with respect to the lack of compensation for past acts[436] and intermediate period acts.[437] The 1998 amendments to the NTA resulted in a diminution in procedural rights for several classes of future acts (Strelein 2009a, 2009b; Brennan *et al*:2015); far from its original intention (Calma, 2009:7).

In its review of the NTA, the Australian Law Reform Commission (ALRC) noted that the NTA is very technical and complex (ALRC, 2015a:25) and that the native title system is resource intensive (ALRC, 2015a:16). Having regard to the review's terms of reference, the range of other stakeholders and the many other statutory frameworks within which the native title system operates, the ALRC recommended several reforms to the NTA focussing in particular on matters relating to connection requirements, authorisation and joinder (ALRC 2015a:18-25). At the time of writing, none of the ALRC's recommendations for reform of the native title system have been acted upon by the Australian Government.[438]

[434] For the purposes of this analysis the issues concerning connection and proof and the nature and content of native title rights and interests have been set aside. These issues have been well examined in a recent inquiry by the Australian Law Reform Commission (ALRC, 2015a).

[435] As discussed in Chapters 2 and 3.

[436] Prior to the enactment of the *Racial Discrimination Act 1976* (Cth) on 31 October 1975.

[437] Between 1 January 1994 and 23 December 1996.

[438] Not in the way envisaged by the ALRC. Although the FCAFC's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 on 2 February 2017 prompted the Australian Government to table the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Cth) in the Parliament on 12 February 2017, the stated purpose of which was to amend the NTA to resolve the uncertainty regarding the authorisation and registration of Indigenous Land Use Agreements (see Frith, 2017). Many of the submissions to the Senate Legal and Constitutional Affairs Legislation Committee (2017) inquiry into the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* argued that the Government's Bill did not take into account the outcome of the ALRC's review of the NTA.

The purpose here is not to discuss the merits or otherwise of the ALRC's inquiry and recommendations. Nor to draw attention to the difficulties associated with how the native title system is operating and the many points of contention and contestation between native title holders or claimants and third parties, let alone the 'too many unknown and interacting factors' and 'significant risks' (Duff, 2013:66) associated with reforming the native title system.[439] The point is that the ALRC's review of the NTA 'has not disturbed the basic proposition that native title rights and interests that are recognised must be possessed under the laws and customs with origins in the pre-sovereign period'[440] (ALRC, 2015a:16).

It is reasonable to conclude therefore, as Tobin (2014:119) does, that a native title determination[441] is a declaration of the authenticity and validity of the Indigenous customary law of the native title holders and a manifestation of recognition and respect for their customary law. And their sovereignty. There are effectively two systems of law and custom operating simultaneously in Australia, albeit mutual recognition occurs under the constraints imposed by the operations of the NTA and other statutes, whilst also noting that the operation of Aboriginal law is not constrained by the NTA in the Aboriginal realm.

The many points of contestation are well documented in the annual *Native Title* and/or *Social Justice Reports* prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner.[442] The matters of particular relevance to this thesis are the lack of recognition of the prior sovereignty of Aboriginal nations, the Crown's power to extinguish native title (including by compulsory acquisition), and the inalienability of native title rights (as discussed in Chapter 3). Walker (2015:21) asserts that the native title system is 'based upon an imperfect, sometimes grotesquely imperfect, inquiry into the past' and the 'granularity' of the determinations 'vary immensely'. The heart of the matter is not only about the distribution of property flowing from native title determinations under the NTA, nor is it about the quantum of

The Bill was passed by both Houses of Parliament on 14 June 2017 and came into effect on 22 June 2017, thereby annulling the effects of the FCAFC decision confirming that the NTA required all registered native title claimants to sign an ILUA (Brigg *et al*, 2017). See the Australian Government's Options Paper for further reforms to the NTA (Attorney-General, 2017) arising from the recommendations of various reviews of the Act, including by the ALRC (2015) SOWG of COAG (SOWG, 2015) and the review of the CATSI Act (ORIC, 2017). For an alternative view of the McGlade case, see McGlade (2017). For another view of the Noongar settlement as Australia's first treaty, see Hobbs and Williams (2018).

[439] These include for example fragile government support, the precarious nature of the balance of power in the Senate, leadership tensions and the perceived need to appeal to a conservative constituency suspicious of the Indigenous rights agenda, economic imperatives favouring the resources industries, business and industry desire for 'certainty', delicate federal-state relations, dynamics between Ministers and their respective departments and agencies, and prevailing community attitudes based on ignorance and racial prejudice (Duff, 2013:66).

[440] That is, prior to British invasion and occupation.

[441] Whether of exclusive or non-exclusive possession.

[442] The annual *Native Title Report* is prepared under s.209 of the NTA and the annual Social Justice Report is prepared under s.46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth) and tabled in the Australian Parliament.

land grants/transfers under the statutory land rights schemes. Rather, it is about the legitimacy of the Aboriginal peoples' pre-existing ownership and sovereignty under their system of law and custom and 'on the need to negotiate across the two systems to reach a just resolution' (Dodds, 1998:202). Perhaps more significantly, as Keenan (2013:493) observes, the outcomes of native title determinations[443] also 'instil a different space of belonging', reaching 'beyond the subject, determining not only what belongs to who, but also who belongs where, and how spaces of belonging will be shaped in the future' for native title holders and non-native title holders.

The role of Indigenous customary law in the recognition, adjudication and protection of Indigenous peoples' land rights is recognised in Articles 26(3) and 27 of the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP), their right to self-determination is recognised in Article 3, and their right to free, prior and informed consent is recognised in Articles 10, 11, 19, 28 and 29 (UN, 2007). The Australian Human Rights Commission (AHRC) defines 'self-determination' as meaning Aboriginal peoples should have a choice in determining how their lives are governed, to participate in decisions affecting them, and have control over their lives and development (AHRC, 2010:24). Exercising that right means that Aboriginal peoples have the freedom to live well and to live according to their values and beliefs (Daes, 2000:58).

The recognition of Indigenous customary law in the international context through the UN DRIP marks an important step towards the reincorporation of Indigenous law and custom within the body politic governing Aboriginal land rights 'from which it has been illegitimately excluded through the discredited policies of colonial and post-colonial governance' (Tobin, 2014:104-05). The role of the UNDRIP is discussed in more detail in Chapters 8 and 9.

For the two systems of law and custom to interact, there will be a 'contact zone'. Pratt (1991:34) defines the 'contact zone' as 'the social spaces where cultures meet, clash, and grapple with each other, often in contexts of highly asymmetrical relations of power, such as colonialism, slavery, or their aftermaths as they are lived out in many parts of the world today'. The 'contact zone' is a space of 'possibilities and perils' (Pratt, 1992:7) and should be a place for 'productive tension based on difference' and collaboration (Somerville and Perkins, 2003:265), rather than a place of domination and interference by one or other party.

[443] And for that matter, also land grants/transfers/reserves under the statutory Aboriginal land rights schemes.

In the context of this thesis, the contact zone is 'intercultural' because the interactions occur between on the one hand, Indigenous culture which has existed in Australia for over 60,000 years (Lawlor, 1991:14)[444] and on the other hand, Western culture in the form of British colonialism since 1788 (in NSW)[445] and the federation of six States into the Commonwealth of Australia in 1901. And the two systems could not be more asymmetrical.

For this analysis the focus of the 'intercultural contact zone' is not only about Aboriginal peoples' law and custom relating to land ownership, but also about their right to make decisions about the use of their land and its resources and to be integrally involved in decision making by others about their lands. Aboriginal peoples' claims for recognition and their right to make decisions about their ancestral lands 'are more than a polite request for the accommodation of their interests' (Porter and Barry, 2016:27). I am not suggesting that Aboriginal approaches to land ownership, use and tenure will be the panacea, but it must be part of the solution (Tobin, 2014:208) and it should and will unsettle the very basis of Western sovereignty in Settler states (Porter and Barry, 2016:27). These complex issues are explored in the case study material in Chapter 7 and discussed in more detail in Chapters 8 and 9.

Porter and Barry (2016:34) argue that understanding and conceptualizing how contact zones 'unfold and emerge' demands seeing them not merely as interactions between distinct cultures, but also as 'performative ensembles' because such contact zones are 'neither pre-determined nor static spheres. Instead, the margins, borders and centres' of interaction are in 'perpetual construction and contest … always open to reconstitution albeit under highly mediated conditions' (Porter and Barry, 2016:34). By conceiving the contact zone as 'performative' means there are no assumptions about predetermining 'the agents of change, the provenance of transformation or the contours of marginalisation' (Porter and Barry, 2016:35) and not perceiving them as bounded systems (Morphy and Morphy, 2013:176). Such an approach holds open the possibility of transformational change.

What this means is that native title becomes the focal point of contact, not on the terms as currently articulated under the NTA, but rather on terms of relatively equal autonomy

[444] Lawlor (1991:14) contends it could be up to 150,000 years.

[445] Self-government in NSW from 1824; Tasmania colonised in 1803, self-government in 1856; Western Australia colonised in 1829, self-government in 1891; South Australia colonised in 1836, self-government in 1856; Victoria colonised in 1851, self-government in 1856; Queensland colonised in 1859, self-government in 1860; Torres Strait Islands colonised in 1879; Commonwealth of Australia established in 1901, Northern Territory separated from South Australia in 1911, self-government in 1978; Australian Capital Territory acquired by the Commonwealth from NSW in 1910, self-government in 1989. Sources: Various public records.

concerning land ownership, use and tenure. (Morphy and Morphy, 2013:177-78). Morphy and Morphy (2013:176) have developed the principle of relative autonomy in 'apposition to the idea of the intercultural' because they see, in their case the Yolngu people, acknowledging 'their encapsulation within the [settler] state but … developing relationships with non-Yolngu Australians in the context of the mutual recognition of and respect for difference'. They argue that governments fail to recognise that 'culture is not a veneer that can be selectively stripped away but, rather, is integral to people's engagement with the world' including within Aboriginal society and in the interactions between Aboriginal peoples and the 'encroaching settler society' (Morphy and Morphy, 2013:176).

For interactions between two distinct systems of law and custom relating to land ownership, use and tenure are to operate on the basis of mutual respect and understanding for difference and reciprocity and not selectively strip away the hard-won gains,[446] there must be a safe space for dialogue and mediation between the parties, in good faith and on the basis of 'honesty, peace and friendship' (Alfred, 2016). I return to these themes in Chapters 8 and 9.

While the NTA includes provisions for determinations by consent and the development of Indigenous Land Use Agreements (ILUAs),[447] the basis for their negotiation and scope are predicated on the current native title system. ILUAs negotiated under the NTA do not necessarily reflect the traditional priorities and aspirations of the native title holders/registered claimants, given their relative bargaining position with resource developers and governments (Prout Quicke, Dockery and Hoath, 2017:76). Furthermore, native title holders do not have a power of veto over future acts on their native title lands. Registered native title holders or claimants only have the 'right to negotiate'[448] or lesser procedural rights[449] with the threat of compulsory acquisition[450] if an agreement cannot be reached about the doing of the future act, should that be deemed necessary by the state. Hence, the power imbalance between the parties (Krien, 2017:28; Lyons *et al*, 2017:10). O'Faircheallaigh (2008:45-46) notes that while negotiated agreements have the potential to protect Indigenous cultural heritage interests, in the native title context the native title holders and registered claimants are at a distinct

[446] From native title determinations and the statutory Aboriginal land rights schemes.
[447] An Indigenous Land Use Agreement is an agreement dealing with a future act—that is, an act that affects native title—made under NTA Part 2 Division 3.
[448] S.26 NTA. The right to negotiate is a procedural right given to registered native title claimants and registered native title bodies corporate in relation to some kinds of future acts. The right to negotiate involves a right to be notified, a right to object and a right to negotiate in relation to the doing of the future act. The right to negotiate applies to some compulsory acquisitions for the benefit of third parties and some mining activity if the right to be consulted does not apply. The right to negotiate is not a power of veto.
[449] Depending on the nature of the future act, as discussed in Chapter 3.
[450] S.24MD(6B) NTA.

disadvantage. The NTA places native title holders and registered claimants in a weak negotiating position because if they are unable to reach agreement with a resource developer, the matter is referred to the National Native Title Tribunal (the Tribunal) which has the power to refuse the grant of a mining lease, grant it with conditions, or grant it without conditions (Bartlett, 2015:944). In the first twelve years since the introduction of the NTA in 1993, the Tribunal has in every such case referred to it determined that mining leases can be granted, and has generally refused to attach conditions relating to cultural heritage protection (or to other matters of interest or concern to the indigenous parties to the grant of leases) (O'Faircheallaigh, 2008:46; see also Corbett and O'Faircheallaigh, 2006)[451] It is only where native title holders are well supported and resourced to pursue their concerns through other means such as environmental impact assessments or the right of objection under other legislation that they tend to be more successful in achieving better outcomes (O'Faircheallaigh, 2008:47; 2010:83-84).

The detailed contents of ILUAs remain confidential between the parties with only limited information entered on the Register of ILUAs by the Native Title Registrar. It is difficult to assess therefore, the extent to which the rights and interests of native title holders remain intact and protected and thereby benefit the native title holders or whether the agreements merely validate a range of future acts affecting native title rights and interests in some way (Ritter, 2009:38-41; Prout Quicke, Dockery and Hoath, 2017:76-81). In other words, the 'granularity' of the public record in relation to the detailed content of ILUAs is not all that clear, especially with respect to what native title holders may or may not be able to do with each other and with other people over land to which they have succeeded in getting their native title determined (B. Walker, 2015:21). As I. Watson (2015:161) rightly observes, the state always 'brings its constructions' to the negotiating table, so 'What would be the purpose, what would be the result? It only produces a muldarbi[452] deal'. No disrespect towards the ILUAs negotiated under the

[451] It was not possible in the time available to obtain more up to date figures as the Tribunal does not keep public records aggregating future act determinations. However, the National Native Title Tribunal (NNTT) was able to provide data which shows that it has recorded determinations involving 886 future acts between 1 January 1994 and 31 January 2019. Less than 25 per cent of those decisions are where the future act may be done subject to conditions and less than one per cent are where the future act may not be done. Two caveats apply to these figures. Firstly, these figures represent the outcomes of individual future acts rather than separate decisions; a single decision may cover several future acts. Secondly, in many cases, a determination that the act may be done, or may be done subject to conditions, will have been made on the basis that the parties have consented to, or at least have not opposed, the determination. Specifically:

(a) At least 565 matters in which the NNTT determined that the act may be done were made on such a basis.
(b) At least 105 matters in which the NNTT determination that the act may be done subject to conditions were made on such a basis. (Source, Personal communication NNTT 8 February 2019.)

[452] 'The word "muldarbi" translates loosely as "demon spirit", although "demon" is an idea more familiar to non-Aboriginal religions. The context here refers to Muldarbi, an ancestor spirit who failed to uphold the best interests of the collective in relation to the natural world' (I. Watson, 2015:1). I. Watson (2015:1) uses the term to 'describe the phenomenon of colonialism and the impact it has had upon Indigenous Peoples' lives, laws and territories, worldwide'.

current regime, but they are not necessarily predicated on mutual respect and parity between the two systems of land ownership, use and tenure, as they should be.

In response to a call for land justice from the Victorian Traditional Owner Land Justice Group (VTOLJG, 2005), the State Government of Victoria developed an alternative native title regime under the *Traditional Owner Settlement Act 2010* (Vic). The Act provides for a voluntary[453] out-of-court settlement of native title claims in Victoria (Steering Committee, 2008:10). The Act enables the Victorian Government to recognise traditional owners and certain rights in Crown land in return for traditional owners agreeing to withdraw their native title claim under the NTA and make no future native title claims (State Government of Victoria, 2018). A settlement package can comprise several elements, including a Recognition and Settlement Agreement, a Land Agreement, a Land Use Activity Agreement (LUAA), a Funding Agreement and a Natural Resource Agreement. The element of particular relevance to this research is the Land Use Activity Regime (LUAR), a simplified alternative to the future acts regime in the NTA which is given effect through a LUAA. The LUAA effectively enables activities to proceed on public land, accommodating third-party interests and respecting the rights of traditional owners attached to the public land and enables the non-extinguishment principle[454] to apply to all activities, unless otherwise agreed (State Government of Victoria, 2012:1).

The *Traditional Owner Settlement Act 2010* (Vic) focusses on outcomes rather than process and provides a reasonable alternative to the NTA in Victoria and has many laudable features.[455] However, the regime still has several limitations.[456] For example, the State Government decides whether to enter into a settlement with a particular group, the settlement only applies to Crown land in the claim area, traditional owner rights are rights that are taken to have no greater effect than is consistent with Victorian law, any native title applications lodged under the NTA must be withdrawn and no further native title claims can be made, and the scope of the settlement binds the traditional owners into a joint management arrangement with the State over Crown lands (State Government of Victoria, 2012:3; 2018).[457] Furthermore, the resulting arrangement is not

[453] The claimants may also elect to file a native title determination application pursuant in the FCA to the NTA in the FCA as an additional or alternative process (Keon-Cohen, 2017:21).
[454] Section 238 NTA.
[455] Including for example, transfer of land title, natural resource benefit sharing, commercial rights, cultural heritage management and recurrent funding and other support (Steering Committee, 2008:10).
[456] For a short critique of the alternative scheme in Victoria, see Keon-Cohen (2017:21-24).
[457] Including in relation to water, see O'Bryan (2016).

based on recognition of their prior sovereignty and right to self-determination as per the UN DRIP.[458]

With all that has happened over the past 230 years since 1788, there is now a point of 'contiguity' (I.M. Young, 2004:177) between the two systems which cannot be undone, but which necessitates a fresh approach. This time a more respectful relationship based on parity and the application of international human rights norms and standards as reflected in the UNDRIP (UN, 2007), rather than on conquest and domination. To reach a just solution, the response must focus on the legitimacy of Australia's sovereignty, recognition of Aboriginal peoples' pre-existing nations with their system of relations to land and its resources, and the need for dialogue and ongoing negotiations between the two systems (Dodds, 1998:202).

What follows is a discussion of the necessary attributes for a more constructive alignment and a just and mutually respectful coexistence with a high degree of parity between the two systems of land ownership, use and tenure.

6.2.3 Conditions for mutually respectful coexistence?

The concept of coexistence applied in this thesis rests firmly on the need for mutual and respectful coexistence between two very different cultures, especially over land and its resources. My approach is not predicated on legal terms alone, but also on moral, political, social and cultural terms. Coexistence in this context involves reframing and reconstructing the Australian property system in such a way that Aboriginal peoples' land rights and interests are viewed as being at least equal, if not more superior, to the Crown's rights and interests (Wensing and Small, 2012) for several reasons. Arguably, the Aboriginal peoples' land rights and interests can be viewed as being more superior because they owned and occupied this land long before invasion and colonisation by the British, they never ceded their sovereignty, and they have never been compensated for the loss of their lands and the resultant destruction of their culture and overall wellbeing.

As discussed in Chapter 4, property in land is 'ubiquitous' because all human societies have ways of deciding how their land is allocated, distributed and used (Harris, 1996:3; Rigsby, 1996:11). What has to be reconciled is that both Indigenous and Western systems of property in land have mechanisms for allocating land, distributing access to its resources and regulating its use among

[458] The right to self-determination is discussed in Chapters 8 and 9.

their respective citizenry and/or others, albeit that the time horizons and cultural values attached are different. For contextual mediation or dialogue to occur there must be a mutually respectful level of parity between the two systems and about how they interact with each other. The challenge therefore is to identify the points at which the two systems have common values that intersect and where it may be possible to locate a 'commonality' of understandings between Indigenous and Western approaches to property.

For coexistence to be effective, the interfaces in the intercultural contact zone cannot be imposed, they 'must be negotiated, tested and modulated to respond to the realities of differing worldviews, value systems and legal vision' (Tobin, 2014:194). A just approach to coexistence requires the parties to engage openly about the meaning and significance of each other's laws, customs, practices and values to develop a more mutual understanding of each other's approaches to property and ownership in land (Dodds, 1998:202). It has to be 'continually negotiated rather than simply settled' (Howitt and Lunkapis, 2010:127) because it requires an inter-cultural dialogue that rests on the three conventions of mutual recognition, consent between the parties and cultural continuity (Tully, 1995:32). I return to these themes in Chapters 8 and 9.

The perpetuity of obligations through time and across generations of Indigenous approaches to property raises another significant challenge. In Australia, over the past two-hundred and thirty years, the dominance of positive law and Western liberal values over natural law and Indigenous cultural values has meant that the critical balance between the wellbeing of humankind and the earth upon which we all depend for our existence has been ignored and forgotten. As discussed in Part 4.6 of Chapter 4, for Aboriginal peoples the balance between humans and the Earth is central to their law and custom and their very existence (Tobin, 2014:194). This delicate balance is reflected in the Yawuru People's vision and values is firmly rooted in their *Bugarrigarra*, which Patrick Dodson, a Yawuru elder, describes as:

> *'the time before time, when the creative forces shaped and gave meaning and form to the landscape, putting the languages to the people within those landscapes and creating the protocol and laws for living within this environment. Bugarrigarra is … the spiritual force that shapes our ongoing cultural values and practice, our relationships with each other and the obligations and responsibilities that we have to each other that form our Community. It requires respect at the interface of change and development.'* (Yawuru RNTBC, 2011:13)

What is lost in the current conceptions of property in contemporary Australia is the need for balance between land and community and an implicit understanding of the inherent limitations regarding land use and the exploitation of its resources. Our understanding of property has to be reframed and reconstructed so that it respects these cultural differences, embraces a willingness to learn and to devise new mechanisms for land ownership, use and access to its resources. What is also necessary is a broadly conceived mutual recognition and acceptance of multiple and overlapping jurisdictions and interdependence, where plural relations to and of governance have relevance and standing (Porter and Barry, 2016:5-6).

A greater respect for Aboriginal peoples' right to self-determination is required, based on 'relationship and connection' rather than on 'separation and domination' (I.M. Young 2004:176). As C. Scott (1996:819) explains:

> *'If one listens, one can often hear the message that the right of a people to self-determination is not a right for peoples to determine their status without consideration of the rights of other peoples with whom they are presently connected and with whom they will continue to be connected in the future. For we must realize that peoples, no less than individuals, exist and thrive only in dialogue with each other. Self-determination necessarily involves engagement with and responsibility to others (which includes responsibility for the implications of one's preferred choices for others). ... We need to begin to think of self-determination in terms of peoples existing in relationship with each other. It is the process of negotiating the nature of such relationships which is part of, indeed at the very core of, what it means to be a self-determining people'*.

Self-determination needs to be seen, not as a threat or as the 'supreme legitimate authority within a territory' (Philpott, 1995:357), but as an opportunity for dialogue and relational interdependence based on ongoing negotiations between peoples. It is time to move beyond such dichotomies and beyond the 'unimaginative, indeed sterile, view that peoples' rights to self-determination are mutually exclusive and the view that, somehow, recognition by one people of another people's rights entails the exclusion of the first people's own rights' (C. Scott, 1996:819).

As discussed in Chapter 2, the prevailing orthodoxy on how Australia acquired its sovereignty 'is wholly compromised and cannot be sustained' because 'every native title determination … recognises an Indigenous society whose native title is sourced in its own extant laws and customs' that were present before 1788 and 'that same "Law" is still vital and dynamic in contemporary Australia' (Lavery, 2015:iv). Lavery (2015:297-311) therefore argues that:

> *'The challenge for Australia is to abandon the orthodox theory which holds that the Indigenous societies of New Holland were so low on the scale of civilisation so as not to possess any "sovereignty", and to incorporate the quiescent residuum of these Indigenous sovereignties into a 21st century jurisprudential framework. This unmaintainable orthodox legal theory of territorial sovereignty needs to be abandoned for a coherent, historically congruent theory'*

The question is how to proceed with abandoning the current orthodoxy and supplanting it with, as Lavery puts it, 'a coherent, historically congruent' 21st century jurisprudential framework, especially in relation to property in land, its use and access to its resources.

As argued in Chapter 5, given the differences between Aboriginal and Western notions of land ownership, use and tenure, we must apply what constitutes full equality and justice and not some form of 'lessening of inequality' (Dworkin, 2000:3). If our concerns for equality and justice in this space are genuine, then, as Alfred (2009:166) states, restitution[459] must be the first step in our pursuit of a just society. We must deal with the fact that all of our settlements, towns and cities are situated on the stolen lands of the Aboriginal peoples who owned and occupied those spaces for many thousands of years. Or, we must be prepared to explain why we are not prepared to go down that path.

In the 'cross-cultural' context between Indigenous and Western conceptions of property, Tully (1994:180) rightly concluded that the parties should be bound together by three shared norms:

> *'that the equality of their respective traditions and institutions is recognized and continued, that the negotiations and argumentation respect the forms of negotiation of both cultures, and that the treaty relations of property they reach by negotiation will be based on consent, not on force or deceit'* (Tully, 1994:180).

The pre-conditions for a mutually respectful coexistence between the Aboriginal peoples of Australia and Settler state governments must include recognition of Aboriginal peoples' pre-existing sovereignty, the integrity of their law and custom and their right to self-determination over their affairs, including with respect to their lands. It has to be about the undoing of the

[459] It is worth noting that the second prong of the Australian Government's response to *Mabo (No. 2)* was the creation of a National Aboriginal and Torres Strait Islander Land Fund the primary purpose of which was as a compensatory measure to enable Indigenous people who are unable to assert their native title rights and interests to acquire and manage land to provide for their economic, environmental and social or cultural benefits for themselves and their future generations. This established what has become the Indigenous Land Fund and the Indigenous Land Corporation (ILC) (Wensing, 2017a). There is a long history of concern and turbulence about the extent to which the ILC has strayed from its original charter to acquire and grant land to Aboriginal and Torres Strait Islander peoples who are unable to claim their traditional lands under the native title system (see for example Sullivan 2009; Casey 2015). However, it is acknowledged that restitution for past grievances against the Aboriginal and Torres Strait Islander peoples of Australia would be a big step that would involve a process of reconciliation and compensation beyond native title matters.

coloniser-colonised or master-servant relationship, especially over land ownership, use and tenure.

As discussed in Chapters 2 and 3, *Mabo (No. 2)* recognised Aboriginal peoples' ancestral land rights as a legally enforceable property right as a necessary step towards a just settlement with the Aboriginal peoples over their land rights. While *Mabo (No. 2)* discredited the notion of *terra nullius* as the basis of British sovereignty over Australia, it failed to recognise the pre-existing and on-going sovereignty of the Aboriginal peoples of Australia. Prior to Mabo *(No. 2)*, the Crown asserted its sovereignty over Australia without recognising the legitimate jurisdictions of Indigenous nations over their respective territories, and because they were not conquered, the Aboriginal peoples of Australia are arguing they remain sovereign. It is time therefore to negotiate treaties that reconcile Aboriginal and Crown sovereignties to form a legitimate nation-to-nation relationship between two systems of land ownership, use and tenure. A relationship based on 'mutual recognition as equals' (Hoehn, 2016:125).

6.3 Implications

This chapter began with a brief discussion of the ongoing disparities between the two systems of land ownership, use and tenure in Australia that give rise to the hypothesis and critical question(s) in this thesis. The hypothesis and critical question(s) were then outlined. The application of the research to the hypothesis and critical questions showed that native title can be viewed as an inter-cultural contact zone rather than continuing to be 'squeezed' into the Crown's land tenures system.

The analysis identifies the necessary conditions for a more mutually respectful coexistence between the two systems of land ownership, use and tenure, and that the Indigenous and Western systems both have points of commonality between them. They both have mechanisms for allocating land, regulating its use and accessing or distributing its resources among their respective citizenry and others, albeit that the time horizons and cultural values attached are different.

I conclude therefore, that a just approach to coexistence requires the parties to engage openly about the meaning and significance of each other's laws, customs, practices and values in order to develop a mutual understanding of each other's approaches to property and ownership in land. I also conclude that to reach a just solution to Aboriginal peoples' claims to their Country,

three matters must be addressed. Firstly, the legitimacy of Australia's sovereignty must be addressed. Secondly, the integrity of Aboriginal peoples' system of relations to land, use and access to its resources must be accepted as having legitimacy and integrity at least equal to that of the Crown's systems of relations to land. And thirdly, there must be room for dialogue and ongoing negotiations between the two systems. The Australian property system requires reframing and reconstruction to respect the cultural differences, to embrace a willingness to learn and to devise new mechanisms for allocating land, regulating its use and accessing/distributing its resources. In many respects, I am arguing for a form of legal pluralism[460] with respect to land that has both a deference to context and an active dimension (Webber, 2006:169). That is, a solution which focusses squarely on the problem of land law to produce a settled order which may involve a single outcome and/or the recognition of areas of autonomy with respect to land ownership, use and tenure, despite the continuing differences between Aboriginal peoples and the Settler state. These issues are explored in more detail in Chapters 8 and 9.

The following chapter explores the land ownership, use and tenure issues in two case study locations, focussing on the conflicts between the Crown land tenures and native title determinations to explore the points of contestation between them and drawing conclusions about the implications on the pre-conditions for coexistence.

[460] For a discussion of legal pluralism and development generally, see Tamanaha, Sage and Woolcock (2012) and Webber (2006).

CHAPTER 7
CHALLENGES IN TWO CASE STUDY LOCALITIES – Bardi and Jawi, and Yawuru

> *'The evidence presented in our native title claim showed that the Bardi and Jawi people are the native title holders for this land, but the difference between how we see our land and the State sees our land is that they see it for themselves as real estate owners, whereas Bardi and Jawi people see it as our land.'*
>
> Kevin George (2016).[461]

> *'Our native title, whilst found in western law, is grounded in the all-encompassing power and richness of Bugarrigarra and the interdependent elements of our world that flow from that – Community, Country and Law. Bugarrigarra is the core of Yawuru cosmology and our experience of Liyan is essential to our well-being in our Country*.'
>
> Patrick Dodson (Yawuru RNTBC, 2011:13).

7.1 Introduction

This Chapter focusses on the sharp differences and crippling complexity between Indigenous and Western approaches to land ownership, use and tenure in two case study localities. A case study approach was used to examine how the two systems of land ownership, use and tenure interact with each other under the current legislative and policy environment and in a concrete situational context. In this case, in Western Australia. The principal aim of this approach is to draw out, in a practical sense, the realities of the challenges for a more equitable and just coexistence between two culturally distinct systems of land ownership, use and tenure than is currently the case.

The primary role of the case studies therefore is to:

1) Identify the constraints – the misalignments or incommensurabilities – that are impeding a more equitable, just and harmonious coexistence between Indigenous and Western forms of land ownership, use and tenure;

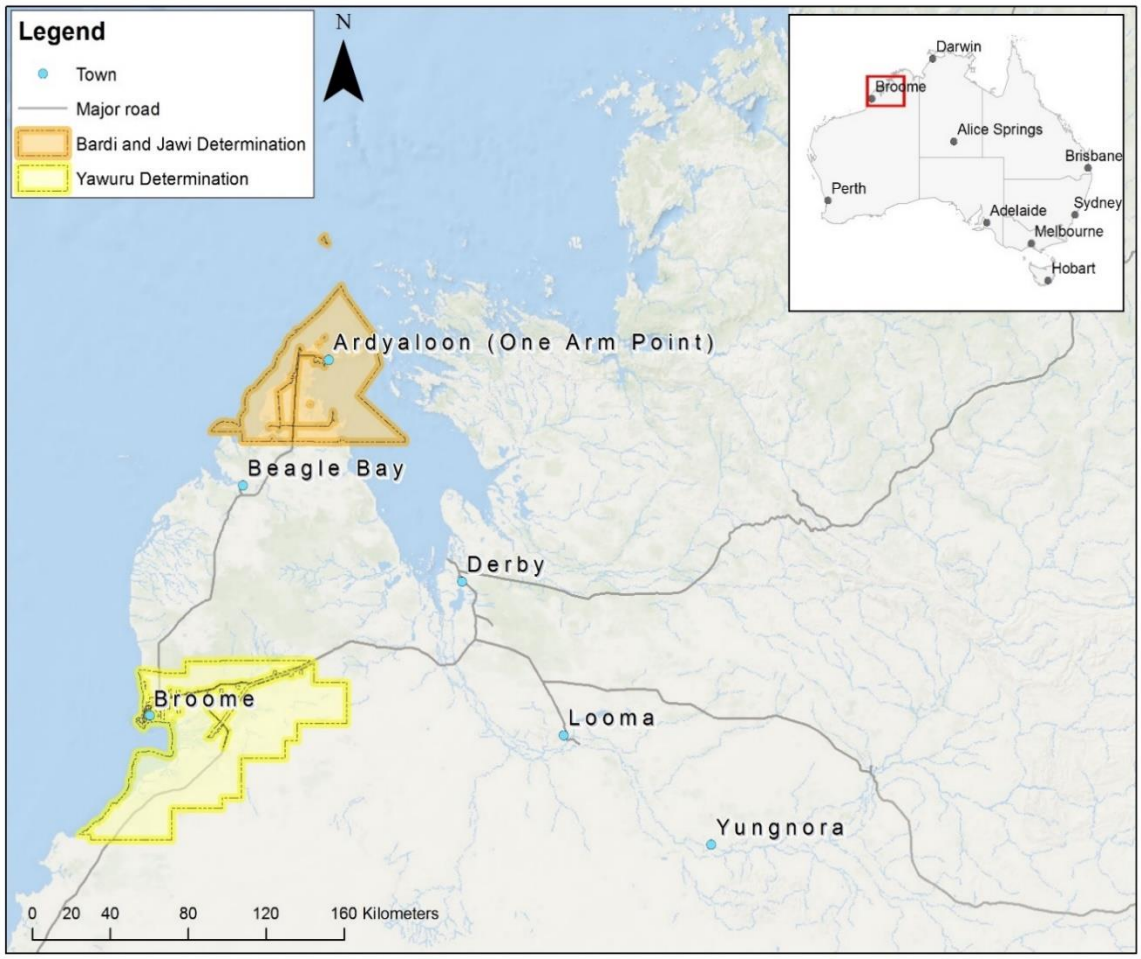
2) Identify the challenges and opportunities for commensurability between Indigenous and Western forms of land ownership, use and tenure, such that native title holders will

[461] Chairperson, Bardi and Jawi Niimidiman Aboriginal Corporation RNTBC, Notes of RNTBC Board Meeting 16-17 November 2016. Held on file by the author.

be able to participate in the economy, should they wish to do so, by being able to leverage their land on their terms and at their choosing; and

3) Ascertain what land tenure and other reforms are necessary, workable, culturally relevant and acceptable to the RNTBCs that will not only achieve their aspirations, but also establish equality, justice and harmony between Indigenous and Western forms of land ownership, use and tenure.

As discussed in Chapter 1, the two localities in WA were self-selected. The first locality is the country of the Bardi and Jawi people on Cape Leveque on the Dampier Peninsula. The second locality is the country of the Yawuru people in and around Broome. The case study locations are shown in **Map 7.1**.



Map 7.1 Location of case study Registered Native Title Bodies Corporate for Bardi and Jawi and Yawuru Native Title determinations

Source: Sandra Potter, PhD Scholar, Fenner School of Environment and Society, The Australian National University.

In both localities the FCA has made positive native title determinations of exclusive possession.[462] This means the appropriate Registered Native Title Bodies Corporate (RNTBC)[463] have been established to hold and manage the native title rights and interests in trust (Bardi and Jawi RNTBC, 2008; Yawuru RNTBC, 2014), essentially 'to facilitate external dealings' by the native title holders with governments and other parties (Glaskin, 2017:219). The primary participants in this research therefore are the Boards of Management of the RNTBC: the Bardi and Jawi Niimidiman Aboriginal Corporation RNTBC[464] and the Yawuru Native Title Holders Aboriginal Corporation RNTBC and their senior staff. In the remainder of this thesis therefore, I refer to the Bardi and Jawi RNTBC and the Yawuru RNTBC as the source of information and analysis drawn from my interactions with them.

The Kimberley Land Council (KLC) is also a primary participant because it is the appointed Native Title Representative Body (NTRB)[465] for the Kimberley region and because the KLC provides the Bardi and Jawi RNTBC with the necessary support and assistance to enable it to fulfil its statutory functions.[466] My access to Bardi and Jawi RNTBC was therefore governed by a Research Agreement between the KLC, the ANU and myself (KLC, 2014).

Both RNTBCs are grappling with issues in a post-native title determination environment that are at the forefront of the interactions between Indigenous and Western forms of land ownership, use and tenure. This Chapter therefore draws out the issues involved in developing a more harmonious and equitable relationship between two culturally distinct forms of land ownership, use and tenure. While there are many similarities, there are also some key differences.

[462] Bardi and Jawi: *Sampi vs State of Western Australia (No 3)* [2005] FCA 1716; *Sampi vs State of Western Australia (No 4)* [2006] FCA 760. Yawuru: *Rubibi Community vs State of Western Australia (No 7)* [2006] FCA 459. In *Warrie v State of Western Australia* [2017] FCA 803, [18] Rares J clarifies that 'a native title right to control access to a claimed area' entitles the native title holders 'to a determination that they have a right of exclusive possession, which in turn will equate to the full rights of ownership of an estate in fee simple'.

[463] S.253 NTA. A registered native title body corporate (RNTBC) is a prescribed body corporate whose name and address are registered on the National Native Title Register (see ss.192 and 193 of the Act). The registered native title body corporate provides a practical and legal point of contact for those wishing to deal with native title holders in relation to a particular area of land or waters.

[464] 'Niimidiman' is a term meaning 'shared' and is used 'to describe shared country between estates and shared sea country' (Glaskin, 2017:219). Registered in 2007, two years after the determination in 2005 but prior to the appeal decision in 2010 (Glaskin, 2017:219). Hereafter referred to as the Bardi and Jawi RNTBC.

[465] Native Title Representative Bodies (NTRBs) are appointed by the federal Attorney-General under Part 11 of the NTA to represent Aboriginal and Torres Strait Islander peoples on native title and related matters.

[466] Under the NTA and the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (Cth) (CATSI Act).

The contextual analysis of each of the case study localities is based on detailed background research that I undertook in the course of researching and writing this thesis[467] and previously for the WA Department of Indigenous Affairs.[468]

The analysis in this Chapter is supported by three Appendices, as follows:

- **Appendix C** includes a description of the WA land tenure system, the nature of the Aboriginal Land Trust (ALT) arrangements in WA, the State's land disposal policy and the ALT's Land Transfer Policy, land tenure options for converting ALT reserves to other forms of tenure within the WA land tenure system, the State's land tenure reform commitments arising from the (now abandoned) Browse LNG Precinct at James Price Point on the Dampier Peninsula, and the WA Government's Aboriginal land reform agenda.
- **Appendices D and E** include a documentation of the native title, land use, land tenure, land use planning, municipal and essential service provision and local governance arrangements in each of the two case study localities, and a summation of the issues that each RNTBC is currently grappling with.

In order to understand the issues that the case studies reveal, this Chapter begins with an overview of WA's land tenure and Aboriginal land system, the WA Government's land transfer policies, land tenure options for transferring ALT lands to Aboriginal people on the Dampier Peninsula, the essential differences between these forms of tenure and their 'affect'[469] on native title rights and interests (Part 7.2). The issues and challenges currently confronting the case study RNTBCs are then summarised (Parts 7.3 and 7.4). The similarities and differences between the two case study localities and their respective RNTBCs are also summarised (Part 7.5). The contestation and conflict between the two distinct forms of land ownership, use and tenure in the WA context are examined (Part 7.6), and the commensurabilities and incommensurabilities arising from these circumstances are discussed (Part 7.7). This chapter concludes with some observations about the implications on the pre-conditions for coexistence in the case study localities (Part 7.8).

[467] See Wensing (2014a; 2014b; 2014c; 2014d; 2015a; 2015b; 2016a; 2016b; 2016c; 2017a; 2017b; 2017c; 2017d; 2017e; 2018a; 2018b).
[468] In my then capacity as an Associate Director of SGS Economics and Planning. See SGSEP (2011a; 2011b; 2012a; 2012b; 2012c; 2012d).
[469] In this thesis the term 'affect' is used as defined in S.227 NTA: 'An act *affects* native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.'

7.2 Context: WA Government's land tenures and their 'affect' on native title rights and interests

Before embarking on an outline of the case study localities and an analysis of the issues and challenges arising therefrom, it is necessary to provide an understanding of the context in which these issues are being examined. Namely, the land tenure system in WA and native title determinations and applications, what constitutes 'Aboriginal Land' in WA, the WA Government's land transfer policies, the State's land tenure options and their affect on native title rights and interests.[470] To put these issues into perspective, 92 per cent of the land mass of WA is Crown land, and as a consequence, over 55 percent of WA is subject to a native title determination of one kind or another and a further 33 percent of WA is subject to a native title application that is yet to be considered and determined (NNTT 2018b). Furthermore, over half of all determined native title in WA is held under exclusive possession (Wyatt, 2018:5).[471] The WA Government therefore claims that it is the State most affected by the operation of the NTA (Government of WA, 2018:5). What follows is a synopsis of the land tenure issues in WA that arise from its interactions with the native title system.

7.2.1 Land tenure and Aboriginal land in WA

The land tenure system in WA is primarily governed by three statutes[472] which enables the WA Government to issue a range of land tenures (discussed below). The State also classifies Crown land as 'unallocated Crown land' or UCL[473] because 'no interests in the land are known to exist' (DoL, 2013a:2-8). The Crown asserts ownership of such lands until such time as a use can be identified for the land. Arguably, the use of the term UCL in its land administration manuals (Landgate, 2010; DoL, 2013a) can be interpreted as a reflection of the now discredited notion of *terra nullius* prior to *Mabo (No. 2)* and therefore an explicit form of ongoing denial by the State of WA of the possible existence of native title rights and interests in such lands. And even where the native title rights and interests have been formally recognised, the fact that the land remains classified as UCL continues to reflect the State's attitude that it may still find a 'better' use for the land regardless of the fact that it is subject to native title rights and interests.

Unlike most other jurisdictions in Australia, WA does not have a statutory land rights grants scheme. The Aboriginal Land Inquiry (Seaman, 1984) recommended establishing such a scheme,

[470] A more detailed description is provided in Appendix C.
[471] Table C1 in Appendix C shows this to be 58.3 per cent.
[472] The *Land Administration Act 1997* (WA) (LAA), the *Transfer of Land Act 1893* (WA) (ToLA) and the *Strata Titles Act 1985* (WA).
[473] In other jurisdictions it is described as 'unalienated' or 'vacant' Crown land.

but the WA Government never acted upon the Inquiry's recommendation. What is termed 'Aboriginal land' in WA is land that has been granted at the discretion of the Minister for Lands or else is held in trust as a reserve 'for the use and benefit of Aboriginal inhabitants'.[474] The reserves were (and still are in many respects) an 'anachronism' because they were created with the aims of corralling Aboriginal people away from the settlers and at 'the extreme margins of the young settler nations state' (Bhandar, 2018:158). An arrangement which the Aboriginal and Torres Strait Islander Social Justice Commissioner has described as a 'protection' style arrangement dating from the 19th century (ATSISJC, 2005:21-22) when State Governments systematically refused to recognise Aboriginal peoples' sovereignty and pre-existing rights to their ancestral lands, but nevertheless acknowledges their ongoing use by the establishment of these schemes.

There is a long history to the creation of various types of reserves in WA 'for the use and benefit of the Aboriginal inhabitants' from the establishment of the Swan River Colony in 1829 to the establishment of the Aboriginal Lands Trust (ALT) in 1972 (DIA, 2003). From 1972, these 'Aboriginal Lands' were vested in the Aboriginal Affairs Planning Authority (AAPA) and have been administered by the ALT established under the *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPA Act). The ALT therefore holds land in trust for Aboriginal people. The AAPA Act provides for the management of Aboriginal reserves and the grant of ordinary freehold and leases to be held on behalf of Aboriginal people by the ALT (appointed by the state government) or the Aboriginal Affairs Planning Authority (AAPA).[475] The ALT is required to ensure that the land it holds is used and managed for the benefit of persons of Aboriginal descent and that the use and management accords with the wishes of the Aboriginal inhabitants of the area, so far as that can be ascertained and is practicable. In particular, land proclaimed under s.25(1) of the AAPA Act must be for 'the use and benefit of the Aboriginal inhabitants' who may or may not be the owners of the land under Aboriginal law.

At the time of the ALT's establishment in 1972, approximately 19.2 million hectares of land was placed under its direct control. By 2011, the overall size of the ALT estate had increased to about 27 million hectares, about 11 per cent of the state's total land area.[476] Following a review of the

[474] The term 'for the use and benefit of Aboriginal inhabitants' in the WA context arises from the proclamation of a reserve under s.25(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) or the vesting of a reserve under Part 4 of the *Land Administration Act 1997* (WA).
[475] The AAPA is an entity that exists in name only. The ALT established under the same Act performs the functions of the AAPA.
[476] Details provided by correspondence between the author and the then WA Department of Indigenous Affairs in 2011. The inventory of the ALT Estate was also publicly available on DIA's website at the time, but not in an accessible format.

ALT in 1996 (Review of the Aboriginal Lands Trust, 1996) and a review of DIA in 2007 (Casey, 2007), it has been the policy of successive WA Governments to transfer ALT lands to Aboriginal people. At the time of writing, it is still the stated policy of successive WA Governments of both political hues to transfer ALT held lands to Aboriginal people in WA. How this is occurring and whether such land transfers are successful or not, is highly debatable.

By June 2015, the overall size of the ALT estate decreased to about 24 million hectares, or 9.65 percent of the State's total land area (DAA, 2016:40), an overall reduction of about 3 million hectares.[477] One of the methods by which the reduction in the overall size of the ALT Estate is being achieved under current policy settings is by way of the transfer of a Management Order (MO) for the 'care, control and management' of the land from the ALT to an Aboriginal organisation without revoking its Crown reserve status. An illustration of the effects of such transfers is explored in more detail later in this Chapter.

What follows is an explanation of the State's land transfer or disposal policies and options for reform of the ALT Estate.

7.2.2 WA Government's Land Transfer Policies

The State is able to allocate and administer several types of land tenure, including freehold, leasehold and reserve tenures. The State's *Primary Tenure Allocation Policy* (DoL, n.d.) guides the determination of the appropriate form of tenure. In principle, the form of tenure must reflect both the value that the community places on a particular Lot and the necessity for continuing oversight by the State, having regard to the objective of the oversight and how that oversight can be achieved. Tenure is also determined on the basis of relevant laws, referrals to other agencies, planning requirements, political considerations, and the particular circumstances of each case (DoL, 2013a:2-50).

The intent of the *Primary Tenure Allocation Policy* (DoL, n.d.) and its broad principles should not be underestimated. The Policy articulates the State's view that it must continue to retain a level of oversight over land after its allocation to another person/entity, which clearly indicates that the State is reluctant to let go of control over the way in which land is owned, used and managed into the future. Perhaps the State's attitude is influenced by the fact that only eight (8) percent of the land mass of WA is in private freehold (DoL, 2016:6), whereas the bulk of the State's land

[477] See Annual Reports for the Department of Indigenous Affairs from 2009 to 2012 (DIA, 2009; 2010b; 2011; 2012a) and the Department of Aboriginal Affairs from 2013 to 2016 (DAA, 2013; 2014; 2015; 2016).

is subject to leasehold or UCL thereby giving the State a much greater level of control over the allocation and use of that land. By comparison, in most other States around Australia the predominant form of land tenure is private freehold.

In relation to the transfer of land out of the ALT estate to another form of tenure, the ALT's *Land Transfer Policy* (ALT, 2010) includes several principles and pre-conditions for the successful transfer of ALT land to an Aboriginal entity or Aboriginal person(s). Namely, that all parties with interests in the land (i.e. occupants, lessees, native title holders or native title claimants) will be consulted; the rights and obligations between Aboriginal groups with historic and traditional interests must be reconciled prior to transfer; there will be transparency and openness in the negotiations and decision making; all statutory requirements will be complied with; the land must be in sound condition so it is an asset not a liability; and land will be transferred to legally durable and constitutionally fair Aboriginal organisations with sound governance capacity or, in certain circumstances, to individuals (DIA, 2006; ALT, 2010). Each of these pre-conditions involves a lot of work.

There is a further complication that is pertinent to the case studies. The bulk of the ALT estate comprises proclaimed reserves under Part III of the AAPA Act (SGSEP, 2011a:31-32). Such reserves cannot be leased, sub-leased, mortgaged or encumbered without the consent of the AAPA[478], and the protection granted through Part III of the AAPA Act can only be changed with the approval of both Houses of State Parliament. While the process for revoking a reserve status may seem relatively straight forward, either House of Parliament may pass a resolution rejecting the proposed revocation of a reserve. This stops the process, but only until such time as there are no Members of Parliament willing to oppose the revocation of a reserve.

Furthermore, all reserves held by the ALT are effectively Crown land under s.18 of the LAA and the ALT is not able to dispose of such land without the Minister for Land's prior approval. When the reserve status under the AAPA Act is revoked by the Parliament, the land automatically reverts to the DoL (SGSEP, 2012a:57). The relevant State departments and agencies may reach an agreement on what will happen in terms of land use and tenure and who should be the recipient of the land transfer or grant and the Minister for Lands generally acts on the recommendations of the Minister for Indigenous Affairs, but in reality the Minister for Lands is

[478] Read, the relevant Minister.

under no obligation to do so unless the Minister for Indigenous Affairs' decision has the backing of Cabinet and/or the Premier (Wensing, 2014b, 2014c).[479]

While transferring ALT lands to Aboriginal people might sound good rhetorically because it gives the impression that the recipients are gaining a level of control over the ownership and use of that land, as the case studies will demonstrate, the realities are quite different and far more complex.

7.2.3 The State's land tenure options

In 2009 the WA Government selected a site at James Price Point on the Dampier Peninsula approximately 60 kilometres to the north of Broome to establish a Common User LNG Precinct to provide for the processing of gas from the Browse Basin (Browse LNG Precinct). At that time, the WA Government was also preparing a Regional Planning Strategy for the Dampier Peninsula. In a Dampier Peninsula Land Tenure Reform Directions Paper (Government of WA, 2009b) and in a Land Tenure Reform Discussion Paper (Government of WA, 2011a), the State revealed its land tenure options for the transfer of the ALT Estate on the Dampier Peninsula, including on Bardi and Jawi Country. The land tenure options include: freehold;[480] freehold with conditions (conditional private freehold);[481] leasehold (fixed term or in perpetuity);[482] conditional purchase lease;[483] or reserves[484] (Government of WA, 2009b and 2011a). A broad outline of the circumstances in which the State applies these tenures is provided below, which will reveal they all imply that the Crown's form of title is superior to any other form of title.

Freehold

Under the LAA and the *Transfer of Land Act 1893* (WA) (ToLA), the relevant Minister is able to transfer Crown land into freehold or freehold with conditions. Freehold is regarded as the strongest form of land tenure, primarily because this form of tenure is of uncertain duration and

[479] This complication depends largely on the machinery of government arrangements. Under the Barnett Liberal Party Government (September 2008 to March 2017) the administrative arrangements were such that land administration, the ALT Estate and land use planning functions were administered by different Departments or agencies, necessitating coordination and agreement between relevant Ministers on changes to the status of land within or out of the ALT Estate. Following the election of the McGowan Labor Party Government in March 2017, the Aboriginal land and heritage functions of the Department of Aboriginal Affairs and the former Department of Lands have been amalgamated with the Department of Planning to form a new Department of Planning, Lands and Heritage (McGowan, 2017), potentially removing some of the internal divisions as all of these agencies now report to the same Minister.

[480] S.74 LAA (WA). Also known as absolute fee simple because estates in fee could be either unrestricted (simple) or restricted (tailed), depending on who could inherit – hence the terms 'estate in fee simple' or 'estate in fee tail' (Butt, 2010:97).

[481] S.75 LAA (WA).

[482] S.79 LAA (WA). It is not current Government policy to issue leases in perpetuity under s.79 of the LAA.

[483] S.80 LAA (WA).

[484] For conservation under the *Conservation and Land Management Act 1984* (WA) (CALM Act); for special purpose reserves under the LAA (WA); or for the use and benefit of Aboriginal people under the *AAPA Act* (WA). These options are discussed in much greater detail in Wensing (2014b).

may last forever (Butt, 2010:101). Freehold empowers the landholder to control the use and development of the land (subject to the limitations of planning schemes, environmental controls and building health and safety laws), its sale, transfer, leasing and subdivision (subject to what is permitted within relevant legislation and government policies). Freehold tenure is usually applied to land which is not required to be retained by the Crown under either reserve or leasehold tenure (DoL, 2013a:2-48). Freehold can also be transferred with very specific conditions relating to designated purpose(s) and progressive purchase arrangements over time subject to satisfactory compliance and completion (Landgate, 2010:491).

Leasehold

Leasehold tenure is usually applied to land over which the State wishes to retain a greater level of oversight for strategic land planning, management or other purposes (DoL, 2013a:2-50). A lease gives the landholder a limited proprietary interest in the land (Butt, 2010:275). Usually a leasehold interest is granted in return for a 'rent', but rent is not an essential part of a lease, as the parties can agree to lease on a rent-free basis (Butt, 2010:276). Typically, leasehold interests are of fixed duration and the interest in the land under a Crown lease comes to an end when the term expires and the land and any improvements revert to the Crown (Butt, 2010:101-102). A conditional purchase lease is a lease that comes with a number of specific conditions attached that the lessee would be expected to fulfil within a specified time frame. Once the conditions have been satisfactorily met, the lease may be transferred to freehold (DoL, 2013a:6-25).

Reserves

There are a number of different legislative provisions for creating reserves in WA.[485] Reserve tenure is usually applied to land which because of its intrinsic community value, is to be preserved and maintained for the benefit of present and future generations. The intrinsic community values may be the land's natural resources, its environmental, recreational, historical, social or cultural significance, or because it has special value for present or future generations (DoL, 2013a:2-50). But a reserve is not an interest in land, it is a description of Crown land that has been set aside or dedicated for a particular purpose in the public interest (DoL, 2013a:4-1).

[485] These include Part 4 of the *Land Administration Act 1997* (WA), Part III of the *Aboriginal Affairs Planning Authority Act 1972* (WA), the *Conservation and Land Management Act 1984* (WA) and other statutes.

As mentioned earlier, one of the ways in which the WA Government is currently transferring ALT lands to Aboriginal people is by way of a transfer of a MO under the s.46 of the LAA to an Aboriginal association/corporation as the management body. An illustration of how this is being done is the transfer of MOs for three separate Lots from the ALT to the Bidan Aboriginal Corporation involving 78 hectares of land along the Great Northern Highway in the Kimberley Region.[486] In 2014, the WA Government announced that it had 'given back a unique pocket of land' that had previously been held by the ALT. The Minister for Aboriginal Affairs' media release was titled – 'Kimberley Aboriginal people take control of land'. The media release stated that the land 'will be used to secure private housing arrangements for members of the community' (Collier, 2014) and the Minister also speculated about the land's potential for tourism to 'further develop the economic independence of the local community' (Collier, 2015).

A MO is a statutory order under the LAA which passes the obligations for the 'care, control and management' of a Crown Reserve to a management body in accordance with the terms set out in the MO. A MO is not an interest in land, even though it may grant to the management body the ability to grant interests (leases, sub-leases or licences) in land. A MO under the LAA does not remove its 'Crown Reserve' status. In this particular case the condition that the Reserve is 'for the use and benefit of Aboriginal inhabitants' remained in place. Therefore, any changes in land use, any transactions (i.e. leasing or sub-leasing) and any developments on the land still require the Minister's prior written approval.[487] The Minister can also revoke the MO at any time, especially if the management body fails to comply with any of the conditions in the MO.

The transfer of these MOs was the best possible outcome that the Bidan Aboriginal Corporation could have achieved given the prevailing legal and policy environment at the time. However, the subtlety of the Minister's (Collier, 2014) language with terms such as 'given back', 'control', 'private housing' and perceptions they could subdivide the land into new residential lots and use the land for tourism development, led the Corporation into believing they had been granted a form of ownership that would enable them to use the land as collateral for finance to construct six new houses over the next five years with the development of a further 25 residential lots in the next 15 years, and possibly for tourism development to supplement the community's income in the longer term. Whereas, in reality the MO cannot be used as collateral for finance without the Minister's prior written approval.[488] While the Corporation has taken additional

[486] This illustration is discussed in more detail in Part C5.3 of Appendix C.
[487] S.18 LAA.
[488] S.46 and s.18 LAA 1997 (WA).

steps to insert relevant protections in their Rule Book to ensure the land remains in the hands of the Corporation and cannot be transferred to interests outside the community under the current arrangements, the Corporation has also reaffirmed its commitment to never agree to the extinguishment of their native title rights and interests on their land. This is consistent with the views expressed by the RNTBCs for the case study localities examined later in this Chapter. The conflicts arising from this illustration of how the ALT land transfer policy is playing out are examined in more detail later in this Chapter (Part 7.6).

The preceding discussion outlined the State's land tenure options for reforming the ALT Estate, including freehold and leasehold tenures. The next step is to examine how those tenure options 'affect' native title rights and interests.

7.2.4 The 'affect' of Crown tenures on native title rights and interests

Converting or transforming land from one tenure type to another is widely regarded as a land dealing.[489] As discussed in Chapter 2, land dealings are classified as future acts under the NTA because they can potentially affect native title rights and interests. Therefore, for land dealings to be valid in so far as they affect native title rights and interests, the relevant processes under the NTA must be followed, including the making of Indigenous land use agreements or ILUAs.

Converting existing land tenures to another form of land tenure in the Crown's land tenure system on Bardi and Jawi or Yawuru Country that are subject to a determination that native title exists will affect the native title rights and interests. This has several implications for the parties involved, including the WA Government, the existing Aboriginal land title holders (i.e. the lessees under the Trust arrangement), the Aboriginal residents and more especially for the native title holders, as outlined below.

The Dampier Peninsula Land Tenure Reform Directions Paper (Government of WA, 2009b) contained not only an indication of the land tenure options that the State was considering, but also an analysis of the effect the different forms of tenure will have on native title rights and interests. The 'affect' each of the different forms of tenure will have on native title rights and interests in the case study localities is analysed and presented below. **Table 7.1** provides a

[489] Dealing is the legal processes through which land is bought and sold or otherwise transferred, also known as conveyancing. It involves the preparation of hard copy documents as evidence of a land transaction between parties, including transfers, mortgaging, leasing, etc.

summary of the effect of freehold on native title rights and interests, **Table 7.2** of freehold with conditions concerning the use and transfer of the land, and **Table 7.3** of leasehold.[490]

Conditional purchase leases with the intent of converting the tenure to freehold or exclusive possession leasehold when the conditions have been satisfied are not examined in a separate Table because the affect on native title is the same as for freehold/freehold with conditions. The effect of Crown reserves on native title rights and interests are also not examined in a separate Table because the native title rights and interests can in many instances continue to co-exist with the classification of land as a Crown reserve.

Working from left to right across the top of each Table, the first column on the left identifies the details of the tenure type; the second column explains the process that must be followed by the State if that form tenure is to be issued; the third column explains the implications for the WA Government; the fourth column explains the implications for existing title holders and Aboriginal residents on the subject Lot(s), and the last column on the right explains the impact that form of tenure will have on native title rights and interests.

[490] Adapted from Government of WA, 2009a. The information presented in Tables 6.1, 6.2 and 6.3 were compiled by the author from a number of sources. They are intended as a guide only.

Table 7.1 Freehold (s.74 LAA)

Details of the tenure	Process	Implications for the WA Government	Implications for existing title holders and Aboriginal residents	Impact on Native Title rights and interests
1. Direct ownership by a person, a family, a company, a statutory body or an incorporated association. 2. Potential to deal in the land (mortgage, lease, sell, etc.). 3. No controls on land use in the title deed, but is necessarily subject to the land use and environmental planning system. 4. Freehold does not include mineral or petroleum and oil rights. 5. Freehold may also be compulsorily acquired by government for a public work (Part 9 of the LAA).	1. Land must be identified and surveyed. All assets must be inspected and assessed and any liabilities identified. 2. All legitimate interest holders must be identified and conflicting interests resolved. 3. NTA future act processes must be complied with. An ILUA could be developed. 4. If AAPA Part III Reserve, then Parliament must approve cancellation of Reserve over relevant areas. 5. Existing titles must be surrendered (title holders may be entitled to some compensation). 6. Department of Mines must clear that land is not in a proclaimed mineral field. 7. Land must be checked for contamination and not on the Contaminated Land Register. 8. Aboriginal and other heritage must be checked. 9. Land must have legal access. 10. WAPC must approve subdivision and land use. 11. Department of Lands must undertake referrals to other agencies. 12. Costs must be identified for all parties. 13. With appropriate form of tenure selected, title deeds must be prepared for transfer, executed and registered.	1. All legislative and policy requirements must be complied with. 2. Mining Act considerations. 3. Contaminated land considerations. 4. Land may be purchased from the State at unimproved land value, or Cabinet may make an exception to grant land. 5. Essential services may need to be regularised. 6. Municipal services may need to be regularised. 7. Existing houses and other assets may require upgrade or replacement prior to transfer. 8. Mining Act considerations. 9. Contaminated land considerations. 10. State will have to pay compensation to native title holders for loss of native title rights and interests.	1. Existing communal titles to Aboriginal organisations must be surrendered. 2. Potential loss of control over land (i.e. non-Aboriginal people could purchase titles off Aboriginal title holders if agreement reached). 3. New freehold title owners must pay for land and title registration (unless Cabinet agrees to waive costs). 4. Potential for land and buildings to be sold on the open market. 5. Potential for individual wealth creation. 6. Community's ability to create wealth may be severely hampered, if not lost. 7. Residents and businesses solely responsible for insurance, repairs and maintenance of buildings and assets and for compliance with local government laws and by-laws. 8. Residents and businesses must pay local government rates in return for municipal services, and consumer charges for other essential services.	1. State requires surrender and permanent extinguishment of native title rights and interests. 2. Or State can exercise compulsory acquisition powers to permanently extinguish native title rights and interests. 3. Native title holders entitled to compensation (on just terms) for loss, diminution, impairment or other effect on their native title rights and interests.

Table 7.2 Freehold with specific conditions (s.75 LAA)

Details of the tenure	Process	Implications for the WA Government	Implications for existing title holders and Aboriginal residents	Impact on Native Title rights and interests
1. Minister for Lands may transfer land in freehold (or fee simple) to a person, a family, a company, a statutory body or an incorporated association but subject to specific conditions concerning use and transfer. 2. Conditions could include restrictions on transfer of title to others prior to satisfying certain conditions. 3. Minister may transfer land for nominal price or be discounted due to community benefit arising from specified land use. 4. Conditional freehold land cannot be transferred without the prior written permission of the Minister for Lands. 5. Conditional tenure land cannot be subject to licence, mortgage, charge, security or other encumbrance without prior permission of the Minister for Lands, which may be given subject to conditions. 6. Conditional freehold does not include mineral or petroleum and oil rights. 7. Conditional freehold may also be compulsorily acquired by government for a public work (Part 9, LAA).	1. Land must be identified and surveyed. All assets must be inspected and assessed and any liabilities identified. 2. All legitimate interest holders must be identified and conflicting interests resolved. 3. NTA future act processes must be complied with. An ILUA could be developed. 4. If AAPA Part III Reserve, then Parliament must approve cancellation of Reserve over relevant areas. 5. Existing titles must be surrendered (and maybe entitled to some compensation). 6. Department of Mines must clear that land is not in a proclaimed mineral field. 7. Land must be checked for contamination and not on the Contaminated Land Register. 8. Aboriginal and other heritage must be checked. 9. Land must have legal access. 10. WAPC must approve subdivision and land use. 11. Department of Lands must undertake referrals to other agencies. 12. Costs must be identified for all parties. 13. With appropriate form of tenure selected, title deeds must be prepared for transfer, executed and registered.	1. All legislative and policy requirements must be complied with. 2. Mining Act considerations. 3. Contaminated land considerations. 4. If applied to an existing settlement, essential services may need to be regularised. 5. If applied to an existing settlement, municipal services may need to be regularised. 6. If applied to an existing settlement, existing houses and other assets may require upgrade or replacement prior to transfer. 7. State may be required to pay compensation for loss of native title rights and interests.	1. Existing communal titles to Aboriginal organisations under s.83 of the LAA or under the AAPA must be surrendered. 2. Potential to maintain control over land (i.e. a condition of the title could include that ownership of land is restricted to Aboriginal people, and to Bardi and Jawi people only). 3. However, if the conditions are breached, the land is liable to forfeiture by the State. 4. New freehold title owners must pay for land and title registration (unless Cabinet agrees to waive costs). 5. Low potential for wealth creation due to restricted or closed market. 6. Title holders will be solely responsible for insurance, repairs and maintenance of buildings and assets and for compliance with local government laws and by-laws. 7. Title holders must pay local government rates in return for municipal services, and pay consumer charges for other essential services.	1. State may still require voluntary surrender and permanent extinguishment of native title rights and interests, even though the conditional tenure may restrict land transfers to Aboriginal people only. 2. State could exercise compulsory acquisition powers where native title holders are reluctant to agree to the surrender and permanent extinguishment of native title rights and interests. 3. Native title holders entitled to compensation (on just terms) for loss, diminution, impairment or other effect on their native title rights and interests.

Table 7.3 Leasehold (s.79 LAA)

Details of the tenure	Process	Implications for the WA Government	Implications for existing title holders and Aboriginal residents	Impact on Native Title rights and interests
1. Lease may be issued to a person, a family, a company, a statutory body or an incorporated association. 2. Leases may be issued for a fixed term or in perpetuity (although it is not current government policy to issue leases in perpetuity in WA). 3. Lessees have a right to use and enjoyment of the land for the duration of the lease, provided it is consistent with the purpose of the lease. 4. Controls on limits to use of the title. 5. Minister for Lands' prior written approval required for dealings with land or undertaking improvements. 6. Any sub-leasing also requires Minister's prior written approval.	1. Land must be identified and surveyed. All assets must be inspected and assessed and any liabilities identified. 2. All legitimate interest holders must be identified and conflicting interests resolved. 3. NTA future act processes must be complied with. An ILUA could be developed. 4. If AAPA Part III Reserve, then Parliament must approve cancellation of Reserve over relevant areas 5. Any other existing titles must be surrendered. 6. Department of Mines must clear that land is not in a proclaimed mineral field. 7. Land must be checked for contamination and not on the Contaminated Land Register. 8. Aboriginal and other heritage must be checked. 9. Land must have legal access. 10. WAPC must approve subdivision and land use. 11. Department of Lands must undertake referrals to other agencies. 12. Costs must be identified for all parties. 13. With appropriate form of tenure selected, title deeds must be prepared for transfer, executed and registered.	1. All legislative and policy requirements must be complied with. 2. Mining Act considerations. 3. Contaminated land considerations. 4. Land may be purchased from the State at unimproved land value, or Cabinet may make an exception to grant land. 5. Essential services may need to be regularised. 6. Municipal services may need to be regularised. 7. Existing houses and other assets may require upgrade or replacement prior to transfer. 8. State may have to pay compensation to native title holders for loss of native title rights and interests, unless non-extinguishment principle can be agreed with native title holders.	1. Existing communal titles to Aboriginal organisations will need to be surrendered. 2. Potential to maintain control over land (i.e. a condition could restrict ownership or sub-leasing to Aboriginal people only). 3. Suitable environment for government housing and infrastructure programs or joint ventures. 4. Very low potential for wealth creation. 5. New lessees must pay for land and title registration (unless Cabinet agrees to waive costs). 6. Lessees must pay local government rates in return for municipal services, and consumer charges for other essential services. 7. Lessees will be responsible for insurance, repairs and maintenance of buildings and assets and for compliance with local government laws and by-laws, depending on arrangements between head lessee and sub-lessees.	1. If head lease issued to native title holders or their RNTBC, then it may not be necessary to surrender and extinguish native title rights and interests permanently. 2. May be able to apply the non-extinguishment principle to the extent of the inconsistency and for as long as the lease term, such that the native title rights and interests revive when sub-lease expires and is not renewed. 3. May be able to apply the same if head lease is to the relevant RNTBC with a long term sub-lease to a local Aboriginal corporation with provisions for sub-lessee to further sub-lease to individuals and families with connections to the native title holding group. 4. However, if leases are to be issued over individual lots, then the State may require the surrender and extinguishment of native title rights and interests. 5. If so, native title holders entitled to compensation (on just terms) for loss, diminution, impairment or other effect on their native title rights and interests.

Source for all three Tables: Adapted from Government of WA, 2009a.

In the case of freehold and freehold with specific conditions, the WA Government requires native title holders to agree to the surrender and permanent extinguishment of the native title rights and interests if the native title holders instead want freehold tenure (Mischin, 2015:8-9). This is a reflection of the WA Government's unflinching position for continuing oversight and control over land use and development and the Crown's pervasive dominance over Indigenous land interests.[491] The Crown's insistence on 'complete erasure' as 'a precondition for settler identity' (Howitt, 2019:7) is a form of violence toward and denial of Indigenous peoples' rights and 'needs to be challenged at every point' (Howitt, 2019:2).

In the case of leasehold, depending on a range of factors (location, land use, lessee's intentions), the State may be able to issue a lease and apply the non-extinguishment principle to the extent of any inconsistency for as long as the term of the lease. However, if the land in question is intended for development and is to be used as collateral for finance, the fact that the land is still subject to native title rights and interests may act as a barrier.

The Indigenous Property Rights Banking Roundtable (AHRC, 2016e) identified five key factors as fundamental to lenders' considerations of financing business proposals, including: the ability to service the loan; the governance and financial acumen of the borrower; valuation in rural and remote Australia (the secondary market); reputational risk to lenders; and the tenure of the land to be used as collateral. The SOWG (2015:36) reported that financial institutions lack confidence in investing in secondary property markets, especially where demand and capacity for economic development and/or home ownership may be low. While these factors are not necessarily specific to Aboriginal land or land subject to native title rights and interests (SOWG, 2015:36), the inalienability of native title and its statutory protection from debt recovery continues to restrain the ability of native title holders to engage in the economy on their terms and at their choosing. Hence the, EIWG state that land tenure 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' (SOWG, 2015:11).

Where a land dealing involves the surrender and permanent extinguishment of native title rights and interests or their compulsory acquisition by the State, the action gives rise to issues of

[491] As discussed in Chapters 2, 3 and 5.

compensation[492] for the loss, diminution, impairment or other effect of an act on the native title rights and interests. The losses incurred will affect not only the present generation of native title holders, but also all future generations of their descendants. Compensation for such losses is extraordinarily difficult to quantify (F. Martin, 2016), which raises the question as to why the State invokes a mandatory requirement for their permanent extinguishment. A further question that arises is whether there are other workable alternatives that do not require extinguishment, either within the existing statutes or within a new framework based on parity between the Indigenous and the Crown's land ownership, use and tenure systems. This is explored in more detail in Chapters 8 and 9.

However, what is often overlooked in the debate about land tenure changes to the ALT estate in WA, is that a wider range of Aboriginal people will be impacted by such changes than just the native title holders. Much of the ALT estate is subject to leases to Aboriginal persons/organisations and is occupied by Aboriginal people who may not be the native title holders for the area, and their rights and interests must also be taken into consideration in any land reforms. These issues become very evident in the case study analyses later in this Chapter.

7.2.5 Essential differences between freehold and leasehold and their 'affect' on native title rights and interests

The merits of accepting freehold or leasehold tenure depends on several factors, including: on the LAA and the ToLA; the extent to which the title holders are able to maximise the long-term benefits of holding the land; and the practicalities of continuing to hold native title rights and interests alongside a form of freehold or leasehold title ostensibly issued by the Crown.

Freehold title(s) may present the potential for the landholder to gain from the development of their land since the land may be sold, mortgaged or leased by the relevant land-holding entity in order to generate capital or rents. As a means of compensation, however, the freehold value of the land at the time of development will not necessarily reflect the value of the land into the future for future generations. Freehold title also presents the significant risk that former native

[492] Compensation for any loss, diminution, impairment or other effect of an act on native title rights and interests is a contentious matter (see F. Martin, 2016, McGrath, 2017). While s.241 of the *Land Administration Act 1997* (WA) provides for determining the amount of compensation it does not include the expression 'just terms', but the State must have regard to the 'just terms' provisions in ss.51 and 51A of the NTA. The 'just terms' provisions in the NTA stem from s.51(xxxi) of the Australian Constitution, which according to Newton and Conolly (2017:3) 'imputes' such a requirement on the States, even without their land acquisition statute having a specific reference to 'just terms'.

title holders will not realise future benefits if the estate is lost through imprudent sales or foreclosure.

If the native title rights and interests are surrendered to the Crown on condition they are replaced by a freehold title, a loss to future generations may occur. Such losses can occur if the land has some intrinsic cultural value to future generations of (former) native title holders that is put at risk by the potential for future development. Or if the economic value of the land is diminished or lost to future generations either because of a decline in its intrinsic value or because an imprudent sale or other transaction means the opportunity costs from any increase in value fail to be recouped (Wensing and Taylor, 2012:27).

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

Leasehold title(s) also present the potential for financial gain, since the land may be sub-leased. However, subsidiary dealings in land may continue to be constrained by the requirement to obtain the prior approval of the Minister for Lands under s 18 of the LAA.[493] This restriction is a feature of the WA legislation that is not shared by some other states and territories and would need to be amended if lessees were to have greater discretion to sublet the land (Wensing and Taylor, 2012:27).

Under the leasehold option, assuming the land has an intrinsic economic value, future generations of native title holders can expect secure and ongoing benefits in the form of rents that would be expected to increase in line with the future economy of the region. Subleases issued on a Crown lease under the LAA can be registered under the ToLA and should therefore have the potential to be traded as well as the potential to be used as security against a loan, meaning that, subject to conditions set by the holders of the head lease, the property may be traded on commercial terms similar to those of freehold title (Wensing and Taylor, 2012:27).

[493] For leases issued under s.79 of the LAA.

Ideally, native title holders should be able to lease their land and trade in sub-leases on commercial terms secure in the knowledge that it cannot be alienated from their custody and control (Wensing and Taylor, 2012:27). This option is explored in Chapters 8 and 9.

However, the following case studies demonstrate the limitations that RNTBCs are currently dealing with in relation to the interactions between their native title rights and interests and the Crown's land ownership, use and tenure systems.

7.3 Bardi and Jawi – Case Study One

7.3.1 Details

Native title rights and interests

The Bardi and Jawi people's ancestral country is located on Cape Leveque on the northern reaches of the Dampier Peninsula. The FCA determined in 2005[494] that the Bardi and Jawi people hold exclusive possession native title rights and interests over 1,037 square kilometres of Aboriginal reserve and UCL as well as non-exclusive possession native title over the inter-tidal zone.[495] In 2010, the FCAFC determined that they hold exclusive possession native title over the islands south-west of Hadley Passage, tidal movements, several islets, and the seaward extent of native title.[496]

There are three townships on Bardi and Jawi Country: Ardyaloon and Djarindjin/Lombadina, each located on separate ALT Reserves or leases. The township of Ardyaloon[497] is the primary focus of this case study. Ardyaloon is located on the eastern most point of the Dampier Peninsula, approximately 190 kilometres from Broome via the partially sealed Broome-Cape Leveque Road, the southern unsealed part of which becomes impassable during the wet season.

Ardyaloon

Ardyaloon was settled in the early 1970s 'partly as a consequence of the closure of the mission on Sunday Island' (Sharon Griffiths and Associates, 2005:5; Glaskin, 2007:64) and has become one of the largest Aboriginal communities in WA, supporting several outstations in the

[494] *Sampi v State of Western Australia (No 3)* [2005] FCA 1716 [30/11/2005 determination].
[495] There are essentially five types of existing Crown tenures on Bardi and Jawi Country, including Aboriginal Lands Trust (ALT) reserves, special leases, unallocated Crown land (UCL), private freehold and public roads, noting that private freehold and public roads are not subject to native title rights and interests.
[496] *Sampi on behalf of the Bardi and Jawi People v State of Western Australia (No 2)* [2010] FCAFC 99.
[497] Also known as 'One Arm Point'.

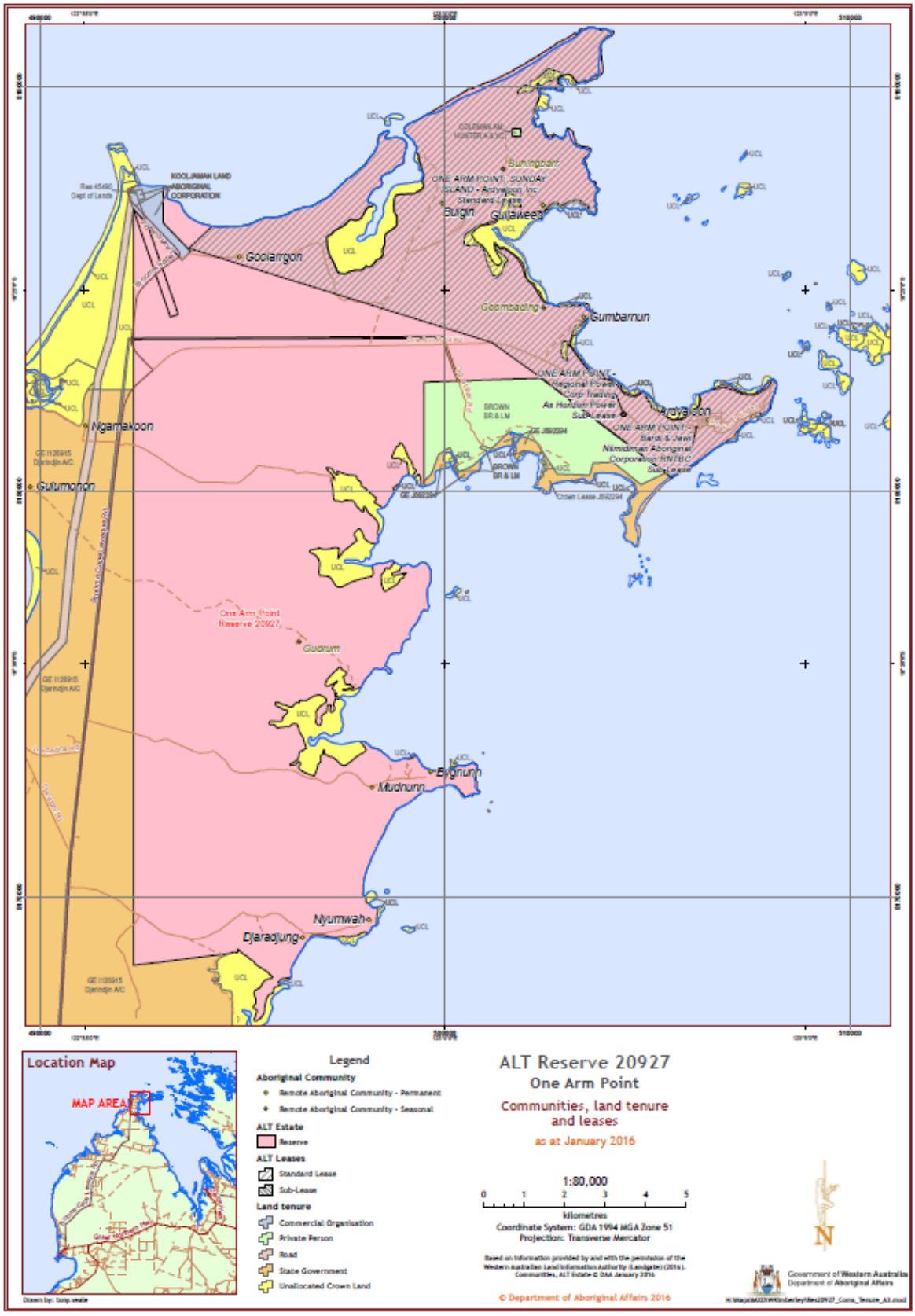
surrounding area reflecting the traditional salt water interests of the Bardi and Jawi people. At the 2016 Census Ardyaloon had a population of about 362 people (ABS, 2016).

Ardyaloon is situated on Lot[498] 89 (**Map 7.2**) which is part of a Crown Reserve vested in the ALT under Part III of the AAPA Act for the 'use and benefit of Aboriginal people'.[499] The context map for Ardyaloon is shown in **Map 7.3**. Land tenure in and around the township of Ardyaloon is shown in **Map 7.4**. A copy of the Certificate of Title for Lot 89 is shown in **Figure 7.1**, which shows that the ALT has leased Lot 89 to Ardyaloon Incorporated[500] for a term of 99 years, expiring in 2074. Membership of Ardyaloon Incorporated is restricted to Bardi and Jawi people.[501]

The current rights and interests in Ardyaloon are listed in **Table 7.4**, progressing from the Crown's radical title at the bottom of the Table to the access rights that visitors receive when they are issued with a permit to visit the area, at the top of the Table. What this analysis reveals is, that there are several layers of rights and interests in the land on which Ardyaloon is situated and that the native title rights and interests sit above the Crown's radical title, but are always subject to the Crown's powers of compulsory acquisition. These conflicts are examined in more detail later in this Chapter.

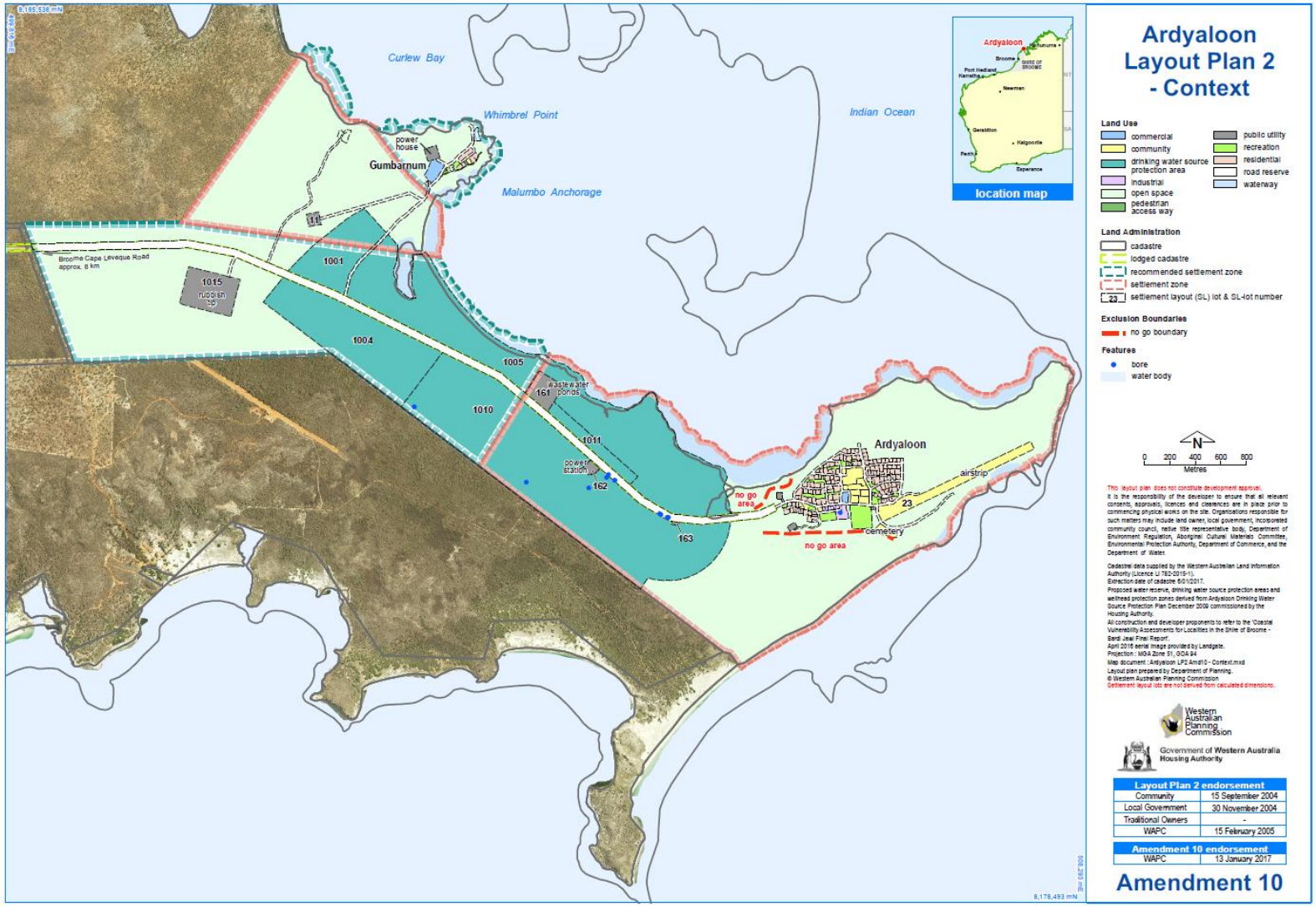
Land use planning and development in Ardyaloon is governed by several layers of statutory planning. At the top is the Kimberley Regional Planning and Infrastructure Framework (KRPIF) (WAPC, 2015b), in between is a sub-regional plan (WAPC, 2015a), and toward the bottom is the Shire of Broome's Local Planning Scheme No. 6 (Shire of Broome, 2016a) and a Layout Plan prepared under a special State Planning Policy (SPP) that applies only to remote Indigenous settlements (Government of WA, 2011b).[502]

[498] As defined in s.4 and s.136 of the *Planning and Development Act 2005* (WA). A lot includes the whole of the land in a certificate of title.
[499] Under s.25(1) and s.27 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPA Act).
[500] A not-for-profit community association registered in July 1973 under the *Associations Incorporation Act 1987* (WA), which was repealed and replaced by the *Associations Incorporation Act 2015* (WA).
[501] To be a member, a person must be a Bardi/Jawi person 18 years and above, affiliated by marriage and accepted by Ardyaloon Incorporated, and reside at Ardyaloon or on the lease held by Ardyaloon Incorporated for a period of 12 months or more continuously (Ardyaloon Incorporated, 1973).
[502] An 'Aboriginal settlement' is defined in State Planning Policy 3.2 as 'A discrete place that is not contiguous with a gazetted town, is inhabited or intended to be inhabited wholly or principally by persons of Aboriginal descent, as defined under the *Aboriginal Affairs Planning Authority Act 1972* (WA), and which has no less than 5 domestic dwellings and/or is supported by essential services that are provided by one or more state agency(s)' (Government of WA, 2011b).



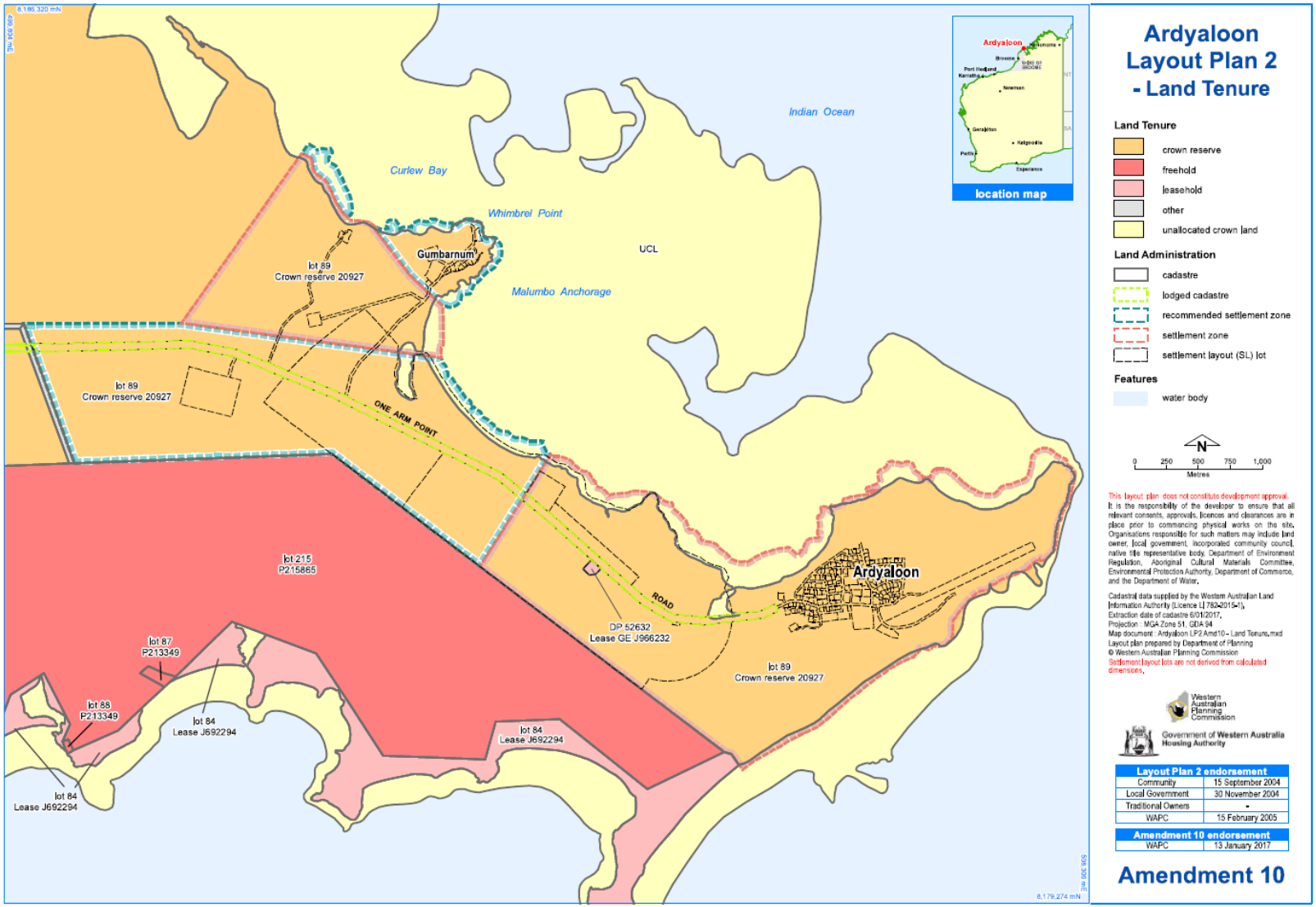
Map 7.2 ALT Reserve 20927 – One Arm Point – Communities, land tenure and leases

Source: Department of Aboriginal Affairs, Government of WA



Map 7.3 Township of Ardyaloon – Context

Source: Department of Planning, Government of WA



Map 7.4 Township of Ardyaloon – Land Tenure

Source: Landgate and Department of Planning, Government of WA

WESTERN AUSTRALIA

REGISTER NUMBER	
89/DP91011	
DUPLICATE EDITION	DATE DUPLICATE ISSUED
N/A	N/A

VOLUME LR3128 FOLIO 867

RECORD OF CERTIFICATE OF CROWN LAND TITLE

UNDER THE TRANSFER OF LAND ACT 1893 AND THE LAND ADMINISTRATION ACT 1997

NO DUPLICATE CREATED

The undermentioned land is Crown land in the name of the STATE of WESTERN AUSTRALIA, subject to the interests and Status Orders shown in the first schedule which are in turn subject to the limitations, interests, encumbrances and notifications shown in the second schedule.

REGISTRAR OF TITLES

LAND DESCRIPTION:

LOT 89 ON DEPOSITED PLAN 91011

STATUS ORDER AND PRIMARY INTEREST HOLDER:
(FIRST SCHEDULE)

STATUS ORDER/INTEREST: RESERVE VESTED UNDER STATUTE

PRIMARY INTEREST HOLDER: THE ABORIGINAL AFFAIRS PLANNING AUTHORITY OF PO BOX 7770, CLOISTERS SQUARE, PERTH

(XE I760627) REGISTERED 15 JANUARY 2004

LIMITATIONS, INTERESTS, ENCUMBRANCES AND NOTIFICATIONS:
(SECOND SCHEDULE)

1. F426044 PART RESERVE 20927 FOR THE PURPOSE OF USE & BENEFIT OF ABORIGINES REGISTERED 17.1.1994.
2. I760627 VESTED. PURSUANT TO SECTION 25 (1) & 27 OF THE ABORIGINAL AFFAIRS PLANNING AUTHORITY ACT 1972. SEE GOV GAZ 15.6.1973. REGISTERED 15.1.2004.
   I760628 CONTROL AND MANAGEMENT TO ABORIGINAL LANDS TRUST OF POST OFFICE BOX 7770, CLOISTERS SQUARE, PERTH PURSUANT TO SECTION 24 (1) OF THE ABORIGINAL AFFAIRS PLANNING AUTHORITY ACT 1972. SEE GOV GAZ 17.8.1973. REGISTERED 15.1.2004.
3. I499093 LEASE TO BARDI ABORIGINES ASSOCIATION INC OF CARE OF ONE ARM POINT COMMUNITY, VIA BROOME EXPIRES: SEE LEASE. AS TO PORTION ONLY. REGISTERED 30.5.2003.
   I499094 CHANGE OF NAME AFFECTING LEASE I499093 . LESSEE NOW ARDYALOON INC OF CARE OF ONE ARM POINT COMMUNITY, VIA BROOME REGISTERED 30.5.2003.
   J966232 SUB-LEASE OF LEASE I499093 TO REGIONAL POWER CORPORATION OF 363 WELLINGTON STREET, PERTH EXPIRES: SEE SUB LEASE. AS TO PORTION ONLY. REGISTERED 26.10.2006.
   K056667 SUB-LEASE OF SUB-LEASE J966232 TO ENERGY GENERATION PTY LTD OF 7-11 CATALANO ROAD, CANNING VALE AS TO PORTION ONLY. REGISTERED 15.1.2007.

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ORIGINAL CERTIFICATE OF CROWN LAND TITLE

REGISTER NUMBER: 89/DP91011 VOLUME/FOLIO: LR3128-867 PAGE 2

Warning: A current search of the sketch of the land should be obtained where detail of position, dimensions or area of the lot is required. Lot as described in the land description may be a lot or location.

----------END OF CERTIFICATE OF CROWN LAND TITLE----------

STATEMENTS:

The statements set out below are not intended to be nor should they be relied on as substitutes for inspection of the land and the relevant documents or for local government, legal, surveying or other professional advice.

SKETCH OF LAND: DP91011 [SHEET 1].
PREVIOUS TITLE: LR3085-803.
PROPERTY STREET ADDRESS: LOT 89 ONE ARM POINT RD, DAMPIER PENINSULA.
LOCAL GOVERNMENT AREA: SHIRE OF BROOME.

NOTE 1: A000001A CORRESPONDENCE FILE 02638-1975-01RO.
NOTE 2: SUBJECT TO SURVEY - NOT FOR ALIENATION PURPOSES
NOTE 3: LAND PARCEL IDENTIFIER OF DAMPIER LOCATION 89 (OR THE PART THEREOF) ON SUPERSEDED PAPER CERTIFICATE OF TITLE CHANGED TO LOT 89 ON DEPOSITED PLAN 91011 ON 14-JAN-04 TO ENABLE ISSUE OF A DIGITAL CERTIFICATE OF TITLE.
NOTE 4: THE ABOVE NOTE MAY NOT BE SHOWN ON THE SUPERSEDED PAPER CERTIFICATE OF TITLE OR ON THE CURRENT EDITION OF DUPLICATE CERTIFICATE OF TITLE.
NOTE 5: J679303 DEPOSITED PLAN 49465 LODGED.

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Figure 7.1 Certificate of Title for Lot 89, part Crown Reserve 20927

Source: Landgate, Government of WA.

Table 7.4 Current Land Rights and Interests in Ardyaloon

Interests or Rights	Conditions	Details
Access Rights	Restricted visiting purposes. Must respect 'no-go' areas.	Entry permits for non-Aboriginal people on to Crown Reserve 20927 administered by the ALT.
Use Rights	Residents of housing in Ardyaloon subject to tenancy agreement with Dept of Housing WA which is subject to the *Residential Tenancies Act 1987* (WA).	A voluntary Housing Management Agreement under the *Aboriginal Housing Legislation Amendment Act 2010* (WA) between Ardyaloon Inc. and the Dept of Housing WA which allows the State to control and manage the letting and leasing of the housing, effectively standing in the shoes of the owner.
Secure Interests	Nil.	Land on an AAPA Reserve cannot be mortgaged without Minister's prior approval.
Other Registered Interests	Sub-lease for power generation. Other interests are not registered.	Ardyaloon Inc. sub-lease a portion of Lot 89 to Regional Power Corporation who sub-leases to Energy Generation Pty Ltd. No other 'interests' in Ardyaloon are registered as sub-lessees, i.e. the local store, the aquaculture business, the airstrip, nor the local school and Commonwealth office that was constructed for the 'Government business manager' in 2013-14.
Registered Interests	Lease over Lot 89 to Bardi Aborigines Association (now Ardyaloon Inc.) 'for use and benefit of Aborigines'. Registered on 30 May 2003.	Lot 89 subject to a lease under s.20 AAPA Act to Ardyaloon Inc., due to expire in 2074. The township of Ardyaloon is subject to by-laws enacted under the *Aboriginal Communities Act 1979* (WA).
PBC Registered Interests	Bardi and Jawi RNTBC as trustee and registered as a CATSI Corporation in 2007.	The FCA determination that Bardi and Jawi Niimidiman Aboriginal Corporation RNTBC holds the determined exclusive possession native title rights and interests as trustee for the native title holders.
Native Title Rights and Interests	Exclusive Possession. Full beneficial interest. No alienation outside group except to the Crown.	Any act that 'affects' native title rights and interests are subject to future act provisions in the *Native Title Act 1993* (Cth), including ILUAs.
Crown Interests	Radical Title. No beneficial interest. No grant of interest without agreement or compulsory acquisition.	Crown Reserve 20927 under Part III AAPA Act for the 'Use and Benefit of Aboriginal Inhabitants' and is protected through the administration of entry permits. Cannot be leased, mortgaged or sub-leased without the AAPA's consent. Its status can only be changed by the approval of both Houses of the WA Parliament.

Source: Adapted from Strelein (2016). Content compiled by the author from various public records.

The current Layout Plan map for the 'Living Area' of Ardyaloon is shown in **Map 7.5** (WAPC, 2005). This plan divides the township into its different land uses (residential, light industrial, commercial, public and civic buildings, recreation and public utilities and an airstrip). The cadastral details in this Layout Plan have not been surveyed, have no legal status and none of the individual lots has legal access[503]. The information in this Layout Plan is indicative only. The significance of this will become apparent shortly.

Each of the higher order land use plans[504] identify Ardyaloon as having potential for growth in support of further tourism and resource development activities on the Dampier Peninsula. The plans also identify Ardyaloon's current status as a Part III Reserve as a significant impediment to the growth of the town and that the land tenure and municipal and essential service delivery arrangements in the township have to be 'normalised'. Whether this is fair and feasible in Ardyaloon is highly debatable, and is discussed below.

Several organisations play various roles in local governance on Bardi and Jawi country (**Table 7.5**). The four local Aboriginal organisations are Ardyaloon Incorporated, Djarindjin Aboriginal Corporation, Lombadina Aboriginal Corporation and the Bardi and Jawi Niimidiman Aboriginal Corporation RNTBC. The three community associations have annual turnovers of around $2 million dollars each. The Bardi and Jawi Niimidiman Aboriginal Corporation RNTBC has no resources or revenue and relies on the KLC for assistance with fulfilling its corporate and statutory obligations.

The MoU

In 2011 the four local Aboriginal organisations agreed to develop a Memorandum of Understanding (MoU) to 'encourage goodwill between the parties' and to 'establish a collaborative governance framework for Bardi and Jawi Land and Sea Country' (Ardyaloon Incorporated, 2012). In this context, they also agreed to a moratorium on all new lease and land use applications on the ALT Estate within the Bardi and Jawi native title determination area until such time as the future governance, land tenure, land use and planning issues are resolved. The ALT agreed to support the moratorium. At the time of writing, the moratorium is still in place.

[503] Legal access to land in WA is generally provided by one of the following means: a dedicated road(s) under the *Land Administration Act 1995* (WA) or the *Main Roads Act 1930* (WA); a private lease(s); a public access route(s) on Crown Land; or a private road(s).
[504] See Shire of Broome (2014:13); WAPC (2015a: 26-27; 2015b).

Hence, no new leasing or land tenure arrangements have been entered into on Bardi and Jawi Country since 2011.

The MoU was finalised in 2012. It includes a commitment to develop a Land Tenure Transfer Plan 'to achieve the return of land ownership to Bardi and Jawi people, for the benefit of all Bardi and Jawi people', mapping new boundaries for each of the community corporations, agreeing permissible land uses on Bardi and Jawi country and the types of land uses that 'will generally not be approved by the Parties' on Bardi and Jawi country (Ardyaloon Incorporated, 2012). However, up until the end of 2017, one of the community associations has refused to sign the MoU, which means that many of the commitments in the MoU have not been able to be progressed.

I interpret these actions by the three local community associations and the Bardi and Jawi RNTBC as 'speaking back' to the systems that have wound them up into these complex local governance and land tenure puzzles. The Bardi and Jawi RNTBC is confused, even angry, with the Crown for putting them in these circumstances.[505] The State's unwillingness to facilitate the 'un-doing' of the previous local governance and crown reserve arrangements demonstrates an uncomfortable level of disrespect by the Crown for the priority that the traditional owners should have secured under the native title system.[506]

[505] Notes and records of meetings with Bardi and Jawi RNTBC 12 August 2014, 16-17 November 2016, 5 and 6 September 2017. Held on file by the author.

[506] The State's unwillingness to 'undo' the current ALT reserve arrangements on Bardi and Jawi Country are evidenced by the fact that these matters have been under discussion by the State since the Bardi and Jawi native title determination in 2005. Recent attempts by the WA State Government to reform the ALT system are documented in part in Appendices C and D of this thesis.

Map 7.5 Township of Ardyaloon – Layout Plan of Living Area

Source: Department of Planning, Government of WA.

Table 7.5 Organisations involved in governance and service provision on Bardi and Jawi Country and their Incorporation status (listed alphabetically)

Organisation	Legislation	Jurisdiction	Date of Incorporation	Primary Functions/Activities
Ardyaloon Incorporated. (formerly The Bardi Aborigines Association Incorporated).	*Associations Incorporation Act 2015* (WA)*; Aboriginal Communities Act 1979* (WA)	WA	18 July 1973	Community governance, some municipal services including maintenance of airstrip. By-laws under the *Aboriginal Communities Act 1979 (WA).* Name change occurred on 20 November 2002.
Bardi and Jawi Niimidiman Aboriginal Corporation RNTBC	*CATSI Act 2006* (Cth) and *NTA 1993* (Cth)	Cth	26 November 2006	Registered Native Title Body Corporate (RNTBC). Performs statutory functions under the NTA 1993 and Regulations and under CATSI Act.
Bardi Ardyaloon Association Inc.	*Associations Incorporation Act 2015* (WA)	WA	16 June 1992	Mirror organisation to Ardyaloon Inc. reciprocal membership and board of management. Sole purpose is to manage the community store in Ardyaloon.
Djarindjin Aboriginal Corporation	*CATSI Act 2006* (Cth)	Cth	10 September 1985	Municipal services, housing, education (including child care), health and community services, art services, personal and other services, employment and training and ran a shop.
Horizon Power	*State Government-owned energy utility*	WA	26 August 2005	Maintains power supply and reticulation in the west Kimberley, including in Ardyaloon, Lombadina and Djarindjin.
Housing Authority WA	*Housing Act 1980* (WA)*; Government Employees' Housing Act 1964* (WA)	WA	n/a	Delivers housing management services in each of the communities. All rent collected goes towards repairs and maintenance costs in the communities. Assumed responsibility for delivery of municipal and essential services in remote communities from 1 July 2015.
Kimberley Land Council	*CATSI Act 2006* (Cth) and *NTA 1993* (Cth)	Cth	27 July 1979	As NTRB under the NTA 1993, performs statutory functions for native title holders in the Kimberley region. Also undertakes wide range of activities to protect traditional land and waters in the Kimberley region.
Kimberley Regional Service Providers (KRSP)	*Corporations Act 2001* (Cth)	Cth	4 June 1988	Joint venture between an Aboriginal organisation and a private company. Maintains water and waste water in Ardyaloon, Djarindjin and Lombadina and provides municipal services in Ardyaloon.
Lombadina Aboriginal Corporation	*CATSI Act 2006* (Cth)	Cth	16 July 1987	Municipal services and provision of accommodation, café and other tourist services.
Mamabulanjin Aboriginal Corporation	*CATSI Act 2006* (Cth)	Cth	2 August 1985	Provision of essential services to several outstations and operates commercial tourism ventures on the Dampier Peninsula.
Shire of Broome	*Local Government Act 1995* (WA)	WA	Est. in 1901 as Roads Board. Est. in 1904 as Municipality	Statutory local government functions include provision of municipal services, land use planning, development control, maintenance of roads etc.

Source: Content compiled by the author from various public records.

7.3.2 Challenges

The situation in Ardyaloon is a classic demonstration of the conflicts that emerge from WA's protectionist era land trust arrangements and recent native title determinations. Ardyaloon is located on a Part III AAPA Act reserve and is subject to an exclusive possession native title determination. The Bardi and Jawi RNTBC has made it clear to the State that they do not wish to surrender and extinguish their native title rights and interests as a pre-condition for land tenure reforms over their traditional country, let alone for Ardyaloon.[507] The issues of land reform for Bardi and Jawi are therefore many and complex.

In the protectionist era, WA's response to the continuing presence of Aboriginal people was to create special reserves for their sole 'use and benefit' and without reference to the Aboriginal peoples' sovereignty or ancestral connections to their country. Whereas native title determinations under the NTA are based on recognition of the continuation of the relevant Aboriginal peoples' laws and customs, a continuing connection with their ancestral land and waters arising from their laws and customs and their ability to be recognised by the common law of Australia.[508]

It is arguable that the entities the ALT selected to hold leases for the townships on its reserves are an anachronism of the way in which Trust lands were administered prior to the recognition of the native title rights and interests. The community associations that were established to hold these land titles on ALT reserves draw their legitimacy, authority and financial income as a result of being trustees of these land tenures, but they stand as potential obstacles to, and erode the original purposes of, recognising and returning the lands to their rightful traditional owners (Tran and Stacey, 2016:19). The RNTBC and the local community associations both have as their objectives improving the quality of life of their peoples, but their resourcing, forms of representation and governing legislative regimes could not be more disparate (Tran and Stacey, 2016:19).

These pre-existing administrative arrangements inadvertently come into open conflict with the 'culturally grounded' RNTBCs that have been established to hold and manage the determined native title rights and interests because the RNTBCs are trying to grapple with a new

[507] Record of meetings with Bardi and Jawi RNTBC 12 August 2014 and 16-17 November 2016. Held on file by the author.
[508] S.223 NTA.

environment (Tran and Stacey, 2016:19).[509] The level of tension between the Bardi and Jawi RNTBC and the three community associations currently responsible for managing each of the townships was palpable, especially over land tenure and land use matters that are likely to affect the Bardi and Jawi people's native title rights and interests.[510] The continuing effect of the moratorium on land tenure decisions is testimony to the ongoing tensions and gives rise to issues around how these land tenure systems can be reconciled.

The classification of the land upon which Ardyaloon is situated as a Crown Reserve for the sole the 'use and benefit of Aboriginal inhabitants' has delivered some benefits to Ardyaloon and the Bardi and Jawi people as a community. There is no doubt that this reserve status has provided the township with a high level of protection from incursions by non-Indigenous interests (Sharon Griffiths and Associates, 2005) and enabled the Bardi and Jawi people to maintain their law and culture on their traditional lands without a great deal of interference from outsiders.

In complete contrast however, the reserve status also suspends the community in an indefinite state of insecurity 'to live a life of permanent uncertainty', an 'ill-defined and uncertain legal status' and 'the dead hand of the ALT' because the land 'remains the property of the Crown' (Wyatt, 2015). As stated above, the existing reserves vested in a trust arrangement under the complete control of the State are a form of 'protectionism' akin to the approaches adopted by governments in the 19th century (ATSISJC, 2005:21-22).

My analysis of the several planning, land tenure and other official public policy documents that prevail over the current circumstances in Ardyaloon reveals an underlying intention on the part of the state.[511] The language being used in the official documents includes terms such as 'hierarchy', 'regularise', 'normalise' and 'comparable', which are indicative of the WA and Australian Governments' desires to impose a level of certainty and closure in the interests of the state and private property that are not necessarily in the long-term interests of the Bardi and Jawi people. The Australian and WA Governments are insisting that the standards of services and infrastructure in remote Indigenous communities such as Ardyaloon should be 'normalised'

[509] I have witnessed this first hand as I sat in and observed the proceedings of several meetings of the Bardi and Jawi RNTBC in the course of my research. Prior to commencing my PhD thesis research, I also attended meetings of the Dampier Peninsula Planning Project Traditional Owner Steering Committee (TOSC) in 2012 at which these issues were also discussed. Notes and records of meetings with Bardi and Jawi RNTBC 21-22 May 2014, 12 August 2014, 16-17 November 2016, 5 and 6 September 2017. Held on file by the author.

[510] Notes and records of meetings with Bardi and Jawi RNTBC 12 August 2014, 16-17 November 2016, 5 and 6 September 2017. Held on file by the author.

[511] The documents are too numerous to list here. See Appendices C and D and the Bibliography of this thesis for more details.

because they are not 'comparable with non-Indigenous communities of similar size, location and need elsewhere in Australia' (Australian Government and Government of WA, 2006:7; SCFFR, 2008, 2009a:6, 2009b:6; WAPC, 2015b:41). The Australian Government's motivation for this policy setting stems from its desire to cease the provision of funding and any direct involvement in what would otherwise be state or local government responsibilities in non-Indigenous towns and villages.

Sullivan (2011:100) maintains that '"Normalisation" is a contestable term' because as a positive goal 'Aboriginal people can expect a standard of living at the national norm', but as a challenge 'it means that Aboriginal people are required to reflect socially, culturally and individually an idealised profile of the normal citizen established by the remote processes of bureaucratic public policy making' (Sullivan, 2011:100). The policy of 'exporting settler (sub)urban values' to remote Indigenous communities is 'unimplementable' and 'misguided' and 'remains an aspiration far from realisation' because of a missing ingredient: '… an understanding that Aboriginal conditions of life are not a remote problem to be solved, but an extension of settler conditions of life' (Sullivan 2011:103).

While land tenure, municipal and essential service delivery and local governance may be interpreted as a scale of governance issue, the stark reality is that the current anomalies in Ardyaloon are the result of decades of ambivalence and neglect by all levels of government.[512] Under current constitutional arrangements, both the WA Government and the Australian Government have responsibility for the provision of essential and municipal services in discrete, remote Indigenous communities such as Ardyaloon, but neither level of government is willing to take sole responsibility (Wensing, 2015a). In November 2015, Australia's then Prime minister, the Hon. Tony Abbott, MP, stated that 'it was not the tax payers' job to subsidise lifestyle choices' if Aboriginal people choose to live in remote areas away from services such as schools and hospitals (ABC, 2015b). Grieves (2015) believes the Prime Minister's views have 'wide currency' with the Australian population and are 'loaded with electoral appeal'. The proposed closure of discrete, remote Aboriginal communities on the basis of disagreements over which level of government should be responsible for providing the same level of essential and municipal services compared to other non-Aboriginal communities of similar size and location shows a failure on the part of governments to understand how geography matters in shaping Aboriginal

[512] Some of the recent history of ambivalence and neglect by State and federal governments is documented in Appendices C and D of this thesis. See also SGSEP 2011a, 2011b, 2012a, 2012d.

peoples' experiences and a 'profound mismatch between the scales of analysis and resolution in a complex intercultural field' (Howitt and McLean, 2015:137, 139). I agree with Howitt and McLean's (2015:139) conclusion that:

> *'The demonstrably inadequate political and policy response articulated by various governments reinforces the significance of the long-term failure to accept the principles of Indigenous rights, particularly the right to self-determination as a necessary foundation for Indigenous policy. Similarly, refusal to acknowledge or address via negotiation with Indigenous peoples the shakiness of the Crown at national and State scales has reinforced the damage in framing how governments respond to Indigenous rights. Such gaps in governments' and politicians' geographic understanding include the links between place and identity, the nature and implications of locational disadvantage, and the importance of subsidiarity as a principle for accountable decision making in public life.'*

The task of transitioning Ardyaloon to become a 'normal' town as prescribed by the Australian Government (SCFFR, 2009b) should not be under-estimated. Such a transition for Ardyaloon will by necessity involve changes to land tenure and titling, changes to land use planning and development controls, changes to local governance arrangements and changes to native title rights and interests resulting in their extinguishment. As discussed in Part 7.2.2 above, creating individual lots and formal cadastral boundaries for each dwelling and all the other land uses in Ardyaloon requires a considerable amount of work. Each and every Lot will need to be surveyed, inspected and assessed to ensure no structures encroach over lot boundaries and that legal access can be provided. This cannot happen overnight. It takes time and effort and comes at a considerable cost. It is unclear who will be responsible for these costs.

Furthermore, the protected status of Part III reserves under the AAPA Act, on which Ardyaloon is situated, can only be revoked by the approval of both houses of the Western Australian Parliament. While this is not administratively insuperable, it may be politically infeasible. And if its special status is revoked, it deprives the township of its protected status and makes the current local governance arrangements unworkable.

The reserve on which Ardyaloon is situated is also subject to exclusive possession native title rights and interests. Therefore, any transformation of the ALT reserve to another form of tenure will affect the native title rights and interests, triggering the need for an Indigenous land use

agreement or compliance with the relevant future act process under the NTA requiring compulsory acquisition of the native title rights and interests.

Land tenure reforms on Bardi and Jawi Country, especially the revocation of the Part III AAPA Act Reserve status over Ardyaloon and the extinguishment of their native title rights and interests for another form of fungible tenure, raises two dilemmas for the Bardi and Jawi RNTBC.

The first dilemma is deciding on the form(s) of land tenure that Bardi and Jawi is prepared to accept from the Crown and on what conditions, including whether the action should also involve acceptance by the Crown of Bardi and Jawi's prior sovereignty on mutually respectful and equal terms (Wensing, 2016a:51) or the surrender and permanent extinguishment of their native title rights and interests and losing control of their inter-generational responsibilities.

The second dilemma is deciding whether Bardi and Jawi wants to become a land use authority and fully-fledged property owner in its own right and therefore having the necessary governance arrangements in place for determining the land use and tenure policies that will be applied to its land holdings in the long term.

These two dilemmas are inter-related. The first dilemma has implications for the continuing existence of Bardi and Jawi's native title rights and interests. The second dilemma will largely be informed by the choices made in response to the first dilemma. A framework for resolving these dilemmas is explored in Chapter 9.

Whether the Bardi and Jawi people really want land tenure reforms that remove the highly protected reserve status over Ardyaloon for a form of tenure that requires the permanent extinguishment of their native title rights and interests, is debatable. From my observations of Bardi and Jawi RNTBC Board of Management meetings in the course of my research for this thesis, when applications for changes in land use or leasing applications came before the Board there was a high level of confusion about the Board's role in view of the moratorium. There was also a high level of mistrust over the State's continuing obfuscation about land tenure reforms to the ALT Estate on Bardi and Jawi Country.[513]

[513] Notes and records of meetings with Bardi and Jawi RNTBC 12 August 2014, 16-17 November 2016, 5 and 6 September 2017. Held on file by the author.

What form land tenure reforms on Bardi and Jawi Country are likely to take, remains a mystery because no formal offers have been made to the Bardi and Jawi RNTBC since the last TOSC meeting in June 2012. Indeed, the WA and Australian Governments have been talking about land tenure reforms on the Dampier Peninsula for at least the past decade and at the time of writing, nothing tangible has emerged from the State (Wensing, 2016a, 2017a, 2017b).

A further critical matter that the Bardi and Jawi people will need to consider is whether they want their townships to remain exclusively for Bardi and Jawi people or whether they would be willing to allow non-Bardi and Jawi people to become land owners in their townships, including non-Indigenous people and not just other Aboriginal people from other clans or language groups. The current special reserve status and excusive native title determination have enabled the Bardi and Jawi people to retain the townships almost exclusively for Bardi and Jawi people. Removing these protections raises serious questions about whether or not these restrictions can remain in place, if that's what the Bardi and Jawi people want.

The Bardi and Jawi native title holders have good reasons therefore to be concerned about how they will be able to continue holding and managing their native title rights and interests, while at the same time also be able to effectively manage land use and access in ways that are both culturally appropriate to them and in accordance with the conventional land administration and land use planning systems of the state of WA.

7.4 Yawuru – Case Study Two

7.4.1 Details

Native Title rights and interests in Broome

The Yawuru people's ancestral country is located around Roebuck Bay in the west Kimberley area and encompasses the regional centre of Broome on the northern side of Roebuck Bay. What began as the Rubibi native title claim in the early 1990s,[514] concluded in 2006 when the FCA recognised the Yawuru people's exclusive possession and non-exclusive possession native title rights and interests over 530,000 hectares of land in and around Broome.[515] The extent of the Rubibi determination is shown in **Map 7.6**, and over the town of Broome in **Map 7.7**.

[514] The conflict the native title claim generated between the native title claimants, the State and the Shire of Broome are well documented by Jackson (1996a; 1996b; 1997a; 1997b) and Kliger and Cosgrove (1999). The history and details of the determination are well documented elsewhere, see NNTT (2005:11-19; 2006a:1-8; 2006b:1-13); Government of WA (2010a; 2010b).

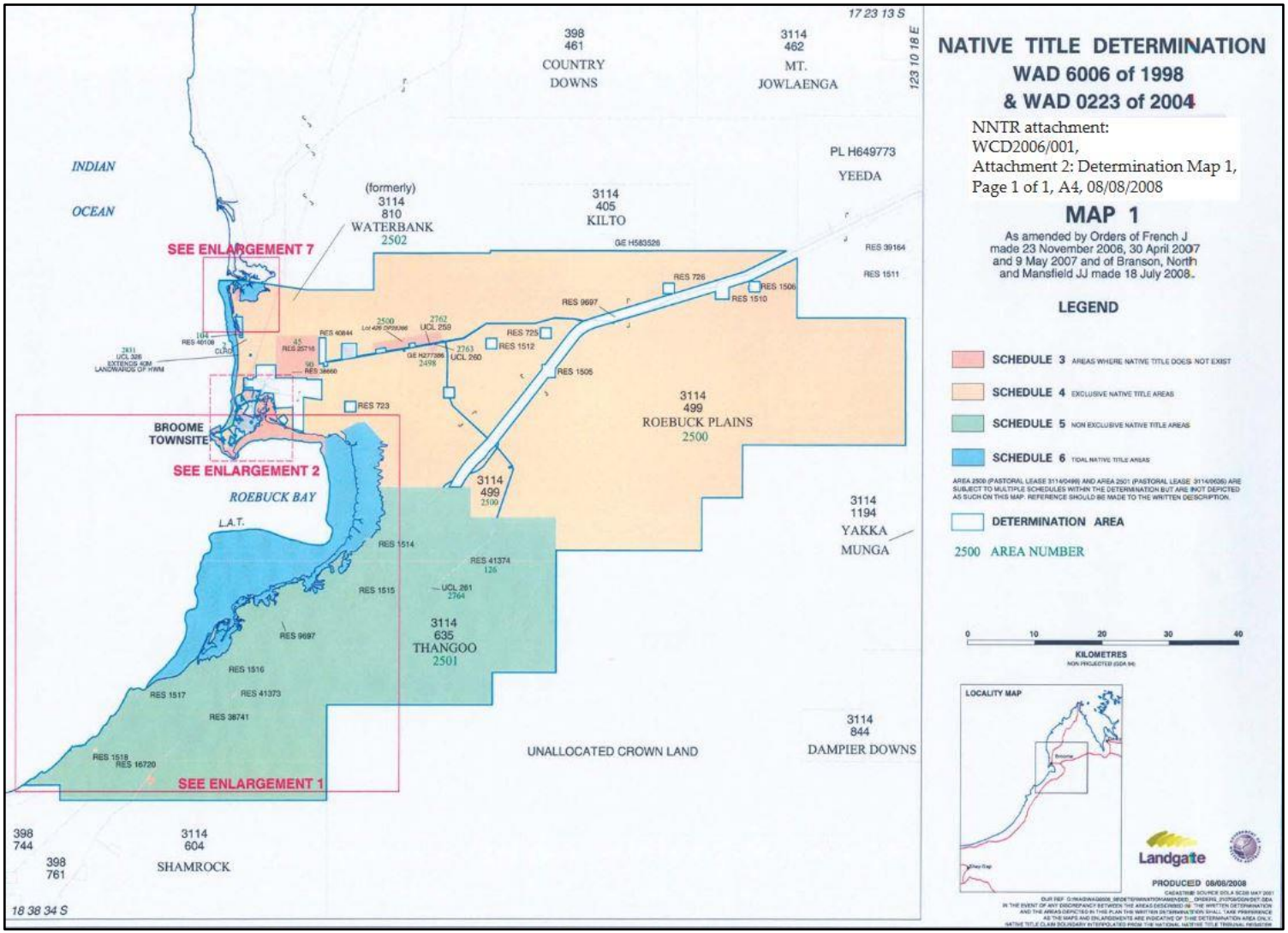
[515] Exclusive possession native title exists over approximately two-thirds of the claim area, including the Roebuck Plains pastoral lease, the former Waterbank pastoral lease, unallocated Crown land around the Dampier Creek (adjacent to the eastern side of

Following three years of difficult negotiations, in 2010 the WA Government signed two ILUAs with the Yawuru people, which is often referred to as the 'Global Agreement'. It is important to note that the Yawuru native title holders have never considered these ILUAs to be the full and final settlement with the State of the native title determination over their traditional country (Wensing, 2016c).

The following analysis examines the issues associated with a native title determination in an urban environment that involves both the recognition of native title in some areas and its extinguishment in other areas and the implications this has for land transfers in a post-determination urban environment. For the Yawuru RNTBC, the land transfers involve parts of the ALT Estate in Broome as well as other parcels of land on the outskirts of Broome, such as Wattle Downs North and South, that are part of the ILUAs that the Yawuru native title holders have signed with the State. The analysis in this thesis focusses on the ALT Estate in Broome (Wensing, 2017e), although the research for this thesis also involved examining the consequences for the Yawuru RNTBC of the transfer of Wattle Downs North (Wensing, 2014d) which is not examined here in detail.[516]

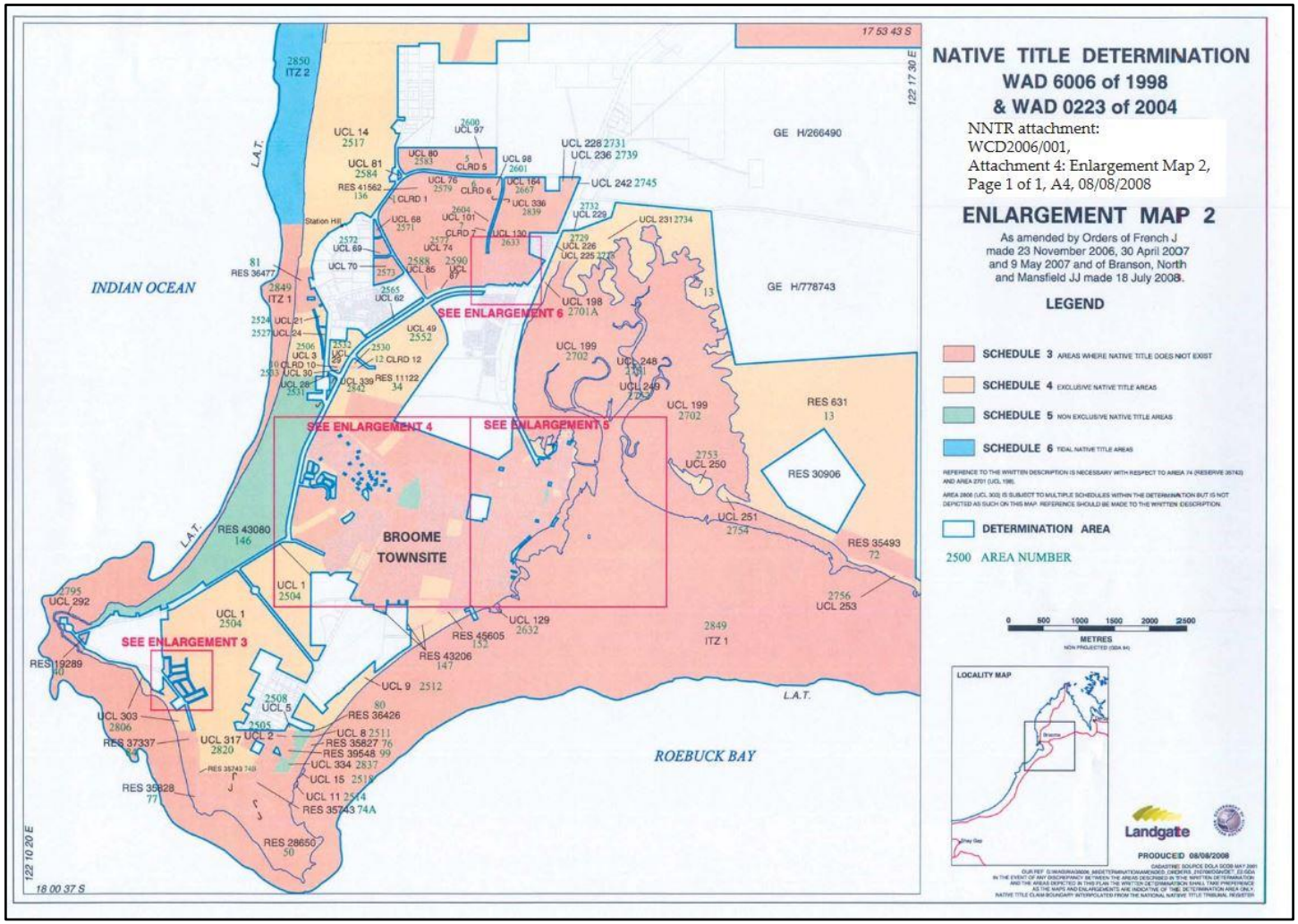
Broome) and Willie Creek to the north of Broome, and unallocated Crown land around Roebuck Bay. Non-exclusive possession native title was found to exist in relation to Thangoo Station pastoral lease, unallocated Crown land in the town of Broome, and the inter-tidal zones throughout the claim area.

[516] Also see Appendix E.



Map 7.6 Rubibi (Yawuru) native title determination

Source: NNTT



Map 7.7 Rubibi (Yawuru) native title determination – Enlargement of Map showing detail over Broome

Source: NNTT

The 'Global Agreement' ILUAs

The 'Global Agreement' comprises two ILUAs: a prescribed body corporate agreement[517] and an area agreement[518] between the Yawuru RNTBC and NBY and the State of Western Australia and other parties.[519] The prescribed body corporate agreement (Government of WA, 2010b) applies to the areas coloured green in **Map 7.8**,[520] and the area agreement (Government of WA, 2010c) applies to the areas coloured yellow in **Map 7.8**.[521]

Each of the ILUAs are intended to provide a range of benefits to members of the Yawuru community, including:

- social and cultural maintenance and enrichment;
- the right to practice and sustain native title rights and interests;
- just terms compensation for the loss, diminution or impairment of native title rights and interests; development of economic and commercial capability and capacity; and
- promotion of economic independence (Government of WA, 2010a:3; 2010b:3).

The two ILUAs also give expression to the native title rights and interests of the Yawuru Community,[522] including to:

- provide for the protection of Yawuru and other Aboriginal heritage;
- apply the non-extinguishment principle[523] wherever possible to land transfers and land reservations;
- provide compensation for Yawuru's agreement to the future acts contemplated by the Agreements that will impair or extinguish native title; facilitate the future development of land in Broome for residential, infrastructural and industrial purposes by both the Yawuru Community and by the State;
- the establishment of conservation and marine parks in and around Broome to be jointly managed by Yawuru RNTBC, the Shire of Broome and the State to provide for the

[517] As per s.24BA NTA.
[518] As per s.24BC NTA.
[519] Other parties to the Yawuru Prescribed Body Corporate ILUA include The State of WA through its Attorney-General's Department, The Minister for Lands, the Conservation Commission of WA, the Conservation and Land Management Executive Body and the Shire of Broome. Other parties to the Yawuru Area ILUA include the Marine Parks and Reserves Authority in addition to those listed above (Government of WA 2010a; 2010b; 2010c).
[520] Approximately 616 square kilometres.
[521] Approximately 362 square kilometres.
[522] Yawuru Community is defined in both of the Yawuru ILUAs as the persons described in Schedule 1 of the Determination of Native Title made by Justice Merkel on 28 April 2006 in proceedings WAD 6006 of1998 (Rubibi) and WAD 223 of 2004 (Rubibi #17) (*Rubibi Community v Western Australia (No. 7)* [2006] FCA 459).
[523] Defined in s.238 NTA.

protection of the environment and Aboriginal heritage, and several other matters (Government of WA, 2010b; 2010c:3).

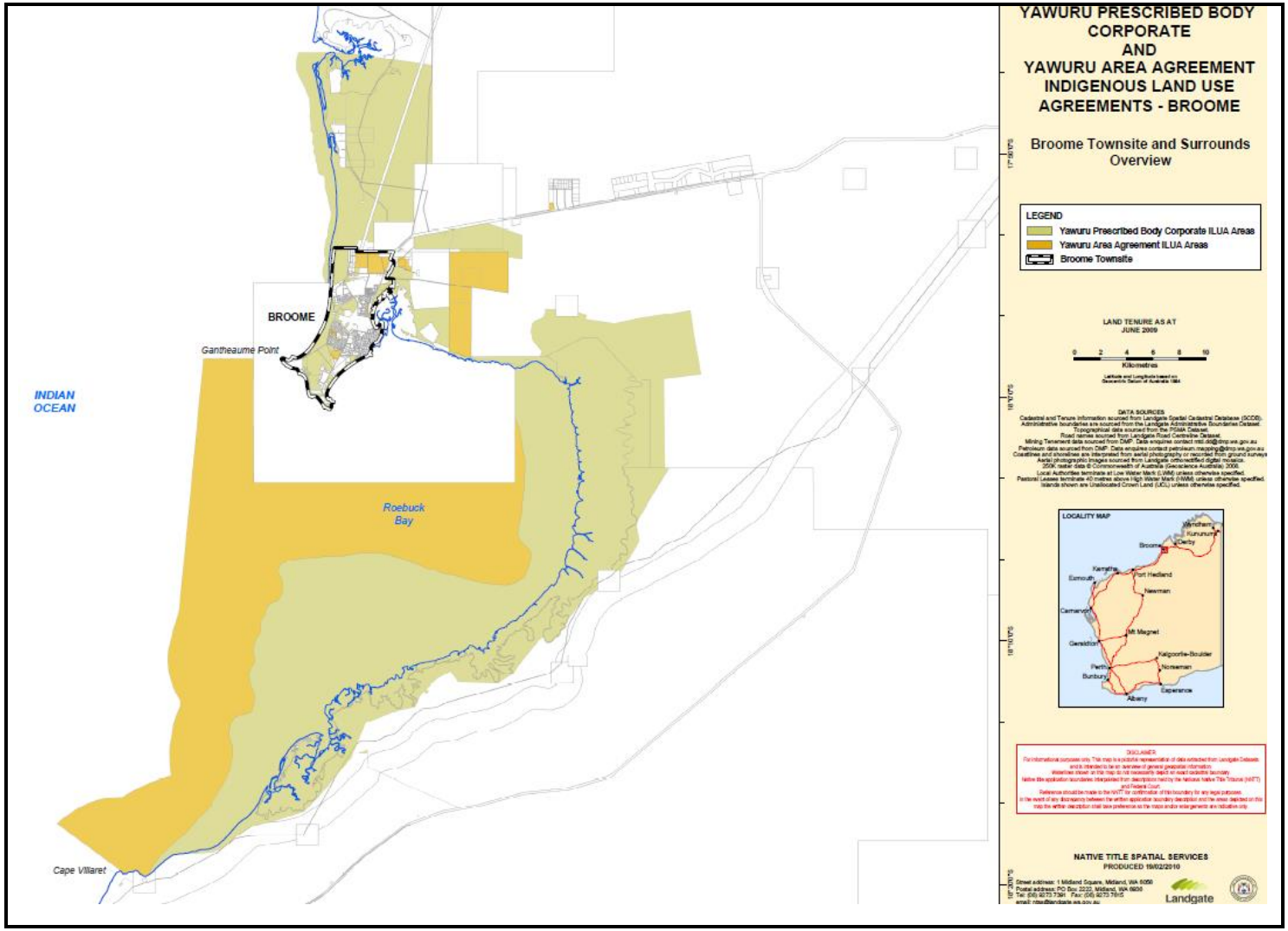
With respect to the application of the non-extinguishment principle, both of the agreements state that:

'*The State acknowledges and agrees that suppression of native title rights and interests pursuant to the Non-Extinguishment Principle as applied in this Agreement does not constitute abandonment or relinquishment of native title rights and interests'*. [524]

The significance of this clause will become apparent later in this analysis.

While the Agreements provide numerous benefits for Yawuru, there are two matters that give rise to significant challenges for Yawuru. The first is the future of the ALT estate in Broome. The second is the transfer of various Lots in unconditional freehold title from the State to NBY Ltd in exchange for the surrender and extinguishment of native title rights and interests. The issues associated with the future of the ALT Estate in Broome are set out below.

[524] Clause 15.3 of Prescribed Body Corporate Agreement (Government of WA, 2010b) and Clause 12.3 of the Area Agreement (Government of WA, 2010c).



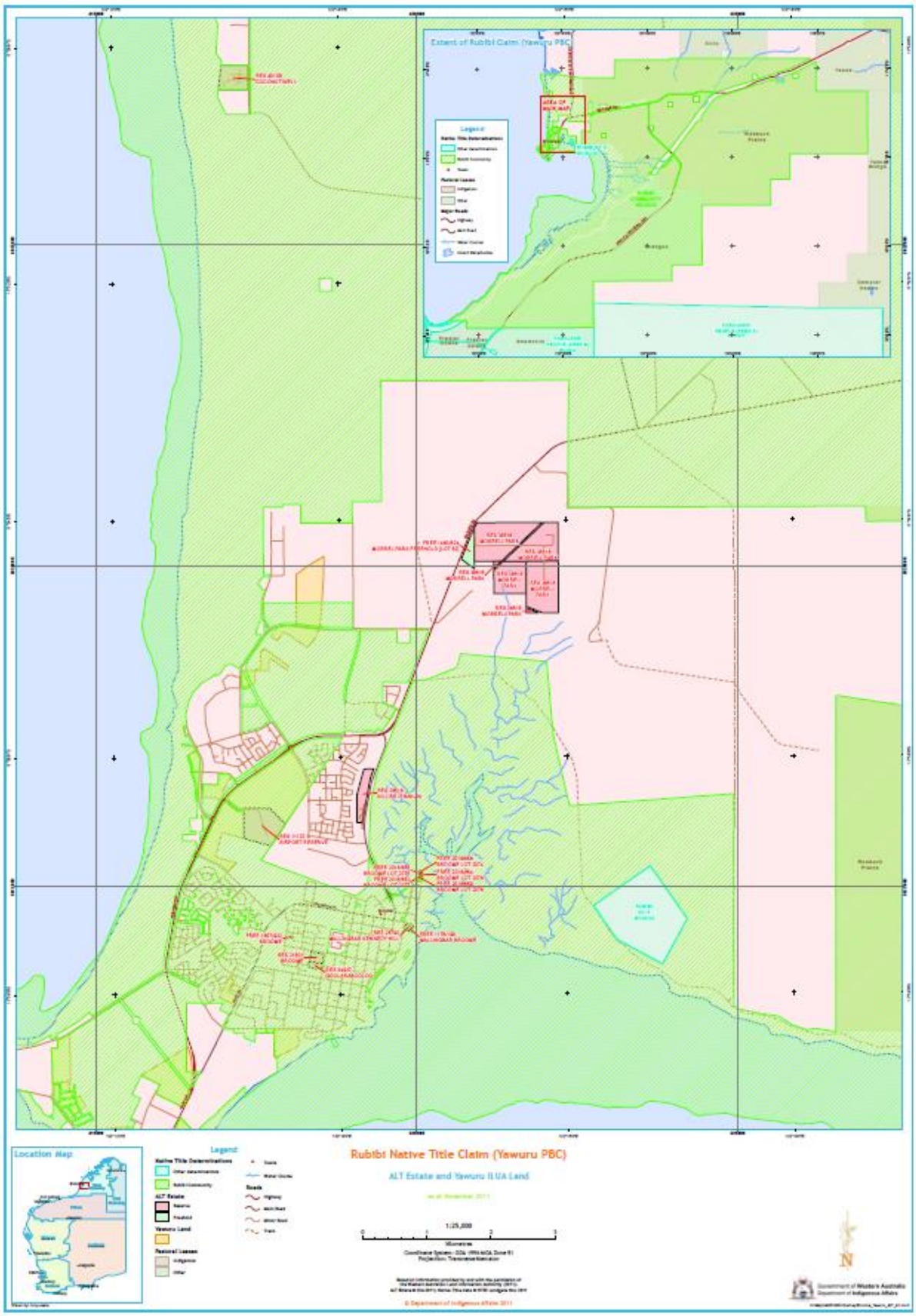
Map 7.8 Yawuru Prescribed Body Corporate ILUA and Yawuru Area Agreement ILUA areas

Source: Office of Native Title, Government of WA, 2010.

The ALT Estate in Broome

The ALT estate in Broome (**Map 7.9**) comprises 17 separate Lots held as reserves 'for the use and benefit of Aboriginal inhabitants' or freehold land.[525] Combined, these Lots provide housing for approximately 300 to 400 people spread over approximately 80-90 households/residences. Within this group of people there is a complex range of language groups, of which Yawuru are a significant number. There is also a significant Aboriginal community services precinct in Dora Street providing a range of economic, social, cultural and environmental services to Aboriginal people in Broome and throughout the Kimberley region, and a significant service provider is located on ALT land at Morrell Park (SGSEP, 2012c; Wensing, 2017c). Some of the Lots are located in areas of high economic value while others are located on the periphery of Broome. But they are all places of cultural significant to Yawuru.

[525] One Lot is a Part III AAAPA Act reserve, six Lots are Crown reserves under the LAA, and eight Lots are freehold lots registered under the *Transfer of Land Act 1893* (WA). The total area involved is approximately 212.3 hectares (SGSEP, 2012c; Wensing, 2017c).



Map 7.9 Rubibi Native Title Claim and the ALT Estate in Broome, November 2011

Source: Department of Indigenous Affairs, Government of Western Australia, 2010

Each of the 17 Lots is subject to Yawuru's native title rights and interests.[526] This means Yawuru has a vital interest in their current and future land use potential, both in terms of their underlying cultural values to Yawuru, as well as their economic or other potential in light of Broome's future growth. In this respect, each of these 17 Lots raises exactly the same kinds of complex land tenure/native title/land use complexities as for the Bardi and Jawi RNTBC discussed above.

The land use planning controls that apply over the ALT Estate in Broome are just as complex as they are over the ALT estate on Bardi and Jawi Country. The same hierarchy of land use plans applies, with one main distinction. As discussed in Part 6.3.1 above, Aboriginal Settlements in WA are subject to State Planning Policy 3.2 (SPP 3.2) (Government of WA, 2011a; 2011b) and the land use zoning in the Shire of Broome's Local Planning Scheme determines whether SPP 3.2 applies to an ALT Lot in Broome.

With the enactment of Local Planning Scheme No. 6 in 2016 (Shire of Broome, 2016a), several of the ALT Lots in Broome are no longer zoned as 'Settlement' and therefore no longer subject to SPP 3.2. The Layout Plans that previously applied to these Lots no longer apply. One Lot retains its 'Settlement' zoning, five Lots are zoned for 'Town Centre' land uses, six Lots are zoned for 'Development', one Lot is zoned as 'Residential', two Lots are zoned as 'Special Use' (meaning they retain their community uses) and a portion of Two Lots and part of another Lot on Morrell Park are zoned as 'Coastal Reserve' because they are prone to flooding. These land use zonings materially influence the underlying economic value of the land, especially in terms of their 'highest and best use'.[527]

Perhaps this is at it should have been. That is, that the Planning Scheme should have applied to the ALT Estate in Broome rather than a special measure by way of a State Planning Policy that was intended to apply to more remote locations than for town-based reserves. The fact that the ALT Estate in Broome was subject to SPP 3.2 meant that the relevant planning and subdivision controls in the Shire's Local Planning Scheme were never applied to activities on the ALT Estate in Broome in the same way they are applied elsewhere in Broome. This has resulted in sub-standard outcomes on the ALT Estate in Broome in terms of lack of land tenure clarity,

[526] Assuming current legislative and policy settings because not all of the ALT Lots in Broome were part of the Rubibi native title claim considered and determined by the FCA.

[527] As discussed in Chapter 4, the notion of 'highest and best use' simply refers to the rational economic assumption that the landowner or winning bidder will seek to use the property for its most profitable use. The notion comprises three dimensions: what is physically possible, what is financially feasible and what is legal. These may not always be in harmony and more often than not, the negative externalities are generally ignored (Rabianski, 2007:45). Nevertheless, landowners and developers often use the land use zonings as a way of extracting the maximum economic value from the land.

lack of land use planning controls and under provision of local municipal and essential services (Cardno, 2011; Wensing, 2015a), all of which must now be addressed if the land is to be transferred out of the ALT Estate. The Reserve known as Airport Reserve stands out for particular mention. This is discussed in more detail under the next sub-heading.

Two other matters stand out for mention. Firstly, the Shire of Broome's Local Planning Strategy notes that planning and development is both informed and constrained by native title considerations and that 'The interaction between Native Title and the formal planning and development system is relatively untested and will require open communication by all parties involved, depending on the nature of Native Title and any related Land Use Agreements.' (Shire of Broome 2014:45, Part 2). This is true because the tensions between the native title and land use planning systems have not yet been tested in the courts. The risk for the Shire is that if a formal planning scheme and/or development approval inadvertently or otherwise affects native title rights and interests and the correct procedures under the NTA have not been followed, then the future act will be invalid and the Shire could be exposed to a claim for damages. This is minimal where the Shire conforms to the relevant future act provisions in the NTA, including the use of ILUAs. To date, no new ILUAs have been negotiated over land tenure and land use changes in Broome. But the tensions remain, as discussed later in this chapter.

Secondly, discussions with key stakeholders also revealed differences in views about the future land use and land tenure arrangements for the ALT estate in Broome with significant divergences between various State departments and agencies, the Yawuru Group[528] and other Aboriginal organisations in Broome.[529] For example, the Kennedy Hill reserve comprises two discrete parcels of ALT land (ALT Lots 2570 and 1178/199) has high cultural values for the Yawuru people. Part of the area is currently being used as social housing by the State Housing Authority. The Kennedy Hill reserve is immediately to the south of the commercial centre of Broome at the southern end of China Town where there are mixed commercial land uses. The proximity of Kennedy Hill between the commercial centre of Broome and the Mangrove Hotel means that the area also has high commercial values.[530] The divergences of views[531] about the future of places such as Kennedy Hill and other ALT reserves in Broome could present some challenges to

[528] The Yawuru Group comprises Yawuru Native Title Holders Aboriginal Corporation RNTBC (as the PBC), Nyamba Buru Yawuru Ltd and Murra Mala Yawuru Pty Ltd. See Part E4 of Appendix E for more details.
[529] SGSEP, 2012c:14; Notes of meetings with various stakeholders, 2014-15 held on file by the author.
[530] See Tables E1, E3 and E4 in Appendix E for more details.
[531] Between the Yawuru native title holders, the State Government, the Shire of Broome, the local chamber of commerce and the wider local Broome population (SGSEP, 2012d).

reaching agreement over the details of any changes in land use arising from the revocation of their reserve status (SGSEP, 2012d:83-85).

Yawuru's interests in the ALT Estate in Broome

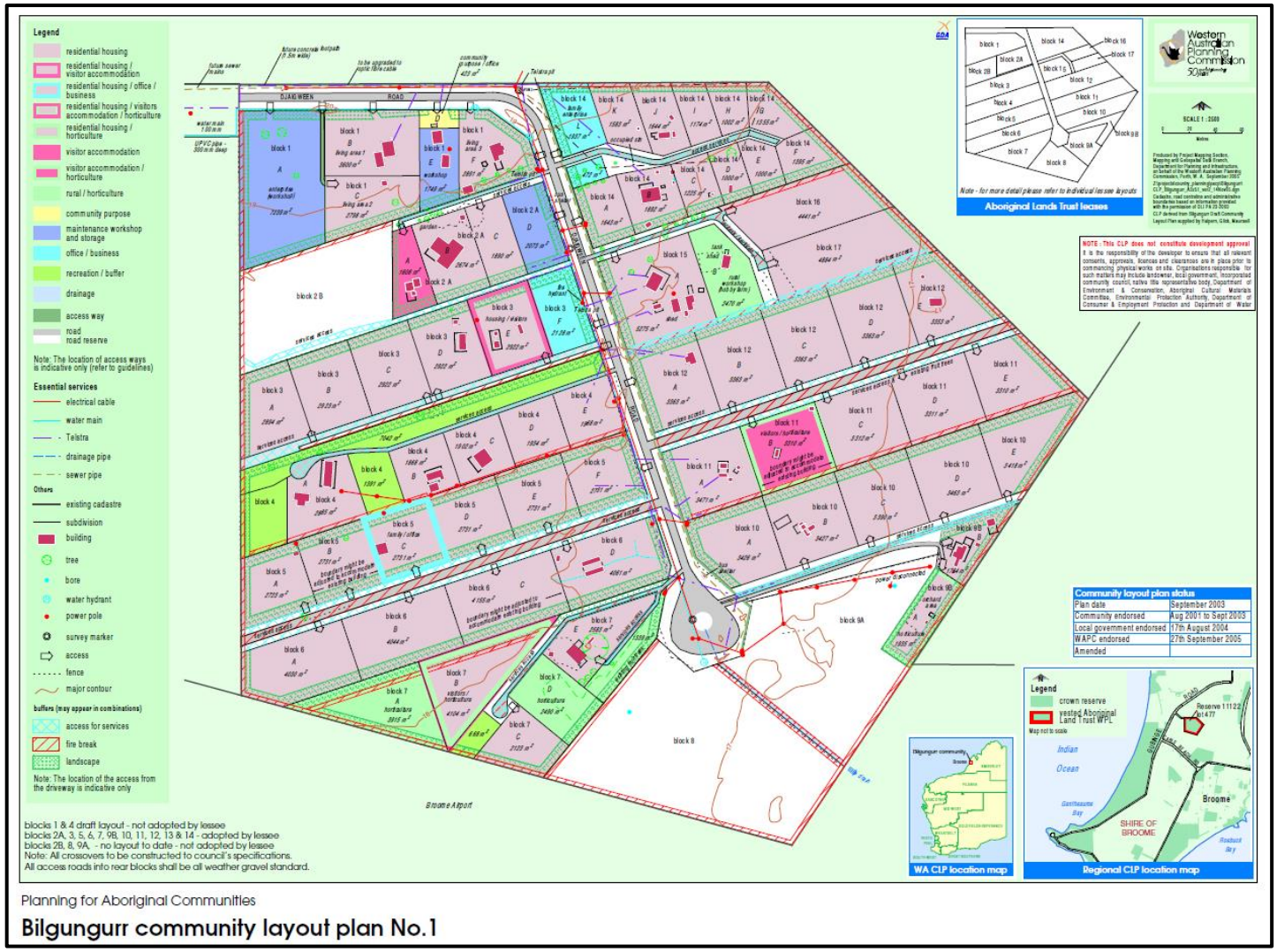
Yawuru have identified their longer-term interests in the ALT Estate in Broome. They hold the native title rights and interests and they want to hold those rights and interests in perpetuity, although Yawuru may consider extinguishment in some areas if that is necessary to advance their long term interests (John Scougall Consultancy Services, n.d:22). Yawuru maintains that places of cultural and historic significance to Yawuru people should be under the protection, care and management of Yawuru people. They will support initiatives that will ensure all housing on the ALT Estate in Broome is brought up to an acceptable standard and that meets the required town planning, building, health and safety regulations. They also maintain that Yawuru residents should be provided with essential and municipal services to the same standards as other residents in Broome, including sealed and maintained access roads, power, water, sewerage, management of storm water drainage, verge crossings, footpaths, waste disposal services and street lighting (John Scougall Consultancy Services, n.d:23).

Airport Reserve

Of the 17 Lots that comprise the ALT Estate in Broome, Airport Reserve (Bilgungurr) (**Map 7.10**) is the one that stands out for the complexity of the issues and challenges it presents for Yawuru and the State. The current rights and interests in Airport Reserve are shown in **Table 7.6**, progressing from the Crown's radical title at the bottom of the Table to the access rights that visitors receive when they are issued with a permit to visit the area, at the top of the Table.

The analysis in **Table 7.6** reveals there are several layers of rights and interests in the land on Airport Reserve and that the native title rights and interests sit above the Crown's radical title but are always subject to the Crown's powers of compulsory acquisition. These conflicts are examined in more detail later in this Chapter.

Airport Reserve is a proclaimed reserve under Part III *AAPA Act 1972* (WA) which means that it cannot be leased, mortgaged or sub-leased without the prior consent of the ALT, is exempt from local government rates, access is restricted by an entry permit administered by the ALT, and its reserve status can only be changed by approval of both Houses of State Parliament. As with Ardyaloon discussed above, revoking the special reserve status is not administratively difficult, but will present several challenges and may therefore be politically infeasible.



Map 7.10 Airport Reserve (Bilgungurr) Community Layout Plan

Source: Department of Planning, Government of WA

Table 7.6 Current Land Rights and Interests in Airport Reserve

Interests or Rights	Conditions	Details
Access Rights	Restricted visiting purposes. Must respect 'no-go' areas.	Entry permits for non-Aboriginal people on to Crown Reserve 20927 administered by the ALT.
Legal Access	Lessees have legal access.	Via a public access on Crown land (identified as Djaigween Road on the Community Layout Plan), but its status under s.64 of the LAA needs verification.
Use Rights	Residents of housing on Airport Reserve have use rights according to their lease from AAPA.	The inhabitants are exempt from paying local government rates, kerbside waste is collected by Broome Shire Council under an arrangement with the ALT. The Reserve was not subject to land use and development regulation prior to Local Planning Scheme No. 6 coming into effect in 2015.
Secure Interests	Nil.	Land on an AAPA Reserve cannot be mortgaged without Minister's prior approval. No secure interests are registered on the Certificate of Title for Lot 477.
Other Registered Interests	Subdivided into 19 Blocks with no individual street addresses, most with 99-year leases.	Lot 477 subdivided into 19 Blocks, 18 of which are subject to a lease under s.83 LAA and authorised under s.20 AAPA Act 'for the use and benefit of Aboriginal inhabitants', due to expire between 2082 and 2088. Several of the leases have been transferred to other Aboriginal people.
Registered Interests	Certificate of Title vesting Lot 477 in the AAPA.	Vested as Reserve 'for the use and benefit of Aboriginal inhabitants' under s.25(1) and s.27 of the AAPA Act on 15 June 1973. No head lease over Lot 477.
PBC Registered Interests	Yawuru Native Title Holders Aboriginal Corporation RNTBC as trustee and registered as a CATSI Corporation in 2008.	The FCA determination that Yawuru Native Title Holders Aboriginal Corporation RNTBC holds the determined exclusive possession native title rights and interests as trustee for the native title holders.
Native Title Rights and Interests	Exclusive Possession. Full beneficial interest. No alienation outside group except to the Crown.	Any act that 'affects' native title rights and interests subject to future act provisions in the *Native Title Act 1993* (Cth), including ILUAs.
Crown Interests	Radical Title. No beneficial interest. No grant of interest without agreement or compulsory acquisition.	Crown Reserve Lot 477 on Deposited Plan 184343 under Part III of the AAPA Act for the 'Use and Benefit of Aboriginal Inhabitants' and is protected through the administration of entry permits. Cannot be leased, mortgaged or sub-leased without the AAPA's consent. Its status can only be changed by the approval of both Houses of the WA Parliament.

Source: Adapted from Strelein (2016). Content compiled by the author from various public records.

Airport Reserve has been subdivided into 19 Blocks, most of which have been leased to 2082 or 2088.[532] Even though the subdivision has no legal status, some Blocks appear to have no legal access and there is no formal street address for the purposes of identification for emergency services.[533] Airport Reserve currently has only one physical access point and no alternative emergency access arrangements. It is 'land locked' by other land tenures and land uses. The lessees/residents are exempt from paying local government rates, the area was not subject to regulation in the same way other areas in Broome are[534], entry to the Reserve is regulated by permit (although not properly enforced) and the residents enjoy a certain level of amenity and quiet enjoyment without a great deal of external interference. The site is also subject to special controls such as height and noise abatement because of its proximity to the existing Broome International Airport (SGSEP, 2012c).

However, its location in the middle of Broome, sandwiched between the Broome International Airport, the Cable Beach tourism precinct, and new residential estates to the north and north east makes it extremely vulnerable to external pressures arising from their proximity.

Several long-term plans for Broome[535] show that the existing airport in Broome is seen as a significant constraint on the expansion of Broome and indicate that sometime beyond 2025 (which is only seven years from now) it will be relocated to a new site on the Broome Road. The Shire of Broome's Local Planning Scheme No. 6 (Shire of Broome, 2016a) zones Airport Reserve as 'Development', which means that the area will, at some point in the near future, be subject to further comprehensive planning to permit more intensive land uses, including 'mixed land uses and subdivision in accordance with an adopted structure plan'.

If these plans proceed, Airport Reserve's Part III AAPA reserve status will need to be revoked and this significantly changes the rules and conditions governing its existence. For example, revocation of its special reserve status removes the exemption for local government rates. Land valuations for the existing Blocks on Airport Reserve will be influenced by the underlying development pressures surrounding the Reserve and the fact that the area is already zoned for 'Development'. If the responsibility for the payment of local government rates in the Reserve

[532] Under s.83 of the *Land Administration Act 1997* (WA), authorised under s.20 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) and registered on the Certificate of Title for the Reserve issued to the ALT. The specific tenure are shown in the *Inventory of ALT Held Land in Broome* prepared by SGSEP (2012d).
[533] For example, the fire brigade or an ambulance in an emergency.
[534] Prior to the enactment of Local Planning Scheme No. 6 by the Shire of Broome in 2015.
[535] The Broome Growth Plan (DRD, 2016a, 2016b); The Kimberley Regional Planning and Infrastructure Framework (WAPC, 2015b); Broome Local Planning Scheme No. 6 (Shire of Broome, 2016a).

are passed on to the existing residents, many of whom are on fixed and low incomes, they will not have the capacity to pay and may well be displaced from the area.

The stark reality is that the classification of the area as a reserve 'for the use and benefit of Aboriginal inhabitants' has insulated the area from the surrounding urban growth pressures. As the CEO of Nyamba Buru Yawuru, Peter Yu, observed, suddenly 'the ALT becomes the inhabitants' best friend' because its status as a Part III AAPA Act Reserve has provided the inhabitants with a number of advantages that would otherwise not be available to them.[536]

Undoing the current reserve status in favour of a new form of tenure under the LAA will have two immediate affects. It will affect the underlying native title rights and interests and require the negotiation of an ILUA with the native title holders. It will also dramatically change all the other underlying dynamics of land ownership and management, regulation of land use planning and development, responsibility for the provision of municipal and essential services and local governance. Those changes are inescapable.

Putting the native title rights and interests aside, the dilemma for Yawuru is whether to retain the area as a special reserve for the sake of the existing lessees/residents or to take advantage of the land's increasing economic value. And if so, then at what point – so as to achieve the maximum return that will benefit the Yawuru people and the Aboriginal people of Broome more generally and not cause too much distress for the existing occupants of Airport Reserve. The dilemma for the State is how to handle these legacies without further disadvantaging the people that will be affected, let alone the compensation implications of any act that may affect the native title rights and interests.

7.4.2 Challenges

Patrick Dodson (Yawuru RNTBC, 2011), as Chairman of the Yawuru Native Title Holders Aboriginal Corporation RNTBC, states that the Yawuru People's native title is grounded in *Bugarrigarra* and the independent elements that flow from that – Community, Country and Law. Community is about how Yawuru people 'relate to each other through their common belief systems, ceremony, language, history and, importantly, through kinship, which culturally and socially determines obligations and responsibilities to all others'. Yawuru people's connection to country is about 'how they use and occupy the seas and lands on Yawuru Country' and

[536] Record of meeting with Nyamba Buru Yawuru CEO and executive team 11 September 2017, held on file by the author.

protecting their Country. And Liyan is about 'relationships, family, community and what gives meaning to people's lives' (P. Dodson, cited in Yawuru RNTBC, 2011:13). Yawuru's vision is that the Yawuru community supports individual and family aspirations while being firmly rooted in the *Bugarrigarra* (Yawuru RNTBC, 2011:13)[537] so that customary law and practice is a living part of family life and celebration (Yawuru Corporate Group, 2010).

While the Agreements between the State of WA and Yawuru formalised the Yawuru Native Title Holders' consent to extinguish their native title rights and interests over significant areas of land in and around Broome and provided a range of benefits as compensation for past acts of unlawful extinguishment, Yawuru maintains that the Agreements:

> *'aim to balance the recognition and protection of Yawuru traditional ownership alongside the future development of Broome and for Yawuru its primary purpose is to safeguard culture, identity and the Yawuru way of life. Within this broad framework that is defined by Yawuru belief in Bugarrigarra are three fundamental components of Yawuru existence that define and guide Yawuru native title: Buru (Country), Ngarrungunil (Community) and Liyan (sense of well-being)'* (Yawuru RNTBC, 2011:13; Yawuru, 2013).

Yawuru also maintains that the Agreements:

> *'are underpinned by Yawuru's determination to be free from Government dependence following a long history of government intervention and control over Yawuru people's lives. The basis of this independence is that Yawuru's income streams, generated by freehold lands, commercial development, leveraging public funding and negotiating revenue from third party use of Yawuru lands, are to be invested in the cultural, social and economic priorities which are determined by Yawuru*.' (Yawuru, 2013).

The work of the Yawuru corporations therefore is to create and grow Yawuru equity thereby enabling Yawuru people to be active participants and contributors to as well as beneficiaries of sustainable economic, cultural and social practices so that they can care for and enjoy their land, values and culture in perpetuity, while enhancing families and the community in which they live (Yawuru, 2010).

However, Yawuru RNTBC is expressing strong reluctance about surrendering their native title rights and interests to gain secure land tenure when Yawuru has invested a lot of time and energy to achieve recognition of their native title rights and interests through the native title process.[538] Some of the ALT Lots in Broome are in areas of high economic value and therefore

[537] As mentioned in Part 6.2.3 of Chapter 6.
[538] SGSEP, 2012a; Record of meetings with Yawuru 19 August 2014 and 12 December 2016. Held on file by the author.

have significant development potential and the continuity of native title rights and interests over the land at Wattle Downs North is significant to Yawuru, conceptually at least, if not also materially with respect to its future use by Yawuru.

The Yawuru Community is also acutely aware that it needs to make prudent and responsible investment decisions to ensure Yawuru people benefit in perpetuity from their native title rights and interests and other landholdings, as the opportunities arise. Where there are clearly identified commercial opportunities that do not impact or impinge on the cultural values of the Yawuru people, the Yawuru Community has indicated that it will identify current and future development opportunities for commercial development on Yawuru land and will facilitate economic development. For example, to provide affordable home ownership opportunities for Yawuru people with security of tenure, access to loan finance, and the ability to bequeath the land and assets to future generations. And the Yawuru Community will also support initiatives that will improve health and other community services to the Yawuru people and Broome's Aboriginal service population.

Clause 6.7 in the Area Agreement between Yawuru and the State states that upon transfer of the land titles for the Wattle Downs lands that the native title rights and interests in the land are to be surrendered and extinguished, Yawuru has indicated that it is reluctant to proceed with the land transfer for Wattle Downs North on that basis.[539] Yawuru wants to review the terms of the ILUA with respect to the requirement for the extinguishment of the native title rights and interests in exchange for a freehold title.

The proposal by DIA to examine only two of the ALT Reserves in the context of the *Living on Our Lands* study infuriated Yawuru because it appeared to be in defiance of an instruction from their own Minister to negotiate with Yawuru over the whole of the ALT Estate in Broome, rather than site by site in isolation of each other.[540] Nevertheless, the the proposed transfer of the ALT Estate to Yawuru and the proposed transfer of Wattle Downs North under the Area Agreement

[539] Record of meetings with Yawuru 19 August 2014 and 12 December 2016. Held on file by the author.

[540] In a letter to the Chairman of the Yawuru Native Title Holders Aboriginal Corporation (Yawuru RNTBC) on 17 March 2011, the then Minister for Indigenous Affairs, the Hon Peter Collier, stated that the State Government is cognisant of the opportunity to enter into detailed discussions with the Corporation regarding the ALT estate in Broome and surrounding areas as part of the ongoing discussions following the negotiated settlement reached in 2010. The Minister stated that he had instructed the Department of Indigenous Affairs to engage with the Corporation in this regard, in accordance with the principles and protocols outlined in the Yawuru Agreements with a view to reaching agreement. The letter also confirmed that some initial discussions between DIA and the Yawuru Corporation have resulted in an 'in principle' agreement to engage in further discussions regarding opportunities that may arise from the ALT estate in Broome (SGSEP, 2012d:1).

as unconditional freehold pose two significant dilemmas for Yawuru. These dilemmas are very similar to the dilemmas facing the Bardi and Jawi RNTBC as discussed in Part 7.3 above.

The first dilemma is deciding on the form(s) of land tenure that Yawuru is prepared to accept from the Crown and on what conditions, including whether the action should also involve acceptance by the Crown of Yawuru's prior sovereignty on mutually respectful and equal terms (Wensing, 2016a:51) or the surrender and permanent extinguishment of their native title rights and interests and losing control of their inter-generational responsibilities. The second dilemma is deciding whether Yawuru wants to become a land use authority and fully-fledged property owner in its own right and therefore having the necessary governance powers in place for determining the land use and tenure policies that will be applied to its land holdings in the long term. These two dilemmas are inter-related. The first dilemma has implications for the continuing existence of Yawuru's native title rights and interests. The second dilemma will largely be informed by the choices made in response to the first dilemma. A framework for resolving these dilemmas is explored in Chapter 9.

7.5 Similarities and differences

The case study analyses entailed a detailed examination of the real-life circumstances of the native title, land tenures, land uses, land use planning controls, municipal and essential services delivery and local governance arrangements that apply in situ over particular sites in each of the case study areas. Several similarities and dissimilarities can be drawn from this analysis.

The similarities include the fact that both localities have positive native title determinations over their respective traditional lands including large areas of exclusive possession and non-exclusive possession. Both RNTBCs are using a variety of means to manage and protect their native title rights and interests.[541] Both RNTBCs are being challenged by current WA government policies that require native title holders to agree to the surrender and permanent extinguishment of their native title rights and interests if they are to use their property rights as equity or collateral to participate in the economy. Indeed, both RNTBCs have indicated they are not willing to agree to the surrender and permanent extinguishment of their 'hard won'[542] native title rights and interests in exchange for a form of tenure from the State such as freehold or leasehold of

[541] Such as through heritage protection regimes, land use planning systems and Indigenous Protected Area (IPA) schemes under the International Union for the Conservation of Nature (IUCN).
[542] 'Hard-won' because their native title claims were among the early native title cases which were costing between $11 and $14 million each and taking between 6-10 years to resolve.

exclusive possession they have little or no understanding of and which they regard as being inferior to their customary land rights.[543] Or as Peter Yu put it so succinctly: something they regard as being 'repugnant' (2016a:2).

The differences between the case study localities are their cultural traditions/identities, their locational settings, the underlying land tenure issues and the benefits that the native title holders are seeking. As a consequence of Yawuru's native title determination, they are currently the largest private landholder inside the town boundaries of Broome, and this includes land in an urban setting with high economic values. Whereas Bardi and Jawi's native title holdings are remote and predominantly non-urban. Another significant difference between the RNTBCs is that one has high organisational capacity and is reasonably well resourced, while the other has low organisational capacity and is significantly under resourced. This has implications for the ability of RNTBCs to cope with the expectations being placed upon them by the WA and Australian Governments and other third parties, as well as by the native title holders themselves.

The most significant observation that can be drawn from this comparative analysis is the inherent conflict between the Aboriginal and Western approaches to land ownership, use and tenure. Both RNTBCs are facing the same dilemmas of having to decide how they will need to hold and protect their native title rights and interests into the future, and how they will determine land ownership, use and tenure on their lands by others alongside their continuing native title rights and interests in a way that does not require their permanent extinguishment and total loss to future generations of native title holders. The first dilemma has significant ramifications for their native title rights and interests, while the second dilemma places some enormous responsibilities on RNTBCs as land authorities in their own right in order to protect their native title rights from further loss, diminution, impairment or extinguishment. In many respects these two dilemmas are inseparable.

One further observation also needs to be made at this point about similarities and differences. There is a high level of complexity involved in analysing the native title, land tenure, land use, land use planning, municipal and essential services delivery and local governance arrangements in both these localities that is beyond the comprehension of most practicing planners (Porter, 2017a). The burden of responsibility on the RNTBCs therefore, to work their way through

[543] Notes of meetings with Yawuru 19 August 2014 and 12 December 2016; Notes of meetings with Bardi and Jawi RNTBC 21-22 May 2014, 12 August 2014, 16 Nov 2016. Held on file by the author.

several layers of legal and institutional complexity in order to make informed choices on how they can continue holding and exercising their native title rights and interests into the future and what kind of land use and tenure reforms will work best for them, must be daunting.

7.6 Contestation and conflict

The preceding case study analyses reveal there are two elements that are generating counterproductive contestation between the two distinct forms of land ownership, use and tenure, the Aboriginal customary system(s) vs the Crown's system(s) of land ownership, use and tenure in the WA context. These conflicts arise from several sources, including: the inherent differences between Aboriginal and Western forms of land ownership, use and tenure; the way in which successive WA Governments' policies on the transfer of Aboriginal lands to Aboriginal people in WA are being administered under a Trust arrangement; and from the way in which the NTA is currently being interpreted and applied. The first of these conflicts was examined in Chapters 5 and 6. The last three of the conflicts listed above, are discussed in more detail below.

7.6.1 Conflicts arising from the WA Government's Aboriginal land system

Successive WA Governments over the past two or three decades have had a policy of transferring ALT lands to Aboriginal people. The former Department of Aboriginal Affairs (DAA)[544] claims that it was aligning the divestment of the ALT estate with existing and future native title priority determination areas by examining land holdings and facilitating divestment through native title agreements (DAA, 2012).[545] An analysis of DIA's/DAA's annual reports from 2005 to 2016 reveal that the size of the ALT estate has shrunk from 12 per cent of the land mass of WA (27 million ha) in June 2005 to 9.65 per cent (24 million ha) in June 2015 (DAA, 2015:28).

Many of these land transfers have been made through the issue of a MO under s.46 of the LAA, as illustrated by the transfer of three Lots to the Bidan Aboriginal Corporation discussed earlier in this Chapter. While a MO can grant to the management body the ability to grant interests (leases, sub-leases or licences) in land where such powers are set out in the MO, all such transactions on Crown reserves still require the relevant Minister for Land's prior written approval under the LAA.

[544] The Department of Aboriginal Affairs was abolished in the machinery of government changes following the 2017 State election. The land and heritage functions went to a newly formed Department of Planning, Lands and Heritage, and the Regional Services reform functions went to the Department of Community Services.
[545] The DAA's website (accessed 28 February 2017) advises that the ALT Strategic Plan 2015-2018 is under development.

A MO is not an interest in land. The land still retains its Crown reserve status 'for the use and benefit of Aboriginal inhabitants'. It simply shifts the 'care, control and management' of the land to an Aboriginal Corporation as the management body in accordance with the terms set out in the MO. The MO is framed in such a way that the relevant Minister always has the upper hand because any changes in land use and any leasing or subleasing of the land requires the Minister's prior written approval and the Minister can intervene at any time in relation to any matters relating to the use and management of the land. There is also a very high risk associated with shifting the responsibility for the care, control and management of land onto an Aboriginal corporation with very little or no experience, capacity or resources to take on such responsibilities.

In the native title context there are also serious questions to be asked about the transparency and the true nature and intent of these deals (Wensing, 2016a: 42; 2017a). Whether or not a lease, sub-lease or licence made under a MO affects native title rights and interests depends on a number of circumstances and is potentially a contentious matter. The extent to which such dealings are seen as constituting some form of compensation for the loss of native title rights and interests over the land in question or in other parts of the relevant claim area, are also contentious. A MO does not result in Aboriginal people becoming the owner of the land and in control of their own destiny in relation to the use and development of that land, which raises serious questions about the real intent of this strategy (Wensing, 2017b).

While the Crown only holds the radical title of the land and any dealings in ALT lands involving the creation of freehold or leasehold interests outside the Crown reserve system must take the native title holders' rights and interests into account,[546] the reality is that Crown reserves are essentially subordinate delineations of land under the authority of the State and the native title holders' rights and interests are still subordinated to the Crown's radical title.

But the conflicts are wider than just about how Aboriginal lands under the ALT are being transferred to another form of Crown reserve under the LAA. The WA Government under Premier Colin Barnett made several commitments to land tenure reform of Aboriginal lands in WA. In the context of the Browse LNG industrial precinct at James Price Point on the Dampier Peninsula, the WA Government was willing to commit more than $30 million to implementing

[546] In accordance with the future act provisions in the NTA, including through ILUAs.

land tenure reforms across the Dampier Peninsula.[547] The sum of money that was committed is to some extent immaterial. What is relevant is that the WA Government was willing to make a significant commitment of resources to implementing land tenure reforms on the Peninsula, but only while the prospect of industrial development on the Peninsula looked like a real possibility. As soon as Woodside Petroleum Ltd (2013) announced that it was not going to proceed with onshore processing, the State Government abandoned its commitment to resourcing the implementation of the land tenure reforms. What form land tenure reforms on Bardi and Jawi Country are likely to take, remains unknown because no formal offers have been made to the Bardi and Jawi RNTBC since the last TOSC meeting in June 2012.

The WA Government also has an outstanding commitment to implement the second stage of its land tenure reforms arising from the NPA-RIH and NPA-RSD that it signed with the Australian Government in 2009 (SCFFR, 2009a, 2009b; Government of Western Australia, 2009a). The first stage of WA's land tenure reforms under these intergovernmental agreements included urgent amendments to the AAPA Act and the *Housing Act 1980* (WA) to enable the Department of Housing (DoH) to become the housing management agent for public housing assets located on ALT and AAPA lands, as well as on non-ALT or AAPA land in which an Aboriginal corporation holds an interest. The second stage of WA's land tenure reforms was intended to enable the State Housing Authority to manage housing (with the agreement of communities) on other forms of land held for the benefit of Aboriginal people. This was to include an examination of relevant State legislation to work towards allowing maximum transferability of individual titles to facilitate home ownership and commercial use of Aboriginal land (Buswell and Hames 2009; Government of Western Australia 2009a:7–8). These second stage reforms never eventuated under the Barnett Liberal Government (Wensing, 2016a:40, 2017b).[548]

Nevertheless, the WA Government continues to pursue a policy of transferring ALT lands to Aboriginal people for policy reasons that are not entirely clear. In its most recent Annual Report in June 2016, DAA stated that it is committed 'to developing a policy framework and appropriate procedures with land use planning, to support land tenure reform and divestment' and that it proposes to do this 'through the development of a land tenure reform issues paper and through land use planning of the ALT Estate to create a framework for land tenure reform' (DAA, 2016: 36). That issues paper was not produced before the Barnett Liberal Government lost office in

[547] SGSEP record of TOSC meeting June 2012. Held on file by the author.
[548] No progress was made with the second stage 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 (Wensing, 2016a:40).

March 2017. At the time of writing, the McGowan Labor Government has stated that it will continue with the policy commitment of transferring the ALT lands to Aboriginal people, but at the time of writing the details have not emerged.

7.6.2 Conflicts arising from the *Native Title Act 1993* (Cth) (NTA)

Arguably, the way native title rights and interests are being construed and dealt with under the NTA are skewed more toward conflict than coexistence. This is because the Crown is continuing to exert its monopoly on extinguishment as a pre-condition for any alternative forms of tenure under the Crown's land tenure systems. Or insisting that the non-extinguishment principle in the NTA be applied in order to avoid the obligation to pay compensation on just terms for the extinguishment of native title arising from the grant of a freehold or leasehold title under the LAA but outside of the Aboriginal land system as it currently operates in WA.

The following discussion focuses on the relative strengths and weaknesses of native title rights and interests, particularly with respect to the Crown's monopoly power over extinguishment. In *Wik*, Brennan CJ noted that:

> *'the strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant'*.[549]

In other words, once the Crown issues a freehold grant, it is protected from further arbitrary interference by the Crown with generally strict rules around compulsory acquisition for public purposes only (Newton and Conolly, 2017:1), but native title rights and interests are not protected in the same way.[550] Wensing and Taylor (2012:23-26) have examined these issues in detail and have made several observations. They are re-stated here because they are pertinent to this thesis.

In the Crown's land ownership and tenure system a freehold title theoretically lasts forever, as does a lease in perpetuity. A fixed term lease lasts for the express duration of the term in the lease, and in most cases a lease can be extended or renewed for another similar term.[551]

[549] *Wik Peoples v the State of Queensland* (1996) 187 CLR 1, Brennan CJ at 84. And these rights are enforceable against the whole world.

[550] See for example, the long running compensation matter in *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 and Martin, 2016.

[551] Such lands in WA are subject to Part 9 of the *Land Administration Act 1999* (WA) which authorises the compulsory taking of land to undertake, construct or provide any public works (having the same meaning as in the *Public Works Act 1902* (WA)) and the procedure to be followed. Where native title is affected, the relevant requirements of the NTA apply, including in relation to compensation.

The current understanding of native title law is that where native title rights and interests continue to exist, the State only has the radical title[552] to the land and therefore cannot issue a freehold or leasehold title with the intention that the form of tenure will grant exclusive possession to the registered proprietor. If the State wants to issue a freehold or leasehold title over land that is subject to native title rights and interests, the State must acquire the full beneficial title (as discussed in Chapter 3). Where native title exists or may exist, the Crown can obtain the full beneficial title by extinguishing the native title rights and interests, either by agreement or by compulsory acquisition with compensation on just terms.[553]

As noted earlier, s.237A of the NTA defines the term 'extinguish' to mean 'permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect'. When the native title rights are extinguished (whether surrendered by agreement or whether by compulsory acquisition), they are extinguished forever and cannot revive at a later date.

Under s.238 of the NTA in relation to native title, the term 'non-extinguishment' means that an act done over an area where native title exists will not, either wholly or partly, extinguish native title. However, the effect on native title is that the native title rights and interests are suppressed by any acts that are inconsistent with them and to which the non-extinguishment principle applies, until the inconsistent act ceases to have effect. When the inconsistent act ceases to have effect or is removed, the native title rights and interests will again have full effect.

In the ordinary course of events the grant of a freehold title or leasehold title over land subject to native title, in order to be valid, must be preceded by a compulsory acquisition[554] or surrender[555] of the native title rights and interests, which extinguishes all the native title rights and interests, permanently. While this can be 'avoided' by applying the non-extinguishment principle, it is contrary to state policy in WA and raises several other issues, which are discussed below and in Chapter 8.

[552] 'In *Mabo (No. 2)* (Brennan J, 48; Deane and Gaudron JJ, 122), the High Court of Australia held that, on acquiring sovereignty, the Crown acquired the "radical" ("ultimate" or "final") title, and that this title empowered the Crown to deal with the land, but did not confer full beneficial ownership to the exclusion of native title rights and interests…it follows that all land in Australia is held either by the Crown (under radical title or as beneficial owner), by native title holders as a burden on the Crown's title, or as a result of a Crown grant.' (Butt, 2010: 976)
[553] See footnote 493.
[554] S.24MD(2) NTA.
[555] S.24MD(2A) NTA.

Upon the valid grant by the Crown of a freehold title (following the extinguishment of native title rights and interests, as above), the freehold title holder can deal with the land at will. If the intent of the freehold grant is to create a commercially viable commodity, then this option is consistent with that intent because there would be no conditions limiting subsequent dealings with the land, including leasing the land to another party. The freehold title holder can sell the land to a third party or can mortgage the land. The mortgagee is able to foreclose on the land should the mortgagor be unable to meet the commitments of the mortgage.

Upon the valid grant by the Crown of a Crown lease (following the extinguishment of native title rights and interests, as above), the lessee can sub-lease the land, charge rent and generally use the land according to the terms of the lease.

Where the native title rights and interests are compulsorily acquired, they must be acquired 'on just terms'[556] for any loss, diminution, impairment or other effect of that act on the native title rights and interests.[557] The just terms may comprise compensation in a form other than money.[558] Where the compulsory acquisition follows an agreement with the native title parties that they will receive a beneficial interest in a freehold title or leasehold title in place of the acquired native title rights and interests, the requirement to provide just terms compensation for the loss of the native title rights and interests may be satisfied. Although, it should be noted that issues of compensation for the loss, diminution or extinguishment of native title in Australia are currently still before the courts.[559]

Where the native title rights and interests are surrendered by agreement with the native title holders in the course of a right to negotiate process, the agreement must include a statement that the surrender is intended to extinguish the whole or part of the native title rights and interests and they are surrendered without any right to compensation other than what may be included in the agreement.[560]

[556] S.51xxxi of the Australian Constitution provides that 'The Parliament shall, subject to this Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.
[557] S.51 of the NTA.
[558] S.24MD(2)(d) NTA.
[559] The compensation issues are being played out in *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (Timber Creek). See also McGrath, 2017 and Martin, 2016.
[560] S.24MD(2A) NTA.

In the case of a freehold[561] or lease[562] which at common law extinguishes the whole of any native title rights and interests, there can be no partial extinguishment. However, in circumstances where extinguishment by compulsory acquisition and extinguishment by surrender in the course of a right to negotiate process do not apply, the non-extinguishment principle can apply to the future act[563] (Wensing and Taylor, 2012:24).

Wensing and Taylor (2012:25) believe it is arguable that the juxtaposition of these provisions in the NTA were intended to or may leave open the possibility of entering into an agreement to surrender native title which does not include a statement that the surrender is intended to extinguish (or not intended to extinguish) the native title rights and interests. The consequence is that section 24MD(3) operates to apply the non-extinguishment principle to the act of surrender followed by a grant. That argument as to the effect of the NTA also involves concluding that those provisions overcome the extinguishing effect of a grant which arises from the operation of the common law.[564] Wensing and Taylor (2012:25) doubt that is the case, but if it does, then the non-extinguishment principle may apply by agreement to a grant of freehold or lease of exclusive possession.

The application of the non-extinguishment principle means the native title holders are unable to exercise their native title rights and interests during the currency of a Crown lease (or freehold title), but when the Crown lease expires (or the freehold is surrendered[565]), the native title rights and interests could again revive (Wensing and Taylor, 2012:25). Wensing and Taylor (2012:25) believe this may raise some difficulties for the freehold title holder, lessee or a sub-lessee, perceptively or substantively. It may inhibit the raising of finance or sale of any such interests. The person or entity holding or purchasing the interest would be aware of the land remaining subject to native title rights and interests and would probably require some reassurance of the fact that the continuing existence of native title has no impact on the rights being transferred.

As discussed in Chapter 3, because native title rights and interests are inalienable (other than to the Crown) they are also statutorily protected from debt recovery processes. Native title rights and interests are therefore unusable as security against a loan. The extent to which a PBC is able to assign leases over land still subject to native title rights and interests is constrained by

[561] *Fejo v Northern Territory* (1998) 195 CLR 96; [1998] HCA 34.
[562] *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28, at [370].
[563] S.24MD(3) NTA.
[564] Wensing and Taylor are indebted to Greg McIntyre, Barrister for these insights.
[565] As if that ever happens with a freehold title, because it rarely does.

s.56(5) of the NTA, which states that the native title rights and interests held by a body corporate are not able to be assigned, restrained, garnisheed, seized or sold or made subject to any charge or interest as a result of the incurring, creation or enforcement of any debt or other liability of the body corporate including any act done by the body corporate.

Wensing and Taylor (2012:25) argue that section 56(5) of the NTA is a reflection of what is regarded as the common law position set out in *Mabo (No. 2)* in relation to native title. That it is a form of property which exists subject to the Crown's radical title and cannot be given by native title holders to anybody outside of their law and custom, but the Crown. If that is the position, then at common law a native title cannot subsist with the creation of a freehold title, lease or any sub-lease exercised pursuant to a lease (by native title holders or otherwise) (Wensing and Taylor, 2012:25). Therefore, when the Crown issues a new form of tenure over land where native title exists, the state/territory and the native title holders must decide whether it is necessary for the native title rights and interests to be extinguished or whether the non-extinguishment principle under s 238 of the NTA can be applied.[566] Whether this is an acceptable form of co-existence for the native title holders in the case study RNTBCs, is indeed doubtful given the discussion in this Chapter so far.

In Chapter 1 reference is made to a recent SOWG report prepared for COAG about Indigenous land use and administration which placed considerable emphasis on recognising 'the fundamental inalienable character of Indigenous land and native title' (SOWG, 2015: 33) and included recommendations supporting bankable interests in Indigenous-held land and removing the barriers to creating long term leases on Indigenous land and native title. What is notable about the SOWG report is that there is no discussion about the restrictions embodied in s.56(5) of the NTA and that this provision may need to be amended in order to meet those recommendations with respect to land subject to native title rights and interests. It is not clear from the public record whether this was an inadvertent oversight or a deliberate omission on the part of the SOWG.

7.6.3 Implications

The preceding analysis of the conflicts between the WA Government's Aboriginal land system and the native title system are being operationalised highlights the inherent tensions in the

[566] As set out in Clauses 12 and 14 of the Browse LNG Precinct Regional Benefits Agreement. This is discussed in more detail in part C8 of Appendix C.

interactions between the two systems. While each system has its own characteristics, their relative interests and powers can be summarised and compared (**Table 7.7**).

What **Table 7.7** demonstrates is the stark power imbalance between the two sets of interests and powers. The state holds the upper hand through its monopoly powers on extinguishment by compulsory acquisition of the native title rights and interests where agreement over their voluntary surrender and extinguishment cannot be reached through negotiation and agreement with the native title holders. The State of WA also has a long record of systematically refusing to recognise Aboriginal peoples' sovereignty and denying their pre-existing rights to their ancestral lands in a way that would enable them to determine their own affairs. These conflicts are products of the systems in which they are embedded, but they are not insurmountable, as the following discussion on the pre-conditions for coexistence demonstrates.

Table 7.7 Relative interests and powers of the Crown in right of the State of WA and Native Title Holders

Crown in right of the State of WA	Native Title Holders
Holds the radical title.	Holds exclusive possession native title rights and interests.
Unallocated Crown Land. No beneficial interest in the land (other than some Reserves – see below).	Full beneficial interest. Distribution of rights and access to resources within the native title holding group remains within the jurisdiction of Aboriginal law and custom.
Cannot create a beneficial interest in the land without agreement (i.e. ILUA) or by compulsory acquisition.	Cannot alienate the land outside native title group, except to the Crown. Regards extinguishment as 'repugnant' to Aboriginal law and custom.
Requires extinguishment to be permanent.	Subject to compulsory acquisition by the Crown if surrender by agreement cannot be reached.
Prefers to avoid paying compensation on just terms.	Compensation on just terms for any loss, diminution or extinguishment of native title rights and interests (S.51 NTA).
Seeks to apply non-extinguishment principle so as to avoid paying compensation for the loss, diminution or extinguishment to native title rights and interests.	Can apply non-extinguishment principle (NEP) through an ILUA.
Regulates land allocation and use via the LAA and the *Planning and Development Act 2005* (WA).	Subject to prior statutory regulation of use of land and resources with some exceptions (i.e. s.211 of the NTA and the *Racial Discrimination Act 1975* (Cth)).
	Cannot secure finance over native title interests (s.56(5) of the NTA).
Aboriginal Reserve 'for the use and benefit of Aboriginal inhabitants' under Part III of the AAPA Act, which cannot be leased, mortgaged or sub-leased without the consent of the AAPA. Protected through administration of access permits administered by the Aboriginal Lands Trust.	Aboriginal reserves subject to native title (in most cases) by virtue of s47A of the NTA.
Portion may be subject to a freehold grant or leased title to an Aboriginal Association or Corporation for 99 years with restriction that it be 'for the use and benefit of Aboriginal inhabitants'.	Native title holders may also be members of the Aboriginal Association or Corporation.

Source: Adapted from Strelein (2016).

7.7 Commensurabilities and incommensurabilities

There can be no denial that Australia has two systems of land ownership, use and tenure operating at the same time and in the same locations, especially where positive determinations of exclusive possession native title rights and interests have been made by the FCA. This is the case for both RNTBCs and the analysis shows there are several commensurabilities and incommensurabilities over ownership, use and tenure between Aboriginal land rights and interests and the Crown's interests in the rights of the State of WA.

As discussed in Chapter 5, our general understanding of Western notions of 'property' is that it implies ownership and control over a thing or a resource, especially land. And that in Western land tenure systems, property is viewed as a set of material rights that are notionally comparable to other material values.

Whereas the Aboriginal peoples view the relationship between the right to cultural difference and land tenure as being inextricably linked, and therefore not able to be readily codified in material terms. For Australia's Aboriginal peoples, Country has always been, and always will be, at the centre of their identity and being (Wensing, 2014e:9).[567]

For Yawuru, the native title determination means that their continuing connection to traditional law, custom and country has been recognised, that Yawuru native title holders have a 'legal responsibility to "look after" land and sea country for current and future generations' and that it provides connection to Yawuru's customary rules and laws 'passed down through generations from *Bugarrigarra* (creator beings) responsible for Yawuru's presence in the landscape' (Yu, 2013:26).

The case study analyses highlight the frictions that exist between two distinctly different cultural systems (Aboriginal and Western) and how the current state of affairs is 'underpinned by an entrenched government belief that Indigenous commitment to traditional culture and communal ownership of land is incompatible with economic development' and 'a pervasive mantra by governments when dealing with native title is that it must be "resolved"', which is code for 'extinguishing or winding back native title rights, so, that in government's view, economic development can proceed' (Yu, 2016:2) unhindered. According to Yu (2016:2)

[567] As discussed in Footnote 41, the term 'country' has significant and special meaning to Aboriginal peoples.

Aboriginal people view extinguishment as 'repugnant'. Which explains why both the Yawuru and Bardi and Jawi RNTBCs have consistently said they do not see the need to extinguish their native title rights and interests for a form of tenure they regard as being inferior to their inherent ancestral land rights and interests.[568]

Yu (2013) believes that the challenge facing native title holders and mainstream society is to construct a relationship based on respect for each other's philosophies, values and approaches to land such that 'a new vibrancy and meaning' can be injected into Western land planning and management frameworks that enables the two different approaches to coexist in a way that redresses past injustices of colonial oppression and allows 'the "good Liyan" to emerge' (Yu, 2013:26), defined earlier as 'good spirit'.

The real task that Australian governments have found so difficult to comprehend is the question of how to reasonably adapt existing western law to accommodate the practical commercial and financial use of property without permanently destroying the Aboriginal land rights and interests of the Traditional Owners. Other countries[569] have solved this problem, but it appears that there exists a wall of Australian legislation and institutional thinking, that despite its rhetoric of concern to 'Close the Gap'[570] in disparities between the Aboriginal population and the total Australian population, has proven to be impenetrable to effective innovation and reform with respect to public policy on land ownership, use and tenure in Australia.

7.8 Implications on pre-conditions for coexistence

This chapter unravelled the legal, institutional and practical complexities of the interactions between native title rights and interests and the Crown's land tenure, use and local governance systems in two case study localities. A task that native title holders and their governing bodies find difficult to tackle, let alone navigate, and beyond the comprehension of most practicing planners (Porter, 2017a). Each of these legal, institutional and practical layers acts as a form of

[568] Records of meetings with Bardi and Jawi and Yawuru RNTBCs 2014-2016 (held on file by the author) and Wensing and Taylor (2012:21).

[569] Canada and New Zealand in particular. See for example Hoehn (2012); Walker, Jojola and Natcher (2013).

[570] 'Close the Gap' is used as a short-hand way of referring to the commitments that the Council of Australian Governments (COAG) made in the National Indigenous Reform Agreement (SCFFR, 2008) to close the gap in certain social and economic measures of the disparities between Aboriginal and Torres Strait Islander people and the total Australian 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.

dispossession, alienation and control over Aboriginal peoples' land rights and interests and impacts adversely on their daily lives (Wyatt, 2015).

What emerges from this analysis is the inherent nature of the conflict between the Western and Aboriginal land ownership, use and tenure systems as currently operationalised in the case study localities. There is a very real tension between the native title scheme which recognises the continuity of traditional laws, customs, practices and beliefs on the one hand, and a reserve scheme of the Crown's land tenure instruments that impair or undermine the use of those legal rights to engage in the wider economy on the other hand (Neate, 2009:169). While the circumstances in the case study localities are highly circumscribed and deeply colonising, what emerges from this analysis are the points of divergence and convergence between the two systems.

The points of divergence include the power imbalance between the RNTBCs and the Australian and State Governments and the inequality in terms of who is dictating the parameters of the discourse between them (I. Watson, 2015:155, 157). The level of proof required for the recognition of native title rights and interests and the conditions for extinguishment imposed by the Crown create a hurdle for Aboriginal people between their understanding of the extent of their relationship with their land and that accepted by the Crown (Jackson, 2017:190). At the heart of this discourse is the fact that Aboriginal peoples' sovereignty and right to self-determination in Australia have never been recognised by the colonisers (I. Watson, 2015:161). Specifically, in relation to land as being an integral part of their being and well-being, Aboriginal peoples view extinguishment as being 'repugnant' (Yu, 2016:2) to their 'obligation and mandate to care for and to nurture all things for the benefit of future generations still coming' (I. Watson 2015:161). These connections to land and waters and cultural obligations cannot be extinguished by the Australian state (I. Watson, 2015:161).

The points of convergence between the two distinct systems of land ownership, use and tenure are that they both encompass a form of property relations that transcend the individual members of the community with mechanisms that enable the wider community to enact a form of control over access to land, its use and the distribution of its resources in ways that do not always prejudice longer term sustainability for future generations.

What also emerges from this analysis is the crippling complexity of how the State's ALT reserve system and the Commonwealth's native title system intersect with each other in the two case

study localities and that both case study RNTBCs are struggling to produce win-win outcomes from their native title determinations. The analysis also demonstrates that native title holders need to be treated differently than they presently are.

The analysis in this and the preceding Chapters demonstrates that it is time to shake off the prevailing assumptions and predilections about Western law being more superior to Indigenous law and custom. It is time to accept that Aboriginal law and custom has not been eradicated by Western law, to look outside the constraints of the Western legal system and find 'a new legal philosophy to ground our relationship with one another and with the planet' (Tobin, 2014:xxi). More significantly, as Lavery (2015:iv; 297-311) states, it is also time to accept that native title determinations are a positive affirmation of Aboriginal peoples' ancestral land rights and interests under their law and custom and therefore their superior right to the land (Wensing and Small, 2012) because the colonisers failed to recognise the Aboriginal peoples as 'a distinct people of equal standing to non-Indigenous people' (Malbon, 1997:39).

The approach to coexistence adopted in this thesis therefore rests firmly on the need for mutual and respectful coexistence between two distinct cultures, especially over land, its use and its resources, predicated on parity and justice. This involves reconstituting the Australian property system in such a way that Aboriginal peoples' land rights and interests are viewed as being at least equal, if not superior, to the Crown's rights and interests. These complex matters are explored in more detail in Chapters 8 and 9.

CHAPTER 8
ONE COUNTRY, TWO SYSTEMS: Foundational Principles for Parity and Coexistence

> *'Why is it that non-indigenous property rights can be determined with no reference to the law – that is, at the whim of government – while Indigenous people are forced to undergo an arduous and offensive "inquisition" before gaining recognition of rights we already hold? The Mabo (No. 2) decision settled the question of terra nullius; the determination process should now be one that starts on the premise of recognition of native title and then be a process of facilitating that recognition within the social, political and economic framework of the nation state. This is possible through mediation, but not through the courts.'*
>
> Kado Muir (1999:5).

8.1 Introduction

The NTA has been in operation for over 25 years and native title has been formally recognised over approximately 34 per cent of the Australian land mass (AIATSIS, 2018:2). There are over 400 registered determinations of native title in Australia, over 1,200 registered Indigenous land use agreements (ILUAs) and over 200 outstanding native title claim applications under the NTA.[571] These numbers will continue to grow over time.

However, given the way the NTA has been framed by the Parliament and interpreted by the Courts[572], there can be no doubt that Australian law is continuing to assert its dominance over Aboriginal law and custom with respect to land ownership, use and tenure. Even where native title has been determined to exist, it still remains vulnerable to regulation and extinguishment by the Crown (Jackson, 2018a) and native title holders do not have a right to say 'No'[573] over development or resource extraction on their native title lands.

As discussed in Chapter 3, Aboriginal leaders and communities have issued several declarations about their land rights, the lack of constitutional recognition and the need for redress for past injustices, and they are growing increasingly frustrated with the way governments in Australia are not dealing with their grievances, especially over land. Pressure is mounting to find better

[571] As at 30 April 2018. National Native Title Tribunal: http://www.nntt.gov.au/Pages/Statistics.aspx
[572] The Federal Court of Australia and the High Court of Australia on appeal on matters of law.
[573] Also referred to as a power of veto.

ways of handling the interactions between two distinct systems of land ownership, use and tenure (K. Smith, 2017). As Kado Muir asserts in the statement cited above, the determination of Aboriginal peoples' land rights should be one that starts from the premise of recognition within the social, political and economic framework of the state through mediation, rather than contestation.

Australia has a responsibility therefore to 'listen carefully and ethically' (Porter, 2017b:651) to what the Aboriginal peoples are saying, to 'move over and make room for Indigenous sovereignties' (Porter, 2017b:651) and to 'relinquish power and control' (Porter, 2017b:653). The notion that all power comes only from the Crown needs to be overturned and the nation needs to become more confident about 'sharing spaces' (Porter 2017b:653) with Aboriginal peoples in parity, rather than by imposition and extinguishment.

Drawing on the conclusions of earlier Chapters, this Chapter begins with a discussion of the relevance of international human rights norms and standards to Aboriginal land matters in Australia (Part 8.2) before establishing a set of ten foundational principles as the basis for parity and coexistence between two distinct systems of land ownership, use and tenure (Part 8.3). The Foundational Principles are then aligned with the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN, 2007) (Part 8.4). The existing Aboriginal land arrangements in WA and a possible alternative approach within the existing statutes in WA are then evaluated against the Foundational Principles (Part 8.5) to ascertain how effectively they recognise and respect Aboriginal land rights and interests, before drawing some conclusions about the need for a new Model for Parity and Coexistence between two systems of land ownership, use and tenure (Part 8.6).

8.2 The relevance of international human rights norms and standards

Aboriginal peoples in Australia are increasingly demanding that the full suite of international human rights norms and standards are applicable to their affairs and to dealings with them, including the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN, 2007).

The UNDRIP may not be a direct source of law (UN, 2013:16), but it nevertheless carries considerable normative weight and legitimacy because it was adopted by the UN General

Assembly,[574] it was compiled in consultations with, and the support of, Indigenous peoples worldwide,[575] and it reflects 'an important level of consensus at the global level about the content of Indigenous peoples' rights' (UN, 2013:16). It also 'reflects the needs and aspirations of Indigenous peoples' (Eide, 2006:157) as well as the concerns of states.[576] As the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya,[577] reiterates there are political and moral imperatives for implementing the UNDRIP in addition to the legal imperatives (UN, 2013:18).

Furthermore, the UNDRIP is an extension of the standards found in many other human rights treaties that have been ratified by and are binding on Member States, including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Convention on the Elimination of All Forms of Racial Discrimination* (UN, 2013:17). Unlike Treaties, Covenants and Conventions, Declarations do not need to be signed or ratified, because as they are adopted by the General Assembly they are considered to be universally applicable (Amnesty International Canada, 2012).

The UNDRIP does not create any new or special human rights, but rather it elaborates general principles and human rights as they relate to 'the specific historical, cultural and social circumstances of indigenous peoples' (UNHRC, 2008:24). It is based on the principles of non-discrimination and equality[578] (UN, 2007). The standards in the UNDRIP 'share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that Indigenous peoples have faced in their enjoyment of basic human rights' and 'connect them to existing State obligations under other human rights instruments' (UNHRC, 2008:24). In addition to a statement of redress, it is also 'a map of action' for 'guaranteeing, respecting and protecting Indigenous peoples' rights' (Stavenhagen, 2011:150).[579]

[574] The UN General Assembly has a long history of adopting declarations on various human rights issues including the *Universal Declaration of Human Rights* in 1948. Such declarations are adopted under Article 13(1)(b) of the UN Charter and are generally reserved by the UN 'for standard-setting resolutions of profound significance' (UN, 2013:16). The UN DRIP was adopted by an overwhelming majority of Member States. There were eleven abstentions, but the four Member States that initially opposed the DRIP (Australia, Canada, New Zealand and the United States of America) have all subsequently reversed their positions (UN, 2013:16). For a discussion of the reasons of the four CANZUS countries for objecting to the UNDRIP, see Ford (2013). Stavenhagen (2011:151) maintains that because it was adopted by 'an overwhelming majority of 143 states, from all the world's regions, and that as a universal human rights instrument it morally and politically binds all of the UN member states to comply fully with its contents'

[575] Erica-Irene Daes was the Chairperson of the Working Group on Indigenous Populations (WGIP) and Special Rapporteur of the UN Sub-Commission on Human Rights from 1984 to 2001 and was instrumental in the preparation of the UNDRIP. Daes (2008:24) maintains that 'no other UN instrument has been elaborated with such an active participation of all parties concerned'.

[576] As discussed below. See Footnote 584.

[577] James S. Anaya was the Special Rapporteur on the Rights of Indigenous Peoples from 2008 to 2014.

[578] As reflected in Articles 1 and 2 and paragraphs 2 and 5 in the Preamble.

[579] Rodolfo Stavenhagen was the UN Special Rapporteur on human rights and fundamental freedoms of Indigenous peoples from 2001 to 2007.

More importantly, the UNDRIP enshrines the principle of free, prior and informed consent (discussed below) as a 'critically important human right' which is 'inextricably linked to the fundamental right of self-determination' (Nosek, 2017:125). According to Anaya (2009:186) 'self-determination is a right that inheres in human beings themselves'. Self-determination 'derives from common conceptions about the essential nature of human beings' and that human beings 'individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly' (Anaya, 2009:186-7).

The principle of self-determination is enshrined in the United Nations Charter of 1945. It is a collective right that can only be asserted by groups who are identified as peoples (Weller, 2018:119). Article 55 of the Charter places self-determination of peoples together with the principle of equal rights as the basis for international peace and stability (Strelein *et al*, 2001:116). Since that time the concept of self-determination has evolved into Common Article 1 in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), both adopted in 1966 with identical language.[580]

Initially, Article 1 applied to the whole populations of sovereign states and was not viewed as applying to Indigenous peoples (Tobin, 2014:34).[581] This changed over time[582] and by 2007, the UN adopted the UNDRIP (UN, 2007), Article 3 of which provides:

> *'Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*'

And Articles 4, 5, 18 and 23 also include references to or express provisions supporting Indigenous peoples right to self-determination. In the course of developing the UNDRIP, nation states viewed self-determination of Indigenous peoples as posing 'a fundamental challenge' to state authority which the State claimed to be a 'uni-polar right' (Weller, 2018:121). Article 46 therefore provides that the UNDRIP cannot be interpreted or construed 'as authorising or encouraging any action that would dismember of impair the territorial integrity or political unity

[580] Which states: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' (UN 1966a, 1966b).
[581] Indeed, Britain and other European empires 'had no compunction in denying' that the principle of self-determination had any application in the territories they invaded (D.H.N. Johnson, 1970:268.) See also Weller (2018:117-125).
[582] For an overview of how Indigenous peoples' rights reached the UN, see Diaz (2009:16-31) and Eide (2006:155-212). For an overview of how the *Declaration on the Rights of Indigenous Peoples* was adopted by the UN, see Eide (2009:32-46).

of sovereign and independent States'.[583] Article 46 also provides that the UNDRIP shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

It would be 'inadmissible and discriminatory to argue that Indigenous peoples lack the right to self-determination merely because of their indigeneity' (Daes, 2008:25). Nation states therefore have 'a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to expand the concept of democracy' and correspondingly, Indigenous peoples have a 'duty to try to reach an agreement, in good faith, on sharing power within the existing state and, to the extent possible, to exercise their right to self-determination by such means' (Daes, 2008:25). While constitutional reform in Australia is an important stepping stone to better recognition and equality and is long overdue, better recognition of Aboriginal peoples' rights in land in Australia as being at least equal to the Crown's rights in land is possible without constitutional reform. The ideas put forward in this thesis are a form of legal pluralism that do not rely on a form of constitutional recognition, but rather propose a solution that focusses squarely on producing a settled order with respect to land ownership, use and tenure which may involve a single outcome and/or the recognition of areas of autonomy and operating over the same space, and which can be advanced without constitutional change. These issues are explored in more detail in Chapter 9.

The principle that free, prior and informed consent from Indigenous peoples is required before adopting and implementing legislative or administrative measures that may affect them is enshrined in several Articles in the UNDRIP (UN, 2007).[584] The principle of free, prior and informed consent has four inter-linked elements:

- **Free** means no force, bullying or pressure.
- **Prior** means that Indigenous peoples have been consulted before the activity begins.
- **Informed** means Indigenous peoples are given all of the available information and informed when that information changes or when there is new information. If

[583] Article 46 has been interpreted by Engle (2011: 147) as sealing the deal that 'external forms of self-determination are off the table for Indigenous peoples' and by Woons (2014:10) as 'the ability of Indigenous nations to use UNDRIP to challenge the power imbalance they are locked into with states has been truncated' with the territorial integrity of the former being maintained at the expense of the latter (White Face and Wobaga 2013). Furthermore, the then UN Special Rapporteur on the rights of Indigenous Peoples, James S. Anaya, also disagrees that any imputation that the right to self-determination sets Indigenous peoples apart from the right to self-determination that peoples generally enjoy under international law (UN, 2013:19; see also Daes (2008:22-24); Anaya (2009:184-198).

[584] In particular, Articles 10 (relocation), 11 (cultural property), 19 (regulatory measures), 28 (land and territories), 29 (environment) and 32 (development and use of land/territories). For more details, see Joffe (2013) and Southalan and Fardin (2018, forthcoming).

Indigenous peoples don't understand this information then they have not been informed. An interpreter or other person might need to be provided to assist.

- **Consent** means Indigenous peoples must be consulted and participate in an honest and open process of negotiation that ensures:
  - all parties are equal, neither having more power or strength;
  - Indigenous peoples' group decision-making processes are allowed to operate; and
  - Indigenous peoples' right to choose how they want to live and their world views are respected (AHRC, 2010:25; WGIP, 2005:para 56).

These elements 'are interlinked, and should not be treated separately' (FAO, 2016:15). The FAO's good practice guide on the concept of free, prior and informed consent states that:

> *'…consent should be sought before any project, plan or action takes place (prior), it should be independently decided upon (free) and based on accurate, timely and sufficient information provided in a culturally appropriate way (informed) for it to be considered a valid result or outcome of a collective decision making process'* (FAO, 2016:15).

The principle of free, prior and informed consent raises the level of engagement with Aboriginal peoples by switching the relationship from consultation to consent and provides a safeguard to Aboriginal peoples' full participation in decisions affecting their rights and interests (Nosek, 2017:119, 124). Indigenous peoples have also identified this principle as 'a requirement, prerequisite and manifestation of the exercise of their right to self-determination' (UNHRC, 2010:10). Any violation of these elements may invalidate the outcomes or any purported agreement with the Indigenous peoples concerned (UNHRC, 2011:29). The free, prior and informed consent provisions in the UNDRIP are aimed at 'reversing the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on Indigenous peoples, and allow them to flourish as distinct communities on lands to which their cultures remain attached' (UNHRC, 2009:14-15).

As argued earlier, the UNDRIP expresses rights and by doing so, explains how Indigenous peoples want nation states (and others) to conduct themselves about matters that may affect their rights and interests. It also imposes obligations on States and third parties to conform to the standards expressed in the Declaration. As a consequence of endorsing the UNDRIP, nation states can therefore no longer make decisions affecting Indigenous peoples' rights and interests by imposition, they now have a duty to consult with Indigenous peoples on the basis of free, prior and informed consent.

While Australia belatedly endorsed the UNDRIP, there is strong opposition to its application to Aboriginal peoples' land rights within Australia which comes down to a lack of political will and a refusal to make a commitment to justice. The Australian Government's response to the Referendum Council's recommendation for an Indigenous Voice to the Parliament is a clear indication of the Australian Government's reluctance to face the issues of practical implementation (Scullion, 2017). Despite the fact that Victoria and the Northern Territory are well advanced in their negotiations over a treaty with the Aboriginal peoples in their respective jurisdictions, and other jurisdictions are also contemplating such actions.[585]

The Australian Government's obduracy on land reforms is a direct function of the continuing settler-colonial power relations over land that has endured uninterrupted in Australia since 1788. Australia's position toward its Indigenous peoples compared to its approaches to Indigenous peoples in the Pacific could not be more duplicitous. In 2008 the Australian Government's former international aid agency, AusAID, released a 500-page, two-volume report titled '*Making Land Work*' as 'an information resource for countries undertaking land policy reform' as part of its Pacific Land Program (AusAID, 2008:vii). The focus of which is on developing harmonious links between the customary (largely oral) institutions and the formal (written) institutions of the modern nation state (AusAID, 2008:xii). The report identifies nine broad principles to guide land policy reform and implementation in Pacific countries (AusAID, 2008:xv, 105-108) (**Figure 8.1**). The Australian Government, through AusAID, acknowledges that elsewhere outside of Australia, the Indigenous customary land tenure institutions 'have served communities for thousands of years' and that Indigenous customary land interests should be given formal recognition through registration, they should be able to make choices about how they use their land, including whether to access credit, and whether customary authority over land should be retained (AusAID, 2008:xii-xiii).

[585] **Victoria:** *Victoria One Step Closer to Treaty and Reconciliation,* Media Release, Premier of Victoria 7 June 2018. See: https://www.premier.vic.gov.au/victoria-one-step-closer-to-treaty-and-reconciliation/ (R. Thomas, 2017).
Northern Territory**:** *Barunga Agreement: Joint Land Councils and Northern Territory Government Statement*, 8 June 2018 (NT Government, 2018). See http://newsroom.nt.gov.au/mediaRelease/26732. **Western Australia:** New move to strengthen government accountability in Aboriginal affairs, Media Statement, Ben Wyatt, 7 June 2018 (Wyatt, 2018). **South Australia:** *South Australian Government commences Treaty negotiations with South Australian Aboriginal nations*. See: https://statedevelopment.sa.gov.au/aboriginal-affairs/aboriginal-affairs-and-reconciliation/initiatives/treaty-discussions. As at 27 November 2017 (Aboriginal Treaty Interim Working Group, 2017). However, a State election was held in SA in March 2018 and the Labor Government was replaced with a Liberal Government. The new Liberal Government has stated that it is pausing treaty negotiations in favour of other priorities on Indigenous matters (Walquist, 2018).

Are there 'Pacific principles' for land policy reform?

Because of the great diversity among customary land systems in the Pacific region, it is not possible to present specific land policies that are relevant to or 'fit' all Pacific countries. But it is possible to identify some broad principles to guide policy reformers and implementers in Pacific countries:

- make tenure security the priority
- work with and not against customary tenure
- intervene only if it is necessary
- ensure land policies reflect local needs and circumstances
- be prepared for long timeframes to achieve lasting reform
- actively involve stakeholders rather than only informing them
- adopt simple and sustainable reforms
- balance the interests of landowners and land users
- provide safeguards for vulnerable groups.

Figure 8.1 AusAID's 'Pacific Principles' for land policy reform

Source: AusAID, 2008:xv, 105-108.

The '*Making Land Work*' report was released at the same time as the Australian Government was implementing Aboriginal land reforms in Australia. As Terrill (2016:290) observes the contrast between the Australian Government's approach to Indigenous land reforms and land reform through AusAID's Pacific Land Program and the methods used in preparing them could not have been more starkly different. The hypocrisy of the Australian Government towards Indigenous land reforms within Australia compared to its policies and actions in the South Pacific are an indictment of its continuing racism towards the Aboriginal peoples of Australia. Terrill (2016:290-291) is scathing in his assessment:

> *'In Australia, it [the Australian Government] did not engage expert advice or seek clarification of the issues. There was no report or consultation period, no case studies and no attempt to define the terminology. After a decade it has never even published an Indigenous land reform policy. It has used the term 'secure tenure' inconsistently and in a manner at odds with its technical meaning (as defined in the AusAID report). It has presented the need for reform as obvious and straightforward rather than complex. It has intervened often and dramatically rather than 'only if it is necessary'. And rather than seeking to balance 'the interests of landowners and land users', it has sought to use the select endorsement of traditional owners as evidence of the efficacy or legitimacy of its reforms.'*

Despite changes in government between Labor and the Liberal/National Coalition and several changes in prime ministership over the last decade, no clear policy on Indigenous land reform has emerged from successive Australian Governments. The political prospects therefore, for reform aimed at drawing a line of parity between Indigenous and Western forms of land ownership, use and tenure systems are not good.

In 2015 the EIWG in its advice to COAG 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*. (SOWG, 2015:5)

These views are also reflected in the '*Uluru Statement from the Heart*' released by the participants of the National Constitutional Convention in May 2017. The Referendum Council (2017a:i) asserted in its final report that the ongoing disparities between the two systems of land ownership, use and tenure in Australia are no longer tenable, as the following statements attest:

> *'Our sovereignty pre-existed the Australian state and has survived it'* (2017a:16).
>
> *'Australia was not a settlement and it was not a discovery. It was an invasion'* (2017a:17).
>
> *'The taking of our land without consent represents our fundamental grievance against the British Crown'* (2017a:20).
>
> And *'… there is unfinished business to resolve. And the way to address these differences is through agreement making'* (2017a:21).

I read these statements as Aboriginal peoples seeking parity for their system of land ownership, use and tenure. They have made their position unequivocally clear that they are willing to negotiate an outcome through a treaty/ies process that would see the two systems of land ownership, use and tenure sitting alongside each other based on mutual understanding, respect, reciprocity and justice. It is time to listen and act on these demands.

Against this backdrop, the next part of this Chapter develops a set of Foundational Principles as the basis for parity and coexistence between two culturally distinct systems of land ownership, use and tenure.

8.3 Foundational Principles for Parity and Co-existence.

Chapter 6 concluded that the pre-conditions for a mutually respectful coexistence with respect to property in land between the Aboriginal peoples of Australia and the Crown must include the recognition of Aboriginal peoples' pre-existing sovereignty, the integrity of their law and custom and their right to self-determination and governance over their affairs, especially with respect to their lands (and waters).

Chapter 7 unravelled the legal, practical and institutional complexities of the interactions between the Aboriginal customary system(s) vs the Crown's system(s) of land ownership, use and tenure by examining the frictions between native title rights and interests, the existing land tenure, land use, land use planning, local municipal and essential service provision and local governance circumstances in two case study localities in WA. This analysis highlights the multiple layers of rights and interests and the inherent conflicts between the Aboriginal and Western systems of land ownership, use and tenure in WA as they currently exist in two localities. Also in Chapter 7, I concluded that each of these legal, practical and institutional layers acts as a form of dispossession, alienation and control over Aboriginal peoples' land rights and interests and impacts adversely on their daily lives and their wellbeing.

8.3.1 Developing a set of Foundational Principles for Parity and Coexistence

Over the last 12 years, various key organisations in Australia have been making clear statements of expectations or principles about Indigenous land reforms (Wensing, 2016a:4-9).[586] The sources include the National Indigenous Council (NIC) (2005),[587] the Aboriginal and Torres Strait

[586] The first seven of the following statements of expectations or principles are reproduced in full in Wensing, 2016c:69-82.
[587] The National Indigenous Council (NIC) in 2005 in the context of providing advice to the Australian Government (NIC, 2005).

Islander Social Justice Commissioner (2009b),[588] SGS Economics and Planning (SGSEP) (2011b),[589] the Australian Law Reform Commission (ALRC) (2015a),[590] the Indigenous Leaders Roundtable (AHRC, 2015e)[591], the Expert Indigenous Working Group (EIWG) (SOWG, 2015),[592] the Indigenous Property Rights Network (AHRC, 2016d)[593], and the Referendum Council (2017a).[594]

Each of the statements of expectations or principles that emerged from these sources were developed either directly by Aboriginal and Torres Strait Islander peoples themselves or they were developed in close consultation with Aboriginal and Torres Strait Islander peoples (Wensing, 2016a:3). A distillation of the themes in these statements is presented in **Table 8.1**.

Several key messages about land reform can be drawn from these statements, including that:

- land is central to Aboriginal peoples' culture and way of life and these are inseparable;
- Aboriginal peoples' right to pursue, reject or negotiate development on their lands should be respected, especially with respect to local decision making;
- Aboriginal peoples want to be able to use their land as collateral for long-term social, economic and cultural development;
- there should be no extinguishment of their rights and interests or any diminution of the Indigenous estate; and that
- 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 their ancestral lands and waters (Wensing, 2016a:6).

[588] 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 in 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' in disparities between Indigenous Australians and the rest of the Australian general population (AHRC, 2009b).
[589] SGS Economics and Planning in 2012 in the context of the '*Living on Our Lands*' study for the Western Australian Department of Indigenous Affairs (SGSEP, 2011b).
[590] The Australian Law Reform Commission in 2014–15 in the context of the Commission's review of the NTA (ALRC, 2015a).
[591] The Indigenous Leaders Property Rights Roundtable convened by the AHRC in Broome, WA in 2015, as part of the AHRC's follow-up to its *Rights and Responsibilities Consultation Report* (AHRC, 2015b; 2015c; 2015d; 2015e).
[592] The Expert Indigenous Working Group (EIWG) in 2015 in the context of advising and assisting the COAG Senior Officers Working Group (SOWG) in its report *Investigation into Indigenous land administration and use* (SOWG, 2015:11-12).
[593] The Indigenous Property Rights Network convened by the AHRC in Canberra in 2016 in the context of the Indigenous Property Rights Roundtable as a further follow-up to the AHRC's *Rights and Responsibilities Consultation Report* (AHRC, 2015a; 2015f; 2015g). See also AHRC, 2016a; 2016b; 2016c; 2016e.
[594] The Referendum Council in its Final Report to the Prime Minister and the Leader of the Opposition in 2017 on advice about progress and steps toward a referendum for the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution of Australia (Referendum Council, 2017a).

Table 8.1 Distillation of themes drawn from various statements of principles about Indigenous land reforms – 2005 to 2017

Themes	Document							
	NIC 2005	ATSISJC 2009	SGSEP 2012a	ALRC 2015a	AHRC 2015e	EIWG 2015	AHRC 2016d	RC 2017
Land is fundamental to Indigenous culture and is inalienable	Y	Y	Y			Y	Y	Y
Self-determination is fundamental and includes free, prior and informed consent		Y	Y	Y		Y	Y	Y
Communal forms of land ownership should be recognised, respected and preserved	Y		Y			Y		Y
Distinctions must be made between different interest holders		Y	Y				Y	
Indigenous land is no lesser a form of land ownership than any other form of land ownership		Y	Y					Y
International human rights standards must be applied		Y		Y			Y	Y
No diminution of the Indigenous estate		Y				Y	Y	Y
Local Aboriginal and Torres Strait Islander decision making must be respected		Y	Y			Y	Y	Y
Ability to use land as collateral but not have to alienate native title interests		Y			Y	Y	Y	
Build/improve land administration equivalent to that for non-Indigenous land							Y	
Build capacity of Indigenous landholders to manage their estate					Y	Y	Y	
Build and support partnerships for economic development						Y	Y	
Support sustainable long-term social, economic and cultural development				Y	Y	Y	Y	
Changes to land tenure should only be voluntary	Y	Y	Y				Y	Y
Full disclosure and complete information must be provided		Y	Y					
Land to be transferred to the Indigenous estate must be remediated and made safe			Y					
Compulsory acquisition only as a measure of last resort and compensation must be on just terms	Y	Y	Y		Y	Y		

Index to Acronyms:

AHRC Australian Human Rights Commission
ALRC Australian Law Reform Commission
ATSISJC Aboriginal and Torres Strait Islander Social Justice Commissioner
EIWG Expert Indigenous Working Group, assisting the Senior Officers Working Group (SOWG)
NIC National Indigenous Council
RC Referendum Council
SGSEP SGS Economics and Planning

Source: Wensing (2016a:4-5), updated in October 2017

It is arguable that these statements reflect an increasing crescendo of concern by Aboriginal peoples that the current statutory land rights schemes and the native title system are not meeting their expectations in terms of recognising their sovereignty and a form of self-determination over their land rights and interests, nor delivering tangible outcomes in terms of restoring, protecting and exercising their unique knowledge, culture and world values and improving Aboriginal peoples' wellbeing on their terms.

As I have observed elsewhere (Wensing, 2016a:6), these themes are also reflected in recent literature by several Indigenous authors, including, for example Black (2011), Tobin (2014), Moreton-Robinson (2007, 2015) and I. Watson (2015).

Drawing on the declarations I documented in **Table 3.1** of Chapter3 and the statements of expectations or principles distilled in **Table 8.1** above, I developed the following ten Foundational Principles as the basis for parity and coexistence between Aboriginal and Western forms of land ownership, use and tenure in the WA context, if not for Australia generally. The Foundational Principles for Parity and Coexistence are listed in **Figure 8.2**. Each of the ten Foundational Principles are inter-related and every one of these Principles must be applied for the two systems of land ownership, use and tenure to operate equally side by side.

Foundational Principles for Parity and Coexistence

1. Land is integral to Aboriginal peoples' culture and ways of life and these are inseparable. Land is also inalienable from Aboriginal knowledge, culture and tradition.

2. Self-determination in relation to land ownership, use and tenure is fundamental to Aboriginal peoples' economic, social and cultural development and wellbeing. This includes Traditional Owners undertaking land use and occupancy planning in accordance with their law and custom.

3. The free, prior and informed consent of Aboriginal people (Traditional Owners) must be obtained and respected, and Aboriginal people must be able to use their own legal traditions to structure their decision-making and to define the meaning of consent.

4. No (further) extinguishment of native title rights and interests and no diminution of the (existing) Indigenous estate.

5. Aboriginal land is no lesser a form of land ownership than any other form of land ownership.

6. Communal forms of land ownership should be recognised, respected and preserved.

7. Aboriginal peoples' have the right to pursue, reject or negotiate development on their lands, which must be respected at all times.

8. Land used by Traditional Owners (or other Aboriginal people with the Traditional Owners' free, prior and informed consent) as collateral for long-term social, economic and cultural development must not depend on extinguishment of native title rights and interests or alienation of any other Aboriginal land rights and interests.

9. The acquisition of Aboriginal land rights and interests should never be exerted by the Crown or any third party. Acquisition can only proceed on the basis of terms negotiated and agreed with the Traditional Owners.

10. Compensation for any extinguishment, loss, diminution, impairment or damage of/to Aboriginal land rights and interests must be on just terms having regard to all of the above principles.

Figure 8.2 Foundational Principles for Parity and Coexistence

8.3.2 Justification for each Foundational Principle

Each of the following Foundational Principles for Parity and Coexistence express important values that are the essential characteristics of how Aboriginal forms of land ownership, use and tenure can be regarded as being at least equal to Western forms of land ownership, use and tenure, if not superior.[595] The justification for each Principle is discussed below.

Foundational Principle 1:

> *Land is integral to Aboriginal peoples' culture and ways of life and these are inseparable. Land is also inalienable from Aboriginal knowledge, culture and tradition.*

Many Aboriginal peoples have consistently and repeatedly stated that land is an integral part of their culture and their well-being, now and for future generations, as stated so eloquently by Tom Trevorrow (Trevorrow, 2010)[596] and by Deborah Bird Rose in her ground-breaking work for the Australian Heritage Commission (D.B. Rose, 1996:7).

D.B. Rose (1996:10) also found that country 'is synonymous with life' and that 'life for Aboriginal people needs no justification'. That Aboriginal peoples' conception of country is 'multi-dimensional' consisting of 'all people, animals, plants, Dreamings, underground, earth, soils, minerals and waters, surface water, and air; that it has origins and a future; and that it exists both in and through time'. All of these are identified by Aboriginal people as being integral parts of their particular country, and each country is surrounded by other unique and inviolable whole countries, ensuring that no country is isolated and 'together they make up some larger whole', each not knowing the full extent because 'knowledge is, of necessity, local' (D.B. Rose, 1996:9, 12, 13). Healthy country is 'one in which all the elements do their work', nourishing each other (D.B. Rose, 1996:10). There is no site for self-interest because 'the interest of all of the other living components of country, cannot exist independently of each other *in the long term.*' (D.B. Rose 1996:10, emphasis in original). 'Each country is understood by its people to be a unique and inviolable whole' and 'the interdependence of all life within country constitutes a hard but essential lesson – those who destroy their country ultimately destroy themselves' (D.B. Rose, 1996:10).

[595] For the reasons discussed in the first paragraph of Part 6.2.3 of Chapter 6.
[596] Cited in Part 5.5 of Chapter 5.

Discussions with both case study RNTBCs revealed very similar views and understandings about their connection to and responsibility for their ancestral country which they inherited from their ancestors, continues with the present generations and which they will pass to future generations. For example, Patrick Dodson's[597] comments cited in Chapter 5 about Yawuru's *Bugarrigarra* bear testimony to these values as an integral part of Aboriginal peoples' identity and wellbeing.

Foundational Principle 2:

> *Self-determination in relation to land ownership, use and tenure is fundamental to Aboriginal peoples' economic, social and cultural development and wellbeing. This includes Traditional Owners undertaking land use and occupancy planning in accordance with their law and custom.*

The Aboriginal people participating in the Australian Human Rights Commission's Indigenous Property Rights Roundtables in 2016 defined self-determination as the fundamental right of their peoples to shape their own lives and to be the key decision-makers in their lives (AHRC, 2016d). D. Smith (2012:6) defines it as 'genuine decision-making power and responsibility about what happens on Indigenous peoples' lands, in their affairs, in their governing systems and in their development strategies'. It is not about devolution of responsibility for programs or projects, but rather about governance. Which D. Smith (2012:6) defines as 'The principles, rules and mechanisms by which the nation, clan, group or community is translated into sustained, organised action.'

While successive Australian Governments have repeatedly rejected, both domestically and internationally, the principle of self-determination as the cornerstone of Indigenous policy in Australia (Strelein *et al*, 2001:145; Gunstone, 2017:41) for fear that it may lead to secession or the dissolution of Australia as a nation state, several Aboriginal leaders have repeatedly rejected the notion that they are trying to dismantle Australia's sovereignty.[598] Nevertheless, the UNDRIP sets a standard with respect to self-determination and there is an expectation that it will be applied in relation to Aboriginal peoples' rights and interests. Indeed, the UNCERD (2017:5) recommended in its most recent periodic report on Australia, that Australia 'accelerate its

[597] Cited at the beginning of Chapter 7 and in Part 7.4.2 of Chapter 7.

[598] 'We define our rights in terms of self-determination. We are not looking to dismember your States and you know it. But we do insist on the right to control our territory, our resources, the organisation of our societies, our own decision-making institutions, and the maintenance of our own cultures and way of life', Geoff Clarke, National Coalition of Aboriginal Organisations appearing before the International Labour Organisation (ILO) in 1998, cited in M. Dodson and Pritchard (1998:4).

efforts to implement Indigenous Peoples' self-determination demands', as set out in the Uluru Statement from the Heart [Referendum Council, 2017b].

The point is not that self-determination has been 'lost or destroyed', but rather that Aboriginal peoples have had to 'adapt in how they assert their authority to self-determine' (Woons, 2014:9) their affairs due to the impacts of colonisation. These impacts cannot be simply reversed. Self-determination must therefore be seen as a means of reinvigorating Indigenous culture and self-governance, adapting to current circumstances, and as a 'self-transforming and open-ended' process that is 'determined by the geography and legal-political heritage' which is locally 'emplaced' (Rowse, 2014:43, 50).

Self-determination enables Aboriginal peoples 'to participate in governing their societies in accord with their own laws and cultural understandings of self-rule, and so regain their dignity as equal and active citizens' (Tully, 1995:192). This includes Traditional Owners being able to undertake their own cultural land use and occupancy planning of their traditional country[599] that does not rely on state action and they can use to influence contemporary land use planning and development undertaken by state agencies and other third parties. Planning is a mechanism for self-determination because it enables Traditional Owners and other Aboriginal people 'to define and progress their present and future social, cultural, environmental and economic aspirations' (Matunga, 2017:640) and to influence the outcomes of contemporary land use planning and development by the Settler state.

Fulfilling Aboriginal peoples' right to self-determination in this way therefore presents a meaningful basis for redressing the imbalances that currently exist between the two distinct systems of land ownership, use and tenure (Gunn, 2012:24).

[599] This suggestion is attributed to Peter Yu, in his capacity as Chairperson of NAILSMA. Notes of a meeting recorded on 11 August 2011, held on file by the author.

Foundational Principle 3:

> *The free, prior and informed consent of Aboriginal people (Traditional Owners) must be obtained and respected, and Aboriginal people should be able to use their own legal traditions to structure their decision-making and to define the meaning of consent.*

The UN Human Rights Council (UNHRC) found that Indigenous peoples worldwide identify the principle of free, prior and informed consent as 'a requirement, prerequisite and manifestation of the exercise of their right to self-determination' (UNHRC, 2010:10). It is arguable therefore, that the principle of free, prior and informed consent has relevance in Australia, especially when Traditional Owners[600] will be affected by decisions concerning land ownership, use and tenure.

None of the land administration or land use planning statutes around Australia prescribe in any detail how public consultation [601] on matters administered by those statues should be undertaken. The entities performing functions under those statutes are generally free to decide what form any public consultation could or should take and therefore have the discretion to apply the principle of free, prior and informed consent when engaging with Aboriginal peoples on matters that may affect their rights and interests. As formidable as this may seem, the existing statutes do not hold any entity back from doing a better job than the statutes currently require.

As this Foundational Principle intimates, for the concept of free, prior and informed consent to work effectively there must be 'a mechanism and process whereby indigenous peoples make their own independent and collective decisions on matters that affect them' and the process must be 'undertaken in good faith to ensure mutual respect' (UNHRC, 2011:27). The right of Indigenous peoples to maintain and strengthen their own legal systems is affirmed by Articles 5, 27, 34 and 40 of the UNDRIP (UNHRC, 2011:9). Such systems enable Indigenous societies to maintain internal harmony and to engage constructively and influence decision-makers

[600] And in some circumstances other Aboriginal peoples with other connections to the same land. It is important to note that the term 'traditional owner' does not appear in the NTA but is used in two Commonwealth statutes (s.3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and s.368(4)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)) and in several of the Aboriginal and Torres Strait Islander land and/or heritage statutes in many jurisdictions around Australia. However, the definition and use of the term varies quite significantly depending on the legislative context (Edelman, 2009: 4).

[601] It is acknowledged that consultation generally only involves the provision and exchange of information between stakeholders and 'does not necessarily facilitate more inclusive involvement in decision making' (World Resources Institute, 2007:7). Whereas free, prior and informed consent should enable the Aboriginal people concerned 'to meaningfully participate in decision-making processes, negotiate fair and reasonable outcomes, and withhold their consent … if their needs, priorities and concerns are not adequately addressed' (World Resources Institute, 2007:7-8).

externally (UNHRC, 2011:9). Aboriginal peoples should therefore be able to use their own legal traditions to define the meaning of consent and to structure their decision-making accordingly (Nosek, 2017:152).[602]

Foundational Principle 4:

> *No (further) extinguishment of native title rights and interests and no diminution of the (existing) Indigenous estate.*

As discussed in Chapters 2 to 6, Aboriginal peoples regard the notion of extinguishment of their connections to and responsibility for their ancestral lands as alien to their knowledge, law and culture (I. Watson, 2015:40). Aboriginal peoples have fought long and hard to protect and preserve their unique cultural identities, their intrinsic connections to country and for recognition of their land rights and interests (Foley and Anderson, 2007; Foley, 2007) including through the native title system, and Aboriginal people are not prepared to lose any of their hard-won gains. The problem is, the native title system and the various statutory land rights schemes remain vulnerable to the political whims of public sentiment and government legislative and policy settings, and not a shared concern for Aboriginal peoples' ongoing land rights and interests.

As stated in Part 3.3 of Chapter 3, Aboriginal leaders (Pearson, 2005; SOWG, 2015:5) have long suspected that the Australian Government's Indigenous land tenure reform agenda is a 'Trojan horse' for diminishing or diluting the extent of Indigenous held lands that have been recognised, granted, transferred or acquired through the various statutory land rights schemes and the native title system (Wensing, 2016a:7 and 21).

In the context of the SOWG investigation into Indigenous land administration and use for COAG in 2015, the EIWG expressed serious concerns about the direction of the Indigenous land tenure reform agenda. The EIWG also expressed concern that the reforms proposed to date would have the effect of diminishing their 'hard fought gains' and the 'well established principles

[602] Nosek (2017:144) identifies several hurdles that need to be addressed for the principle of free, prior and informed consent to work effectively, including 'who will be entitled to free, prior and informed consent, defining how consent is achieved, dealing with logistical issues like constraints on time and funding', and when the principle is in place, risks include lack of accountability, vulnerability to manipulation, increased conflict within and between Aboriginal communities, and the generation of unrealistic expectations about likely benefits.

around the human rights of traditional owners' (SOWG, 2015:5). They also argued that the land reform agenda needs to go in a different direction (SOWG, 2015:5).

Both case study RNTBCs have also expressed concerns about the direction of Indigenous land tenure reforms in WA, especially on the Dampier Peninsula as discussed in Chapter 7,[603] and about the ongoing uncertainties that holds for the future of their ancestral lands. The RNTBCs have said they do not want to be forced to surrender and extinguish their native title rights and interests in exchange for a form of tenure from the Crown (i.e. freehold or leasehold of exclusive possession) that they see as being inferior to theirs. They have also consistently expressed their opposition to any diminution of their current land holdings.[604]

Foundational Principle 5:

> *Aboriginal land is no lesser a form of land ownership than any other form of land ownership.*

Chapter 1 of this thesis opens with statements by three Aboriginal and Torres Strait Islander people comparing the Aboriginal and Western systems of land ownership, use and tenure. What is remarkable about these statements is that they evince a strong sense of parity between the two culturally distinct land systems. This is, as Peter Yu states, a reflection of Aboriginal peoples' ability 'to recognise another land tenure system which is inherent in Aboriginal peoples' cultural practice of reciprocity – their ability to accept visitors, allow them to travel over their country and to have access to lands and waters and other resources'.[605]

It is also a reflection of a position that the Aboriginal peoples have always maintained since colonisation by the British in 1788: that their sovereignty was not recognised, that they never ceded their lands, and that these issues have never been adequately addressed.[606] Therefore they are seeking to establish a mutually respectful basis for equality between two culturally distinct systems of land ownership, use and tenure.

[603] Documented in more detail in Appendices B, C and D.
[604] The case study RNTBCs also identified several additional priorities in relation to land reform generally, including building and improving land administration capacity; building the capacity of Indigenous landholding entities to own and manage their estate; supporting partnerships for economic, social and cultural development on the Indigenous estate; supporting sustainable long-term social, economic and cultural development on the Indigenous estate and elsewhere; and all land in the Indigenous estate must be subject to full disclosure and complete information must be provided and the land remediated and made safe prior to transfer.
[605] Peter Yu, notes of interview with the author, 2 December 2015, held on file by the author.
[606] Professor Mick Dodson, Concluding Remarks at the National Centre for Indigenous Studies 2016 HDR Research Retreat, 21 October, ANU, Canberra. Record of proceedings held on file by the author.

The question is what constitutes 'Aboriginal land'? The Indigenous Property Rights Network refers to the 'Indigenous estate' and defines it as encompassing 'the lands, seas, waters and resources of Aboriginal and Torres Strait Islander peoples' (AHRC, 2016c:1). This definition includes the Indigenous estate as defined by Altman et al (2007:5).[607] But, arguably there is other land that Aboriginal people may have access to, or land that Aboriginal people still have cultural responsibilities for, that is not necessarily 'legible to the political-legal apparatuses of the state' (Altman and Markham, 2015:132) and should nevertheless be regarded as Aboriginal land. This is something that Australia has yet to come to terms with.

In 2015, the EIWG stated 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' (SOWG, 2015:5). In effect, the EIWG was arguing that they want their land ownership, use and tenure to be seen as being equal to the Crown's and of no lesser status.

Foundational Principle 6:

Communal forms of land ownership should be recognised, respected and preserved.

I have previously articulated (Wensing and Taylor, 2012) and Terrill (2016:291) has also found that the Indigenous land tenure reform debate was wrongly focussed on dismantling the communally owned lands into individuated and alienable forms of tenure. In Chapter 3, I discussed the Commonwealth's pursuit of Indigenous land tenure reforms and how Terrill (2016:294) found that the debate had centred on the merits of individual versus communal or group ownership of land rather than what the best outcomes might be by working methodically through the reform process. Terrill (2016:291) also found that communal forms of land ownership were being characterised 'as a type of laissez-faire collectivism' where everyone owns the assets, 'rather than as a system for allocating rights over land and infrastructure' to particular groups of people and/or organisations. As a result, the Indigenous land tenure reform debate was around seemingly 'opposing concepts of communal versus individual ownership' and therefore 'coalescing around the wrong issues or themes' (Terrill, 2016:291).

[607] Discussed in Part 2.7 of Chapter 2.

In *Mabo (No. 2)* the HCA determined and the NTA[608] states that 'native title or native title rights and interests means the *communal, group or individual* rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land or waters' (emphasis added). While the NTA may operate to recognise or protect a native title holder's individual native title rights and interests, it will always be in reference to the communal or group rights because it is a collective right held by all members of an Aboriginal nation or group. Individuals or groups may have rights and interests that could be said to be pendant or carved out of the communal or group title.[609] Additionally, most of the statutory Aboriginal land rights schemes around Australia provide for land grants or transfers to be held communally rather than by individuals, although the latter is possible in some of the schemes (Wensing, 2016a:31-35).

The reality is that Aboriginal peoples will always view their relationships with their ancestral lands as being an integral part of their wellbeing (as reflected in Foundational Principle 1 above) and Aboriginal peoples' connections based on language, genealogy, other familial ties or other grouping as determined by that clan's law and custom. Therefore, their communal forms of land ownership should also be recognised, respected and preserved as an integral part of their cultural identity and wellbeing.

Foundational Principle 7:

> *Aboriginal peoples' have the right to pursue, reject or negotiate development on their lands, which must be respected at all times.*

Aboriginal peoples have long expressed the view that as the original owners of the land they have a right to pursue, reject or negotiate development on their land, but it was not until the HCA's decision in *Mabo (No. 2)* that Aboriginal peoples were recognised as having any legal rights to their ancestral lands under their system of law and custom and therefore any rights to have a say in how land is used and developed by others. Consistent with Aboriginal peoples' ongoing connections with and responsibility for their ancestral country under their system of law and custom, several statements in the preamble to the UNDRIP and Articles 3, 17, 18, 19,

[608] S.223(1).

[609] I am indebted to Lisa Strelein for this insight. Personal comments, 9 February 2016.

20, 21, 23, 25 and 32 affirm Indigenous peoples right to control over developments affecting them and their lands, territories and resources.

Both case study RNTBCs expressed concerns about not being directly involved in decisions affecting their country. Or if they were consulted, more often than not, their views were not respected. Despite the existence of an exclusive possession native title determination, research for this thesis in one of the case study localities revealed several future acts[610] that have occurred without complying with the relevant future act processes under the NTA, potentially rendering the actions invalid in so far as they may have affected native title rights and interests and potentially exposing the responsible entities to claims for compensation for damages. These revelations prompted the case study RNTBCs to state that they want the right to reject or negotiate developments on their lands on the basis of their free, prior and informed consent, and that these rights should be respected by governments and other third parties.

Foundational Principle 8:

> *Land used by Traditional Owners (or other Aboriginal people with the Traditional Owners' free, prior and informed consent) as collateral for long-term social, economic and cultural development must not depend on extinguishment of native title rights and interests or alienation of any other Aboriginal land rights and interests.*

Article 10 of the UNDRIP states that 'Indigenous peoples shall not be forcibly evicted from their lands or territories.' Arguably, current policy settings requiring native title holders to extinguish their native title rights and interests for another form of tenure which they can then use as collateral for finance is a form of forced eviction and destruction of their culture. The ability of Aboriginal people to use their land as collateral for economic or other development in support of their development rights should not have to depend on the extinguishment of native title rights and interests or any other Aboriginal land rights and interests.

Consistent with the case study findings in the *Living on Our Lands* study (SGSEP, 2012a), the case study RNTBCs in this research echoed similar views: That Aboriginal people see the alienation of their land rights and interests as repugnant to their law and custom. Whether implemented by agreement or not, current policy settings requiring the extinguishment of native title rights and

[610] As defined in s.233(1) NTA.

interests in favour of freehold or leasehold tenure are discriminatory on the basis of race and therefore in contravention of Article 10 of UNDRIP. Such extinguishment is also detrimental to the survival of Aboriginal peoples' culture and law and custom.

Foundational Principle 9:

> *The acquisition of Aboriginal land rights and interests should never be exerted by the Crown. Acquisition can only proceed on the basis of terms negotiated and agreed with the Traditional Owners.*

There are two issues here. The first relates to the continuing classification of Crown land as 'unallocated' or UCL where native title has been formally determined to exist, and the second relates to the Crown's power to acquire native title rights and interests for public purposes and/or for the purposes of granting it to a third party.

In relation to the first issue, native title holders are concerned that the classification of land as UCL where native title has been determined to exist continues to legitimise the State's belief that the land is still available for a 'better' use and that the native title rights and interests can be compulsorily acquired to make that happen. The classic demonstration of such an action was the acquisition of land at James Price Point for the Browse LNG precinct (Broome and Kimberley News, 2016). In relation to the second issue, most land acquisition statutes around Australia restrict the power of resumption to a public purpose or public works (Newton and Conolly, 2017:1-3),[611] although in the NT and the ACT the relevant statutes enable land acquisition to be carried out 'for purposes which are within the scope of a Territory's power to make laws' (Newton and Conolly, 2017:9, 60).[612]

It is a well-established principle within the legal system that 'the courts will presume legislation [enacted by the parliaments] does not amend the common law to derogate from important rights enjoyed under the law, except by provisions expressed in clear, unequivocal language'

[611] For a discussion of 'public purpose' and 'public works' in the land acquisition context, see Newton and Conolly (2017:56-62).

[612] The issue of acquisition for more than one purpose was hotly contested in *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 609 at 619 and in *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2010) 240 CLR 409 at 421. Newton and Conolly (2017:57) note that:

> *'An acquiring authority which takes land for two purposes [i.e. a public purpose and for another purpose], both of which are within its statutory power, but there is evidence to show that the taking is for only one of those legitimate purposes, is acting within its powers and the taking is valid. Yet there must be some doubt whether this principle is applicable to each and every instance. Perhaps a higher standard is required of an acquiring authority in the 21st century not to mislead a landowner in any respect.'*

(Newton and Conolly, 2018:16). This principle is often referred to as the 'principle of legality'.[613] In relation to native title rights and interests, in *Mabo (No. 2)* and in *Wik*,[614] the HCA said that native title could be extinguished by the Crown but that its intention to extinguish must be made using 'clear and unambiguous words'.[615] Two questions arise in relation to the acquisition of native title rights and interests. The first question is whether the acquiring authority has the power to acquire native title rights and interests,[616] and the second question is whether the native title holders are entitled to compensation. The issue of compensation is discussed under the next Foundational Principle.

While the compulsory acquisition of native title rights and interests is subject to the right to negotiate,[617] S. Brennan (2008:185) notes that the 1998 amendments to the NTA 'increased the vulnerability of native title that exists as unalienated Crown land, especially in towns and cities.'[618] The important point here is that UCL 'is among the most precious remaining stock of recoverable country not taken after more than 200 years' (S. Brennan, 2008:185), which Kirby J described as 'the classic circumstance in which Australian law gives recognition to an established Aboriginal native title.'[619]

Arguably therefore, the state's acquisition of native title rights and interests should never be exercised by the Crown without the express agreement of, and then only with the free, prior and informed consent of and on terms negotiated and agreed with the relevant Traditional

[613] French CJ summarised this 'principle of legality' in *Momcilovic v R* (2011) 245 CLR1 at 46-7, noting that the principle was not a constraint on legislative power, but that the principle presumes 'that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language'. In addition, Newton and Conolly (2018:16) note that 'It is also well established that legislation should not be construed to deprive a person of land or its beneficial enjoyment without compensation unless a state legislature has expressed that clear intention', citing *Kettering v Noosa Shire Council* (2004) 134 LGERA 99 at [31] and *Cameron v Noosa Shire Council* (2006) 145 LGERA 316. For an in-depth discussion of the principle of legality in the Australian and New Zealand contexts, see Meagher and Groves (2017).

[614] *Wik Peoples v Queensland* ("Pastoral Leases case") [1996] HCA 40, (1996) 187 CLR 1.

[615] *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1 at 64, 111; *Wik Peoples v State of Queensland* (1996) 187 CLR 1 at 155, 247.

[616] All States and Territories have enacted complementary legislation to the NTA and other relevant statutes which enable them to acquire native title rights and interests in conformity with the NTA (Newton and Conolly, 2018:33). Although the relevant provisions of the *Lands Acquisition Act* (NT) were considered in *Minister for Lands, Planning and Environment v Griffiths* (2004) 14 NTLR 188 and the appeal dismissed in *Griffiths v Minister for Lands, Planning and Environment* (2008) HCA 20. In this matter, the NT Government issued notices of acquisition stating that it intended to acquire all of the land in Timber Creek that was not Crown land, but the validity of the notices was challenged. The HCA held that the *Lands Acquisition Act* (NT) enabled the Minister to acquire land for 'any purpose whatsoever' and this was applicable notwithstanding that s.11(1) of the NTA provides that native title cannot be extinguished contrary to the NTA (Newton and Conolly, 2018:33-34). The case has continued through the courts, focussing on the question of compensation for the loss, diminution, impairment or other effect on native title. See McGrath (2017); F. Martin (2016).

[617] And if necessary an arbitral hearing before the National Native Title Tribunal (s.26(2)(f) NTA), but noting that a lesser procedural right applies if the land is within a town or city (s.251C NTA) (S. Brennan, 2008:184).

[618] S. Brennan (2008:185) notes that the HCA in *Griffiths v the Minister for Lands, Planning and Environment* (2008) 'rejected the invitation to scrutinise statutory acquisition powers by reference to different, but also deeply embedded legal principles' and that the purposes for which native title might be compulsorily acquired could be 'unambiguously defined' or construed in such a way that could meet 'all exercises' of their acquisition powers affecting native title. S. Brennan suggests that the remedy lies instead with the Government and the Commonwealth Parliament.

[619] In *Griffiths v Minister for Lands, Planning and Environment* (2008) HCA 20 at [62].

Owners, acknowledging that there may be particular circumstances where the Traditional Owners are happy to relinquish their native title rights and interests permanently for a public purpose(s).

Foundational Principle 10:

> *Compensation for any extinguishment, loss, diminution, impairment or damage of/to Aboriginal land rights and interests must be on just terms having regard to all of the above principles.*

Article 28 of the UNDRIP provides that Indigenous peoples have the right to redress, including just, fair and equitable compensation for the loss of their traditional lands, especially when it has been taken without their free, prior and informed consent. Compensation can include lands equal in quality, size and legal status or monetary compensation or other appropriate redress. The principle of 'just and fair' compensation for the loss of traditional lands is also reflected in Article 10 of the UNDRIP (UN, 2007).

In relation to native title in Australia three of the Justices in *Mabo (No. 2)*[620] declared that native title was subject to extinguishment at common law without compensation by inconsistent Crown grant irrespective of whether there was legislative authority, attributable to its unique status (Bartlett, 2015,775). Compensation for any loss, diminution, impairment or other effect on native title is only payable for acts that occurred or occur after the introduction of the *Racial Discrimination Act 1975* (Cth).[621] The *Racial Discrimination Act 1975* (Cth) therefore protects native title holders from discriminatory extinguishment or impairment of their native title rights and interests. Prior to the enactment of this Act, Commonwealth, State and Territory Governments could make grants or do acts that affected native title and no compensation was (or is) payable.

The NTA requires that an acquisition of native title rights and interests must be made on just terms.[622] Indeed, in Griffiths v Northern Territory (No. 3),[623] the FCA has made its first litigated award of compensation for the loss or impairment of native title rights and interests. In

[620] (1992) 175 CLR 1, Mason CJ, McHugh and Brennan JJ.
[621] 31 October 1975.
[622] Ss.51-53 NTA.
[623] [2016] FCA 900.

determining the parameters of compensation the native title holders were entitled to, importantly, the FCA noted that even though native title cannot be disposed of in the open market this was not a discounting factor for reducing the amount of compensation (Newton and Conolly, 2017:34).

Therefore, where native title rights and interests or any other Aboriginal interests in land are to be compulsorily acquired and/or extinguished, then compensation must be paid on just terms, having regard to all of the preceding principles. In any case, the 'just terms' provisions in s.51(xxxi) of the Australian Constitution impute such a requirement (Newton and Conolly, 2017:3).[624]

8.4 Aligning the Foundational Principles for Parity and Coexistence with the UN DRIP

With Australia committing to the UNDRIP in 2009 (Macklin, 2009), it is arguable that the international human rights framework provides the basis for a more respectful relationship based on equality and justice, rather than one always prevailing over the other arising from the historical imposition of colonisation and dispossession.

Several Articles in the UNDRIP are relevant to the discussion of Aboriginal peoples' rights in land ownership, use and tenure in Australia because these elements are pertinent to the commonalities of property – land ownership, allocation, use and distribution of its resources – as discussed in Chapter 5.

Articles 3, 4, 8, 10, 11, 18, 19, 21, 23, 25, 26, 27, 28, 31, 32, and 34 have particular relevance to the application of Aboriginal peoples' human rights in contemporary land ownership, use and tenure in the Australian context, as shown in **Table 8.2**. Taken together, these Articles provide the basis for Aboriginal peoples to require recognition of their land rights and interests on at least equal terms, and in compliance with their laws and customs (Tobin, 2014:46). **Table 8.2** also shows how the Foundational Principles for Parity and Coexistence articulated in Part 8.3 can be aligned with the UNDRIP.

[624] Compensation on 'just terms' has been incorporated in the relevant statutes in South Australia, New South Wales, the Northern Territory and the Australian Capital Territory in addition to the Commonwealth. Victoria, Queensland, Western Australia and Tasmania do not use this term, but normally where property is compulsorily acquired in accordance with the law, the property owner is compensated justly (Newton and Conolly, 2017:13-15).

Many of the UNDRIP Articles listed in **Table 8.2** can be viewed as enabling rights that are fundamental to the realisation of the full suite of development rights, including the right to cultural difference and the right to pursue a pathway to social and economic development that is determined and controlled by the Indigenous people themselves. Arguably, the rights in Articles 3, 4, 19, 23, 26 and 32 can be considered as the concession made at the international level for the loss of the opportunity for Indigenous peoples living within established States to claim statehood over territory. Without these enabling rights there is no meaningful site for aspirations towards cultural difference and economic development that are exclusively under the determination and control of Indigenous peoples.[625]

Indeed, Article 43 of the UNDRIP states that:

> '*The rights recognised herein constitute the minimum standards for the survival, dignity, and well-being of the Indigenous peoples of the World*'

and Article 26 states that:

> '*Indigenous people have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and the right to own, use, develop and control the lands, territories and resources they possess by reason of their customary ownership*'.

What then are the steps necessary to ensure Indigenous rights to land and resources are better accommodated within conventional land ownership, use and tenure systems such that their customary land rights and interests can survive and prosper with dignity and respect?

The UNDRIP expresses rights and, by doing so, it explains how Indigenous peoples expect nation states (and others) to conduct themselves when dealing with Indigenous peoples about matters that affect Indigenous peoples' rights and interests. This is where Article 19 is of particular relevance. Article 19 states that Indigenous peoples have the right to be consulted in good faith in order for governments to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[626]

[625] Paul Howarth, personal comments, see Wensing and Small (2012:7).

[626] The UN Permanent Forum on Indigenous Issues at its fourth session in 2005 (UNPFII, 2005a) endorsed the *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples* (E/C.19/2005/3) (UNPFII, 2005b) and in 2010 the Australian Human Rights Commission released *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (AHRC, 2010) which includes details of how the principle of free, prior and informed consent can be applied in Australia. See http://www.humanrights.gov.au/declaration_indigenous/index.html.

The next step in this analysis is to apply the Foundational Principles for Parity and Coexistence to the existing situation in the case study localities and to ascertain whether there are any opportunities for achieving their full application through any of the tenure options under the existing statutes in WA.

Table 8.2 Aligning the UNDRIP, Aboriginal land ownership, use and tenure in Australia, and the Foundational Principles for Parity and Coexistence

Article in the UNDRIP (subheadings inserted by the author)		**Relevance to Aboriginal land ownership, use and tenure**	**Foundational Principles for Parity and Coexistence**
Article 3	**Self determination** Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.	Aboriginal and Torres Strait Islander peoples want to pursue economic, social and cultural development on their terms and at their timing. Conventional land use planning and land tenure systems need to be more cognisant of these rights.	Foundational Principle 2.
Article 4	**Autonomy or self-government** Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.	Aboriginal and Torres Strait Islander peoples want autonomy over their own affairs, including in relation to the ownership, use and tenure arrangements for themselves and by others on their Country.	Foundational Principle 2 Foundational Principle 3. Foundational Principle 6. Foundational Principle 7. Foundational Principle 8.
Article 8	**No forced assimilation, destruction of their culture or dispossession of their lands** 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; b. Any action which has the aim or effect of dispossessing them of their lands, territories or resources; c. Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; d. Any form of forced assimilation or integration; e. Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.	Efforts to transfer native title to other forms of tenure within the Crown's land tenure system are assimilative. Aboriginal and Torres Strait Islander peoples want to retain, maintain and develop their unique culture on their terms. Aboriginal and Torres Strait Islander peoples have the right to practice their culture without the threat of assimilation, destruction, dispossession of their lands, territories or resources, dislocation, assimilation or integration, or racial discrimination. Conventional land use and tenure systems need to be adapted to recognise and respect Aboriginal and Torres Strait Islander peoples' knowledge, culture and traditions.	Foundational Principle 9

Article in the UNDRIP (subheadings inserted by the author)		**Relevance to Aboriginal land ownership, use and tenure**	**Foundational Principles for Parity and Coexistence**
Article 10	**No forced removals** Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.	Land use and tenure decisions by others can result in the forced removal of Indigenous peoples from their lands or territories or denial of access, especially if it occurs without their free, prior and informed consent as per Article 19.	Foundational Principle 1. Foundational Principle 2. Foundational Principle 3. Foundational Principle 9. Foundational Principle 10.
Article 11	**Cultural traditions and customs** 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.	Aboriginal and Torres Strait Islander peoples want to be involved in conventional land use planning and land tenure decision making to protect their right to practice and revitalize their cultural traditions and customs, especially in terms of access to places of cultural significance. Conventional land use and tenure systems are a legitimate means for Aboriginal and Torres Strait Islander peoples to be involved in decision making that affects their rights and interests, and if necessary, to seek redress for property taken without their free, prior and informed consent as per Article 19.	Foundational Principle 2. Foundational Principle 4. Foundational Principle 6.
Article 18	**Decision making** Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.	Aboriginal and Torres Strait Islander peoples have the right to participate in conventional land use and tenure decision-making, whether legislative or administrative, that affect their rights and interests, including the right to say 'no', especially when an action has, will have or is likely to have or be a direct threat to their survival or cultural integrity.	Foundational Principle 3 Foundational Principle 7.
Article 19	**Free, prior and informed consent** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.	This is the minimum standard by which Aboriginal and Torres Strait Islander peoples want nation states (and others) to conduct themselves when dealing with Indigenous peoples about matters that affect them, including land use and tenure decisions whether they be legislative or administrative.	Foundational Principle 3.

Article in the UNDRIP (subheadings inserted by the author)		**Relevance to Aboriginal land ownership, use and tenure**	**Foundational Principles for Parity and Coexistence**
Article 21	**Right to improvement of economic and social conditions** 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.	Aboriginal and Torres Strait Islander people have a right to, among other things, housing with appropriate sanitation and other essential services. Native title holders should not be asked to give up their native title rights and interests, nor having them unilaterally taken away in exchange for housing. Aboriginal and Torres Strait Islander peoples have the right to special measures to improve their social and economic conditions, and with particular attention on those with special needs.	Foundational Principle 2. Foundational Principle 8
Article 23	**Development priorities** Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions.	Aboriginal and Torres Strait Islander peoples have land use and occupancy planning processes for developing and determining their priorities for health, housing and other economic and social development. Conventional land use and environmental planning processes need to be adapted to recognise and respect their integrity and legitimacy.	Foundational Principle 2. Foundational Principle 3. Foundational Principle 7
Article 25	**Spiritual relationship with land and waters and responsibilities to future generations** Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.	The relevant protocols for identifying the right people for country need to be applied, especially where they are not known, and actively facilitate Aboriginal and Torres Strait Islander peoples' involvement so that responsibilities for future generations can be taken into consideration in conventional land use planning activities and land tenure decision making.	Foundational Principle 1 Foundational Principle 2. Foundational Principle 5.

Article in the UNDRIP (subheadings inserted by the author)		**Relevance to Aboriginal land ownership, use and tenure**	**Foundational Principles for Parity and Coexistence**
Article 26	**Rights to ownership, use and development of traditional lands** 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.	Conventional land use planning and land tenure systems need to be more respectful and accommodating of Aboriginal and Torres Strait Islander peoples' customary ownership, use and development of their traditional lands. The details need to be respectfully negotiated in good faith between the relevant parties and, where relevant in relation to native title matters, Indigenous land use agreements developed and registered under the *Native Title Act 1993* (Cth).	Foundational Principle 1. Foundational Principle 2. Foundational Principle 5. Foundational Principle 6. Foundational Principle 8.
Article 27	**Transparency** States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.	Aboriginal and Torres Strait Islander peoples have a crucial and legitimate stake in conventional land use and tenure matters affecting their lands and waters. The principle of free, prior and informed consent is the preferred method of engagement on matters that will affect Aboriginal and Torres Strait Islander peoples' rights and interests, unless otherwise negotiated and agreed through registered Indigenous land use agreements under the *Native Title Act 1993* (Cth) or through separate treaty negotiations.	Foundational Principle 3. Foundational Principle 4. Foundational principle 7.

Article in the UNDRIP (subheadings inserted by the author)		**Relevance to Aboriginal land ownership, use and tenure**	**Foundational Principles for Parity and Coexistence**
Article 28	**Redress and just, fair and equitable compensation** 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.	Aboriginal and Torres Strait Islander peoples have a right to compensation on just terms under the provisions of s.51(xxxi) of the Australian Constitution when the Crown compulsorily acquires their traditional lands, the same as any other person in Australia when the Crown compulsorily acquires their land.	Foundational Principle 10.
Article 31	**Cultural heritage** 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.	Aboriginal and Torres Strait Islander peoples have a right to their traditional knowledge, culture and tradition which conventional land use planning activities and land tenure decision making needs to recognise and protect.	Foundational Principle 1. Foundational Principle 7.

Article in the UNDRIP (subheadings inserted by the author)		**Relevance to Aboriginal land ownership, use and tenure**	**Foundational Principles for Parity and Coexistence**
Article 32	**Planning for land use and tenure** 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.	Aboriginal and Torres Strait Islander peoples have legitimate processes for determining their priorities and strategies for the development and use of their lands, territories and resources, and they should be consulted in good faith in order to obtain their free, prior and informed consent before any decisions are made that may affect their lands, territories or resources. Conventional land use planning and tenure decisions can also include actions to mitigate adverse environmental, economic, social, cultural or spiritual impacts. In any event where Aboriginal and Torres Strait Islander peoples' rights and interests will be adversely affected by land use and tenure decisions, compensation should be on 'just terms' (s.51(xxxi) of the Australian Constitution).	Foundational Principle 1. Foundational Principle 2. Foundational Principle 3. Foundational Principle 7. Foundational Principle 8.
Article 34	**Institutional structures** Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, judicial systems or customs, in accordance with international human rights standards.	Aboriginal and Torres Strait Islander peoples have their own 'institutional structures' for internal decision-making, and conventional land use and tenure systems need to recognise and respect their legitimacy in accordance with international human rights standards.	Foundational Principle 2. Foundational Principle 5. Foundational Principle 6.

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

8.5 Applying the Foundational Principles for Parity and Coexistence

The following analysis evaluates to what extent the existing Aboriginal land arrangements in WA satisfy the Foundational Principles developed in Part 8.3. Two options are examined in detail. Both options involve applying different land tenure arrangements over the township of Ardyaloon on Bardi and Jawi Country and Airport Reserve on Yawuru Country under existing WA and Australian statutes, with Option A requiring the permanent extinguishment of native title rights and interests, and Option B applying the non-extinguishment principle validated through an Indigenous land use agreement. The details are explained below.

8.5.1 Option A: Existing situation in Ardyaloon and Airport Reserve

In Chapter 7, an analysis of the current rights and interests in two separate Reserves under Part III of the AAPA Act, one in each case study locality, were documented (**Table 7.4** and **Table 7.6**). This analysis reveals several layers of rights and interests progressing from the Crown's radical title at the bottom of the Table, to the native title rights and interests, the RNTBC's interests, registered interests, other registered interests, secure interests (i.e. mortgagee), to access rights granted under entry permits administered by the ALT, at the top of the Table.

The existing circumstances in Ardyaloon and Airport Reserve are very similar. Both are Part III AAPA Reserves with a highly protected status[627] has provided the inhabitants with a number of advantages that would otherwise not be available to them, and has insulated the area from external growth pressures. There is one difference between these two sites. Airport Reserve is not leased as a whole Lot and has been formally subdivided into 18 separate lots each of which is subject to an authorised lease to Aboriginal people (individually or jointly). Whereas, the whole of the township of Ardyaloon is on one Lot that has been leased to an Aboriginal association[628], has not been subdivided and there are no authorised subleases.

As concluded in Chapter 7, the relative interests and powers of the Crown in the right of the State compared with those of the native title holders under the current ALT reserve arrangements as documented in **Table 7.7** shows a stark power imbalance between the two sets of rights and interests with the WA Government holding the upper hand.

[627] Which, as discussed earlier, is not that difficult to undo administratively, but may be difficult politically.
[628] Incorporated under the *Associations Incorporation Act 1987* (WA) (repealed), replaced by the *Associations Incorporation Act 2015* (WA).

Table 8.3 and **Table 8.4** need to be read together. **Table 8.3** is a distillation of **Tables 7.4 and 7.6**, and shows the layers of rights and interests in the two Part III Reserves of Ardyaloon and Airport Reserve, extending from the Crown's radical title at the bottom of the Table to access rights at the top of the Table. Descriptions of the details of each layer are shown in the right hand column. **Table 8.4** reproduces the layers of rights and interests in the left hand column and then applies each of the Foundational Principles in the columns to the right. The colour coding applies the traffic light indicators of red, orange or green. Red indicates that the Foundational Principle is not satisfied. Orange indicates that the Foundational Principle is partially satisfied. And green indicates that the Foundational principle is satisfied.

What **Table 8.4** shows is that the existing situation fails to satisfy nine of the ten Foundational Principles, and that Foundational Principle 5 is only partially satisfied with respect to no extinguishment of the native title rights and interests arising from the designation of land as a special reserve under Part III of the AAPA Act or the LAA and s.47A of the NTA. **Table 8.4** also shows that native title rights and interests are always subject to the Crown in the right of the State holding the radical title and the power of compulsorily acquisition over native title rights and interests.

On the basis of this analysis it is concluded that the outcomes of applying the Foundational Principles to all of the ALT Estate in both case study localities would be much the same – very poor outcomes for Traditional Owners and for the Aboriginal occupants of the land.

Table 8.3 Option A: Current land rights and interests in Ardyaloon and Airport Reserve

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

Source: Adapted from Strelein (2016). Content compiled by the author from various public records.

Table 8.4 Option A: Evaluation of current situation in Ardyaloon/Airport Reserve, against the Foundational Principles

Option A: Existing Situation in Ardyaloon/Airport Reserve

Assumptions:	Foundational Principles:									
Existing conditions: Crown land classified as Part III Reserves	1	2	3	4	5	6	7	8	9	10

Layers of Rights & Interests	Does this situation satisfy the Foundational Principle?
Access rights	
Use rights	
Sercure interest	
Registered interest	
RNTBC interest	
Crown reserve	
Native title rights and interests	
Crown interest (Radical title)	

Legend:

- No
- Partially
- Yes

8.5.2 Option B: A special purpose lease under existing statutes validated through an ILUA

In Chapter 7, it was noted that under s.79 of the LAA the Minister for Lands is able to issue special purpose leases for a fixed duration (i.e. 99 years) or in perpetuity and that subleases issued on a Crown lease under the LAA can be registered under the ToLA. This is an instrument upon which the use, allocation, access and distribution of land and its resources can be exercised and which could maintain the native title rights and interests by applying the non-extinguishment principle in the NTA.[629]

Herein lies a possible mechanism within the existing statutes that would enable the Crown to grant a special purpose lease to an entity established by an RNTBC[630] as the head lessee and granting the head lessee with the ability to issue sub-leases that can be registered under s.81Q of the ToLA which should, therefore, have the potential to be traded as well as the potential to be used as security against a loan. Meaning that, subject to conditions set by the head lessee, the property may be traded on commercial terms similar to those of freehold title, and the RNTBC-related entity or the subsidiary interest holders should be able to enter into a mortgage or other security arrangement (SGSEP, 2012a:33-34, 43, 119-122).

For this option to work under current statutes and legal understandings, an ILUA with the relevant native title holders would be required that authorises the future act, being the grant of a conditional lease to an RNTBC-related entity and the application of the non-extinguishment principle in s.238 of the NTA for the duration of the lease (SGSEP, 2012a:31-33, 111, 128; Strelein, 2016). The legal effect of the ILUA is the creation of a limited beneficial interest in the Crown for an immediate vesting of a conditional special purpose lease to an RNTBC-related entity for a significant period (i.e. 99 years or in perpetuity) with no other limits as to purpose, and which allows for the transferability of subsidiary interests created by the RNTBC-related entity, such as sub-leases, licences and mortgages (Strelein, 2016).[631]

However, subsidiary dealings in land may continue to be constrained by the requirement to obtain the prior approval of the Minister for Lands under s 18 of the LAA for leases issued under

[629] This option was canvassed in considerable detail in the Final Report of the *Living on Our Lands*, of which the author of this thesis was the principal researcher and author (SGSEP, 2012a) and is also canvassed by Strelein (2016).
[630] As discussed in Part 3.2.3 of Chapter 3 and in Parts 7.2.5 and 7.6.2 of Chapter 7, native title holders are unable to encumber the native title rights and interests. Therefore, any non-native title interests associated with their native title rights and interests in the same land must be held by a separate entity. Yawuru has created such a corporate structure, as discussed in Part E4 of Appendix E (as have some other native title holders elsewhere in Australia).
[631] See also AHRC (2016e).

s.79 of the LAA, unless otherwise provided for in the ILUA (SGSEP, 2012a:43, 55, 149, 120). Technically, it may be possible to remove this requirement in the ILUA or s.18 would need to be amended if lessees are to have greater discretion to sub-lease the land without always having to obtain the Minister's approval. If this obstacle cannot be satisfactorily resolved in the ILUA or by amending the LAA, then it may adversely affect the market for subleases and hence land values. However, a head lease from the Crown presents the potential to gain from sub-leasing and development of the land by the RNTBC-related entity without the risk that the land may be alienated or the economic benefits being otherwise diminished (as may be the case with a grant of freehold).[632].

A change in State Government policy is also required, because under current policy settings in WA native title holders are required to agree to the surrender and permanent extinguishment of their native title rights and interests before the WA Government will issue such a leasehold title (Mischin, 2015).[633]

Two other pre-conditions are also necessary: the native title determination must be of exclusive possession native title and over unallocated Crown land (UCL) with no other registered interests (Strelein, 2016).[634] This is because the native title holders through their RNTBC-related entity will be given a discretion to issue subsidiary interests to others via the head lease, and this does not need to be complicated by having to deal with other pre-existing non-native title interests, which under current prevailing legal and policy settings continue to have priority over the native title rights and interests.

This mechanism could also be made to work over land where Crown Reserves have been created, including special reserves created under Part III of the AAPA Act such as Ardyaloon and Airport Reserve, mainly because such Crown Reserves can also be subject to native title determinations of exclusive possession, just as Ardyaloon is. However, the ILUA will also have to validate the steps required to revoke the reserve (assuming both Houses of the WA Parliament will support such a motion) and the native title holders (and the current Aboriginal inhabitants) are willing and able to work out land use, land tenure, land use planning, local municipal and essential service provision and local governance arrangements that will be necessary to fill the void that

[632] As discussed in Part 7.2.5 of Chapter 7
[633] As discussed in Part 7.2.4 of Chapter 7.
[634] Although, this mechanism could also work over areas subject to non-exclusive possession, such as pastoral lease, especially where the pastoral lease is to an Aboriginal corporation. This is an area where further research is required.

will be left from revoking the land's special reserve status.[635] Ideally, these matters should be worked through before the revocation of the Reserve proceeds.

Other conditions will also be necessary to protect the underlying longevity of the native title rights and interests. Including that the burden of restrictive covenants placed on the lease by the native title holders and the conditions in the head lease run with the land, that the native title holders retain a legal reversionary interest at all times, that on the expiry or early termination of a sub-lease all improvements revert to the native title holders, and that the native title holders have recourse under contract and equity (Strelein, 2016).

As discussed in Chapters 3 and 7, subsidiary dealings in land may continue to be constrained by s.56(5) of the NTA, which Wensing and Taylor (2012:25) believe is a reflection of what is regarded as the common law position set out in *Mabo (No. 2)*: That native title is a form of property which exists subject to the Crown's radical title and cannot be given by native title holders to anybody but the Crown. SGSEP (2012a:33) concluded that 'If that is the position, then at common law a native title cannot subsist with the creation of a freehold title, lease or any sub-lease exercised pursuant to a lease (by native title holders or otherwise).'

While it may be conceivable that a trust PBC could authorise, through an ILUA, a dealing with its native title rights and interests other than by surrender, transfer or otherwise under s.56(4)(a)(iii) of the NTA and the application of the non-extinguishment principle in s.238 of the NTA, it is not inconceivable that at a later time it may become a point of contention if disputed by an affected native title holder. Arguably, it is an open question that the Courts may therefore form the view that the non-extinguishment principle cannot be applied in circumstances entailing a long-term lease because of the provisions of s.56(5) of the NTA. If that is the case, then s 56(5) of the NTA remains a significant impediment to native title holders who wish to use their property rights to engage in the economy using the mechanism described above (Wensing and Taylor 2012:26; SGSEP, 2012a:128).

However, for Option B to work in practice, several criteria must be met. These include that: there must be an exclusive possession native title determination; it must be over UCL with no other registered interests (but could include land classified as a Reserve 'for the use and benefit of Aboriginal inhabitants'); it must be possible to create an instrument within the existing land

[635] As discussed in Parts 7.3.2 and 7.4.1 of Chapter 7.

tenure system that enables the native title rights and interests to be retained (especially the inter-generational interests); and it must be possible to create an instrument upon which the use, allocation and distribution of resources can be exercised with reversionary interests in favour of the native title holders.

Table 8.5 and **Table 8.6** need to be read together. **Table 8.5** sets out how Option B could be made to work over the same two sites as discussed in Option A above. **Table 8.5** shows how the mechanism of a special purpose lease (s.79 LAA) with the application of the non-extinguishment principle can be implemented and the affect it will have on the various layers of rights and interests. The first column on the left-hand side identifies the various layers of rights and interests beginning with the Crown's interests at the bottom of the Table and up to access rights granted through entry permits or licences at the top of the Table. The columns to the right effectively show how some of the rights and interests are redistributed and the key steps involved, including: The negotiation of an ILUA to authorise the necessary future acts (Column 2); the issuing of a head lease as a s.79 LAA special purpose lease (Column 3); the issuing of sub-leases (Column 4); and the creation of easements and legal access as required (Column 5). Column 6 sets out the conditions that will apply when subsidiary interests expire or are terminated earlier than the agreed term. That is, that all subsidiary interests will include reversionary interests to the native title holders.

Figure 8.4 evaluates the issue of a special purpose lease under s.79 LAA and applying the non-extinguishment principle in the NTA, against the Foundational Principles, applying the same traffic light indicators as for Option A in **Table 8.4** above. The assessment reveals that for all the layers above the native title rights and interests this mechanism satisfies Foundational Principles 1, 2, 3 and 8. It partially satisfies Foundational Principles 4, 6 and 10, but it fails to satisfy Foundational Principles 5 and 9. However, as the bottom right hand corner of **Table 8.6** reveals when the head lease expires or is surrendered or terminated, the Crown's radical title survives and none of the Foundational Principles can be satisfied.

Table 8.5 Option B: A special purpose lease validated by an ILUA: Partial redistribution of rights and interests

Option B: A special purpose lease validated by an ILUA: Partial redistribution of rights and interests

Assumptions:

(a) Must have exclusive possession native title determination.
(b) Unallocated Crown Land (UCL) with no other registered interests, but includes land classified as a Reserve 'for the use and benefit of Aboriginal inhabitants'.
(c) Must be able to create an instrument that maintains native title rights and interests, especially the intergenerational interests.
(d) Must be able to create an instrument upon which the use, allocation and distribution of resources can be exercised.

Layers of Rights & Interests	ILUA	Head Lease	Sub-Leases	Easements, Legal Access	Post-Lease
Access rights				RNTBC creates easements for public utilities, cultural practices, or ather purposes as required. Entry permits for visitors and non-residents to be administered by RNTBC. Public roads and other legal access authorised and manintained in usual way.	Native title rights and interests fully revive on expiry or early termination. All improvements revert to head lessee.
Use rights			DoH enters into sub-lease with RNTBC.		
Secure interest			Mortgages may be registered.		
Registered interest			Sub-leases to existing users, but with payment of rent.		
RNTBC interest		Head lease to RNTBC and manages native title rights and interests as Trustee. Head lease registered under s.81Q of ToLA and able to sub-lease and mortgage.			If head lease expires or surrendered to Crown, native title holders recover full beneficial interests.
Crown reserve	ILUA between native title holders and the Crown validates a s.79 LAA special purpose lease (as a head lease) and applies the non-extinguishment principle. Also validates revocation of Reserve status.				
Native title rights and interests					
Crown interest (Radical title)					Radical title survives. Crown can compulsorily acquire native title.

Source: Adapted from Strelein (2016). Content compiled by the author from various public records.

Table 8.6 Option B: Evaluation of a special purpose lease validated by an ILUA under existing statutes, against the Foundational Principles

Option B: Evaluation of a special purpose lease validated by an ILUA, against the Foundational Principles

Assumptions:	**Foundational Principle:**									
(a) Must have exclusive possession native title determination. (b) Unallocated Crown Land (UCL) with no other registered interests, but includes land classified as a Reserve 'for the use and benefit of Aboriginal inhabitants'. (c) Must be able to create an instrument that maintains native title rights and interests, especially the intergenerational interests. (d) Must be able to create an instrument upon which the use, allocation and distribution of resources can be exercised.	1	2	3	4	5	6	7	8	9	10

Layers of Rights & Interests	ILUA	Head Lease	Sub-Leases	Easements, Legal Access	Post-Lease	Does this action satisfy the Foundational Principle?
Access rights	ILUA between native title holders and the Crown validates a s.79 LAA special purpose lease (as a head lease) and applies the non-extinguishment principle. Also validates revocation of Reserve status.	Head lease to RNTBC and manages native title rights and interests as Trustee. Head lease registered under s.81Q of ToLA and able to sub-lease and mortgage.	DoH enters into sub-lease with RNTBC.	RNTBC creates easements for public utilities, cultural practices, or ather purposes as required. Entry permits for visitors and non-residents to be administered by RNTBC. Public roads and other legal access authorised and manintained in usual way.	Native title rights and interests fully revive on expiry or early termination. All improvements revert to head lessee.	
Use rights			Mortgages may be registered.		If head lease expires or surrendered to Crown, native title holders recover full beneficial interests.	
Secure interest			Sub-leases to existing users, but with payment of rent.			
Registered interest						
RNTBC interest						
Crown reserve						
Native title rights and interests						
Crown interest (Radical title)					Radical title survives. Crown can compulsorily acquire native title.	

Legend:

No
Partially
Yes

8.5.3 Evaluation

The assessment of Option A in **Table 8.4** against the Foundational Principles, shows that the existing land ownership, use and tenure arrangements in the two case study localities fails to satisfy the Foundational Principles. This reflects what we already know: that the existing land ownership, use and tenure arrangements are generally stacked against Aboriginal peoples' rights and interests, especially in relation to the ALT estate where they have no involvement in decision making affecting the land that has essentially been set aside for their particular use and benefit.

The assessment of Option B in **Table 8.6** against the Foundational Principles shows that if certain criteria can be met, it is possible to apply a mechanism under the existing WA and Commonwealth statutes that only partially satisfies five of the Foundational Principles (1, 2, 3, 4 and 8). It cannot satisfy the other five Foundational Principles (5, 6, 7, 9 and 10). In particular, the RNTBC entity as head lessee cannot refuse to issue a lease where the relevant procedural rights under the NTA for that future act have been satisfied because the procedural rights under the Act are limited to a right to negotiate about the doing of the act and do not amount to a right of veto. Also, there can be no surety that the Crown will recognise the s.79 special purpose lease as a form of Indigenous land that is no lesser a form of ownership than any other form of land ownership. And nothing in this mechanism changes the fact that the Crown in the right of the State continues to hold the radical title and the power of compulsorily acquisition over the native title rights and interests, as shown in the bottom right hand corner of **Table 8.6**. Therefore, Option B can never fully satisfy all of the Foundational Principles.

8.6 Implications for parity and coexistence

Given the course of the debate over Indigenous land tenure reforms and the analysis in earlier Chapters of this thesis, the relevance of international human rights norms and standards to the rights of Indigenous peoples was examined. Ten Foundational Principles were then developed as the basis for parity and coexistence between two culturally distinct systems of land ownership, use and tenure. These Foundational Principles are drawn from numerous statements of principles that Aboriginal and Torres Strait Islander peoples have made over the period from 2005 to 2017 (as documented in **Table 8.1** above) (Wensing, 2016a:3-9). Several key messages can be drawn from their statements and their frustration with all levels of government is clearly evident (Wensing, 2016a:43).

The Foundational Principles were also aligned with the UNDRIP to show how they reflect the International human rights norms and standards of relevance to Aboriginal peoples' rights to land ownership, use and tenure in Australia. This was done because the UNDRIP expresses rights and by doing so, it explains how Indigenous peoples expect nation states (and others) to conduct themselves when dealing with Indigenous peoples about matters that affect their rights and interests.

In Chapter 7, two specific sites in the case study localities were examined in detail. Two options for the transfer of these sites to Aboriginal people under existing WA and Australian statutes were evaluated against the Foundational Principles for parity and coexistence. Option A assessed the current land tenure arrangements for these sites. Option B assessed a special purpose lease with the application of the non-extinguishment principle based on certain pre-requisites being satisfied in order for it to work effectively.

This analysis concludes that Option A, which reflects the existing land tenure arrangements, cannot fully satisfy any of the ten Foundational Principles. And while Option B could satisfy most of the Foundational Principles, it will never satisfy all of them, principally because the Crown in the right of the State continues to hold the radical title and the power of compulsorily acquisition over the native title rights and interests.

My overall conclusion therefore is that a new approach to land ownership, use and tenure is required if Australia is to free itself from the 'doctrinally unnecessary dogma' that 'all governmental authority' comes only from the Crown (McNeil, 2013:146). Furthermore, if Australia is to meet its international human rights obligations with respect to the Aboriginal peoples' land rights and interests, it is time to 'puncture some legal orthodoxies' (McHugh, 2011:68, 328-339) relating to property and land ownership. The next Chapter reframes the architecture of land ownership, use and tenure in Australia by exploring a model upon which the two culturally distinct systems can interact with parity, mutual understanding and respect for difference.

Chapter 9
ONE COUNTRY, TWO SYSTEMS: A Model for Parity and Coexistence

> *'But logically and morally, there is no escaping that the real and deeper problems of colonialism are a direct result of the theft of our lands, which cannot be addressed in any way other than through the return of those lands to us.'*
>
> Taiaiake Alfred (2009:183)[636]

> *'To ask Indigenous people to give up their traditional tenure (finally now recognised in Australian law) for one of 'our' tenures is not only racially discriminatory but also a failure of the imagination.'*
>
> Lisa M. Strelein (in Bauman *et al*, 2013:87)[637]

9.1 Introduction

In a speech to the Developing Northern Australia Conference in June 2017, Joe Morrison,[638] stated that Indigenous people have consistently and courageously asserted their inherent rights with four universal principles underpinning their position:

> '*All Traditional Owners view the protection of their country and continuation of their culture and languages as paramount; that the capacity for Indigenous people to participate in their regional and local economies and to be independent from government welfare is critically important to all northern Indigenous groups; that every Indigenous group aspires to transcend the legacy of domination and exclusion from the authoritarian colonial era and live decent lives in good houses supported by services of a First World nation; and that Indigenous people have sought recognition of their customary governance structures within the governance and land planning system that administers the North'* (Morrison, 2017:4).

Morrison (2017:9-15) also outlined what Indigenous leaders see as key pillars for development in northern Australia, including a comprehensive overhaul of the land tenure system 'to create fungible land title' that does not necessitate the extinguishment of native title rights and interests.

[636] A Kanien'kehaka (Mohawk) philosopher, writer, and teacher, University of Victoria, Canada.
[637] Director of Research, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra.
[638] The Chief Executive Officer of the Northern Land Council in the Northern Territory.

The three statements by Aboriginal and Torres Strait Islander people cited at the very beginning of Chapter 1 are a reflection of their desire for a more mutually respectful relationship between their system of land ownership, use and tenure and that of the Crown's. Indisputably, because the 'crime of colonialism' is as present today, as it was when the colonists first arrived and failed to negotiate a treaty. The land was stolen from the Aboriginal peoples without their consent, the legal fiction of *terra nullius* was deployed as the justification for understanding and recounting the story of dispossession, wrongly, as found by the majority of the Justices in *Mabo (No. 2)* in 1992.[639] A situation that has never been made right (M. Dodson, 2016).[640] The economic and social dimensions of which are continuing to have significant impacts on the Aboriginal peoples to this very day (Dale, 2014:129; Jackson *et al*, 2018c). 'Knowing and responding to this history is critical' (Matunga, 2017:643).

This Chapter explores the necessary attributes of a Model for Parity and Coexistence between two culturally distinct forms of land ownership, use and tenure (Part 9.2), develops a model for parity and coexistence based on the Foundational Principles discussed in Part 8.3 (Part 9.3), and presents a framework for applying the model (Part 9.4). The Model is then evaluated against the Foundational Principles (Part 9.5) before drawing some important conclusions (Part 9.6). The discussion begins with a clarification of 'native title' and 'Aboriginal land rights' that I am applying in the Model for Parity and Coexistence.

9.1.1 Clarification of 'native title' and 'Aboriginal land rights and interests' in this research

At this point, it is important to clarify the use of the term 'native title' in the context of the Model for Parity and Coexistence that follows, because I am applying a much a broader interpretation of the term than that used in the NTA to embrace a deeper understanding of Aboriginal peoples' land rights and interests.

The term 'native title rights and interests' is defined in s.223 of the NTA.[641] As the Preamble to the NTA states, the Act is the Parliament's response to the HCA's decision in *Mabo (No. 2)* and

[639] As discussed in Parts 2.4 and 2.6 of Chapter 2.

[640] Professor Mick Dodson, Concluding Remarks at the National Centre for Indigenous Studies 2016 HDR Research Retreat, 21 October, ANU, Canberra.

[641] The term 'rights and interests' is used deliberately because the definition of 'native title' in s.223 NTA uses this term, as follows:

Native title

Common law rights and interests

*(1) The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

is intended to be a special measure under the *International Convention on the Elimination of all Forms of Racial Discrimination* (UN, 1965).[642] But like any Act of Parliament, it is always open to the Parliament to amend the NTA, which it has done several times since it was first enacted on 1 January 1994, for the better or worse of the people it was intended to benefit.

Despite the best intentions of the NTA's primary objects to provide for the recognition and protection of native title into the future, it is never beyond the power of the Parliament to erode the positive attributes in the NTA, or to even repeal the NTA. To this end the UNCERD found that the winding back of protections to native title rights and interests in the 1998 amendments to the NTA went so far as to bring into question the NTA's status as a special measure within the meaning of Articles 1(4) and 2(2) of the *Convention on the Elimination of All Forms of Racial Discrimination* and Australia's compliance with Articles 2 and 5 of the Convention (UNCERD, 1999:7)[643].

I accept that native title is the term adopted by the HCA in *Mabo (No. 2)* to recognise the pre-existing land rights and interests of the Aboriginal peoples of Australia under their system of law and custom. But such recognition comes within the confines of the NTA[644] because native title claims must be made within the dominant society's normative system of law and custom.[645]

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), ***rights and interests*** *in that subsection includes hunting, gathering, or fishing, rights and interests.*

Statutory rights and interests

(3) Subject to subsections (3A – conferral of access rights on native title claimants in respect of non-exclusive agricultural and pastoral leases*) and (4* – rights and interests created by a reservation or condition in a pastoral lease granted before 1 January 1994; or in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994*), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression* ***native title*** *or* ***native title rights and interests.***

Subsection (3) does not apply to statutory access rights

(3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).

Case not covered by subsection (3)

(4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):

(a) in a pastoral lease granted before 1 January 1994; or

(b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

[642] Which is enacted into Australian law as a Schedule to the *Racial Discrimination Act 1975* (Cth) under the external affairs head of power in s.51(xxix) of the Australian Constitution.

[643] See also Triggs (1999); Strelein, M. Dodson and J. Weir (2001); Marks (2002).

[644] And without reference to common law precedent or international and comparative law (Strelein, 2009). Noting that the Australian Law Reform Commission (ALRC) recently undertook a review of the Act, including a review of the connection requirements, the nature and content of native title rights and interests, parties and joinder, claims resolution and the legal framework (ALRC, 2015a).

[645] Technically, common law native title claims can still be made directly to the HCA, but in *Western Australia v Ward* [2002] HCA28, the HCA 'emphasised that the starting point for the determination of the law that governs a claim under the NTA is the legislation,

Native title claims under the NTA are therefore subject to 'the language of the jurisprudence and property-rights regime of those responsible for their [Aboriginal peoples] plight in the first place' (Dirlik, 2001:181) and which 'demands proof of who we [Aboriginal peoples] are by those who once treated us [Aboriginal peoples] as invisible due to *terra nullius*' (K. Smith, 2017:8).

The ultimate outcome of a native title claim is a determination of 'whether or not native title exists' and is made by the FCA in accordance with s.225 of the NTA.[646] While the NTA is the starting point for considering a determination of native title in any particular location[647], the NTA also establishes the overall native title system which includes several constraints on the full expression of native title as a form of property, as discussed in Chapters 3, 4, 5 and 6.

In the previous Chapters of this thesis, I have therefore been using the term 'native title rights and interests' to refer to the way it is defined in s.223 of the NTA on the understanding that a native title application and determination is not just about recognising a pre-existing land entitlement, but also about eliciting the Aboriginal customary form of that land entitlement (Glaskin, 2017:14).[648] I accept that the current native title process not only heavily influences the way a native title claim is made and presented, but also influences the internal relations and dynamics within the claim group (Glaskin, 2017:14).[649] The point is that a much wider focus is required that embraces the full spectrum of the law and custom the native title holders practice with respect to their land ownership, use and tenure, and less on the 'weight behind the hammer' (Muir, 1998:3) of the West's assertions of dominance over native title holders.

It has been shown in previous Chapters and will be further argued through the remainder of this thesis, that there is no persuasive basis for the native title rights and interests of the Indigenous

not the common law' (Bartlett, 2015:87). Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that: 'it must be emphasised that it is to the terms of the NTA that primary regard must be had, and not the decisions in *Mabo [No. 2]* or *Wik*. The only present relevance of those decisions is for whatever light they cast on the NTA' (at [25]).

[646] S.225 NTA (emphasis in original): *A **determination of native title** is a determination whether or not native title exists in relation to a particular area (the **determination area**) of land or waters and, if it does exist, a determination of:*

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
(b) the nature and extent of the native title rights and interests in relation to the determination area; and
(c) the nature and extent of any other interests in relation to the determination area; and
(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

[647] *Commonwealth v Yarmirr* (2001) 208 CLR 1, [7]; *Western Australia v Ward* (2002) 213 CLR 1, [16], [25]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [32], [70], [75].

[648] Glaskin (2017:14) explains that the native title claims process requires claimants to present themselves 'in a certain way', including 'not only the outward presentation of the group, but relations within the group', and which requires them to engage with 'a very different set of cultural assumptions' that obliges the claimants to articulate their claims in very specific ways, such as by drawing cadastral boundaries around their ancestral lands (Glaskin, 2014). Glaskin (2017:15) concludes therefore that claims are 'often inherently transformative' for the claim group.

[649] See also Weiner and Glaskin (2007); B.R. Smith and Morphy (2007); K. Smith (2017:8-11).

peoples of Australia to always having to be seen as being subservient to the Crown's system of land ownership, use and tenure. The acquisition of sovereignty in Australia 'virtually obliterated Indigenous governance authority as a matter of law' (McNeil, 2013:146), especially over their ancestral lands. Furthermore, I agree with McNeil (2013:145-46) that 'there is no reason why the governmental authority of indigenous peoples over their own communities and lands should not have continued under the overarching sovereignty of the nation state' that colonized Australia.

Mabo (No. 2) successfully removed the doctrine of *terra nullius* from the Australian legal landscape. But there is one thing it did not do, and that is recognise Aboriginal peoples' continuing sovereignty and right to self-determination and self-governance. Australia 'remains the single nation state … where the courts cling to the historically unrealistic, and doctrinally unnecessary, dogma that all governmental authority comes from the Crown' (McNeil, 2013:146), and as a direct consequence 'land rights and self-government have become completely bifurcated' (McNeil, 2013:146). As McNeil (2013,146-47) argues, this 'legal mindset' is 'rooted in colonial attitudes that are no longer acceptable', and that it is time to break loose from it by reconceptualising Aboriginal peoples' land rights and self-governance as being inseparable. While self-determination and self-governance are often viewed as promoting separatism and a stand-alone form of sovereignty (D. Smith, 2002:3),[650] that does not have to be the case as there are other forms of self-determination and self-governance that can be applied depending on the circumstances.

The next step that needs to occur in Australia is the recognition of the continuing sovereignty of the Aboriginal peoples and how that translates as an ongoing sphere of legal authority and autonomy (Strelein, 1998:32), especially with respect to their ancestral lands and waters (Referendum Council, 2017a:20). How that can be achieved constitutionally in Australia is the subject of considerable debate[651] and scrutiny by various processes instigated by the Australian Government and the Australian Parliament.[652] It is not the intention to explore those issues here, but to highlight their relevance to the issues being explored in this thesis.

[650] Tobin (2014:35) argues that the possibilities of any Indigenous people being in a position to secede and receive international recognition are extremely rare, as was discussed in Part 8.2 of Chapter 8.
[651] See for example, Lavery (2015); M. Davis and Langton (2016); Freeman and Morris (2016); Mansell (2016); S. Young *et al* (2016).
[652] In particular, see the following: Expert Panel on Constitutional Recognition of Indigenous Australians (2012); Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel (2014); and the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Parliament of Australia, 2015); Referendum Council (2017b).

What I am arguing here is that every positive determination that native title exists[653] is an affirmation of Aboriginal law and custom, their sovereignty and their superior rights to the land, and therefore the legitimacy of any land dealings should only be achieved through negotiations on equal terms, not on subservient terms as is currently the case in all native title settlements and agreements.

I am departing from the statutory definition of native title in the strict sense of the NTA and I am conceiving a much wider interpretation. Henceforth, in the remainder of this thesis I am using the term 'native title' to refer to 'Aboriginal land rights and interests' that encompasses Aboriginal peoples' inherent property rights in land as defined by Aboriginal peoples on their terms under their law and custom. References to the ***rights and interests*** of Aboriginal peoples relates to their human rights[654] arising from international treaties, covenants, conventions and declarations[655], and to their rights and interests relating to land arising from native title claims and determinations and the statutory land rights schemes operating in all jurisdictions around Australia (Wensing, 2016a; 2017a).[656] Because land is such an integral part of Aboriginal law and custom and their being, I also include Aboriginal peoples' ***knowledges and values*** that relate to

[653] Of course, this raises the question of how we respond to 'negative' determinations of native title. That is, where the FCA determines that native title no longer continues to exist in an area due to such factors as the native title holders ceasing to exist; the Aboriginal or Torres Strait Islander people ceasing to observe their customary laws and traditions on which their title is based; loss of continuing connection with an area; or the Aboriginal and Torres Strait Islander people surrendering their native title rights and interests to the Crown, possibly in exchange for other benefits (NNTT, 2009). This is an area ripe for further research.

[654] I am conscious of Dembour's (2006: 11) differing concepts of human rights (the natural school, deliberative school, protest school and discourse school) and that I may not be discussing the same thing. I lean towards the 'Deliberative' school, that 'human rights' provides 'no more, nor less, than the laws and mechanisms agreed by nation states' (Southalan, 2013: 3). I agree with Southalan (2013: 3) that the phrase 'human rights' is sometimes applied interchangeably with concepts of 'justice', 'fairness' or 'humanity' and that these concepts 'are best furthered with more than just law – with philosophy, political science, history, anthropology, economics, international relations, sociology and other disciplines'. To which I would add the discipline of land use and environmental planning.

[655] Many of which Australia is a signatory to. The Instruments (and specifically relevant Articles) include the following:

- *United Nations Charter* (Article 1) (UN, 1945)
- *Universal Declaration of Human Rights* (Article 2) (UN, 1948)
- *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) (UN, 1965)
- *International Covenant on Civil and Political Rights* (ICCPR) (Article 27) (UN, 1966a)
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (Article 1) (UN 1966b)
- *Declaration on the Right to Development* (Article 5) (UN, 1986)
- *ILO Convention No. 169 Indigenous and Tribal Peoples Convention* (Article 1) (ILO, 1989) (to which Australia is not a signatory)
- *Convention on Biological Diversity* (CBD) (Article 8j) (The CBD Secretariat, 1992)
- *Universal Declaration on Cultural Diversity* (Article 4) (UNESCO, 2001)
- *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Preamble Paragraphs 8 and 15, Articles 2.3 and 7) (UNESCO, 2005)
- *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN, 2007).

[656] Regrettably, it is generally harder for many Aboriginal and Torres Strait Islander peoples to establish their native title rights and interests in many parts of Australia, especially in our capital cities and major regional centres (Wensing and Porter, 2015) because of the long history of dispossession and forced removals into state reserves or church run missions. I readily accept therefore that there are likely to be Aboriginal or Torres Strait Islander peoples with connections to a particular area through familial or historical ties that are not necessarily also related to their ancestral or cultural roots. An Aboriginal and Torres Strait Islander person's historical connection and knowledge of country may therefore equate to a 'right' under some statutory land rights schemes or cultural heritage protection regimes, but not necessarily qualify as a right in native title law nor in international human rights law. In some respects, the native title and statutory land rights schemes risk making Aboriginal and Torres Strait Islander peoples without access to these schemes 'invisible' again (K. Smith, 2017:9).

their unique systems of knowledge, culture, law and traditions embodied in their belief systems, ways of life and their world views, especially in so far as they relate to land use and management. I also include Aboriginal peoples' ***needs and aspirations*** based on factors they see as being integral to their overall cultural and spiritual wellbeing. I am not referring to the institutionalised approaches that emphasise the economic aspects and paint 'a deficit picture of Indigenous Australians' (Yap and E. Yu, 2016:316-318), which in their current format fail to take into account what Aboriginal peoples believe constitutes their wellbeing.[657]

Also, in this thesis I have been using the phrase 'land ownership, use and tenure' to denote the three key elements about land that all societies use to manage the relationship between land and its value to that society. The separation between ownership, use and tenure is very deliberate to drive a distinction between the land owner as in the underlying property right (who will always be the Aboriginal peoples whose ancestral lands it is), the use to which land may be put and tenure as a means to an end, a form of instrumentation to register the current land user. The reasons for these distinctions will become apparent in the model discussed later in this Chapter.

The remainder of this thesis unpacks how the propositions discussed above can become a reality, especially in terms of parity and coexistence between the two culturally distinct land ownership, use and tenure systems and for just outcomes that are mutually agreed.

9.2 Necessary attributes of a Model for Parity and Coexistence

For coexistence between two distinct land ownership, use and tenure systems to operate effectively, there are several matters that require careful consideration, some of them arising from the Foundational Principles articulated in Chapter 8. Consider, first, the proposition that a native title determination is not only a confirmation of Aboriginal law and custom, but also their sovereignty (Lavery, 2015). I have previously argued that once native title is determined to exist 'it must be upheld as the superior system of land law' because it pre-existed the Crown's interests and leaves 'western land use control as the subordinate manifestation of law' (Wensing and Small, 2012:7). For the purposes of applying the model that follows, I am relying on the NTA and the current requirements for proof of native title. Additionally, I note the ALRC's discussion

[657] Here, I am referring specifically to the measures applied by the Productivity Commission in their periodic 'Overcoming Indigenous Disadvantage' reports (Productivity Commission, 2014) and in COAG's 'building blocks' for 'Close the Gap' in certain socio-economic disparities between Aboriginal and Torres Strait Islander peoples and the rest of the population under the National Indigenous Reform Agreement (NIRA) (SCFFR, 2008). See Markham and Biddle (2017) for a recent critique.

of French J's suggestions to 'lighten some of the burden of making a case for a determination' that native title exists by lifting the burden of proof and shifting the onus onto the state to prove that native title has been extinguished (French J, 2008; ALRC, 2015:21-22).[658] However, I also hasten to acknowledge that the NTA is not the sum total of land justice for the Aboriginal peoples of Australia.[659]

Consider, second, that a native title determination is a property right, albeit under Aboriginal law and custom. All native title determinations, regardless of whether they are of exclusive possession or non-exclusive possession, should be treated with all due respect. Where native title is determined to co-exist with other rights and interests (i.e. pastoral leases, Crown reserves, leases to other Aboriginal organisations), the underlying premise of the other interests needs to be re-negotiated, such that the continuing property rights and interests of the native title holders can be reflected in the nature of the relationship, and such that the native title holders have a role in determining what happens to and on their ancestral lands and on what conditions. These matters are no longer the province of the Crown to determine in isolation.

Consider, third, the integrity of Aboriginal law and custom as having a way of governing the use, allocation and distribution of resources among their peoples, especially over time and through generations. Aboriginal peoples have for centuries, undertaken their own form of land use and occupancy planning that does not rely on state action as an integral part of their law and custom, and they continue doing so. This constitutes self-determination by Aboriginal peoples over the ownership, use and tenure of their ancestral lands. Recognising these practices as being at least equal, if not superior, to the conventional forms of Settler state-based planning will enable Aboriginal people to regain their dignity as equal and active polities, given the denial and discrimination they have had to endure since colonisation.

[658] French J (2009:10) makes three suggestions for changes to assist the resolution of native title. First, 'allow a statement of facts agreed between the relevant state government and applicants for a native title determination to be relied upon by the Court in making a consent determination. Second, provide for a presumption in favour of the existence of native title rights and interests if certain conditions are satisfied. Third, introduce a provision requiring historical extinguishment to be disregarded over certain classes of land and waters when the applicants and the relevant state or territory government have agreed that it should'. While the ALRC maintains that some of these measures have come into reality through amendments to the NTA in 2011, 2012 and 2014, they argue that the extent of evidence required to establish native title is in tension with the object of the NTA to recognise and protect native title, especially where there may be incomplete historical and anthropological records (ALRC, 2015:22). On balance the ALRC recommended that the definition of native title in s.223 be amended and that 'there be guidance in the NTA regarding when inferences may be drawn in the proof of native title rights and interests' (ALRC, 2016:22).

[659] This raises the wider question of what to do with respect to Aboriginal peoples' connection to their ancestral lands in circumstances where native title is regarded as having been extinguished by past acts (as in the Australian Capital Territory) or where native title is very difficult to prove (as is the case in Melbourne and Sydney, for example). See Wensing and Porter (2015) on the fate of native title claims over our capital cities in Australia and Jackson *et al* (2018) for an in-depth analysis of town planning's imperial foundations and complicity in the dispossession of Aboriginal peoples from towns and cities around Australia.

Consider, next, that sovereign-to-sovereign relationships between Aboriginal and other interests on equal terms are required as the basis for negotiations on all land dealings/transactions on land subject to a native title determination. A sovereign-to-sovereign relationship necessitates an acceptance of the need to negotiate inter-cultural exchanges that allows for the use, allocation and distribution of resources in land[660] to be exercised on mutually agreeable terms and conditions. It also includes recognising that Aboriginal peoples have the right to pursue, reject or negotiate development on their lands. There is much Australia can learn from Canada with respect to 'shared sovereignty' (Hoehn, 2012:148). The Supreme Court of Canada in *Haida Nation v British Columbia 2004*,[661] recognised prior Aboriginal sovereignty and 'acknowledged that Crown assertions of sovereignty cannot be recognised as legitimate unless founded on a treaty' (Hoehn, 2012:151). Hoehn (2012:151) argues that a treaty 'lays a solid foundation for a new paradigm of Aboriginal law based on the equality of peoples, and finally satisfy long-standing calls to abandon a foundation of Canadian sovereignty that relies on false beliefs about the superiority of European nations.' As documented in Chapter 3, the Aboriginal people of Australia have been asking for a treaty for at least the past eighty years.

Consider, finally, that the Crown's ability to unilaterally compulsorily acquire native title rights and interests is over. If the two systems are to be seen as being equal in status, then it is no longer reasonable that one party can exert a power of acquisition over the other party and without their free, prior and informed consent. Acquisition of Aboriginal land rights and interests should only occur on the basis of terms negotiated and agreed with the Traditional Owners, and even then when it can be demonstrated that the land is required for essential purposes for the benefit of the wider community.

These considerations demand an equal relationship between Aboriginal peoples and the Settler state[662] over land ownership, use and tenure, a sovereign-to-sovereign relationship based on collaboration, not confrontation and contest. According to Matunga (2017:643), the 'problem definition' phase is well and truly over and the process of 'reconciliation, resolution and partnership, leading to collaborative planning with Indigenous communities, and then action' is long overdue. A 'dialogic space' (Schneekloth and Shibley, 1995; Forsester, 1999:63) must be

[660] And waters.

[661] 2004 SCC 73 at para 20. 3 S.C.R. 511, [2005] 1 C.N.L.R. 72 [*Haida Nation*].

[662] Porter (2018b) uses the term 'settler-colony' because the 'settlers came to **stay**' (emphasis in original), 'not to insert themselves into an existing order, but [to] specifically usurp and replace that existing order with one of their own making', but 'never completed largely due to the extraordinary struggle of Indigenous peoples, every day, in the face of it'. The term 'Settler state' is used in this thesis because each of the colonies are now referred to as States.

created for collaborative decision making, where the substantive issues and the relationships that link the parties can come together and enter into genuine dialogue. But it has to be a 'safe space' (Forester, 1999:248) where Aboriginal peoples, the state and land users can come together on equal terms to raise serious concerns and work creatively and collaboratively to develop mutually agreeable and workable solutions. A dialogic space over land matters will inevitably be an arena for 'conflict, struggle and antagonism' (Rose-Redwood *et al*, 2017:115) given the years of dispossession and denial of Aboriginal peoples' sovereignty and ownership of the land prior to colonisation, but it should also lead to mutual outcomes.

What is important here is how the dialogic space is framed, because as Wright (2018:129) observes, the context 'shapes what may be said, and thought, and by who and how.' Wright (2018:129) warns that great care is needed because 'what is enabled and enabling', is heavily dependent upon 'a constellation of logics, power structures, and racist and exclusionary social relations … that dismiss and undermine' other world views. For a model of coexistence in relation to land ownership, use and tenure to work effectively, the dialogic space must not replicate the circumstances that enable the state's continued domination over Aboriginal peoples, but rather must be on terms 'set by, imagined by, and grounded in specific Indigenous peoples and places' (Wright, 2018:130).

As eluded to in Part 4.9 of Chapter 4, the power imbalances between the Aboriginal estate and the Settler estate need to be redefined. And that redefinition must redress the deep asymmetry running between the two systems of relations over land ownership, use and tenure. I acknowledge that the denial of Aboriginal sovereignty raises many legal and political issues of power and governance (Lavery, 2015; Tobin, 2014). However, I am suggesting that both systems of law and custom engage in the most basic of human activities of planning for one's survival into the future and therein lies an opportunity for re-alignment that would enable the two systems to develop workable interactions over land ownership, use and tenure. This is explored in more detail below.

Joe Morrison (2017:4) was right when he said Aboriginal people need to be in the 'planning wheelhouse' in order to be in control of their own affairs with respect to land use and access (2017:12), and certainly not as 'spectacle' or 'spectral' (Baloy, 2016),[663] as is currently the case.

[663] Baloy (2016:209) argues that 'non-Indigenous ideas of Indigenous alterity shape and are shaped by processes that render Indigeneity spectacular and/or spectral'. That is 'cultural not political, visual not otherwise sensorial, passively observed not participatory' and 'despite dispossession, erasure, and displacement, Indigenous people return again and again to exercise their

I interpret Joe Morrison's comments to mean a commanding role in land and resource use and decision making, rather than a subservient role in state-based planning by the Settler state.[664]

Less than a handful of planning educators and scholars have given this particular challenge some thought.[665] The stand-out researcher is Professor Hirini Matunga from Lincoln University in New Zealand. I am singling Professor Matunga's work out because the outcomes of his research are very similar to my own, and in this Chapter I am applying and extending his ideas into the Australian context.[666]

Planning is not 'owned by the West, its theorists, or practitioners' (Matunga, 2013:4). Planning is 'a universal human function with an abiding and justifiable concern for the future' and it is something that all human communities do (Matunga, 2013:4-5). Planning is essentially a future oriented function – looking at where we are now, where we might want to be in the future and what we need to do to get there (Matunga, 2013:5). The problem is, the West's approaches to planning have never included Indigenous peoples because until recently 'the locus of power' and the 'ultimate right [of Indigenous peoples] to determine their future' rested almost exclusively with the Settler state, 'either through the power of the musket or the power of law, policy, planning and technology' (Matunga, 2013:4), as I highlighted in Chapter 5.[667]. In Australia, the Crown has never acknowledged that Aboriginal peoples have always practiced a form of planning, as reflected in those incisive statements by Tom Trevorrow and Irene Watson cited in Chapter 5.[668]

On the basis that planning is 'by/with (not for) Indigenous peoples', outcome oriented and not just a process for process sake, Matunga (2017:641-42) defines Indigenous planning as:

> *'Indigenous people making decisions about their place (whether in the built or natural environment) using their knowledge (and other knowledges), values and principles to*

sovereignty and refuse conditions of disappearance', producing a 'holographic Indigeneity: hyper-visible from some angles, invisible from others; constantly present even in moments of apparent absence'. Drawing on the work of two French philosophers (Guy Debord and James Derrida), Baloy arrives at her own definitions by posing the question of 'what is seen, unseen, and remains to be seen in the everyday lived experiences' of Indigenous peoples in a colonial Settler state.

[664] I have been advocating this position over the past two decades. See Wensing and Sheehan (1997); Wensing and R. Davis (1998); Sheehan and Wensing (1998); Wensing (2007; 2012); Wensing and Small (2012); Wensing (2014e); Wensing and Porter (2015); Wensing (2016a; 2017d).

[665] In Australia, New Zealand and Canada they include for example, Porter *et al* (2018); Matunga (2013; 2017), Porter (2010); Porter and Barry (2014 and 2016).

[666] With permission. Personal communication, 15 December 2017.

[667] See also Mount (2014:13).

[668] See Part 5.5.

> *define and progress their present and future social, cultural, environmental and economic aspirations.'*

Or, given Indigenous peoples strong connections between 'people, place and ancestors', Matunga also offers the following definition:

> *'Indigenous peoples spatialising their aspirations, spatialising their identity, spatialising their Indigeneity*'.

We need to begin by asking the critical question of 'what would flourishing as Indigenous peoples in *this* place … look like, feel like, and mean' (Matunga, 2017:644)[669] in whatever context – major city, inner regional, outer regional, remote or very remote?[670] Therefore, for Indigenous planning to become a meaningful reality, it must be transformative of the dynamics of power relations between the Indigenous peoples and the Settler state, especially over land ownership, use and tenure.

Matunga (2017:644) therefore argues there should be 'three sites of/for planning': Indigenous planning, Settler state-based planning and what he calls a third hybrid space 'where the coloniser and colonised, oppressed and oppressor can come together to dialogue reconciliation, emancipation, collaboration and collective action for the future'. Indigenous planning is a legitimate form of planning in its own right and it needs to be recognised as such through formal 'institutional/statutory connectors' between it and Settler state-based planning. As Matunga (2017:644) and Wensing (2017d) argue, planning across all three spaces is critical to our collective futures.

The three sites of/for planning are reflected in **Figure 9.1** which is drawn from **Table 4.1** and **Figure 4.4** in Chapter 4 (Wensing, 1999) and builds on Matunga's work (2017:644).

On the left-hand side is the Aboriginal and Torres Strait Islander peoples and their estate.[671] On the right-hand side is the Settler state and the Crown estate.[672] Moving inwards, on the left-hand side is Aboriginal and Torres Strait Islander planning, the first planning space, as they have

[669] Emphasis in original.
[670] Applying the five categories in the Accessibility/Remoteness Index of Australia (ARIA) index (Wensing, 2016a:83-84).
[671] The Aboriginal and Torres Strait Islander Estate is to be taken as a reference to the 'Indigenous Estate' as defined by the Indigenous Property Rights Network (AHRC, 2016a:1; 2016d): 'the lands, seas, waters and resources of Aboriginal and Torres Strait Islander Peoples'. This includes land subject to native title determinations (irrespective of exclusive possession or non-exclusive possession), land grants/transfers/reserves under State/Territory statutory Aboriginal and Torres Strait Islander land rights schemes, and other arrangements that enable Aboriginal and Torres Strait Islander peoples to own, manage or control land.
[672] In this context, the term 'Crown estate' refers to the fact that 'Absolute rights in property are held by the Crown or the public, such that the sovereign power [of the Crown] has the ultimate right to make grants in land or leases over land' (Porter, 2018b:61), except native title rights and interests as discussed in Chapter 1.

done for thousands of years and continue to do.[673] On the right-hand side is state-based statutory and strategic planning, the second planning space, which includes the state-based planning and environmental management statutes. Then in the middle is what Hirini Matunga refers to as the third planning space where the first and second planning spaces enter into dialogue with each other. This middle space becomes a dialogic space for collaborative planning and action.

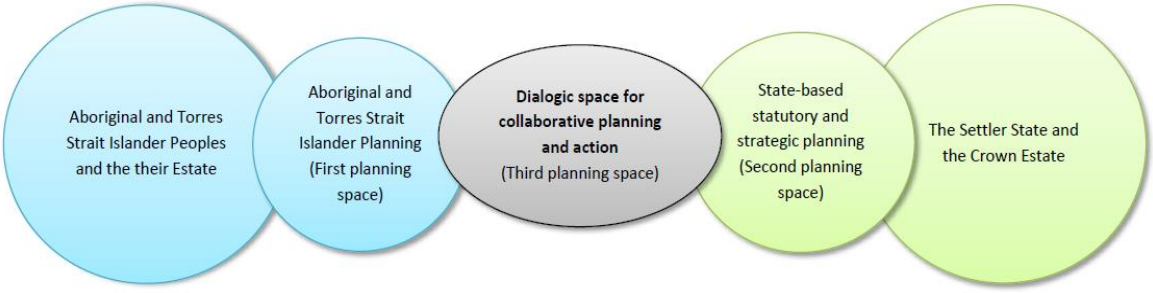


Figure 9.1 Three sites of/for planning

Adapted from Wensing (1999) and Matunga (2017).

It is the alignment of rights and interests on a level playing field with a dialogic space between them that sets the ground for a just model for parity and coexistence between two distinct laws and customs relating to land ownership, use and tenure.

Placing the two sovereigns on a level playing field opens up the assumptions and predilections underpinning their relations. In creating a dialogic space between two distinct approaches to

[673] The first planning space in Figures 9.1 and 9.2 is not elaborated in this thesis because as a consequence of *terra nullius* and the devastating impacts of colonisation, Aboriginal peoples' approaches to land use planning and management were ignored by the colonial settlers. There is therefore a dearth of research and understanding of Aboriginal approaches to land use planning 'that acknowledge and engage with pluralist coexistence in ways that … support Indigenous peoples' rights and secure avenues for Indigenous peoples' participation' in contemporary planning systems as equal partners (Howitt and Lunkapis, 2010:111). Howitt *et al* (2013:314-315) asserts the problem is that contemporary planning practices and systems are underpinned by a 'belligerent and arrogant insistence of Eurocentric systems of thought, governance and management' which 'eclipses questions of culture, context, and rights' across 'profound cultural differences.' It is only in recent decades that Australia's natural resource management practices have begun taking Aboriginal knowledges and approaches to land and resource use seriously and incorporated them through initiatives such as the Indigenous Protected Area (IPA) Program (Gilligan, 2006; Department of the Environment and Water Resources, 2007; Hill *et al* 2011; Australian Government, 2015a) and the employment of Indigenous rangers through the Working on Country Program (Department of the Environment, Water, Heritage and the Arts, 2009; Walter Turnbull, 2010; AIATSIS 2011; The Allen Consulting Group, 2011; Urbis, 2012). Even in the light of these recent developments, Howitt *et al* (2013:313) argues there are still capacity deficits (including lack of knowledge, understanding, skills and competence in basic issues of social science, cultural awareness, and locally contextualised knowledge) in government agencies, commercial interests and non-Indigenous institutions that affect collaborative approaches to natural resource management. Howitt *et al* (2013:332) concludes that there is enormous scope 'for engaged and collaborative scholarship that challenges and rectifies the lack of intercultural capacity within the dominant institutions of land use planning, natural resource management and environmental governance'. In a keynote address to the annual *State of Australian Cities* Conference in Adelaide in December 2017, Associate Professor Libby Porter (2018a) argues that the field of urban scholarship and practice 'has been held back, is being held back, by an inability to accurately recognise and admit to the foundational story of Australian cities and to consider how seeing the urban as Country [in the sense of Aboriginal peoples' inherent connect to and responsibility for their ancestral lands] opens up new possibilities for just and sustainable urban futures for all of us'. See Johnson, Porter and Jackson (2018) for a snapshot of how Australia's planning history and practice needs to be reframed and revised and Jackson, Porter and Johnson (2018) for a fuller discussion.

property, I am arguing for a space that is 'sensitive to differences of identity, needs and reasoning' (Benhabib, 1992:8). It is acknowledged that this may pit '"emotional" (deemed irrational and illegitimate) against "reasoned" (legitimate) deliberation', it is also acknowledged that 'there may be times when difference is irreconcilable as a result of diversity, deep-seated conflict or historically embedded divisions' (Bond, 2011:166). I agree with Benhabib (1996:78) who argues that participants should be seen as being equal and equally entitled to take part in the discourse over matters that will affect their lives. Benhabib (1996:78) also argues that in such situations the parties are entitled to certain 'moral rights', including universal moral respect and egalitarian reciprocity. As Benhabib (1996:79) elaborates:

> *'The norms of universal moral respect and egalitarian reciprocity allow minorities and dissenters both the right to withhold their assent and the right to challenge the rules as well as the agenda of public debate. For what distinguishes discourses from compromises and other agreements reached under conditions of coercion is that only the freely given assent of all concerned can count as a condition of having reached agreement in the discourse situation.'*

Singer (2000) argues that 'disputes over property use can be solved only by reference to human values, to a normative framework that helps us choose between freedom and security.' Deliberation and outcomes over matters relating to property in land will 'always be situated [in] and draw on the intuitions and resources' of those involved (Bond, 2011:166) and its outcomes will involve some level of 'gradation of moral and political principles and intuitions' (Benhabib, 1996:90). The outcomes of such negotiations are outside the scope of this thesis, but the point here is to create a space that does not 'perpetuate existing inequalities' (Bond, 2011:174) or continue to place the Crown at the apex of our property system, but rather enables the parties to reconfigure the relationship such that they can engage openly about the meaning and significance of each other's laws, customs, practices and values in order to develop a level of mutual understanding and respect for difference. Whyte (2018:287) argues that it is time to stop entrenching and perpetuating the illusion that the settlers are the host and the Indigenous peoples are the parasites[674] constantly seeking aid or special treatment. To restate the key statements in Paul Keating's famous speech at Redfern Park in Sydney on 10 December 1992: the starting point is:

[674] Whyte (2018:282) uses the term 'parasite' in a technical sense to refer to a 'particular systematic formation of relationships' in politics, culture, and economics, among other areas' and not to 'stereotype or criminalise individuals'. Whyte (2018:283) views settler colonialism as a parasitic system because the coloniser's goals are 'not just to invade and live off the host, but to *become* the host' (emphasis in original). In Australia, as in the USA, the 'settlers sought, and continue to seek, to live off of, benefit from, and receive shelter from Indigenous territories in ways that are violent and harmful to Indigenous peoples (Whyte, 2018:287).

> '*the starting point might be to recognise that the problem starts with us non-Aboriginal Australians … It was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers. We practiced discrimination and exclusion. It was our ignorance and prejudice. And our failure to image these things being done to us'* (Keating, 1992 in Warhaft, 2004:353).

The next part of this Chapter outlines the details of a Model for Parity and Coexistence which has the potential to stop recapitulating the 'very *resilient* parasitic system' that Whyte (2018:287 emphasis in original) talks of in settler colonial societies, and re-setting the relationship between two culturally distinct forms of land ownership, use and tenure in Australia.

9.3 A Model for Parity and Coexistence

The following Model for Parity and Coexistence is aimed at enabling a more equitable coexistence of rights and interests based on mutual respect and justice. Its primary goal is to remove the necessity for Aboriginal people to sever their cultural connections to and responsibilities for their ancestral lands through extinguishment of their rights and interests against their will. The model is about restitution and reparation of Aboriginal peoples' land ownership and decision-making over their ancestral lands on their terms without outside interference and on the basis of free, prior and informed consent, consistent with Articles 18 and 19 in the UNDRIP (2007). The aim is, as Morrison (2017:4) states, to put Aboriginal peoples in the 'planning wheelhouse'.

The Model builds on the level playing field between the three planning spaces articulated in **Figure 9.1** above. The Model in **Figure 9.2** and **Table 9.1** are divided into three columns and three layers. **Table 9.1** provides a limited articulation of the components in each of the columns and layers, which is discussed in more detail below.

The three columns comprise of:

- Column A on the left is the Aboriginal and Torres Strait Islander peoples and their estate.
- Column C on the right is the Settler state and the Crown estate.
- And Column B in the middle represents the inter-cultural contact zone or interface between the two sets of laws and customs.

The three layers comprise of:

- The top layer deals with land ownership, especially the continued existence of native title rights and interests as per the current NTA with all its merits or dismerits.[675]
- The middle layer deals with land use and planning and this is where Indigenous planning must be seen as having a status equal to state-based planning, as discussed above.
- The bottom layer deals with tenure, the instrumentation used to register interests in the land, any dealings with the land and its transactional value for taxation purposes and as collateral for finance.

It is important to note however, that Aboriginal peoples do not view things in a hierarchical fashion. **Figure 9.2** and **Table 9.1** do not purport to reflect an Indigenous Australian view.

The most important part of the model is the inter-cultural contact zone in Column B, the dialogic space where the systems come together. By placing the two systems on a level playing field, the points of interaction will be about land ownership, use and tenure and mediation between the two systems becomes essential because, as Tully (1995:211) asserts, 'a mediated peace *is* a just peace' (emphasis in original). How that mediation occurs is a matter for the parties to determine. Negotiating mutually acceptable outcomes may require a treaty or treaties, or any other kind of negotiated agreement at whatever levels are required – national, state/territory, Aboriginal nation/country and/or local levels – consistent with applying the principle of subsidiarity.[676] It is important to note however, that Aboriginal peoples do not necessarily view things in a hierarchical fashion and **Figure 9.2** and **Table 9.1** do not therefore purport to reflect an Indigenous Australian view.

[675] Noting that the UN Committee on the Elimination of Racial Discrimination in its eighteenth to twentieth periodic report on Australia (UNCERD, 2017) recommends that Australia urgently amends the NTA to lowering the standard of proof and simplifying the applicable procedures, ensure that the principle of free, prior and informed consent is incorporated into the Act and other legislation as appropriate and fully implemented in practice, to consider adopting a national plan of action to implement the principles contained in the UNDRIP, and to reconsider Australia's position and ratify the ILO *Indigenous Tribal Peoples Convention 1989* (ILO No. 169) (ILO, 1989).

[676] Subsidiarity is an organisational and democratic principle stating that matters ought to be handled by the smallest (or the lowest) entity capable of carrying out the function. The principle relates to organisational efficiency but also concerns the sharing of power between stakeholders. The principle of subsidiarity also relates to the use and support of local capacity where such capacity exists. Devolution to the lowest viable level often allows for more responsive and efficient services that are better suited to the local context. Due to initial limits to local resources and capacity in Indigenous communities, the degree to which subsidiarity might be achieved in the short term may also be limited. This does not mean abandoning the principle, however; instead, it means investing in strategies that will increasingly deliver the principle over time (Wensing and Taylor, 2012:28).

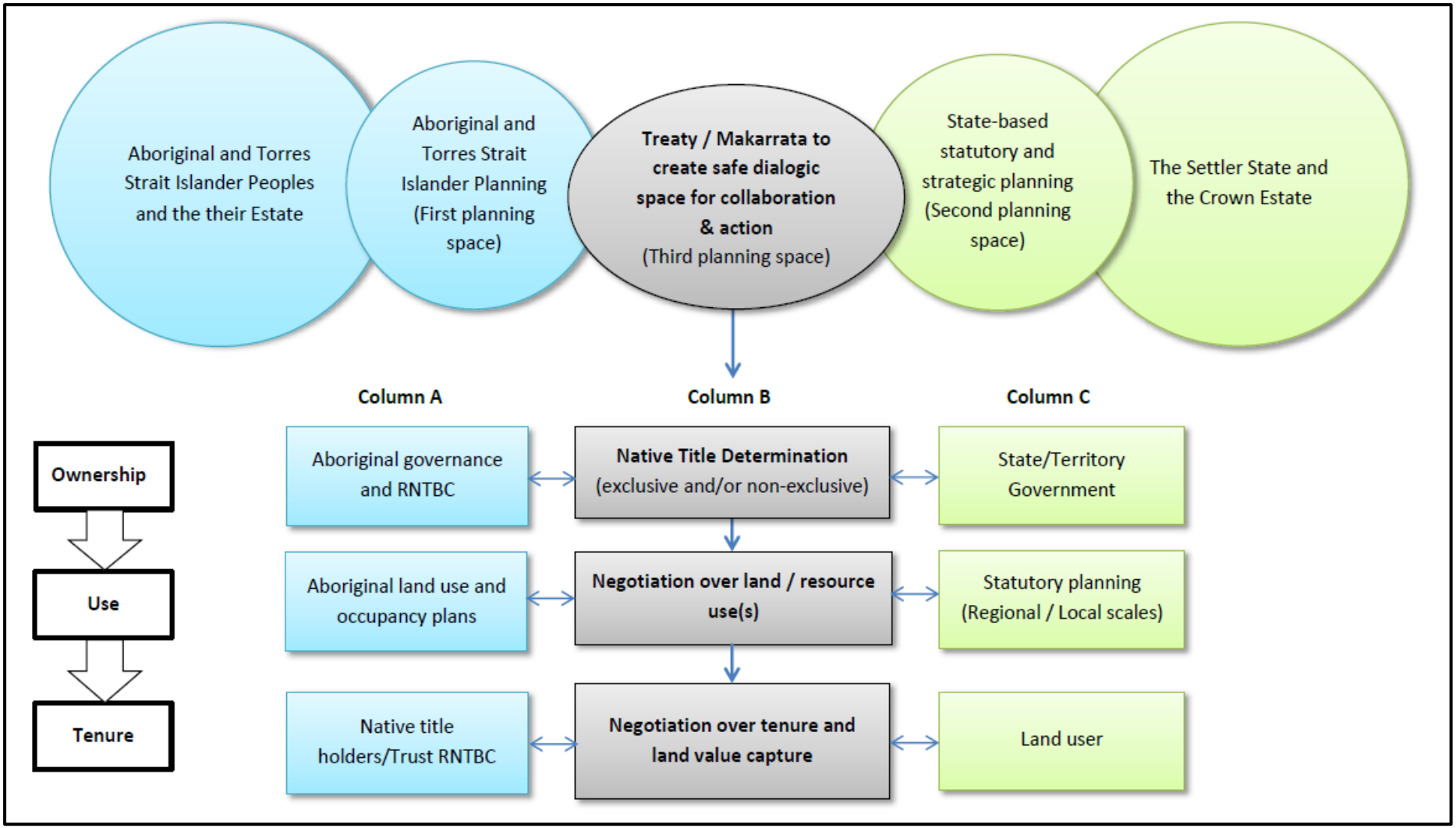


Figure 9.2 Model for Parity and Coexistence between Aboriginal and Settler state land ownership, use and tenure

Adapted from Wensing (1999) and Matunga (2017).

Table 9.1 Details of the Model for Parity and Coexistence between Aboriginal and Crown land ownership, use and tenure systems*

THE INTERCULTURAL CONTACT ZONE BETWEEN TWO DISTINCT LAWS AND CUSTOMS WITH RESPECT TO LAND OWNERSHIP USE AND TENURE		
Column A	***Column B***	***Column C***
Aboriginal and Torres Strait Islander Peoples and their Estate	***A safe dialogic space for collaboration and action where mutually agreed outcomes can be negotiated***	**The Settler state and the Crown Estate**
Box A1	***Box B1***	***Box C1***
Aboriginal governance and RNTBC: NTRB/SP pursues the native title claim, assists claimants to establish a RNTBC and assists with the development of its corporate governance structure and capacity. Indigenous governance advises/supports RNTBCs with decision making under their law and custom and methods for engaging with others on a nation-to-nation basis.	**Negotiating land ownership** A determination of native title rights and interests: Confirms Aboriginal sovereignty and their ongoing law and custom. Native title as a property right, equal to any other and can be of exclusive possession and/or non-exclusive possession. Sovereign-to-sovereign relationship is the basis of all negotiations. The Foundational Principles in Chapter 8 forms the basis of all negotiations over land/resource use and tenure.	**State/Territory Government:** The Crown is no longer the source of all authority over land and waters. The state relinquishes power of compulsory acquisition over native title. Extinguishment of native title only on basis of free, prior and informed consent as negotiated with native title holders, and compensation only on just terms.
Box A2	***Box B2***	***Box C2***
Aboriginal Planning: Aboriginal peoples undertake land use and occupancy planning according to their law and custom consistent with their values, worldviews and processes.	**Negotiating land / resource use** This is the 'third space' where the parties bring together their respective planning outcomes and jointly develop land use and resource management plans based on mutual respect, collaboration and partnership. Areas may be identified for protection, and other areas being identified for development or other resource use, for public infrastructure and other public use.	**State-based statutory & strategic planning:** State undertakes land use and environmental planning and management consistent with their values, worldviews and processes.
Box A3	***Box B3***	***Box C3***
Native title holders: Native title holders decide how they want to hold and protect their native title rights into the future. They also decide to what extent their native title rights and interests may be suppressed for a period and on what terms, including payment of rent.	**Negotiating tenure and land value capture** Form of tenure(s), specific to the proposed land/resource use are agreed. Title must be able to be used as collateral for finance for home ownership or economic development, where relevant. Payment of rent is agreed for use of land that affects or suppresses native title rights and interests. State/Territory land title Registrars could be contracted by native title holders to perform land administration functions.	**Land user(s):** Land users have use and enjoyment of land, including the ability to use the title as collateral for finance and where relevant for economic development, but subject to terms agreed with native title holders, including payment of land rent where appropriate.

* Adapted from Wensing (2002).

While land administration and land use planning in Australia are the constitutional responsibility of State Governments,[677] the various declarations made by Aboriginal leaders over the past 80 years[678] show that they want and expect issues relating to Aboriginal land rights and interests to be dealt with in the context of a treaty or treaties between Aboriginal peoples and the Australian Government at the national level, as well as at State/Territory levels. In 2017, the Coalition Government's[679] response to the '*Uluru Statement from the Heart*' (Referendum Council, 2017a) did not indicate that the Government was prepared to consider developing a treaty with Australia's Indigenous peoples (Scullion, 2017).[680] Without a treaty, it is arguable that Australia has no legitimacy as a nation (Hoehn, 2016:117) because we have not reconciled the establishment of the nation state on the stolen lands and sovereignty of the Aboriginal peoples.

Whether a future Australian Government will venture down this path remains to be seen. In its latest Concluding Observations on Australia's periodic reports, the UNCERD has recommended that Australia accelerates its efforts to implement the principles of self-determination as set out in the UN DRIP, including by 'entering into good faith treaty-negotiation with Indigenous Peoples'. UNCERD has also requested that Australia provide detailed information in its next periodic report on concrete measures taken to implement this recommendation (UNCERD, 2017:5, 10).

As discussed in Chapter 8, Victoria and the Northern Territory have already commenced the process of developing a treaty/treaties with the Aboriginal peoples in their respective jurisdictions. (R. Thomas, 2017; NT Government, 2018).[681] Both jurisdictions have released documents outlining their broad approach to the negotiations and the issues that are likely to be discussed. The documents reveal that land is a central issue that will have to be dealt with in the negotiations, but the extent to which these issues will be addressed to the satisfaction of the Aboriginal peoples remains unclear at this time.

[677] While the Commonwealth has conferred a large measure of self-government on the Northern Territory and the Australian Capital Territory, under S.122 of the Australian Constitution the Commonwealth can make laws on any subject, thereby over-riding any Territory laws and rendering them ineffectual, which the commonwealth has done to both Territories in recent years over issues relating to euthanasia (in the NT) and same-sex marriage laws (in the ACT).

[678] As documented in Part 3.4 of Chapter 3.

[679] At that time, led by Prime Minister the Hon. Malcolm Turnbull, MP.

[680] For a stinging critique of the Australian Government's response to the Referendum Council's report, see McKenna (2018:1-86) and Grattan (2017).

[681] South Australia also released a document in June 2017 (Aboriginal Treaty Interim Working Group, 2017). On 7 June 2018, the Victorian Parliament passed the *Advancing the Treaty Process with Aboriginal Victorians Bill 2018* (Vic), the primary purpose of which is to 'to advance the process of treaty making between Aboriginal Victorians and the State'.

What **Table 9.1** shows is that in each layer there are several constitutive elements which will need to be carefully and methodically negotiated between the Aboriginal peoples of Australia and the Settler state at each level of governance, from national down to local, as they overturn currently prevailing orthodoxies and paradigms about planning and land administration. The Foundational Principles in Chapter 8 must form the basis of those negotiations. The content of the constitutive elements shown in each layer in **Table 9.1** are discussed in more detail below, noting that this is not intended to be exhaustive, just indicative of the kinds of issues that will need to be attended to at each level.

9.3.1 Negotiating land ownership (Box B1 in Table 9.1)

Negotiating land ownership is the primary space for intercultural dialogue between Aboriginal peoples and the Crown, and where the Aboriginal and Western conceptions of property discussed in Chapters 5, 6 and 7 come face-to-face in terms of their practical realities. What is at stake is how each party understands the other party's approaches to land ownership and as to how land and its resources can be used and the terms and conditions that will apply.

Most native title claims are resolved by consent rather than by contested litigation (Webb, 2016:124) and the dialogic space is therefore primarily about negotiations in the context of consent determinations. The primary focus of a consent determination is on determining where native title exists, where it coexists with other interests, where it has been extinguished, who holds the native title rights and interests, what the rights and interests may comprise, and how they may be exercised. In other words, they are about determining the priority of land ownership between Aboriginal peoples and other people, including the Crown.

What is not negotiated in the context of a consent determination is the Crown's power to make land grants/transfers (in freehold or leasehold) and land use decisions where native title continues to exist or co-exist with other interests. Decisions about land use and tenure are classed as future acts under the NTA and they can be validated by ILUAs or by complying with the relevant procedures in the future act hierarchy, which includes compulsory acquisition. But the future act regime is far from perfect. As discussed in Chapter 8, the 1998 amendments to the NTA considerably weakened the procedural rights of native title holders over acts that affect native title, especially on UCL that is subject to exclusive possession native title.

The research summarized in **Vignette No. 2** (**Figure 9.3** below) highlights the systemic failures arising from the lack of integration between the future act regime in the NTA and land

administration/land use planning systems in a post-determination environment. The analysis reveals that native title holders are negotiating away their procedural rights on land use decisions by agreeing in an ILUA to their relegation as a low impact future act, and without realising they are, potentially if not in reality, also foregoing compensation for the loss, diminution or impairment of their native title rights and interests arising from such future acts in certain circumstances. In fact, the property rights of native title holders are not being adequately recognised and protected by the NTA, as it was originally intended to do, due to three factors:

- the absence of Aboriginal peoples' rights and interests from the planning statutes;
- the absence of material changes in land use as another type of future act within the future act hierarchy in the NTA, and
- the omission of native title holders from the definition of 'owner' with property rights (See **Vignette No. 3**, **Figure 9.5** discussed below).

I conclude therefore that the distinct systems are not well integrated to avoid the kinds of failures documented in **Vignette No. 2** (**Figure 9.3**).

Vignette No. 2: Overcoming systemic failures between different systems

Source: Wensing (2017d).

Indigenous land use agreements (ILUAs) with various third parties are increasingly being included in consent determinations. Some of these ILUAs seek to obtain validity from the native title holders for a class of future acts far in advance of the doing of a particular future act that may fall within that class. Having done so, the native title holders are often foregoing further communication and consultation over the doing of a particular future act that falls within that class of future acts, but which may affect their native title rights and interests.

My research revealed several ILUAs with local governments authorising a class of 'low impact future acts'. The ILUA includes a list of identified classes of low impact future acts, including 'statutory approvals' which a Schedule to the ILUA defines as:

- 'Anything that involves, or which permits or requires, the granting, issuing, making by or to the *Local Government* of any approval, consent or permission under any *Law*. Examples include - …environmental approvals, permits under Local Laws.' (italics in original).

This definition is included in 26 ILUAs with local governments across Australia. I also found one particular instance in which this definition of low impact future acts in an ILUA with local government provided validity for the doing of a future act that consisted of a planning approval for a significant development on land subject to native title rights and interests without any notification, communication or consultation with the affected native title holders. The planning approval was deemed as falling within the definition of 'low impact future act' in the schedule to the ILUA that the local government and the native title holders had signed several years before, and therefore there was no requirement to notify or consult with them on the doing of the future act. It is likely that the native title holders' rights and interests were affected by this future act, and the future act is proceeding without any compensation for the loss, diminution or impairment of their native title rights and interests.

It is doubtful that all 'statutory approvals' by a local government would be of 'low native title impact' as intended by s.24LA of the NTA, because how is it possible for a local government to know precisely what planning decisions it is going to make in the future and whether the effect of such decisions on native title will always be of low impact? Indeed, the only people who can determine whether a future act will be of low impact on native title is the native title holders, not anyone else. The analysis demonstrates that care needs to be taken with what is included in the definition of 'low impact future act' in an ILUA that is being negotiated in the context of a consent determination. In particular, to ensure that procedural rights for future acts involving a change in land use that may affect native title rights and interests are not inadvertently foregone and that rights to compensation for the loss, diminution or impairment of their native title rights and interests as a consequence of land use decisions on the determined native title rights and interests are fully assessed and are also not foregone.

Figure 9.3 Vignette No. 2: Overcoming systemic failures between distinct systems

But the underlying issues run much deeper, because, as I eluded to above, what is missing from the interface between the two property systems is equality of status. The assumption that the Crown can continue making land use and tenure decisions on land subject to native title rights and interests (irrespective of whether the determination is of exclusive or non-exclusive possession) is not part of the negotiations in consent determinations by virtue of the way the future act regime has been designed in the NTA (Wensing, 2016d). This thesis therefore argues these matters need to be discussed and renegotiated, especially where a native title determination is being arrived at through consent. After all, consent determinations are determinations arrived at by consent between the parties. Furthermore, the Aboriginal peoples are asking for restitution of their land rights, not some form of reconciliation on terms pre-determined by the Settler state. Without restitution for 'past harms and continuing injustices' against Aboriginal peoples, including restitution of ownership of their ancestral lands, there is a risk that 'reconciliation only absolves governments of their colonial injustices and is itself a further injustice' (Alfred, 2009:179).

As I argued in Chapter 8, all power over land use and tenure in Australia does not only come from the Crown. The notion that the Crown is the only source of knowledge and power in Australia is a nonsense, especially since the HCA's decision in *Mabo (No. 2)* as I have outlined earlier in this thesis. For the Aboriginal peoples of Australia 'the notion of the Crown has been the great mystery of Anglo-imperial legal faith' and its identity has shifted and changed over time 'behind the cloak of settler law and practice' (McHugh and Ford, 2013:1). McNeil (2015:26) argues that the Crown as a single juristic entity has 'outlived its purpose … long ago and should be relegated to legal history'.[682] In Australia, the refusal to address 'the shakiness of the Crown at national and State scales' (Howitt and McLean, 2015:139) continues to reinforce the power imbalances and 'the damage in framing how governments respond to Indigenous rights' (Howitt and McLean, 2015:139). Australia must come to terms with the fact that we share the land with the Aboriginal peoples that owned and occupied these lands before the British first arrived in 1770. I argue therefore that governments must share their power over land matters on more equal terms by seeing the two systems of land ownership, use and tenure as having equal status, rather than as one always having to prevail over the other.[683]

[682] See also Footnotes 8 and 32.

[683] As reflected in the three statements by three prominent Aboriginal and Torres Strait Islander people at the beginning of Chapter 1 of this thesis.

Having regard to the necessary attributes for just coexistence (Part 9.2 above) and to the Foundational Principles (Chapter 8), an indicative list of the constitutive elements that will require careful consideration and negotiation is provided in **Figure 9.4**. Of course, other issues are also likely to arise during negotiations.

Indicative list of constitutive elements for negotiation in the Model for Parity and Coexistence

- How Aboriginal sovereignty and equal status of their law and custom relating to land can be affirmed by a consent determination.
- How a consent determination can also affirm native title as a property right equal to property rights issued by the Crown.
- How a sovereign-to-sovereign relationship between native title holders and the Settler state can be applied to all land dealings/transactions on land subject to a native title determination. This includes the re-negotiation of other rights and interests where native is found to coexist with other rights and interests.
- How the right to free, prior and informed consent of the native title holders is to be obtained in relation to dealings/transactions on land subject to a native title determination involving the use, allocation and distribution of the land's resources.
- How the rights of other Aboriginal people with other connections to the same land will also be given fair consideration in such circumstances.
- How the Crown (in all its manifestation) will relinquish its power of compulsory acquisition over native title rights and interests.
- In what particular circumstances will native title holders consider the permanent extinguishment of their native title rights and interests and on what terms and conditions.
- What may constitute compensation on just terms for any extinguishment, loss, diminution, or impairment of native title rights and interests, including money, other land in lieu, and benefits other than money or land (perhaps with reference to s.24MD(2)(d) of the NTA).
- In what particular circumstances will native title holders consider the suppression of native title rights and interests for a fixed period of time and on what terms and conditions.
- How the liabilities and responsibilities for land ownership and management will be shared or distributed between the Crown and native title holders. This is particularly pertinent to public access and responsibility for public liability insurance cover.

Figure 9.4 Indicative list of constitutive elements for negotiation in the Model for Parity and Coexistence

9.3.2 Negotiating land/resource use (Box B2 in Table 9.1)

Negotiating land/resource use is the 'third planning space' where the native title holders and the Crown bring their respective land use and environmental planning together in collaboration

and partnership to develop outcomes based on mutual respect. Settler state-based planning is deeply complicit in the dispossession of Aboriginal peoples of their traditional country in earlier colonial times (Byrne, 2003), and contemporary Australian planning has an appalling record of ignoring its fundamental responsibilities in its relations with Aboriginal peoples,[684] even where a native title determination is in place.[685]

As I have argued previously, the Crown's system of land use planning is not the ultimate authority on planning and development (Wensing and Small, 2012). Furthermore, the oppression and marginalisation of Aboriginal peoples through our land use planning systems is no longer acceptable (Porter, 2010:18). Aboriginal peoples have also been undertaking their own forms of land use planning and management for thousands of years. It is time therefore to 'move beyond the colonised mind'[686] and come to terms with the fact that we live in a shared space between the two systems of law and custom, especially with respect to land. We have to change our assumptions about the use of space (Porter, 2010:17) and become more inclusionary and let Aboriginal world-views – including their rights, interests, knowledges, values, needs and aspirations – play out and take their own form (Ryan, in Porter, 2017b:655) in the intercultural contact zone between the two cultures.

Wensing and Small (2012:6) contend that in western societies the owners of land have their rights to land use at the grace of government because 'Ownership is only ever an arbitrary system of government sponsored permissions to use the land in particular ways' and 'land use planning fits comfortably within that paradigm of ownership that places land owners at the bottom of the cascade of rights distributions'. Wensing and Small further argue that 'planning is effectively the right, held by the government against private landholders, to control land uses' (2012:12), and 'its exercise is always a form of sovereign act' (2012:7).

As discussed in Chapter 3, the Crown's assertion of absolute sovereign ownership of the radical title and the right to manage private interests through land use planning has to be brought into question and 'requires a major rethink' (Wensing and Small, 2012:7) because *Mabo (No. 2)* dispels those assumptions. It must now be recognised that sovereign acts that remove Aboriginal rights to their ancestral lands constitute some level of extinguishment and may

[684] There is a growing literature in this field, see for example, Porter (2010); Wensing (2012:260-264); Wensing and Porter (2015:8); Porter and Barry (2016); Jackson, Porter and L.C. Johnson (2018).
[685] As documented in Vignette No. 2 in Figure 9.3 above.
[686] Professor Hirini Matunga, Lincoln University, personal communication 15 December 2017.

violate the *Racial Discrimination Act 1975* (Cth) and for which compensation 'on just terms'[687] must be paid (Wensing and Small, 2012:7).

If, as Strelein (2009a:43) argues, native title cannot be extinguished absolutely in the Australian legal system,[688] then respect for Aboriginal peoples' traditional custodianship of land could be shown regardless of its tenure history in Australian law. Once Aboriginal peoples' rights to land are recognised, 'it must be upheld as the superior system of land law leaving western land use control the subordinate manifestation of law' (Wensing and Small, 2012:7). This could well see Indigenous customary owners recognised as the natural owners of all land use permissions not yet enacted, including over freehold land (Wensing and Small, 2012:8). Such actions are not intended to supplant or eliminate the role of Settler state-based planning, but rather to reinstate Aboriginal peoples' right to determine what happens to and on their ancestral lands. As Wensing and Small have previously argued:

> *'…, if it is accepted that land use control constitutes a form of property right that has been withheld from the bundle of rights that constitute freehold title* [or even leasehold]*, then it may well be a right that is still available to customary owners, given the current rules for recognition adopted in Australia from* Mabo (No. 2) *onwards. … Land use controls exist in the negative. Their positive expression consists in the granting of permission to a private landholder to use the land in some way. In cases where land has never been permitted for some higher value land use, it could be argued that the right to use the land for that higher use has never been alienated. If this is the case then it may be available to the customary owners. This could well see Indigenous customary owners recognised as the natural owners of all land use permissions not yet enacted over freehold land.'* (Wensing and Small, 2012:8).

These power imbalances between Aboriginal peoples and the Crown over land and resource use should be the focus of negotiations between the parties, not only at the point of reaching a consent determination, but also as an integral part of the terms and conditions for ongoing land and resource use over time. To reclaim this space as the third planning space, Aboriginal peoples' planning and land rights and interests need to be seen on a level playing field alongside the Settler state-based statutory planning systems. This is not impossible to do within existing planning systems, as the State of Queensland has recently demonstrated, as documented in **Vignette No. 3** (**Figure 9.5**).

[687] Section 51(xxxi) of the Australian Constitution.

[688] Here, the assumption is that native title holders as governing a system of property law, are not just occupiers and possessors of a particular title, but rather, are property owners of no lesser form of land ownership than fee simple and rights to compensation on just terms for extinguishment or any loss, impairment, diminution or any other effect on their native title rights and interests.

Vignette No. 3: Queensland setting a precedent in Planning law reform

Source: Wensing (2017d, 2019).

In May 2016 the Queensland Parliament passed new legislation to reform the State's statutory land use and environmental planning and development system.

The new *Planning Act 2016* (Qld) contains a provision which requires all entities performing functions under the Act to perform the function in a way that advances the purpose of the Act. Advancing the purpose of the Act includes, amongst other matters, '*valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition*' (Ss.5(1) and 5(2)(d) *Planning Act 2016* (Qld)). Functions performed under the Act include, but are not necessarily limited to, preparing State planning policies, a State plan, regional plans, planning schemes, temporary local planning instruments (TLPIs), planning scheme policies, development assessment decisions and a range of other functions (S.4 *Planning Act 2016* (Qld)).

This is the first time in the history of planning legislation in Australia that Aboriginal and Torres Strait Islander peoples' knowledge, culture and tradition are included in a planning statute (Wensing, 2016d). This provision does not rely on a native title determination, a land transfer or grant under Queensland's statutory land rights schemes, or a heritage registration under Queensland's Aboriginal or Torres Strait Islander heritage protection legislation. Section 5(2)(d) places the onus on the entity performing a planning function under the *Planning Act 2016* (Qld) regardless of any of those factors and gives Aboriginal and Torres Strait Islander peoples the opportunity to be on the offensive from the outset of a planning function, rather than always being on the defensive and considered as an afterthought.

The new provisions in the *Planning Act 2016* (Qld) raise several questions which planning practitioners need to think about in implementing this requirement, including: why this provision is included in the Act; what constitutes Aboriginal and Torres Strait Islander knowledge, culture and tradition; who holds the relevant information; how can that information be accessed; how can it be applied to the planning task at hand; how can that information be protected from misuse; and how can its application be evaluated and by whom?

While there are no guidelines as to how s.5(2)(d) is to be applied, the Queensland Division of the Planning Institute of Australia has stated that the only way this provision can be applied successfully is by negotiation and partnership with the Aboriginal and Torres Strait Islander peoples that hold and own that knowledge, culture and tradition, and on the basis of mutual respect and understanding (Harwood and Wensing, 2017). This provision in the Planning Act also sets a significant precedent and minimum standard for other jurisdictions to follow and improve on (Wensing, 2016d; Harwood and Wensing, 2017).

Figure 9.5 Vignette No. 3: Queensland setting a precedent in Planning law reform

Furthermore, in Foundational Principle 2 in Chapter 8, I argued that Aboriginal people have the right to self-determination thereby enabling them to govern their societies in accord with their law and custom and so regain their dignity as equal and active citizens given the negative impacts that colonisation has had on them. And in Foundational Principle 5, I argued that Aboriginal land is no lesser a form of land ownership than any other form of land ownership, and the NTA already provides native title holders[689] with the same procedural rights as other land owners in relation to a range of specific types of future acts in ss.24FA to 24NA, but land use planning and development decisions are not specifically included in those provisions as a future act that may affect native title.[690]

A land 'owner' has significant property rights in planning and development matters and in most jurisdictions plays a vital role in the development assessment (DA) process. A landowner can lodge an application for development on their land, enter into agreements with others about development on their land, give their consent to a third party to undertake development on their land, be notified and given the opportunity to comment on development proposals on any adjoining land, appeal planning decisions affecting their land and be able to claim compensation for losses or damages to their land (Wensing, 2017d).

Currently, none of the relevant planning and land administration statutes recognise native title holders as owners (Wensing, 2017d), which in part, explains why their rights and interests continue to be overlooked and/or ignored in land use planning and development assessment decision making.[691] Amending the definition of 'owner' in planning and land administration statutes to include registered native title holders/claimants, as discussed in **Vignette No. 4** (**Figure 9.6**), would ensure they would be given the same procedural rights as other landowners in land use planning and development assessment decisions where their rights and interests are likely to be affected.

[689] Irrespective of whether the native title rights and interests are of exclusive or non-exclusive possession.
[690] In the course of research for this thesis, it was found that a local council had recently made a planning decision in relation to a development on land subject to a positive native title determination and in all likelihood will adversely affect the native title rights and interests. Further investigation revealed that the decision was made without any communication with the native title holders. My argument here is that land use planning decisions should be included in s.24LA(1) of the NTA such that they cannot be regarded as a low impact future act, as discussed Vignette No.2 in Figure 9.3 above (see also Wensing, 2017d).
[691] As discussed in Vignette No. 2 in Figure 9.3 and Vignette No. 4 in Figure 9.6.

Vignette No. 4: Changing the definition of 'owner' to include native title holders

Source: Wensing (2017d, 2019).

In the State-based planning systems around Australia, land owners have significant property rights in planning and development matters and they play a vital role in development assessment, especially on or adjacent to their land. A landowner has the discretion to lodge an application for development on their land, give their consent to a third party to undertake development on their land, and they must be notified and given the opportunity to comment on development proposals on any adjoining land. They may also be able to enter into agreements with others about development on their land, appeal planning decisions affecting their land and, in some jurisdictions, be able to claim compensation for losses or damages to their land. Generally, where a land 'owner' is not the proponent of a land use change or development proposal, the planning statute requires either the proponent or the relevant local government to notify and obtain the relevant land owner's consent. Without this prior consent, most third party development proposals cannot proceed.

While a land 'owner' is defined differently in each jurisdiction, the definitions are conventional in the sense that to be an owner, a person must hold a fee simple or freehold land title (or in the case of the ACT, a 99-year lease) or the owner is entitled to receive the rent for the land.

In *Mabo (No. 2)* the HCA determined that native title is a property right, albeit under Aboriginal law and custom. Under the NTA, registered native title holders/claimants are entitled to the same procedural rights as other 'ordinary title holders' have in the State-based planning systems. 'Ordinary title' is defined in s.253 of the NTA as a freehold estate in fee simple.

However, in most jurisdictions the definition of 'owner' does not include registered native title holders/claimants or traditional owners. Where they are included (Victoria and Western Australia), they have only very limited application.

As registered native title holders/claimants have procedural rights under the NTA that are at least equivalent to the same rights as 'ordinary title holders', there is a very strong case for jurisdictions to amend the definition of 'owner' in their relevant planning and land administration statutes to include registered native title holders/claimants (as defined in s.253 of the NTA), because only they can assess the likely effects land use changes and development will have on their native title rights and interests.

Figure 9.6 Vignette No. 4: Changing the definition of 'owner' to include native title holders

9.3.3 Negotiating tenure and land value capture (Box B3 in Table 9.1)

Determining land tenure and value capture is the space where native title holders and the Settler state and third parties can negotiate (or renegotiate) the interactions between the continued existence and exercise of native title rights and interests. Including on the one hand, their suppression for fixed periods of time (or their surrender and extinguishment), and on the other hand, how other parties may occupy and use land and resources subject to native title rights and interests and on what terms and conditions. This is also the space where the definition of 'tenure' or 'tenir' documented in Chapter 4[692] comes into play. In this context, land tenure is seen as an institution,[693] setting the rules about the allocation of rights between the land owner and the land/resource user. In other words, determining the terms and conditions on which the land/resources can be used, for how long and on what other terms and conditions, including things like performance, payment of land rent (where appropriate) and remedies for breaching the terms and conditions.[694]

While the term 'land title' may have three distinct meanings as discussed in Part 4.4 of Chapter 4, it is used here to denote the interests in land in terms of land use and access and its transactional values, both for taxation purposes as well as collateral for finance.

In Chapter 3 it was noted that under current statutes and case law, native title holders are unable to use their property rights to participate in the economy in the same way as other property holders are able to. State Governments are requiring native title holders to surrender and extinguish their native title rights and interests in exchange for absolute fee simple (freehold) or leasehold title (where there is an intention that the new form of title is for the exclusive possession of the new title holder). As discussed in Chapters 3 and 5, the pre-existing land rights and interests of Aboriginal peoples were not recognised in Australia until the HCA's historic decision in *Mabo (No. 2)*. As the HCA also determined that native title rights and interests are inalienable and can only be surrendered or compulsorily acquired by the Crown, this precludes the right to lend land subject to native title rights and interests to others for a fee (Wensing and Taylor, 2012:39).[695] Arguably, recognition of their pre-existing land rights and interests could

[692] Part 4.4.
[693] As defined by the FAO (2002:7), cited in Chapter 4.
[694] Including for example, fines or other penalties or early termination of leases for persistent breaches. Such penalties for breaches of leases existed in the leasehold system in the ACT for many years (See F. Brennan, 1971; Stein, Troy and Yeomans, 1995; Wensing 2014d:84-91 and my personal manuscripts in the National Library of Australia, Wensing, Bib ID 358895).
[695] Because it effectively encumbers the native title rights and interests, which is not permitted under s.56(5) NTA.

have provided for Aboriginal peoples to lease their land to the Crown rather than for outright sale or possession (Wensing and Taylor, 2012:38), but this was never considered.

As discussed in Chapter 5, it is uncontentious that ownership of land generally infers the right of the owner to lend a possession to another for a fee. If native title rights and interests are no lesser a form of land ownership than any other form of land ownership[696], then the fundamental innovation required is to enable Aboriginal people to lease their land directly to the Crown and/or other third party interests, for a fee and not for free.

Absolute fee simple or freehold on Aboriginal lands is not an option for several reasons,[697] including the fact that native title holders have to surrender and extinguish their native title rights and interests in order to acquire a freehold land title from the Crown. Once land is freeholded outside of the Aboriginal estate, without a closed market it can be on-sold to non-Aboriginal interests and then it is effectively lost to the Aboriginal estate forever. The only measures that can be used to control land use (short of resumption) are taxation and regulation and they are not always very effective (Productivity Commission, 2008; 2017a; 2017b).[698]

Leasehold tenure systems offer the greatest potential for meeting the needs of Aboriginal land interests (Wensing and Taylor, 2012:38). As I have previously argued:

> *'… leasehold systems have the capacity to respect Aboriginal peoples' rights and interests in land because the land is never alienated from the Aboriginal owners. If Aboriginal landowners were given the tools to act as landlords, their land could be opened up for optimum economic use in ways consistent with local aspirations, by Aboriginal people, by third parties or by government, without the need to relinquish Aboriginal control or to forfeit their native title rights and interests*' (Wensing and Taylor, 2012:39).

Following a positive determination of native title under the NTA, it should be possible to develop a leasehold system based on the root title being held by the native title holders rather than the Crown (SGSEP, 2012:121). The problem is the inalienability of native title and the fact that the

[696] Foundational Principle 5 in Chapter 8.
[697] As discussed in Chapters 3 and 5.
[698] Although Dwyer (2003) argues there is considerable scope for Australia to make a fundamental shift in tax policy by replacing other taxes with more economically efficient taxes on land such as rates, land tax and resource rent taxes. Dwyer's analysis presents a longer time series analysis from 1910-11 to 1998-99 that shows the growth of all Australian tax revenues and land income over most of the twentieth century. The analysis shows that even though taxation has risen strongly as a percentage of GDP over the century, the growth of land values and land income has largely kept pace (Dwyer, 2003:36). Dwyer (2013:40) concludes therefore that land-based tax revenues are indeed sufficient to allow a total abolition of company and personal income taxes 'as a real social choice about tax bases if one is concerned about losing revenue from mobile tax bases in an era of globalisation' (See Footnote 44 in Dwyer, 2003:40). Dwyer (See Footnote 45 in Dwyer, 2003:40) also argues that such land taxes would have the greatest impact on semi-idle speculators and that the market value of land that is being used productively 'could be expected to increase with increased competition'.

NTA currently precludes native title holders from encumbering native title rights and interests.[699] To get around these obstacles in the present system, the NTA and the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) would need to be amended, perhaps along the lines as canvassed by Keane CJ.[700]

Appropriate amendments to the NTA could create a new form of Aboriginal leasehold that will enable native title holders to become the lessors of their native title land without the pre-requisite of having to agree to the surrender and permanent extinguishment of their native title rights and interests. They should be able to lease their land direct to their own people, to all levels of government, to third parties, and enable leasehold interests to be used as mortgage security. Such a system may require the creation of a title system, perhaps based on existing Crown land title registers that would provide security of title to occupiers, and the State Land Title Registrars could be contracted by native title holders to perform specified land administration functions under their direction. The leases would include a provision whereby the land (and any assets) would revert to the native title holders when the lease expires (SGSEP, 2012a:127). The essential elements of an Aboriginal leasehold system are articulated in **Vignette No. 5** in **Figure 9.7**.

In Part 4.5 of Chapter 4, I noted that Western forms of instrumentation such as the Torrens land titling system were used to block out the history of Aboriginal land ownership. It is important to note here that in suggesting the creation of a leasehold system on Aboriginal lands, I am applying the best available mechanism for enabling the Traditional Owners to continue holding onto their underlying ancestral land rights and interests and to control how others use and access their lands. The intent is that the Traditional Owners exercise the right to lease their land on their terms and at their choosing, and that any revenues generated by doing so are returned to the Traditional Owners.

Having developed a Model for Parity and Coexistence between two culturally distinct systems of land ownership, use and tenure, attention must now turn to how the Model can be applied. What follows is a framework for applying the Model to enable a major restructure of the Australian land system and restitution of Aboriginal peoples' ownership of their ancestral lands.

[699] As discussed in detail in Parts 3.2.3 and 3.2.4 of Chapter 3.
[700] As discussed in Chapter 3. See also Keane (2011); SGSEP (2012a:122); Strelein (2016).

Vignette No. 5: Leasehold tenure on Aboriginal lands

Source: SGSEP (2012a) and Wensing (2014d).

Leasehold is an ideal tool for managing other interests in land. It can serve two primary functions: estate management, and land use and planning.

These two functions are closely related, but are also quite distinct. The estate management function seeks to maximise the long-term benefits to the community and for future generations from the entire estate. The land use and planning function is to protect amenity and facilitate the use of land that is both sustainable and enhances quality of life for both present and future generations. These two functions both make use of a very important instrument – the lease conditions. The lease conditions will define the use and development rights via a lease purpose(s) clause and other lease conditions. In the great majority of cases an enlightened estate manager and an enlightened planning authority will agree on the appropriate lease conditions. But they can also come into conflict. How such conflicts are resolved is a measure of the integrity of the system to deliver the best possible long-term outcomes from the estate for present and future generations.

Leasehold on Aboriginal lands could therefore have three strands:

- The regulation of land/resource use through lease conditions (including a lease purpose(s) clause) to achieve cultural, social, environmental and economic objectives based on Aboriginal land use and occupancy planning.
- A land rent that reflects the land's value, discourages lessees from keeping the land idle once a lease arrangement has been entered into, and periodic reviews to capture unearned increases in value arising from external factors, including for example regulatory changes, population growth and economic development.
- The allocation of land on concessional conditions for essentially public purposes, such as health and education facilities.

Its essential characteristics would include:

- Land subject to native title rights and interests remains as such in perpetuity;
- A lease would be subject to payment of rent, subject to regular re-appraisement;
- Revenue raised will be used for the benefit of the native title holders and where relevant the wider Aboriginal community;
- A lease will include a lease purpose(s) clause and other relevant lease conditions;
- A lease would be for a fixed term related to its purpose(s) but for no more than 99 years;
- A lease will include binding covenants and conditions with which the lessee is required to comply;
- The lease title can be used as collateral for finance;
- Lessees would own all the buildings and improvements they undertake; and
- Lessees would have the use and quiet enjoyment of the land on the terms and conditions of the lease contract; and
- The land and all buildings and improvements revert to the native title holders when the lease expires or is terminated earlier.

Figure 9.7 Vignette No. 5: Leasehold tenure on Aboriginal lands

9.4 Applying the Model for Parity and Coexistence

As discussed in Chapter 1, land administration and land use planning are the responsibility of the States,[701] not the Commonwealth. Therefore, no amendments to the Australian Constitution are required for this Model to work effectively. Although Victoria and South Australia have amended their Constitutions to go some way toward recognising the Aboriginal peoples as the original custodians of the land, recent amendments to the New South Wales and Queensland Constitutions are much weaker (Mansell, 2016:146-47). Mansell (2016:147) argues that acknowledging the prior and continuing Aboriginal sovereignty 'will not harm Australia … upend the Constitution, parliaments or parliamentary elections', nor 'overturn the legal system', but that 'it will aid the search for truth'.

While land reforms of the kind envisaged from the Model for Parity and Coexistence discussed above may rest with the States, the application of the Model can be advanced by a treaty/treaties or negotiated settlements, depending on what can be negotiated with the Aboriginal peoples in each State. As discussed earlier, the Victorian and the Northern Territory Governments have already commenced negotiations over a treaty and these actions present an opportunity to address the outstanding land ownership, use and tenure matters. Whether these treaty negotiations will result in further changes to the respective State Constitutions[702] remains to be seen. Although, just settlements cannot be imposed, they can only be negotiated between the parties (Hoehn, 2016:145), and a treaty is preferable to constitutional change because it can establish the rules for coexistence and power sharing (Mansell, 2016:146).

Leon Terrill (2016) has developed a framework for land reform which focusses on the statutory land rights schemes in the Northern Territory and Queensland where the shift is not aimed at significantly altering the status quo. However, Terrill (2016:259) argues that the framework can also be applied to circumstances aimed at achieving a major restructure. What follows therefore, is an adaptation of Leon Terrill's framework (2016: 258-289)[703] to reflect a major restructure of the Australian land system as the Model for Parity and Coexistence suggests.

[701] And mainland Territories (NT and ACT) to the extent that the Commonwealth will allow them to apply the Model consistent with the land administration and land use planning functions they are responsible for.
[702] Noting that the Northern Territory does not have a constitution because it is a Territory of the Commonwealth. The Commonwealth granted the Northern Territory self-government in 1978 under the *Northern Territory (Self-Government) Act 1978* (Cth). There is however, a long history of statehood and constitutional reform in the Northern Territory, see Horne (2007).
[703] With permission.

In the context of this research, the Model aims to ensure that two culturally distinct systems of land ownership, use and tenure can operate in parity alongside each other. In doing so, it is important to understand that when there are interactions between the two systems, then it will be necessary for native title holders/RNTBCs to take on the role of a land use and tenure authority.[704] Being a land use and tenure authority involves making decisions about land use and tenure, and who the recipient or beneficiary will be, among other things. The role of a land use and tenure authority is outlined in more detail in **Table 9.2** and **Figure 9.4** and is discussed below.

The Framework in **Table 9.2** retains Terrill's (2016:260-267) two-step process of:

- Firstly, working out *what* variables require a decision; and
- Secondly, working out *how* the variables should be decided (Terrill 2016: 258, 262, emphasis in original).

The Framework, discussed below, takes into account the necessary attributes for coexistence (Part 9.2 above) and the Foundational Principles (Chapter 8).[705] Circumstances in the case study localities are used to illustrate the applicability of the Framework.

9.4.1 Step One: Working out what requires a decision

The first step in the Framework involves working out *what* requires a decision. The Framework in **Table 9.2** identifies the following five matters:

(a) becoming an underlying land use and tenure authority;
(b) deciding on land use;
(c) deciding on the form of tenure (including the terms and conditions and how they will be enforced);
(d) deciding on responsibility for the provision of infrastructure and its operation and maintenance (and whether user charges will apply); and
(e) deciding on the allocation of land/assets (Terrill, 2016:260-262).

Figure 9.8 provides an indicative flow chart of the ideal sequence in which those decisions need to be made. The details are discussed below.

[704] The governance, capacity and resourcing implications for RNTBCs taking on the role of a land use and tenure authority are discussed under Governance in Part 9.4.2 below.
[705] This framework was presented to Yawuru in my fourth Research Paper (see Wensing, 2016c). However, similar to Terrill's (2016:266) approach, distinct Indigenous cultural values and practices are not considered separately because it is anticipated that RNTBCs and Traditional Owners will embed their cultural practices into each of the factors in the framework.

Table 9.2 Summary of a Framework for Applying the Model for Parity and Coexistence

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

Adapted from Terrill (2016:260-267).

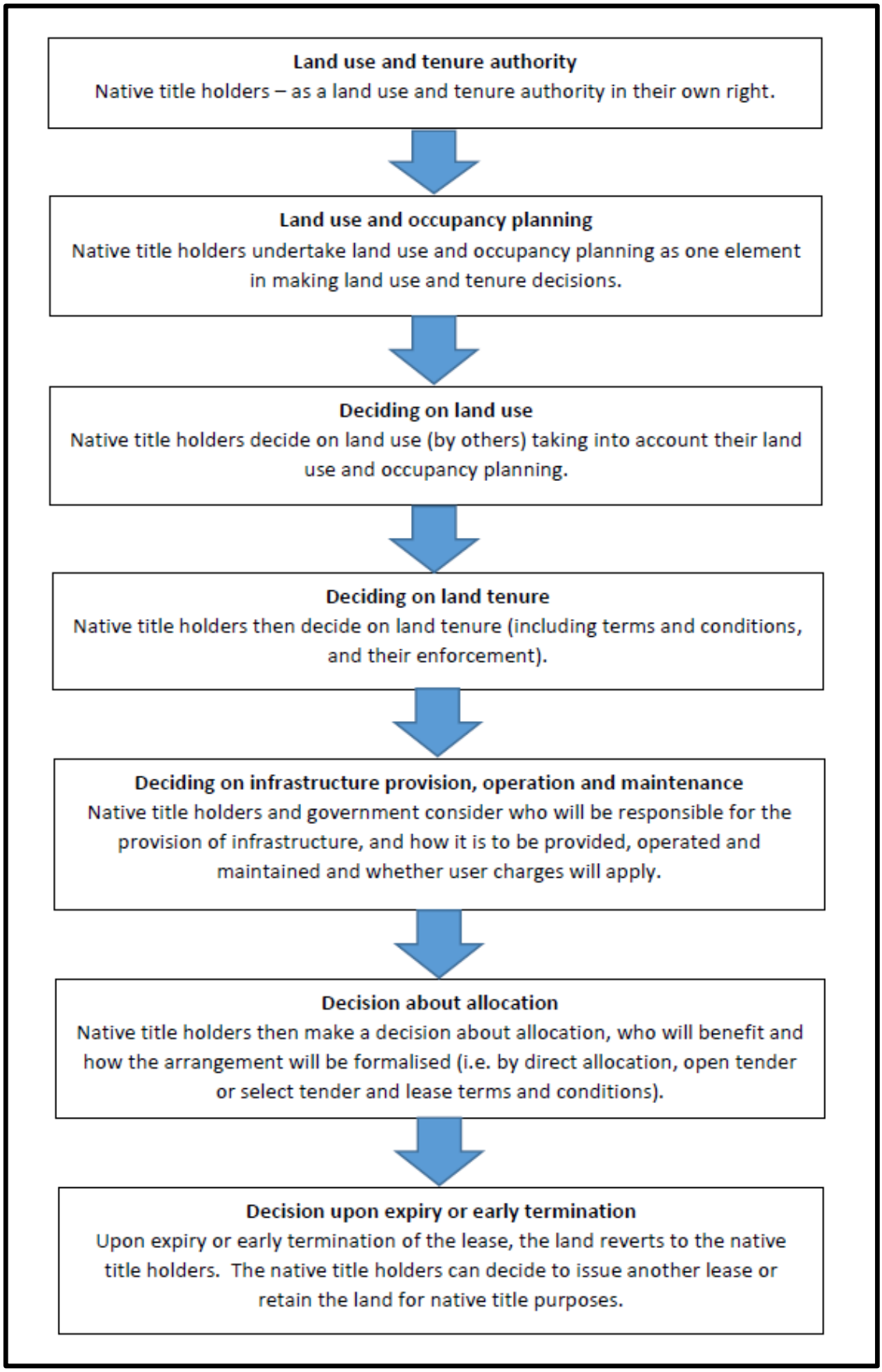


Figure 9.8 Land use and tenure authority: Indicative flow chart of decisions

The role of the underlying land use and tenure authority

Under current land administration and land use planning arrangements throughout Australia, State (and Territory) Governments are the underlying authority for making land use and tenure decisions. If native title is a form of land ownership that is no lesser in status than any other form of land ownership and if the two distinct systems of land ownership are to be seen as having equal status, then the state can no longer be solely responsible for making land use and tenure decisions. Therefore, the current institutional arrangements will have to change.

In that context native title holders take on considerable responsibility for determining land use, tenure and allocation in a wider context than within their own clan or group of native title holders. However, it is important to appreciate that native title holders have been doing this for many thousands of years under their own system of law and custom, as so eloquently reflected in Tom Trevorrow's comments cited in Chapter 5. But when two systems of law and custom relating to land ownership, use and tenure are placed alongside each other with equal status and there are interactions between the two systems requiring decisions about land use and tenure, then the native title holders as a group take on the role of being a land use and tenure authority over their estate for a much wider range of interests. Being a land use and tenure authority entails making decisions on a range of matters, as depicted in **Figure 9.8**. Each of these matters are discussed in turn below.

However, before turning to each of those matters, Terrill (2016:261) raises the issue of governance arrangements, including the identity of the body (or bodies) that will play the role of the land use and tenure authority, who makes that decision and how (Terrill, 2016:261). One of the case study RNTBCs discussed in Chapter 7, Yawuru, has established three separate corporations to hold its native title rights and interests, its assets and how Yawuru manages its affairs. For Yawuru, the separation of powers between the three Yawuru corporations over land use decisions on the one hand, and the impact on the rights and interests of native title holders in a specific location on the other hand, are kept quite separate from each other by placing appropriate checks and balances on the exercise of those powers. The rules governing interactions between these separate entities, how they are constituted, their structures and processes, with whom they are required to consult – traditional owners, community, residents, governments, other occupiers – and who it is that has the ultimate control needs to be carefully documented and managed. These governance issues are explored in more detail in Step Two further below.

Deciding on land use

While land use and land tenure are inextricably intertwined and interdependent,[706] under current planning and land administration arrangements land tenure tends to drive land use. Reconstituting native title rights and interests as a separate but equal form of land ownership enables these factors to be decided separately and on their respective merits. Because native title rights and interests are not being extinguished but will remain in place as the underlying land owner, then land uses by others and their rights and interests in the land have to reflect the reality that at a later point in time, the land will revert to the native title holders (in principle at least). Therefore, the question of tenure should be separated from the question of land use, and a decision about land use should drive the decision about how that allocation of land for a particular purpose needs to be formalised and regulated. These decisions are shown separately in **Figure 9.8.**

As Aboriginal people have their own form of planning, this will assist them in making informed decisions about land uses on their country, not only by their own people, but also by others. On-Country land use and occupancy plans could identify areas that need to be held for cultural purposes and not put to any active developmental use by others. And it could also identify areas where land can be used for residential, commercial or industrial uses, for the provision of public services such as health and education, or for agricultural or pastoral uses. Negotiating the interface with Settler state-based planning will be important for achieving outcomes that better respect and take account of Aboriginal peoples' rights and interests based on their world views, knowledge, culture and tradition, as documented in **Vignette No. 5** in **Figure 9.7** above.

Deciding on the form of tenure and enforcement

As stated earlier, the form of tenure should be seen as a means to an end, a mechanism for sharing rights of access to and use of land on pre-determined terms and conditions. While deciding on the form of tenure can be a complex task, given the discussion in Part 7.2.4 of Chapter 7 about the extinguishing effect of freehold on native title rights and interests and the fact that native title holders do not want to surrender and permanently extinguish their native title rights and interests, private freehold as a perpetual form of tenure should be off the table. As discussed in Part 8.3.3 in Chapter 8, I have previously argued that leasehold tenure offers the greatest potential for meeting Aboriginal peoples' desire to have a greater degree of control over how other people use their lands (Wensing and Taylor, 2012:38). Leasehold's strengths lie

[706] As discussed in Chapter 4.

in determining the appropriate terms and conditions (i.e. duration of the lease, a lease purpose(s) clause and other conditions to ensure the user has quiet enjoyment of the land without further undue interference), appropriate measures for enforcement of the terms and conditions, and a commitment to enforcement. Without enforcement, lease terms and conditions are worthless.[707]

The critical measures include whether the lease should be of short or long-term duration, restrictive or unrestrictive in terms of use(s), the method for changing lease purpose(s), whether or not they should be subject to rent, and, as Terrill (2016:262) notes, whether the form of tenure should be highly prescribed by relying on fixed precedents or set rules, or whether there should be space for flexibility to allow for individual negotiation. Other matters include whether the leases will be alienable or inalienable, whether the market should be open or closed to non-Indigenous interests, and how these matters may impact on market conditions (discussed in Part 9.4.2 below).

When it comes to land tenure reform in places such as Ardyaloon, a further issue is whether and in what circumstances land tenure needs to be formalised or in what circumstances they might be allowed to remain informal (Terrill, 2016:262). Historically, many of the land uses that comprise a township on ALT reserves are not subject to a form of tenure. This includes public utilities as well as some commercial activities such as the local store. One of the potential benefits of formalising tenure is the ability to change the nature of the arrangements, including the ability to apply land rent.[708]

Deciding on infrastructure provision, operation and maintenance

Social or community housing, infrastructure and essential and municipal services are normally the responsibility of relevant State, Territory and/or local governments (Wensing, 2015a). On the ALT Estate in WA Aboriginal communities were often provided with sub-standard community housing, infrastructure and essential services. The responsibility for funding the provision and ongoing operational and maintenance costs of municipal and essential services in

[707] Leasehold tenure has been successfully used throughout Australia to regulate the way people use land and its resources, including in Canberra, the nation's capital city (F. Brennan, 1971; Neutze, 2003). And there is much we can learn from the lack of enforcement of lease terms and conditions in the administration Canberra's leasehold system. See Stein, Troy and Yeomans (1995); Neutze (2003:39-59); Wensing (2014d:84-91) and my personal manuscripts in the National Library of Australia (Wensing, Bib ID 358895).
[708] As happened in the Northern Territory under the township leasing arrangements introduced by the Australian Government as part of its Indigenous land reform agenda (Terrill, 2016:236-37).

remote Aboriginal communities has been and continues to be matter of controversy between the Australian and WA Governments (Wensing, 2015a:8; Howitt and McLean, 2015).[709]

As discussed in Part 7.3 of Chapter 7,[710] the Australian Government's objective is to 'normalise' the provision of municipal and essential services delivery arrangements in Aboriginal communities to a level that is comparable to the standard of services delivered in non-Indigenous communities of similar size and location. Critical factors to consider in this context include how such services are to be provided, who will take responsibility for their provision and to what standards, how will the up-front establishment costs be paid for, who will take on the responsibility for their ongoing operation and maintenance including cost, and whether user charges can be applied.

Deciding on allocation of land/assets

The allocation of land (and any existing assets on the land) is a significant factor in determining who will benefit and how the benefits will flow to the native title holders and, where relevant, the wider Aboriginal community. In both case study localities, land determined to be subject to native title rights and interests already have existing occupiers with existing commitments, some of them formal, many of them informal. These will need to be carefully examined and analysed in terms of liabilities and responsibilities, and especially as to where the responsibility should lie and how that responsibility is to be allocated, under whatever arrangements can be agreed. Furthermore, any land being transferred must also be in sound condition so it is an asset and not a liability.

Issues an RNTBC will need to consider in making allocation decisions include: how currently unoccupied land is made available for use and/or development; how competing claims to land and existing infrastructure/assets are adjudicated; how existing occupancy arrangements should be formalised with the RNTBC as the primary landholder; whether existing occupants should be paying rent to the RNTBC and/or native title holders; in what circumstances an existing occupier might be asked to vacate the land; and how vacated land is to be reallocated (Wensing, 2016c:46).

[709] See also Part D5.4 in Appendix D.
[710] And in Appendix D.

9.4.2 Step Two: Working out how to make decisions on those matters

Having determined what needs to be decided upon, the focus shifts to working out *how* the variables are to be addressed, which includes establishing good governance frameworks and institutions, making an assessment of market conditions, and developing an understanding of benefit provision (Terrill, 2016:262-267).

Governance

Sound governance is crucial in relation to prudent land ownership and management. The governance framework needs to be explicitly identified (Terrill, 2016: 265) with clear distinctions between the native title holders for any particular locality *per se* and the broader membership of the native title holding group for transparency and accountability.

As mentioned earlier, Yawuru has established three separate entities in its corporate governance arrangements. While the three entities have a shared purpose of enabling Yawuru people to be active participants and contributors to as well as beneficiaries of their native title rights and interests and Yawuru's landholdings in perpetuity, they each perform different roles as a check and balance on decision making about Yawuru's affairs. This distinction emphasizes the separation between the native title holders and the wider Yawuru and Aboriginal communities of Broome (the constituency). The distinction between native title holders and the constituency is critically important where land assets are concerned. There will be situations in any locality where there will be tensions between the native title holders, the residents or occupants of land, and the Yawuru community (and also the wider Aboriginal population of Broome) that may need to be recognised and taken into consideration. These tensions need to be carefully managed. Terrill (2016: 269) warns however, that if decision making is too fragmented there is a risk that it can lead to the creation of an anti-commons: a situation where there are too many discrete opportunities for refusal. 'To the extent possible, processes should be streamlined and decisions made in a single forum that enables clear outcomes to be arrived at' (Terrill, 2016: 269).

Both case study localities are governed by all three levels of government – federal, state and local – and they each have their own laws and statutes. Currently, the Settler state controls land administration, land use, planning and local government systems. If native title holders are determined to be free from Government dependence, then as discussed in the Model above, RNTBCs need to become the land use and tenure authority and have the capacity to engage

effectively with the Settler state on an equal basis in terms of power and authority over their traditional lands. Taking on a new role and function as a land use and tenure authority will require RNTBCs to expand their skills and capacities, especially with respect to land use planning and land administration in both Indigenous and conventional planning paradigms.

This raises several challenges for the network of PBCs/RNTBCs across Australia.[711] Two reviews of the RNTBCs in the past decade have found that very few are operating effectively (Australian Government, 2007:6) and most of them 'have extremely limited resources and no capacity' to meet their obligations or to pursue their aspirations (Deloitte Access Economics, 2014:30). Both reviews have commented that RNTBCs need to operate effectively so that native title holders can utilise their native title rights and interests to derive economic and other benefits and discharge their land management and other statutory obligations (Australian Government, 2007:6; (Deloitte Access Economics, 2014:30). It is also noted that the SOWG in its report to COAG in 2015, recommended that all governments commit to 'investing in the building blocks of land administration' and 'building capable and accountable land holding and representative bodies' (SOWG, 2015:8-9).

There are a range of options that could be explored to assist with resourcing and developing the capacity of RNTBCs' including for example, establishing arrangements similar to the Aboriginals Benefits Account under s.64 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); establishing a time-limited special purpose levy paid into a trust fund to be administered by an overarching body similar to the Land Rights fund operated under the *Aboriginal Land Rights Act 1983* (NSW); (Deloitte Access Economics, 2014:38); or the establishment of a Native Title Corporations Foundation as an independent non-government organisation incorporated as an unlisted public company limited by guarantee to provide professional and other support and advice to RNTBCs (Oscar, 2013). A further option could be the establishment of an Aboriginal land administration entity at State/Territory or national levels[712] that can be the property manager for native title holders, especially where native title holders may not have the capability to take on the land administration responsibilities. Such an entity will need to be mindful of the cultural needs of the Aboriginal owners and could be used as vehicle for protecting their unique cultural, social and political identity as Indigenous peoples and

[711] As at 31 December 2018, there are 189 RNTBCs. Derived from Native Title Vision on the National Native Title Tribunal's website. For a national snapshot of PBCs, see: https://www.nativetitle.org.au/learn/role-and-function-pbc/pbc-national-snapshot.

[712] In effect, the Indigenous Land Corporation (ILC) already performs this function in relation to land that is purchased on the open market before being returned to an Aboriginal corporation.

developing their capacity to manage their land with optimum cultural, social and economic outcomes on their terms and at their choosing.

Market conditions

An assessment of the prevailing market conditions is essential, including economic, social, environmental and cultural conditions, because they will either facilitate or constrain what is possible. Local/regional income levels will influence what people are prepared to pay for land, local/regional land prices affect the ability to use land as collateral and the level of mortgage finance available, and market conditions will also influence the level of interest and hence risk. These conditions are also heavily influenced by open or restricted markets (Terrill, 2016:263). As discussed in Chapter 7, both case study localities have benefited from the highly protected reserve status in certain locations which has created a closed market in terms of who is entitled to live on those reserves. The reality for places like Ardyaloon, is that the Reserve status has prevented market conditions from developing and kept rents and land values low, which has generated considerable benefits. If these protections are removed, then in certain circumstances, the native title holders will have to consider the consequences of opening up the land to 'outside' interests. This is not to suggest that an open market is problematic, but rather to be conscious of the impact that opening up what was a highly protected arrangement to an open market may have adverse impacts in such locations, and that such changes need to be handled with care.

Critical factors in assessing market conditions include a sound understanding of local/regional economic conditions, social circumstances and environmental conditions and how the region contributes to both national and international economies. Terrill (2016:263) also warns that the economic benefits of land reforms should not be overestimated or exaggerated. The reality is that 'land reforms cannot be relied upon to escape the conundrum of having communities that rely on government assistance' (Terrill, 2016:263), especially in remote locations where local economies are very weak. This is especially pertinent to the townships on Bardi and Jawi country. In contrast, Broome is the major service centre for the Kimberley Region and the opportunities for engaging in the economy are more diverse but no less challenging.

Benefit provision

Terrill (2016:263) uses the term 'benefit provision' to 'describe the way in which governments and other organisations provide different types of goods, services and payments to individuals

and families to help them meet their needs.' Benefits therefore take on different forms for different purposes. For example, they can include social security payments, free and/or subsidised access to housing, education, health, transport and/or in some cases free access to food and clothing. In the context of this thesis, it necessary to understand the relationship between benefit provision and land reform and what falls within the land use/tenure authority's purview to manage or influence and not to see them in isolation of wider contexts and circumstances (Terrill, 2016: 264). It is especially important to understand what it is about the provision of benefits that can be harmful and how this harm can be minimised or avoided. For example, transferring land to another person with a rent-free period longer than may be required in order to get a business up and running, or charging a rent that is heavily discounted for the duration of the lease rather than only for a short term while the business is being established. As Terrill (2016:263) notes, providing the wrong kind of benefit can lead to the wrong outcomes.

Terrill (2016:264) discusses three areas: housing, rent from land users/occupiers, and ownership of enterprises. With respect to housing, the crucial question is the circumstances under which social housing and/or subsidised[713] home ownership is to be provided.[714] With respect to land rent, the divestment impact from the introduction of land rent in Aboriginal communities should not be overstated and is likely to be small and incremental, but the reality is that service providers and land users in Aboriginal communities need to factor these into their budgets and submissions to government for funding as part of their operating costs. Further, occupiers of Aboriginal lands should be required to pay rent and that provides a legitimate source of income for Aboriginal landowners. The crucial question is what the landowners do with that income and how it is reinvested in the community in other ways. Again, the way rent is determined and where and how that income is reallocated is also one of the variables in Step One discussed above.

With respect to ownership of enterprises, there will be situations where it will be necessary to decide which form of enterprise ownership is to be given preference. For example, some of the ALT Estate in Broome is adjacent to the Chinatown precinct, the historical and commercial heart of Broome, and is regarded economically as high value land. The land also has high cultural

[713] Keeping market values low is better for a society than a 'strong' market and achieves this automatically.
[714] As noted in Chapter 5, the Commonwealth's actions with respect to the provision of social housing in Aboriginal communities has resulted in governments playing a more embedded and controlling role, reinforcing dependency rather than independence through the community housing associations that previously managed the social housing stock (Terrill, 2016:4; FaCSIA, 2007).

values. Setting those issues aside for the moment, if the opportunity to develop the land for commercial purposes reflecting its high economic value should arise, say for shops and offices, then the question arises as to whether the entity that runs those business opportunities should be granted to an individual, a private company, a Yawuru-community owned enterprise or other Aboriginal organisation or entity (Wensing, 2016c:41).

It is important to understand that land reform on its own will not make the need for government benefits disappear, but it may alter the mode of provision (Terrill, 2016: 265). The challenge is to ensure that the provision of benefits is not harmful and that they achieve their intended 'beneficial' outcomes. Native title holders as landowners in their own right need to make prudent and responsible investment decisions consistent with their stated values and long-term interests and for the benefit of their people in perpetuity and not on the basis of short term gains. Aboriginal law and custom will also be relevant here, including the rights of particular sub-groups. The most crucial consideration for the land use and tenure authority is deciding the most helpful and least harmful way of providing benefits in the context of implementing land reforms (Terrill, 2016:265).

9.5 Evaluating the Model for Parity and Coexistence

Before evaluating the Model, the key challenges and practical realities that the case study RNTBCs are currently confronting are summarised below.

9.5.1 Challenges and practical realities for the case study RNTBCs

As discussed in Chapter 7, under the terms of the ILUAs that Yawuru RNTBC has entered into with the WA Government, Yawuru will acquire title to significant landholdings in and around Broome.[715] Indeed, some of the transfers have already occurred and further transfers are planned, potentially including the 15 parcels of land that comprise the ALT estate in Broome.

In contrast and as discussed in Chapter 7, Bardi and Jawi RNTBC has not entered into any ILUAs with the State, but the State is continuing to make noises about the transfer of ALT lands to Aboriginal people at some point in time, but the details remain unclear.[716] Any changes in land tenure on land subject to native title rights and interests are dealings in land that will trigger the

[715] See also Appendix E.
[716] See also Appendix D.

future act provisions in the NTA. This includes provisions for negotiating an ILUA to validate a future act to the extent that it affects native title rights and interests.

These issues present two inter-related challenges for the RNTBCs. The first challenge is how native title holders want to continue holding their native title rights and interests into the future, given they will not agree to the surrender and permanent extinguishment of their native title rights and interests for a form of Crown tenure they regard as being inferior. The second challenge is that if native title is to be seen as a form of land ownership no lesser than any other form of land ownership, the respective RNTBCs will be responsible for deciding how they will manage ownership, use and tenure on their native title lands, especially in terms of how they may want to use their property rights to engage in the economy, as well as for other cultural and/or social outcomes.

These challenges give rise to two practical realities for native title holders and RNTBCs.

The first practical reality is about continuing to hold their native title rights and interests, unextinguished, alongside other forms of land tenure (as distinct from ownership). Having adopted a position of not surrendering and extinguishing native title rights and interests for other forms of tenure within the Settler state's land tenure system and adopting a position of wanting the two systems of land ownership, use and tenure to be seen as being of equal status, RNTBCs will need to give some thought to the interactions between the two systems on an ongoing basis. It is in this context that native title holders effectively become the underlying land use and tenure authority which will have to make decisions on land use, allocation and tenure. This is where Aboriginal law and custom, Aboriginal governance and land use and occupancy planning undertaken by native title holders will play an important role assisting RNTBCs to make informed decisions about land use and tenure.

The second practical reality is about becoming a responsible landowner in a contemporary sense. This involves taking on responsibility for making land use and tenure decisions and working out how to make those decisions. The Framework outlined above unpacked some of those complexities. It also involves taking on responsibility for a wide range of land management functions or deciding who will be responsible for them, including the payment or receipt of local government rates and charges; having public liability insurance cover; the payment of utility charges for power, water and sewerage, telecommunications; compliance with the local planning scheme with respect to land use and development; compliance with building health

and safety codes and regulations; compliance with environmental management controls; compliance with local regulations relating to boundary fences; and keeping the land in a clean and tidy condition (i.e. control of feral animals and obnoxious weeds and reducing bushfire hazards). Some of these responsibilities can run with the title down to lessees or sub-lessees.

However, these matters need to be carefully and methodically negotiated as they overturn several prevailing orthodoxies and paradigms about land administration, planning and land use.

9.5.2 Evaluating the Model against the Foundational Principles

The following evaluates the Model for Parity and Coexistence against the Foundational Principles in Chapter 8.

The Model for Parity and Coexistence is deliberately aimed at establishing a more equitable coexistence of land rights and interests between Aboriginal peoples and the Settler state based on parity and justice by removing the necessity for Aboriginal peoples to sever their cultural connections to and responsibilities for their ancestral lands through extinguishment of their rights and interests against their will. The Model is also deliberately aimed at reconfiguring the Crown's compulsory acquisition powers such that Aboriginal land rights and interests can only be extinguished on the basis of terms negotiated and agreed with traditional owners and with their free, prior and informed consent.

As discussed in Part 9.2 above, the Model rests on several necessary considerations. For the Model to work effectively, the following matters need to be agreed between native title holders and the Settler state assuming governments are willing to negotiate, perhaps through a treaty or negotiated agreement, as follows:

- that a native title determination is a confirmation of Aboriginal sovereignty and their law and custom or freedom to exercise sovereignty over their affairs according to their law and custom;
- native title is a property right equal to any other property right;
- Aboriginal law and custom has a way of governing the use, allocation and distribution of resources among their own peoples and others;
- Aboriginal peoples have their own approaches to planning land use, allocation and tenure;
- sovereign-to-sovereign relationship between Aboriginal peoples and the Settler state is the basis of all negotiations;

- the Foundational Principles in Chapter 8 will form the basis of negotiations over all land/resource dealings; and
- Aboriginal peoples have the right to pursue, reject or negotiate development on their lands.

In evaluating the Model against the Foundational Principles, the question that must be asked is: Does each layer satisfy the Foundational Principle if this Model is applied in the locality of the case study RNTBCs? This is no simple answer to this question because it will depend to a large extent on what can be negotiated between the RNTBCs and the Settler state, mainly the WA Government but also the Australian Government. The following analyses each level and draws some conclusions as to what could be negotiated between the parties.

Negotiating land ownership

While the native title rights and interests in both case study RNTBC localities have already been determined, there is a need to re-open negotiations. Yawuru has advised that they are in the process of renegotiating the ILUAs they signed with the WA Government and other parties in 2010. And they have also advised that they have never regarded the ILUAs as the full and final settlement of their grievances with the State. In examining the current ILUAs against the Foundational Principles, they do not reflect the content in Foundational Principles 2, 3, 4, 7, 8 and 10. In other words, issues to do with self-determination and land use and occupancy planning over all of the claim area; obtaining Yawuru's free, prior and informed consent on all land matters affecting their rights and interests; no further extinguishment of native title rights and interests on lands to be transferred to Yawuru under the existing ILUAs; Yawuru's right to pursue, reject or negotiate development on their lands; removal of the requirement to extinguish native title and the inability to use native title as a form of collateral; and compensation for past extinguishment, loss diminution, impairment and damage to native title rights and interests.

In the case of Bardi and Jawi RNTBC, it is essentially a clean slate in terms of what needs to be and can be negotiated over land ownership. A determination of exclusive possession native title has been made by the FCA, the WA Government continues to make statements about transferring the ALT lands within the determination area to Aboriginal people but the details remain unclear, and no ILUAs have yet been negotiated. There is an opportunity for Bardi and Jawi to 'seize the moment' and set the ground rules for all negotiations from here on and to set

a new bar in relation to what an ILUA could achieve in terms of coexistence between Aboriginal rights and interests and the Crown estate.

Negotiating land/resource use

For Yawuru, the renegotiation of the ILUAs with the State offers the opportunity to revisit all terms and conditions relating to land/resource use. This is not to say that Yawuru has not benefited from the existing ILUAs, but rather to re-draw the institutional landscape such that Yawuru's land use and occupancy planning is given equal status to state-based planning and the parties establish a joint planning-governance arrangement based on equality and mutual respect.

For Bardi and Jawi, there is a building momentum for change on the Dampier Peninsula and the current impasse between the various existing institutional arrangements simply cannot go on for too much longer. The current circumstances present a unique opportunity for Bardi and Jawi to set the terms and conditions over land and resource use on Bardi and Jawi Country by insisting that the Foundational Principles are the starting point for all negotiations. Anything and everything can be put on the table for negotiation.

For both RNTBCs, if the application of Foundational Principle Two is successfully applied, then this is where both RNTBCs should also be able to negotiate how their land use and occupancy planning can be seen as being of equal status to the State's statutory planning and land management arrangements and to develop a collaborative space for bringing the two planning systems together to achieve mutual outcomes by agreement.

Negotiating land tenure and value capture

Here, the Model aims to reinstate Aboriginal peoples' control over what happens on their land, how it happens, for how long and the nature of the transactional arrangements that will apply. As discussed earlier, this includes the use of leasehold as the form of tenure because native title rights and interests do not have to be extinguished for this land administration tool to be applied. Furthermore, all dealings in land have a transactional value, including increases in value arising from external factors, including changes in land use zonings, the provision of infrastructure and the investment decisions of adjoining landowners/users. Capturing these 'unearned' increases in land value, preferably through land rent rather than a one-off premium payment up front, is a crucial factor in restoring equilibrium in the system. Where native title rights and interests are not extinguished, land rent should be charged to other users. This would be in line with the

definition of 'owner' in most planning and land administration statutes around Australia because a landowner includes those entitled to receive rent from the land. Whether concessional rents apply for community uses or where land is leased to their own people for essentially communal and not private purposes is a matter for the relevant native title holders to determine.

For Yawuru, the transactional costs are likely to be of considerable value given Broome is a key tourist destination and a major hub in the Kimberley region. For Bardi and Jawi there are no apparent reasons why they should be required to surrender and extinguish their native title rights and interests in perpetuity. As discussed earlier, leasehold tenure is an effective tool for entering into arrangements with others or with their own people for the use of their traditional lands, including the payment of rent with regular reappraisals.

Evaluation of the Model

If the necessary attributes for coexistence[717] can be agreed, then it is arguable that the Model can satisfy all of the Foundational Principles at all three levels. **Table 9.3** shows, ideally, the conditions that have to be agreed at each of the three distinct levels in the hierarchy of land ownership, use and tenure and that all of the Foundational Principles can be satisfied at each level. It should be noted that the outcomes in any particular locality will depend on the ability of the parties to reach agreement on the application of the Foundational Principles and how the Model is to be applied in the circumstances. The assessment shown in **Table 9.3** is therefore indicative only.

[717] Discussed in Part 9.2 above.

Table 9.3 Evaluation of Model for Parity and Coexistence against the Foundational Principles for Parity and Coexistence

Assumptions:	Foundational Principles:									
(a) A native title determination is a confirmation of Aboriginal sovereignty and their law and custom. (b) Native title is a property right equal to any other property right. (c) Aboriginal law and custom has a way of governing the use, allocation and distribution of resources among their peoples. (d) Aboriginal peoples have their own approaches to planning land use, allocation and tenure. (e) Sovereign-to-sovereign relationship is the basis for all negotiations. (f) Foundational Principles forms the basis of all negotiations over land/resource use and tenure. (g) Aboriginal peoples have the right to pursue, reject or negotiate development on their lands.	1	2	3	4	5	6	7	8	9	10

THE INTERCULTURAL CONTACT ZONE BETWEEN TWO DISTINCT LAWS AND CUSTOMS WITH RESPECT TO LAND OWNERSHIP, USE AND TENURE			Does this layer satisfy the Foundational Principle?								
Column A **Aboriginal and Torres Strait Islander Peoples and their Estate**	***Column B*** ***A safe dialogic space for collaboration and action***	***Column C*** **The Settler State and the Crown Estate**									
Box A1 ***Indigenous governance and RNTBC:*** NTRB/SP pursues the native title claim, assists claimants to establish a RNTBC and assists with the development of its corporate governance structure and capacity. Indigenous governance advises/supports RNTBCs with decision making under their law and custom and methods for engaging with others on a nation-to-nation basis.	**Box B1** **Negotiating land ownership** A determination of native title rights and interests: Confirms Aboriginal sovereignty and their ongoing law and custom. Native title as a property right, equal to any other and can be of exclusive possession and/or non-exclusive possession. Sovereign-to-sovereign relationship is the basis for all negotiations. The Foundational Principles in Chapter 8 forms the basis of all negotiations over land/resource use and tenure.	***Box C1*** ***State/Territory Government:*** The Crown is no longer the source of all authority over land and waters. The state relinquishes power of compulsory acquisition over native title. Extinguishment of native title only on basis of FPIC as negotiated with native title holders, and compensation only on just terms.									
Box A2 ***Aboriginal Planning:*** Aboriginal peoples undertake land use and occupancy planning according to their law and custom consistent with their values, worldviews and processes.	**Box B2** **Negotiating land/resource use** The 'third planning space' is where the parties bring together their respective planning outcomes and jointly develop land use and resource management plans based on mutual respect, collaboration and partnership. Areas may be identified for protection, and other areas being identified for development or other resource use, for public infrastructure or other public use.	***Box C2*** ***State-based statutory & strategic planning:*** State undertakes land use and environmental planning and management consistent with their values, worldviews and processes.									
Box A3 ***Native title holders:*** Native title holders decide how they want to hold and protect their native title rights into the future. They also decide to what extent their native title rights and interests may be suppressed for a period and on what terms, including payment of rent.	**Box B3** **Negotiating tenure and land value capture** Form of tenure(s), specific to the proposed land/resource use are agreed. Title must be able to be used as collateral for finance for home ownership or economic development, where relevant. Payment of rent is agreed for use of land that affects or suppresses native title rights and interests. State/Territory land title Registrars could be contracted by native title holders to perform land administration functions under their direction.	***Box C3*** ***Land user(s):*** Land users have use and enjoyment of land, including the ability to use the title as collateral for finance and where relevant for economic development, but subject to terms agreed with native title holders, including payment of land rent where appropriate.									

Legend:
No
Partially
Yes

9.6 Conclusion

The desire for coexistence between the two systems of land ownership, use and tenure as reflected in the statements at the very beginning of Chapter 1 has been explored and shown that it is possible. The Model for Parity and Coexistence developed in this Chapter recognises the sovereignty of Aboriginal peoples over their ancestral lands, especially where native title determinations can be made under the current native title regime and without creating an inconsistency with Australian sovereignty over the same territory. Applying the Foundational Principles in Chapter 8 and the international human rights norms and standards reflected in the UNDRIP (UN, 2007), the Model removes the necessity for native title holders to sever their cultural connections to and responsibilities for their ancestral lands through extinguishment of their rights and interests against their will should they choose to use their lands to participate in the broader economy.

The Model reinstates native title holders' traditional land ownership and decision-making over their ancestral lands without outside interference and on their terms including their free, prior and informed consent, consistent with the UNDRIP (UN, 2007) on matters affecting their rights and interests. The Model does this by placing Aboriginal planning alongside state-based planning and creating a dialogic space between them for collaborative planning and action about land ownership, use and tenure. The dialogic space must be a safe space where concerns can be raised and avoidance and fearfulness can be overcome. It must also be a space where Aboriginal peoples, the state and land users can come together to raise concerns, engage with disagreement and conflict, and work creatively and collaboratively to develop mutually agreeable and workable solutions.

The Model also operates at three different levels, dealing with ownership, use and tenure separately, but also together as interconnected but differentiated elements. At the ownership level, the negotiations are over the existence of native title, restitution of Aboriginal ownership over their ancestral lands and their right to make decisions over their lands, including the right to say 'No'. At the land use level, the negotiations are about bringing the two systems of planning together to develop land use outcomes based on mutual respect rather than domination by one party over the other. At the tenure level, the negotiations are over who gets access to their lands, for what purpose(s) and on what terms and conditions, with leasehold as

the primary tool for managing those arrangements, including the payment of rent and enforcement of conditions.

While the Model was developed to specifically address issues in the Kimberley region of WA, the Model can also be applied elsewhere across Australia, wherever native title determinations are being made.[718] The final chapter summaries the findings and conclusions of this research.

[718] This is not to deny the fact that Aboriginal peoples everywhere have the right to have their inherent connections to their ancestral lands recognised by the state in some form, including where native title rights and interests have been determined by the FCA to have been extinguished or no longer to exist, or in circumstances where the *Native Title Act 1993* (Cth) confirms the past extinguishment of native title rights and interests by certain valid or validated past acts or intermediate period acts. These issues are beyond the scope of this thesis.

Chapter 10
FINDINGS AND CONCLUSIONS: A just and peaceful coexistence

> *'What Aboriginal people ask is that the modern world now makes the sacrifices necessary to give us a real future. To relax its grip on us. To let us breathe, to let us be free of the determined control exerted on us to make us like you. And you should take it a step further and recognise us for who we are, and who you want us to be. Let us be who we are – Aboriginal people in a modern world – and be proud of us. Acknowledge that we have survived the worst of what the past has thrown at us, and we are here with our songs, our ceremonies, our land, our language, our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way.'*
>
> Galarrwuy Yunupingu, 2016:28.[719]

10.1 Introduction

This thesis attempts to demonstrate precisely how that spirit of equality before the law called for by Galarrwuy Yunupingu can be understood and perhaps achieved in Australia with respect to land ownership, use and tenure. This thesis hypothesised that if native title is perceived as an intercultural contact zone between two distinct systems of land ownership, use and tenure, then it will evince potential alignments that are conducive to respectful and just coexistence, and that native title holders do not always have to agree or be required by others to the surrender and permanent extinguishment of their native title rights and interests in order to participate in the economy, on their terms and at their choosing. This thesis therefore explored whether there is scope for seeing native title rights and interests as being at least equal (if not superior) in status to the Crown's land interests and examined what causes Aboriginal peoples' ancestral lands rights to be framed in such a way that prevents them from being able to use their land to participate in the economy, on their terms and at their choosing, rather than by others.

This thesis makes a unique contribution to methodological approaches, empirical enquiry, conceptual thinking, theoretical analysis and practical application in relation to Indigenous land rights and justice. The discussion about the research methods in Part 1.5 of Chapter 1 showed how this research was driven by the case study RNTBCS, Bardi and Jawi and Yawuru, because of the realities of what they are currently dealing with: The complex interactions between their determined native title rights and interests on the one hand and the Settler state's land interests

[719] Yolngu Elder.

on the other, presenting them with serious challenges about their respective futures. By applying elements of a constructivist grounded theory method, I was able to adopt an iterative flexible design approach to examining what is happening in two particular localities in the Kimberley region of WA. Hence, I was able to work deductively from ideas and theory toward observable empirical evidence, while at the same time work inductively building from empirical observations toward more abstract thinking, followed by a grounded approach to developing practical tools that can be applied in the real world. The Bardi and Jawi and Yawuru RNTBCs largely drove the direction of this research in their search for a model of coexistence that would enable two distinctly different systems of land ownership, use and tenure to coexist in parity and justice.

The research for this thesis answers the critical research question and the inter-related research questions posed in Part 1.4 of Chapter 1 of how two distinct systems of land ownership, use and tenure can coexist alongside each other and what conditions are necessary for this to happen with parity, respect, reciprocity and justice. Specifically, the research found that a native title determination, whether of exclusive and/or non-exclusive possession, can be viewed as an intercultural contact zone with identifiable characteristics that enable two distinct systems of land ownership, use and tenure to coexist with parity, respect, reciprocity and justice.

The research findings are summarised, chapter-by-chapter in Part 10.2 below. Part 10.3 provides a summary of the empirical findings in the two case study localities. Part 10.4 provides a summary of the conceptual and theoretical contributions to understanding the interactions between two culturally distinct approaches to property in land. Part 10.5 provides a summary of the contribution the research makes to the practical aspects of coexistence between two distinct forms of land ownership, use and tenure. And Part 10.6 presents some final conclusions.

10.2 Research Summary

Chapter 1 presented an outline of the stark reality confronting Australia with two systems of law and custom relating to land constantly interacting with each other and the need for research on how they can co-exist with parity based on mutual understanding, respect, reciprocity and justice. Chapter 1 also provided an outline of the thesis content and structure.

Chapter 2 explored the roots of Australia's predicament in not having recognised the prior land rights of the Aboriginal peoples' by examining the influence of Western property theory in

colonial times, how the Judiciary dealt with Aboriginal peoples' rights between 1788 to 1992 including *Mabo (No. 2)*, and how the Aboriginal estate was created through the statutory Aboriginal land grants/transfer schemes and native title determinations arising from the NTA. Chapter 2 concluded that Western property theory in colonial times influenced the constructs of property and viewed the Aboriginal peoples in Australia as being without society, sovereignty or property and sought to imbue them into European civilisation. While this history of misconception, denial and dispossession was finally dispelled in *Mabo (No. 2)*, Aboriginal peoples' land rights still remain significantly constrained by the supremacy of the Australian legal and policy framework.

Chapter 3 analysed the disjuncts arising from *Mabo (No. 2)*, the dilemmas posed by the Commonwealth's pursuit of Indigenous land tenure reforms and the challenges arising from Aboriginal peoples' declarations to reshape Australia. Chapter 3 concluded that while ground breaking in some respects, the HCA's decision only went part of the way in realigning the law with the truth about the dispossession of Aboriginal peoples from their ancestral lands. The analysis confirms that native title as currently prescribed in Australia is a highly constrained contrivance of the courts and the Federal Parliament on the Settlers' terms, not on Aboriginal peoples' terms, and not on terms agreed between the parties and with the free, prior and informed consent of the Aboriginal peoples. The research found that Aboriginal peoples have been making declarations at regular intervals since the 1930s about their rights and how they want past injustices addressed, all of them calling for a treaty between Aboriginal peoples and Australian governments and for recognition of their ancestral land rights. Chapter 3 therefore concluded that we need to break away from the current narrow frameworks for recognition and move toward restitution of Aboriginal peoples' rights and interests if we are to achieve a true and lasting foundation for equality and justice between Aboriginal peoples and the Settler state.

There are many concepts relating to property that we take for granted. It was necessary in Chapter 4 therefore, to unpack several concepts to clarify their application to this thesis' research and analysis. The concepts include property in land, land use and planning, and land tenure and land titles. The differences between a Torrens title and the Native Title Register were outlined. The concept of the 'recognition space' between native title and the Crown's interests was revisited because, as argued in Chapter 6, it is time to move beyond that concept. The parameters of other concepts such as coexistence, equality and justice, and dialogue were

also outlined to provide a clear understanding of their application to the analysis in subsequent chapters.

Chapter 5 explored the notion of a common understanding of property in land, noting that property is a legal, economic, social and political phenomenon performing a dual function in the use and distribution of resources and influencing people's wealth and wellbeing. Indigenous and Western theories of property and ownership were explored and contrasted. It is concluded that Indigenous approaches to property embrace a relationship based on an indeterminable and inalienable spiritual connection to land and exclusive possession through their bloodline. Whereas Western approaches to property embrace a relationship based on a dispensable material connection to land. The research found there are points of commonality between Indigenous and Western approaches to property because they both have mechanisms for allocating land, regulating land use and accessing or distributing land and its resources among their respective citizenry and others, albeit that the time horizons and cultural values attached are different. The analysis of the differences between Indigenous and Western approaches to property in Chapter 5 argued that a critical test for parity between the two systems is the nature of their perpetual obligations to property, especially over time and through generations. It is concluded that Indigenous approaches have a much deeper commitment to land that includes respect for its natural limits and the condition in which land is nurtured and passed to future generations.

In Chapter 6 the hypothesis and critical questions were addressed. The hypothesis surmised that native title can be seen as an intercultural contact zone between two distinct systems of land ownership, use and tenure and that while there will be contestation between the two systems, there will also be room for a respectful and just coexistence. The hypothesis also surmised that if the two systems of land ownership, use and tenure can coexist alongside each other respectfully, then native title holders will not always have to forego their ancestral land rights through extinguishment in order for them to engage in the economy on their terms and at their choosing. The critical question therefore, was what legal and practical conditions are necessary for this to happen with parity based on mutual respect, understanding, reciprocity and justice? The analysis in Chapter 6 found that a native title determination is a declaration of the authenticity and validity of Indigenous customary law and that native title can be viewed as an intercultural contact zone – a space where cultures not only meet, clash and grapple with each other, but also full of possibilities and perils that need to be explored together. In that

context, I argued that a contact zone should be a place of productive tension for collaboration based on mutual understanding, respect and reciprocity, thereby overcoming the asymmetrical power relations that have always dominated the dealings between Aboriginal peoples and the Settler state. The final analysis in Chapter 6 pivoted on two significant findings. Firstly, that a just approach to coexistence requires the parties to engage openly about the meaning and significance of each other's laws, customs, practices and values in order to develop a level of mutual understanding and respect for difference. And secondly, that reciprocity requires engagement with disagreement and conflict, rather than avoidance and fear of the unknown.

Chapter 7 unravelled the legal, institutional and practical complexities of the interactions between the native title rights and interests and the Crown's rights and interests in two different localities. The research and analysis verified that each legal, institutional and practical layer acts as a form of dispossession, alienation and control over Aboriginal peoples' daily lives. What emerges from this analysis is the inherent nature of the conflict and tension between the two systems.

The points of divergence include the power imbalance between the native title holders and the Crown, who dictates the parameters of the discourse between them. The level of proof required for the recognition of native title rights and interests and the conditions for extinguishment imposed by the Crown create a hurdle for Aboriginal people between their understanding of the extent of their relationship with their land and that accepted by the Crown. The points of convergence are that they both encompass a form of property relations that transcend the individual members of the community with mechanisms that enable the wider community to enact a form of control over land access, land use and the distribution of its resources in ways that do not always prejudice longer term sustainability for future generations.

Chapter 7 concluded therefore, that Aboriginal law and custom is not eradicated by Western law, that native title determinations are an affirmation of Aboriginal peoples' ancestral land rights and interests under their law and custom and therefore their superior right to the land because it preceded the Crown's interests. Chapter 7 also concluded that Aboriginal peoples' laws and customs relating to land ownership, use and tenure warrant recognition as being at least equal in status to the Crown's land ownership and tenure system.

By adopting an approach that rests firmly on mutual understanding, respect and reciprocity between two distinct cultures, Chapter 8 establishes ten foundational principles as the basis for

parity and coexistence between two culturally distinct systems of land ownership, use and tenure. The research for the Foundational Principles found that Aboriginal peoples have been making declarations about their rights for over 80 years with eleven declarations between 1937 and 2018[720] and another eight statements of principles between 2005 and 2017.[721] The Foundational Principles also establish a basis against which existing and alternative approaches to land ownership, use and tenure can be evaluated. Aligning the Foundational Principles with the UNDRIP showed how the Principles reflect the minimum international human rights norms and standards when working with Aboriginal peoples' land rights in Australia. This alignment was done because the UNDRIP expresses rights and by doing so, it explains how Indigenous peoples want nation states (and others) to conduct themselves when dealing with Indigenous peoples about matters that affect their rights and interests.

In Chapter 8 an evaluation of two specific sites in the case study localities shows that existing legislative and policy settings cannot satisfy the Foundational Principles. Principally because the Crown in the right of the state continues to hold the radical title and can exercise the power of compulsory acquisition over native title rights and interests at any time and native title holders have no power of veto over what can happen on their ancestral lands.[722] This analysis leads to the conclusion that a new approach to land ownership, use and tenure is required if Australia is to come to terms with the truth about how it asserts its sovereignty over the Aboriginal peoples and nations of Australia and frees itself from the prevailing orthodoxy that the Crown is the only source of all authority in Australia. This involves reconstituting the Australian property system in such a way that Aboriginal peoples' land rights and interests are viewed as being at least equal, if not more superior, to the Crown's rights and interests.

The challenges the RNTBCs are facing in the case study localities are not only a theoretical problem, but also a very real contemporary problem affecting Aboriginal peoples' every-day lives, livelihood and wellbeing. Chapter 9 therefore developed a Model for Parity and Coexistence and a framework for applying the Model (discussed in Part 10.5 below) as tools (to be used, adapted and tested by others) for ensuring the two systems of land ownership, use and tenure can co-exist alongside each other based on mutual respect and justice and without

[720] Documented in Chapter 3.
[721] Documented in Chapter 8.
[722] Including over exploration and mining for mineral resources (J. Norman, 2018:9).

arbitrary and undue interference, provided the parties are willing to commit to applying the tools.

10.3 Empirical Findings

In many respects, the methods applied for this thesis research had to be designed as the research evolved to ensure the analysis was authentic, contemporary and grounded in reality. The circumstances in two case study RNTBCs were comprehensively examined through detailed lengthy fieldwork. The research with the case study RNTBCs entailed culturally informed ethnographic fieldwork through extraordinary access to in-depth meetings with RNTBC Boards of Management and their senior staff while they were discussing land tenure, native title and local governance matters. The fieldwork also involved traversing the corridors of power in state and federal bureaucracies and interviewing key native title practitioners and researchers in academia in order to capture the standpoints of key stakeholders. The empirical research entailed reading through several layers of documents governing native title, land use planning policies, planning strategies and statutory planning schemes, land administration manuals, land tenure registers and individual title deeds, Aboriginal cultural heritage records, local institutional governance arrangements and municipal and essential service delivery in order to understand the dynamics and complexity of interactions in Aboriginal communities in both remote and urban settings.

Overall, the thesis analysis elucidates the frictions that exist between the two systems of land ownership, use and tenure and how the current state of affairs is underpinned by an entrenched belief by governments that Aboriginal culture is incompatible with economic development and that native title must be extinguished or somehow suppressed. The research revealed that what is at stake is the configuration of power relations between two culturally different societies that we have been conveniently denying for the past 230 years.

For Bardi and Jawi the most significant challenge is the revocation of the highly protected reserve status over a significant portion of their Country, including one of their communities. On the one hand the reserve status positions the community indefinitely in a state of insecurity with an ill-defined status and fully dependent on the state. On the other hand, residency in the community is quarantined to Bardi and Jawi people only and the community is protected from any external intrusions, including visitors without a permit (though only when properly enforced). Under current prevailing legal and policy settings, the revocation of the reserve

status will have deep and long-lasting ramifications on the community of Ardyaloon, including the loss of control over who can or cannot reside in the community, who will be able to own land in the community and the extinguishment of native title rights and interests forever. As yet, no native title agreements have been struck between Bardi and Jawi and the WA Government, which gives Bardi and Jawi the opportunity to set the terms of any negotiations.

Yawuru faces significant challenges both from within its own constituency as well as from the wider public over perceptions about the opportunities and constraints of native title within and around the urban fabric of Broome. Although there was widespread extinguishment of their native title rights and interests over large parts of Broome given its tenure history, Yawuru is the largest single landholder in and around Broome.[723] Yawuru also faces the very same challenges with respect to the revocation of the reserve status over at least two significant Aboriginal settlements in Broome. However, the most significant challenge facing Yawuru is making prudent and responsible investment decisions to ensure Yawuru people continue to benefit in perpetuity from their native title rights and interests and other landholdings in and around Broome, and not compromise opportunities for improving the provision of services to the Yawuru people and to Broome's Aboriginal residents and service population. The pointy end of this challenge is in locations where their native title lands have both high cultural and economic values in juxtaposition with each other. While Yawuru has struck two ILUAs with the State following their native title determination, Yawuru does not view the ILUAs as the full and final resolution of their grievances with the state. At the time of writing, Yawuru is in the early stages of reviewing its agreements with the WA Government, which also presents Yawuru with an opportunity to set new terms for further negotiations.

Both RNTBCs are confronted by the same dilemmas. Firstly, having to decide how they will continue to hold and protect their native title rights and interests into the future and how they can use their property rights to engage in the economy on their terms and at their choosing. Secondly, how they will determine land ownership, use and tenure on their lands by others and by members of their own community, alongside their continuing native title rights and interests in a way that does not require their permanent extinguishment and loss of transmission to future generations of native title holders. In many respects these two dilemmas are inseparable, because the first has substantial ramifications for their native title rights and interests, while the second places some enormous responsibilities on the RNTBCs as land authorities in their own

[723] After the State Government.

right in order to protect their native title rights from further loss, diminution, impairment or extinguishment and to act as prudent land managers at all times. The burden of responsibility on the RNTBCs to work their way through these challenges and dilemmas in order to make informed choices about the future of their native title rights and interests and what works best for them, is daunting.

The case study research found that the failure to recognise Aboriginal peoples' sovereignty and their rights to self-determination and free, prior and informed consent are at the heart of the discourse over Aboriginal land rights and land tenure reforms. The case study research also found that land is an integral part of Aboriginal peoples' being and wellbeing and that their obligation to care for and to nurture their ancestral Country for present and future generations still to come cannot be extinguished by the Australian state, which explains why they see extinguishment as being 'repugnant'.[724]

10.4 Conceptual and Theoretical Contributions

The research for this thesis makes several conceptual and theoretical contributions to understanding the interactions between two culturally distinct approaches to property in land. The thesis research found that if property in land is an essential component of any society and how it controls, uses and transmits its property determines the wellbeing of its citizens and ultimately the planet, then the elements of ownership, use and tenure constitute the points of commonality in property. By separating ownership, use and tenure, it is possible to ascertain how the constitutive elements are applied by/in different cultural domains to manage who owns the land, what use is made of the land and how transmission or tenure is managed, including over time and through generations. It was concluded therefore that these three elements are capable of forming the basis for comparing and managing interactions between Indigenous and Western systems of property.

I did not plan to return to Noel Pearson's oft-cited concept of the 'recognition space' between two culturally distinct laws and customs, but as the research unfolded, I realised the value of Pearson's idea of placing two culturally distinct systems of law and custom side-by-side and on a level playing field. Pearson's idea was that the two systems of law and custom overlap, to a degree, and he termed this overlap as the 'recognition space'. However, my interpretation has

[724] As cited earlier in this thesis, I. Watson (2015:161); Yu, (2016a:2).

always been that the two systems are constantly interacting with each other on all matters, but especially in relation to land and property matters as demonstrated by **Table 4.1** and **Figure 4.4** in Chapter 4.

The thesis research argued that because a native title determination is an affirmation of Aboriginal peoples' land rights and interests it can therefore be viewed as an intercultural contact zone between two systems relating to property in land. While an intercultural contact zone may be an emergent and unpredictable space, the research revealed that it can be a space where concerns can be raised and the parties can work together, creatively and collaboratively, based on mutual respect, reciprocity and justice. The thesis research also revealed that a key ingredient is for the parties to come to the negotiating table as equals and not with one side always having some form of superiority over the other. The research argued that avoidance and fearfulness must be overcome by ongoing dialogue where Aboriginal peoples, the Settler state and land users can come together to raise concerns, engage with disagreement and conflict and work creatively and collaboratively to develop mutually agreeable and workable solutions. The research also argued that restitution is an important consideration in creating a just and moral society and for two systems of land ownership, use and tenure to coexist with relative autonomy and equality.

This thesis therefore concluded that it was time to move beyond the recognition space and view the two culturally distinct systems as interacting with each other on matters of mutual concern with relatively equal autonomy rather than hierarchically, and through agreements rather than adversarially through the courts. The thesis research argued that outcomes between parties are better negotiated rather than being imposed by courts or unilaterally by governments, especially in matters relating to property in land.

The Model developed in Chapter 9 captures the contact zone between two culturally distinct systems and gives a practical resolution to the equality that Galarrwuy Yunupingu spoke of at the beginning of this Chapter. The Model is a conceptual and theoretical construct that I have created in order to explain how the two systems can and should work together. The Framework for applying the Model provides the next steps to making the Model a reality.

10.5 Contributions to Praxis

This thesis therefore makes a valuable contribution to praxis in land administration and land use planning in the form of a practice Model and a framework for applying the Model through which the Foundational Principles for Parity and Coexistence can be actualised, especially in the context of the current native title system in Australia.

The thesis analysis rests on a deep understanding of a complex contemporary policy problem confronting not only the two case study RNTBCs, but also many other RNTBCs across Australia in similar circumstances. The research found that the failure of the Settler state to recognise Aboriginal peoples' pre-existing land rights and sovereignty and the ongoing denial and obfuscation by governments to deal with these matters is leaving a mess that is becoming increasingly difficult to resolve without the requisite tools.

Drawing on the conceptual framework (Chapter 4), the theoretical analysis (Chapter 5), the application of the hypothesis and answers to the critical questions (Chapter 6) and the results of the case study analyses (Chapter 7), this thesis developed the requisite tools for analysing and working through the challenges (Chapters 8 and 9). The tools are deliberately aimed at reconstituting property relations in Australia by addressing the current power imbalance between two distinct laws and customs relating to land within the existing native title system. As discussed, the Foundational Principles are based on the declarations and statements made by Aboriginal peoples over the past eighty years and the research argued that the Principles are inter-related and must be applied equally for two systems of land ownership, use and tenure to operate side-by-side with parity and justice. The Model for Parity and Coexistence recognises Aboriginal peoples' sovereignty over their ancestral lands, especially where native title determinations can be made under the current native title system, and their rights to self-determination and FPIC consistent with the UNDRIP (2007).

The Model places the two systems of land ownership, use and tenure side-by-side on a level playing field and operates at three different levels dealing with ownership, use and tenure separately, but consecutively. The Model reinstates Aboriginal peoples' land ownership and decision-making over their ancestral lands without outside interference and on their terms. The Model also removes the necessity for Aboriginal people to sever their cultural connections to, and responsibilities for, their ancestral lands through extinguishment of their rights and interests against their will under any circumstances. The Model includes a form of leasehold tenure that

might offer the greatest potential for respecting Aboriginal peoples' inherent connections to and cultural responsibility for country. **Vignettes 2 - 5** in Chapter 9 demonstrate the realities of the issues and that practical solutions are possible. The framework for applying the Model systematically works through what actions require a decision and how those decisions need to be made. Furthermore, changes to State Constitutions or the Australian Constitution are not required to apply the Model, although amending them to recognise the sovereignty of the Aboriginal peoples may be an ideal outcome of the treaty negotiations that applying the Model will precipitate.

More importantly, the practical tools in this thesis make a valuable contribution to planning and governance *if* the parties are prepared to consider a different kind of relationship based on understanding, mutual respect, reciprocity and a willingness to negotiate over land ownership, use and tenure matters in all respects. The 'if' is emphasised here because the proposition rests on a significant paradigm shift in terms of the relationship between Aboriginal peoples and the state over land ownership, use and tenure. The thesis research found that this is what the case study RNTBCs want.

10.6 Conclusion

This research found, indisputably, that divergent understandings of property and the failure to recognise Aboriginal peoples' sovereignty and prior ownership of Australia have created a cleavage between the Aboriginal peoples and the Colonisers that has wreaked havoc on Aboriginal and Torres Strait Islander peoples and communities for the past 230 years and undermines the state's claims to sovereignty.

As a direct consequence, Aboriginal peoples have been making declarations over the last 80 years and statements of principles about their rights with increasing crescendo over the last 15 years. In the 1960s to the 1990s the fight was particularly about land rights. The Aboriginal leaders over that period put up a good fight. There have been some very significant wins, including the various statutory land grants/transfer schemes created prior to *Mabo (No. 2)* and since the enactment of the NTA several native title determinations and an increasing number of ILUAs. The native title system is leading to more frequent and deeper interactions in which new spaces of engagement, recognition, dialogue and agreement making are taking place. But in many respects a native title determination can be a hollow victory because the system is not resulting in the tangible outcomes that Aboriginal peoples are seeking, largely because the

power relations are remaining deeply asymmetrical. Evidenced by the onerous difficulties associated with successfully prosecuting native title claims, the inalienability of the resultant property rights, the Crown's monopoly power of extinguishment, the lack of veto by native title holders over what other people or governments can do on land subject to native title. The thesis research found that governments' unwillingness to listen and act on Aboriginal peoples' demands is fuelling their frustrations.

The thesis research also found that the next generation of Aboriginal leaders are asking some difficult questions: How can Aboriginal peoples' rights be exercised such that they deliver the outcomes that Aboriginal peoples want? How can Aboriginal peoples determine their own destinies? How can Aboriginal peoples protect their cultural heritage from further erosion? How can Aboriginal peoples' control what happens to and on their ancestral lands?

This thesis fits into the conversation about turning rights into realities. This thesis postulated that ever since colonisation there are two systems of law and custom operating in Australia, especially with respect to land ownership, use and tenure. The critical question that this thesis sought to address is how two culturally distinct systems of law and custom relating to land can co-exist alongside each other respectfully and justly, and what legal and practical conditions are necessary for this to occur with parity, based on mutual understanding, respect, reciprocity and justice.

This thesis provides a comprehensive understanding of the intercultural interactions between two systems of law and custom relating to land within the confines of the existing native title system. This thesis not only explains the divergence and convergence within an intercultural space relating to property in land, but also constructs a robust evidence-based model that could put into practice a more equitable and workable co-existence that recognises the rights of Indigenous peoples' own systems of property that Galarrwuy Yunupingu speaks about at the beginning of this Chapter. The thesis also identifies the points of alignment that could enable the two systems to coexist with parity based on mutual understanding, respect, reciprocity and justice, especially where native title exists.

As noted in Chapters 1 and 7, Aboriginal people regard extinguishment as alien or repugnant to their law and custom. Aboriginal people will argue that their connection to their ancestral lands continues despite the fact that the native title system may determine their native title rights and interests to be extinguished. This raises the question of how Aboriginal peoples' connection to

their ancestral country can be given tangible recognition in such circumstances and taken into consideration in making land use and tenure decisions. As Wensing and Small (2012:16) have previously argued, 'The logic of customary ownership implies that they [Aboriginal Traditional Owners] should have a right of veto against development proposals comparable to that which is the operational power of urban and regional planners. Customary owners have a highly developed sense of responsibility for maintaining their land which suggests that involvement in the planning system should respect the fundamentals of customary ownership and lead to enhanced land use outcomes.' How that might work in practicality is for others to investigate, but the Foundational Principles, the Model for Parity and Coexistence and the Framework for Applying the Model developed in this thesis sets some important groundwork.

The empirical research findings arising from the two case studies in this thesis research argued that it is time to shake off the predisposition about Western law being more superior to Aboriginal law and custom in Australia, that Aboriginal law and custom has not been eradicated by Western law and that it is time to look outside the constraints of the Western legal system and find a new way of working collaboratively with one another beyond current constraints. The thesis research argued that if there is to be a mutually respectful level of co-existence between two distinct approaches to land and if Australia is to achieve a true and lasting foundation for equality and justice, then Australia must move toward restitution of Aboriginal peoples' rights and interests, especially in relation to land and not only where native title rights and interests can be determined to exist, but also in circumstances where it may be difficult to determine under the current native title system. The thesis research also argued that the Australian property system requires reconstituting to respect the cultural differences between the two systems of land ownership, use and tenure and how this can be achieved.

Importantly, this thesis concludes that in order to reach a just solution to Aboriginal peoples' claims to their ancestral lands, three matters must be addressed. Firstly, the legitimacy of how Australia's sovereignty was established must be reviewed. Secondly, the integrity of Aboriginal peoples' systems of relationships to land must be understood, recognised and accepted as having legitimacy and integrity at least equal to that of the Crown's systems of relationships to land. And thirdly, a specifically created space or room for dialogue and ongoing negotiations between the two systems is required. The thesis evidence demonstrates that a pre-condition for such a space is that it must embrace a willingness to learn and to devise new mechanisms for allocating land, regulating its use and accessing/distributing its resources through

negotiation between the two systems. And this thesis provides the conceptual and practical tools to do so, provided the parties are willing to apply the necessary tools.

Finally, the desire for coexistence between the two systems of land ownership, use and tenure as reflected in the statements by three Aboriginal leaders at the very beginning of Chapter 1 has been explored in this thesis and shown that it is theoretically and practically possible. The recognition of Aboriginal peoples' land rights and interests as being at least equal to, if not more superior than, the Crown's land rights and interests is the unfinished business of the colonisation of Australia by the British. It is the unfinished business of the land rights campaigns of the 1960s, 70s, 80s and 90s and the Tent Embassy (Foley and Anderson, 2006; Foley *et al*, 2014), of the Royal Commission into Aboriginal Deaths in Custody (RCADC, 1991a), of the Social Justice Strategy promised by Prime Minister Keating as the third prong of the Australian Government's response to the HCA's decision in *Mabo (No. 2)* (ATSIC 1995), of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (HREOC, 1997), of the Final Report of the Council for Aboriginal Reconciliation and the (Sydney) Harbour Bridge Walk (CAR 2000), of the ALRC's recent review of the NTA (ALRC, 2015a), and of the Final Report of the Referendum Council and the *'Uluru Statement from the Heart'* (Referendum Council, 2017a, 2017b).

As stated in Chapter 1, the Aboriginal peoples of Australia have owned and occupied these lands for over 65,000 years. They have the oldest living culture on Earth. They have the oldest continuing system of land tenure in the world. And they also have the oldest continuing system of land use planning and management in the world. In the same spirit as Galarrwuy Yunupingu states at the beginning of this Chapter and as I have previously stated (Wensing, 2014f:9), these attributes should be perceived as a gift to all Australians, and not a hindrance. It is time therefore to reconstitute the Australian property and planning systems to include Aboriginal peoples' land ownership, use and tenure systems as being of at least equal status to the Crown's systems, if not superior.

The final words to this thesis come from Tom Trevorrow (2010b:233), a Ngarrindjeri Elder, who states 'Let us not leave this unfinished business to our children and future generations. Let us sit down now as mature people and resolve the unfinished business.' Not tomorrow, not the day after, but now.

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Xanthaki, A. (2010) *Indigenous Rights and United Nations Standards. Self-Determination, Culture and Land*, First paperback edition, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, UK.

Yap, M. & Yu, E (2016) 'Operationalising the capability approach: developing culturally relevant indicators of indigenous wellbeing – an Australian example', *Oxford Development Studies*, Volume 44, Issue 3, pp. 315-331. DOI: 10.1080/13600818.2016.1178223

Yawuru

- (2013) *Knowing Yawuru*. Yawuru's Submission to the Joint Select Committee Inquiry into Northern Australia, Submission Number 214. Attachment B. http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia/Inquiry_into_the_Development_of_Northern_Australia/Public_Hearings
- (2014) *Governance*. Accessed 18 June 2014. http://www.yawuru.com/our-organisation/governance/

Yawuru Corporate Group (2010) Yawuru Corporate Group Strategic Plan 2010-2015: Vision, Mission, Values, Vision Statement and Key Strategic Issues. Yawuru Broome. (Extract provided by Yawuru CEO and held on file by the author. Cited with permission.)

Yawuru RNTBC

- (2011) *Walyjala-jala buru jayida jarringunn buru Nyamba Yawuru ngan-ga mirli mirli. Planning for the future: Yawuru Cultural Management Plan. The cultural management plan for Yawuru coastal country and the Yawuru Conservation Estate*. Yawuru, Broome, WA.
- (2014) *The Rule-book of Yawuru Native Title Holders Aboriginal Corporation RNTBC, ICN: 7033*, Office of the Registrar of Indigenous Corporations. Accessed 20 February 2014. http://register.oric.gov.au/document.aspx?concernID=204093

Young, I.M.

- (1996) 'Communication and the Other: Beyond Deliberative Democracy', Chapter 6 in S. Benhabib (ed) *Democracy and Difference. Contesting the Boundaries of the Political*, Princeton University Press, New Jersey.
- (2004) 'Two concepts of self-determination', Chapter 8 in S. May, T. Moddod and J. Squires (eds) *Ethnicity, Nationalism, and Minority Rights*, Cambridge University Press, Cambridge, UK.

Young, S. (2008) *The Trouble with Tradition. Native Title and Cultural Change*, The Federation Press, Leichhardt, Sydney.

Young, S. Nielsen, J. and Patrick, J. (2016) *Constitutional Recognition of First Peoples in Australia. Theories and Comparative Perspectives*, The Federation Press, Leichhardt, Sydney.

Younging, G., Dewar, J. and DeGagne, M. (eds) (2009) *Response, Responsibility and Renewal. Canada's Truth and Reconciliation Journey*, for the Aboriginal Healing Foundation (AHF), Ottawa, Canada.

Yu, P.

- (2013) 'Process from the other side. Liyan in the cultural and natural estate' *Landscape Architecture Australia*, No. 139, August, pp. 26-27.
- (2016a) *Keynote Address*, Northern Development Conference, Darwin, 20 June 2016. http://northaust.org.au/plans-develop-northern-australia-not-embracing-indigenous-population-says-peter-yu/
- (2016b) *Keynote Address*, The Association of South Asian and South East Asian Universities and Colleges Conference, 26 August, University of Notre Dame Australia Broome Campus.

Yunupingu, G.

- (1997) *From Bark Petition to Native Title*, Chapter 1 in G. Yunupingu (ed) (1997) *Our Land is Our Life. Land Rights – Past, Present and Future*, University of Queensland Press, Brisbane, pp. 1-17.
- (2016) 'Rom Watangu. The Law of the Land', *The Monthly*, July 2016. Carlton, Melbourne.

Publications and Projects undertaken by Ed Wensing

(P) indicates independently and blind **Peer Reviewed.**

In 2000, I established my own private consultancy firm, Planning Integration Consultants Pty Ltd, of which I am still a Director.

From June 2008 to October 2012, I was an Associate Director of SGS Economics and Planning Pty Ltd, a firm specialising in urban economics with offices in Melbourne (head office), Sydney and Canberra. I was based in the Canberra office, where we specialised in Indigenous projects.

In these and other positions I have held over the course of my professional life, I have undertaken several research or consultancy projects involving Indigenous people and/or land tenure/land use planning matters that have influenced my thinking on land tenure and native title rights and interests.

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Books

(P) Bird, D., Govan, J., Murphy, H., Harwood, S., Haynes, K., Carson, D., Russell, S., King, D., Wensing, E., Tsakissiris, S., Larkin, S. (2013) *Future change in ancient worlds: Indigenous adaptation in northern Australia*, National Climate Change Adaptation Research facility, Gold Coast. (co-authored book). (266 pages). http://www.nccarf.edu.au/publications/future-change-indigenous-adaptation-northern-australia

This research project examined the underlying vulnerabilities, adaptive capacities and population movements of Indigenous communities in several small towns in northern Australia with various exposures to extreme weather events, climate variability and climate change. The project was completed in 2013. The Principal Investigators were:

- Dr Deanne Bird and Katharine Haynes, Risk Frontiers at Macquarie University.

Other members of the team included:

- Dean Carson, Poche Centre for Indigenous Health, Flinders University, SA
- Jeanie Govan, The Northern Institute, Charles Darwin University, NT
- Sharon Harwood and Helen Murphy, School of Earth and Environmental Sciences, James Cook University, QLD
- David King, Centre for Disaster Studies, James Cook University, Qld
- Pro-Vice Chancellor Steve Larkin, Indigenous Leadership, Charles Darwin University, NT
- Stephen Russell, Defence and Systems Institute, University of South Australia, SA.

[725] ORCID is an open, non-profit, community-based effort to provide a registry of unique researcher identifiers and a transparent method of linking research activities and outputs to these identifiers. More information can be found here: http://orcid.org/about

My role in this project was to provide input and guidance on land tenure, native title and land use planning matters and was provided *pro bono*. The end product was a research report which was published as a book. Even though my contribution was on a *pro bono* basis, I was heavily involved in writing and editing significant parts of the final report.

Book Chapters

(Listed chronologically)

(P) Harwood, S., Wensing, E. and Ensign, P.C. (2016) *Place-based Planning in Remote Regions: Cape York Peninsula, Australia and Nunavut, Canada*, Chapter 6 in A. Taylor, D.B. Carson, P.C. Ensign, L. Huskey, R.O. Rasmussen and G. Saxinger (eds) *Settlements at the Edge: Remote Human Settlements in Developed Nations*, New Horizons in Regional Science, Edward Elgar Publishing, Cheltenham, UK.
http://www.e-elgar.com/shop/settlements-at-the-edge

(P) Wensing, E. (2016) *Dealings in native title and statutory Aboriginal land rights lands in Australia: What land tenure reform is needed?* Chapter 16 in W. Sanders (ed) *Engaging Indigenous Economy. Debating diverse approaches,* CAEPR Monograph No. 35, ANU Press, Canberra.
http://press.anu.edu.au?p=344543

(P) Wensing, E. (2014) *Aboriginal and Torres Strait Islander peoples' relationships to 'country'.* Chapter 2 in J. Byrne, N. Sipe, and J. Dodson (eds) *Australian Environmental Planning: Challenges and Future Prospects.* Routledge, Sydney. (12 pages)

- In November 2014, this book received the Queensland Division Planning Excellence Awards for Cutting Edge Research and Teaching.
<http://www.planning.org.au/awards/qld>
- In May 2015, this book received the Planning Institute of Australia, National Award for Cutting Edge Research and Teaching.
<http://www.planning.org.au/awards/national>

(P) Wensing, E. (2012) *Aboriginal and Torres Strait Islander Australians*. Chapter 11 in S. Thompson and P. Maginn (eds) *'Planning Australia: An overview of Urban and Regional Planning',* 2nd Edition, Cambridge University Press, Melbourne. (22 pages)

- In November 2012, this book received a Commendation in the WA Division's 2012 Planning Excellence Awards in the category of Cutting Edge Research and Teaching.

(P) Wensing, E. (2007) *Aboriginal and Torres Strait Islander Australians*. Chapter 11 in S. Thompson (ed) '*Planning Australia: An overview of Urban and Regional Planning*', 1st Edition, Cambridge University Press, Melbourne. (22 pages)

- In November 2007 this book received NSW Division *Award for Planning Excellence in Planning Scholarship, Research or Teaching* from the NSW Division of Planning Institute of Australia.
- In April 2008 this book received the *National Award for Excellence in Planning Scholarship* from the Planning Institute of Australia

(P) Shain, K., Genat, W. J. & Wensing, E. (2006) *Agreement making in the Local Context: Case Studies from Regional Australia.* Chapter 9 in M. Langton, O. Mazel, L. Palmer, K. Shain and M. Tehan (eds) *'Settling with Indigenous People: Modern treaty and agreement making'* The Federation Press. Sydney. (24 pages)
http://www.atns.net.au/reference.asp?RefID=1492

Research Reports

(Listed alphabetically by Client)

ABIS Community Cooperative Society Ltd (2009-2010) *ABIS Community Cooperative Society Ltd Business Plan 2009-2011*. Prepared by SGS Economics and Planning. The outputs for this project included:

- A business case for different scenarios (50 pages) (Unpublished);
- Modelling and a feasibility analysis (55 pages) (Unpublished);
- A report on policy advice (69 pages) (Unpublished); and
- A final report and business case (101 pages) (Unpublished).

Aboriginal Lands Trust (ALT), South Australia (2015) Various Research Papers prepared by Planning Integration Consultants Pty Ltd:

- (2015) *Advice on information and data collection about the people living on ALT Lands and Communities in South Australia*. (8 pages)
- (2015) *Funding for municipal and essential services in discrete / remote Aboriginal Communities with a focus on South Australia.* (73 pages)
- (2015) *Recent Aboriginal Land Reforms in South Australia.* (29 pages)

Aboriginal legal Rights Movement (ALRM) (2001) *Policy advice,* Prepared by Planning Integration Consultants Pty Ltd:

- (2001) *Issues Paper: Development of a negotiating position on planning and development matters with State and Local Government in SA for native title claimants in SA.* (19 pages) (Unpublished)
- (2002) *Template Indigenous Land Use Agreement (ILUA) between native title holders/registered claimants and local government in South Australia.* (40 pages) (Unpublished)
- (2002) *Issues for negotiation with Local Government: A Discussion Paper for the Narrunga Nations People* (53 pages) (Unpublished)

ACT Chief Minister's Department (2009 – 2011) *Future Ownership and Management Options for the Narrabundah Long Stay Caravan Park,* ACT Chief Minister's Department, ACT Government, Canberra. The outputs for this project included:

- (2009) *Future Ownership and Management Options for Narrabundah Long Stay Caravan Park: Issues Paper* (59 pages).
- (2010) *Narrabundah Park: Options Paper* (134 pages).
http://www.laps.act.gov.au/__data/assets/pdf_file/0008/188450/NLSCP_-_Narrabundah_Park_-_Options_Paper_Final_2010_web_version.pdf

- (2011) *Narrabundah Park: Final Report on Options for Future Ownership and Management* (77 pages). http://www.economicdevelopment.act.gov.au/infrastructure_and_construction/projects/narrabundah_long_stay_park

The ACT Government accepted 25 of the 28 the final recommendations and has worked with the residents to improve the overall living conditions and security of tenure for residents of the Park. http://www.economicdevelopment.act.gov.au/infrastructure_and_construction/projects/narrabundah_long_stay_park

Australian Human Rights Commission (AHRC) (2003) Policy advice to the Aboriginal and Torres Strait Islander Social Justice Commissioner prepared by Planning Integration Consultants Pty Ltd:

- *Report to the Aboriginal and Torres Strait Islander Social Justice Commissioner on Commonwealth Native Title Policy and Practice*. (59 pages) (Unpublished)
- *Report to the Aboriginal and Torres Strait Islander Social Justice Commissioner on Native Title Policy in New South Wales*. (47 pages) (Unpublished)
- *Report to the Aboriginal and Torres Strait Islander Social Justice Commissioner on Native Title Policy in Victoria*. (31 pages) (Unpublished)
- *Report to the Aboriginal and Torres Strait Islander Social Justice Commissioner on Native Title Policy in Tasmania*. (10 pages) (Unpublished)

These four reports were prepared as background material for the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 2003*. The Aboriginal and Torres Strait Islander Social Justice Commissioner's published *Native Title Report 2003* can be found here: http://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/native-title-report-2003

Australian National Audit Office (ANAO) (2010) *Evaluation of the Government Business Managers.* Prepared by SGS Economics and Planning. Outputs for this project included background to the initiatives and the general policy framework; draft findings; and draft final report (104 pages). (Unpublished). However, the ANAO's final report was tabled in Federal Parliament. http://www.anao.gov.au/~/media/Uploads/Documents/2010%202011_audit_report_no18.pdf

Broome Shire Council (BSC) and the Kimberley Land Council (KLC) (2001) *Planning and Environmental Management with Native Title in Western Australia.* Prepared by Planning Integration Consultants Pty Ltd with financial assistance provided by the Legal Aid Branch of the Federal Attorney-General's Department. (110 pages) (Unpublished)

Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), Australian Government (2010) *Baseline Community Profile for Tenant Creek in the Northern Territory*. Prepared by SGS Economics and Planning. Final Report (199 pages) (Unpublished)

Department of Families, Housing Community Services and Indigenous Affairs (FaHCSIA), Australian Government (2009) *Baseline Community Profile for the Groote Eylandt and Bickerton Island Communities of Angurugu, Umbakumba and Milyakburra in the Northern Territory*. Prepared by SGS Economics and Planning. The output for this project included a data base of the characteristics and services on the Islands, and a final report (183 pages). (Unpublished)

Department of Indigenous Affairs, Government of Western Australia (2012) *Living on Our Lands.* Prepared by SGS Economics and Planning. The outputs for this project included:

- *Final Report* with an executive summary (212 pages)
- *Background Paper No. 1. The Aboriginal Lands Trust Estate* (124 pages)
- *Background Paper No. 2 Policy Context and Literature Review* (64 pages)
- *Aboriginal Lands Trust Tenure Assessment Tool: A Resource Manual* (151 pages)
- *Case Study No.1: Kununurra – Mirima and Nulleywah* (91 pages)
- *Case Study No. 2: Halls Creek – Lundja and Nicholson Camp* (116 pages)
- *Case Study No. 3: Dampier Peninsula – Ardyaloon & Beagle Bay* (112 pages)
- *Case Study No. 4: Broome: Overview of Broome's Population and Economic Growth Impacts* (53 pages)
- *Case Study No. 4: The ALT Estate in Broome: An Inventory and Issues for Land Transfer* (107 pages)
- *Case Study No. 4: Inventory of ALT Land in Broome.* Excel Spreadsheet (133 pages).
- The Tenure Assessment Tool was also applied to one parcel of land in each of the case study locations.

The final reports for this study have not been released, but the project is mentioned in the following documents on the Department's website:

- http://www.dia.wa.gov.au/en/News/Events/New-framework-for-Indigenous-Affairs1/
- http://www.dia.wa.gov.au/Documents/News/Events/2012/Land.pdf

Some of the final recommendations of this study are cited in a paper released in March 2013 by the Council of Australian Government's (COAG) Select Council on Housing and Home Ownership on Indigenous Home Ownership.

- http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/indigenous-home-ownership-select-council-on-housing-and-homelessness

District Council of Ceduna (2000) *Native Title Audit for the District Council of Ceduna, SA. An internal audit of Shire planning and development assessment processes*. Prepared by Planning Integration Consultants Pty Ltd (80 pages) (Unpublished)

Gunaikurnai Traditional Land Owner Management Board (2013) *A Project Brief for the preparation of a Joint Management Plan for ten parks and reserves.* Prepared by Context Pty Ltd and Planning Integration Consultants Pty Ltd. (40 pages) (Unpublished)

Indigenous Business Australia (2008) *Native Title and Home Ownership on Indigenous Owned Land in Far North Queensland*. *An Issues Paper and Strategy for developing Indigenous Land Use Agreements on land subject to native title rights and interests*. Prepared by SGS Economics and Planning. (105 pages) (Unpublished)

Infrastructure Australia (2011) *Preparation of a National Strategic Policy Framework and Funding Model for the Planning and Development of Infrastructure in Remote Indigenous Communities*. Advice on the development of alternative models for the planning, provision and financing of essential infrastructure in remote Indigenous communities. Prepared by SGS Economics and Planning. The outputs for this project included:

- An Issues Paper (99 pages) (Unpublished);
- An Options Paper (38 pages) (Unpublished);
- Draft Strategic Policy Framework and Funding Model (25 pages) (Unpublished);
- National and International Case Studies (28 pages). (Published in 2012)

Jimmy Little Foundation and Medicines Australia (2010 – 2011) *Provision of advice and assistance with the development of a Monitoring and Evaluation System for the Uncle Jimmy Thumbs Up! Healthy Food Program*. Prepared by SGS Economics and Planning. The outputs for this project included:

- A report to Medicines Australia (22 pages) (Unpublished)
- Several Appendices:
  - A program logic;
  - A monitoring and evaluation framework;
  - A quarterly activity planning template;
  - A quarterly activity reporting template;
  - A payment schedule; and
  - End of program cycle reporting template. (Unpublished)

Local Government Association of South Australia (LGASA) (2003-2005) *Local Government/Aboriginal Service Agreement Project - Case Study and Guide.* Prepared by Planning Integration Consultants Pty Ltd for the South Australian Office of Local Government and the Local Government Association of South Australia (LGASA). (total 150 pages) Some of this material has been published.

http://www.lga.sa.gov.au/page.aspx?u=277

Local Government Ministers under the auspices of the Australian Local Government Association (ALGA) (2002) *Reconciliation Action Plan – Local Government Ministers' Conference.* Prepared by Planning Integration Consultants Pty Ltd. (25 pages)

New South Wales Aboriginal Land Council (NSWALC) (2009 – 2012) *The Sustainability of the New South Wales Aboriginal Land Rights Network.*
NSWALC was concerned about the longer term sustainability of the NSW Aboriginal Land Rights Network. Between 2009 and 2012 SGS Economics and Planning was engaged by NSWALC to analyse the issues, identify options for improving the longer term sustainability of the network and for undertaking analysis and modelling of the various options for reform. As an Associate Director of SGS, I was the lead researcher for each of the following research projects.

- (2009) *Two Part Discussion Paper on Issues and Complexities Confronting the Network*. (11 pages and 25 pages) (Unpublished)

- (2010) *Report on Modelling of Funding Options for Local Aboriginal Land Councils.* Econometric Modelling and Report (42 pages) (Unpublished)
- (2010) *Final Report on Options*. Econometric Modelling and Final Report. (Unpublished)

  The outputs for this project included:
  - Consequence mapping of over 25 options for reform of the network;
  - A final report (78 pages);
  - A briefing and discussion paper for circulation to members of the network (52 pages).
- (2011) *Detailed Modelling of Funding Options for Local Aboriginal Land Councils*. Econometric Modelling and Report (67 pages) (Unpublished)
- (2012) *Detailed Modelling of Funding Options for Local Aboriginal Land Councils: Update.* Final Report (Unpublished)

  The outputs for this project included:
  - A database of the financial statements of the 115 Local Aboriginal Land Councils in NSW;
  - Econometric modelling of several options;
  - A hybrid funding formula; and
  - A final report (57 pages).
- (2012) *The Hybrid Funding Formula –Explained.* Final Report (34 pages) (Unpublished)
- (2012) *Assessment of Resource Sharing and Voluntary Amalgamations.* Econometric Modelling and Final Report (32 pages) (Unpublished)
- (2012) *NSWALC Situation Report – Update*. Final Report (43 pages) (Unpublished)
- (2013) *The Sustainability of the NSW Aboriginal Land Rights Network A Discussion Paper*. NSWALC, Parramatta. Sydney. (29 pages) http://www.alc.org.au/media/87433/NSWALC%20Sustainability%20Discussion%20Paper.pdf

Native Title Services Victoria (2004) *The Potential for Agreements between Native Title Holders and Local Governments in Victoria,* Final Report, 1st Edition. Prepared by Planning Integration Consultants Pty Ltd. (74 pages) (Unpublished)

Native Title Services Victoria (2007) *The Potential for Cultural Heritage and Native Title Agreements between Aboriginal People and Local Governments in Victoria,* Final Report, 2nd Edition. Prepared by Planning Integration Consultants Pty Ltd. (80 pages) (Unpublished)

NQ Dry Tropics (2009) *Regional Traditional Owner Land and Sea Management entity: Feasibility Study*. Prepared by SGS Economics and Planning. Final Report (132 pages)

Office of Evaluation and Audit (Indigenous Programs), Department of Finance and Deregulation, Australian Government (2009) *Evaluation of the Indigenous Leadership Program*. Prepared by SGS Economics and Planning. Discussion Paper (55 pages); Final Report. (51 pages). (Unpublished). However, the Office of Evaluation and Audit's final report was tabled in Parliament. http://www.anao.gov.au/~/media/Uploads/Documents/performance_audit_of_the_indigenous_leadership_program.pdf

Rubibi Native Title Claimants, Shire of Broome, and the WA State Government (2002) *Rubibi WC99/23 Indigenous Land Use Agreement Consultancy*, Preparation of resources for the development of an ILUA between the parties. Research and documentation prepared by Ed Wensing, Planning Integration Consultants Pty Ltd and Peter Driscoll, Landvision Pty Ltd, and comprised:

- *Framework for an ILUA: An Issues Paper, Volume 1.* (88 pages) (Unpublished)
- *Framework for an Indigenous Land Use Agreement between Rubibi the Shire of Broome and the WA State Government, Volume 2.* (10 pages) (Unpublished)
- *DRAFT Indigenous Land Use Agreement between Rubibi and the WA State Government and the Shire of Broome*. (16 pages) (Unpublished)

Rural Industries Research and Development Corporation (RIRDC) (2010) *Sustainable Rural Economic Development Opportunities in Cape York for Indigenous Australians*. Prepared by SGS Economics and Planning. The outputs for this project included:

- *Final Report* (138 pages) (Unpublished);
- *Good Practice Principles – A tool for comparative analysis of Indigenous economic development initiatives* (29 pages) (Unpublished);
- *Cattle industry review* (29 pages) (Unpublished);
- *Fisheries industry review* (20 pages) (Unpublished).

Shire of Broome (2000) *Native Title Audit for the Shire of Broome*. *An internal audit of Shire planning and development assessment processes*. Prepared by Planning Integration Consultants Pty Ltd (67 pages) (Unpublished)

Shire of Halls Creek (2003) *Consideration of Native Title Matters in the Preparation of a Local Planning Strategy for the Town of Halls Creek in Western Australia*. Final Report. Prepared by Planning Integration Consultants Pty Ltd. (46 pages). (Unpublished)

South West Aboriginal Land and Sea Council (2003) *Development of an Indigenous Land Use Agreement template for 16 Local Government Councils in the Central Ward of SW WA*. Prepared by Planning Integration Consultants Pty Ltd. (28 pages) (Unpublished)
(This was the first such ILUA in WA at the time and set a benchmark for others to follow.)

Urban Frontiers Program, University of Western Sydney (UWS), Planning Integration Consultants Pty Ltd, and Landvision Pty Ltd (2002) *Kimberley Sustainable Region Programme, Strategic Planning Analysis, Volume 1: Executive Summary.* Kimberley Sustainable Region Advisory Committee, Kimberley Development Commission. (49 pages)

Urban Frontiers Program, University of Western Sydney (UWS), Planning Integration Consultants Pty Ltd, and Landvision Pty Ltd (2002) *Kimberley Sustainable Region Programme, Strategic Planning Analysis, Volume 2: Analysis of Reports, Programmes and Key Variables.* Kimberley Sustainable Region Advisory Committee, Kimberley Development Commission. (149 pages)

Yalata Community Inc. (2011) *Strategic Management Planning and CDEP Operational Planning*. Prepared by SGS Economics and Planning. The outputs for this project included a strategic management plan (pp. 16) and a policy manual (51 pages). (Unpublished)

Yalata Community Inc (2009) *Development of a Community Profile and Three-year CDEP Action Plan*. Community profile and a three-year CDEP Action Plan. Prepared by SGS Economics and Planning. (Unpublished)

Journal Articles

(Listed chronologically)

(P) Wensing, E. (2018-19) 'Indigenous rights and interests in statutory and strategic land use planning: Some recent developments', *James Cook University Law Review* (forthcoming).

(P) Wensing, E. and Porter, L. (2015) *Unsettling Planning's Paradigms: Toward a just accommodation of Indigenous rights and interests in Australian urban planning?* Australian Planner, published electronically 11 December.
DOI: 10.1080/07293682.2015.1118394. (13 pages)
http://www.tandfonline.com/doi/pdf/10.1080/07293682.2015.1118394
http://hdl.handle.net/1885/95297

(P) Wensing E, Harwood S, Bird D, and Haynes K. (2014). 'Conflicting World Views: Disjuncture between Climate Change Knowledge, Land Use Planning and Disaster Resilience in Remote Indigenous Communities in Northern Australia'. *Geography Research Forum*, Volume 34, pp. 92-108. (16 pages).
http://www.geog.bgu.ac.il/grf/current.html

(P) Harwood, S., Carson, D., Wensing, E., Jackson, L. (2014) 'Natural Hazard Resilient Communities and Land Use Planning: The Limitations of Planning Governance in Tropical Australia'. *Journal of the Geography of Natural Disasters* Volume 4. Issue 2. (15 pages)
DOI: 10.4172/2167-0587.1000130.
http://omicsgroup.org/journals/ArchiveJGND/currentissue-geography-natural-disasters-open-access.php

Wensing, E. (2013) *Walter Burley Griffin is Dead: Long Live Walter Burley Griffin's Planning Ideals!* Urban Policy & Research, 31:2, 226-240 (14 pages).
DOI: 10.1080/08111146.2013.782799.
http://www.tandfonline.com/doi/pdf/10.1080/08111146.2013.782799

Wensing, E. (2008) 'Caring for Our Country: the new national natural resource management program', *Australian Planner*, Volume. 45, Number 2, pp. 22-23.
DOI: 10.1080/07293682.2008.9982649. (3 pages)

Wensing, E. and Sheehan, J. (2002) Letter to the Editor, *Australian Planner*, 39:3, 131-134 (3 pages).
DOI: 10.1080/07293682.2002.9982302.
http://www.tandfonline.com/doi/pdf/10.1080/07293682.2002.9982302

Wensing, E. and Olsauskas, D. (2001) 'Toward a national education strategy on strategic planning'. *Urban Policy and Research* 19:4, pp. 529-543 (14 pages).
DOI: 10.1080/08111140108727897.
http://www.tandfonline.com/doi/pdf/10.1080/08111140108727897

Macmillan, L. and Wensing, E. (1999) 'Local Government – Working with Native Title', *Local Government Law Journal,* Volume 4, Number 3, pp. 117-123 (6 pages).

Wensing, E. and Macmillan, L. (1999) 'Working with Native Title: Linking Native Title and Council Processes', *Australian Construction Law Newsletter,* Volume 68, pp. 25-29 (5 pages).

Wensing, E. and Davis, R. (1998): Letter to the Editor, *Australian Planner*, Volume 35, Number 1, pp. 2-4 (2 pages).

Wensing, E. (1997) 'Federal Urban and Regional Policy in Tatters!!!' Editorial, *Urban Policy and Research*, Volume 15, Issue 3, pp. 172-173.
DOI:10.1080/08111149708551350. (2 pages)
http://www.tandfonline.com/doi/pdf/10.1080/08111149708551350

(P) Wensing, E. (1994) 'Incrementalism versus Strategic Planning', *Australian Planner*, Volume 32, Number 1. (An earlier version of this paper was also presented to the RAPI's 23rd Biennial Congress in Canberra in 1992) (7 pages).
DOI: 10.1080/07293682.1994.9657655.

(P) Wensing, E. (1992) 'Landlords and Land Use Controls in the Australian Capital Territory', *Australian Planner*, Volume 30, Number 2 (7 pages).
DOI: 10.1080/07293682.1992.9657555.

Discussion Papers/Issues Papers/Policy Papers

(Listed chronologically)

Harwood, S. and Wensing, E. (2017) *Background Report on Draft Aboriginal and Torres Strait Islander Planning Policy for the Queensland Division of the Planning Institute of Australi*a. Planning Institute of Australia and James Cook University.

(P) Wensing, E. (2016) *The Commonwealth's Indigenous land tenure reform agenda: Whose aspirations, and for what outcomes?* AIATSIS Research Publications, AIATSIS, Canberra.
http://aiatsis.gov.au/sites/default/files/products/report_research_report/the-commonwealths-indigenous-land-tenure-reform.pdf

Wensing, E. (2015) *In denial and disarray: Recent history of funding for municipal and essential services in discrete/remote Aboriginal Communities*, A background paper. Posted on Academia in October 2015. (72 pages)

(P) Wensing, E. and Taylor, J. (2012) *Secure tenure for home ownership and economic development on land subject to native title*, Discussion Paper 31, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra. (44 pages)
http://aiatsis.gov.au/ntru/documents/WensingTaylorDP_web.pdf

Indigenous Planning Working Group (IPWG) (2010) *Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Recommendations for Reforming Planning Education Curricula for PIA Accreditation*, A Discussion Paper. Planning Institute of Australia, Canberra. (29 pages) (Co-authored with other members of the Group.)
http://www.planning.org.au/documents/item/2381

(P) Wensing, E. (2003) *Compulsory Acquisition of Native Title and Compensation: Issues for Local Government*. Issues paper No. 7, ALGA. Canberra. (19 pages)

(P) Wensing, E. (2002) *The High Court of Australia's recent decision in Western Australia v Ward1: Implications for Local Government*. ALGA Information for Local Government. (6 pages)

(P) Wensing, E. (2002) *Indigenous Land Use Agreements Involving Local Government.* Issues Paper No. 4, ALGA, Canberra. (19 pages)

(P) Wensing, E. (2000) *Native Title and Local Government: adopting a precautionary approach.* Issues Paper No. 1, ALGA, Canberra. (4 pages)

(P) Wensing, E. (2000) *Following the Future Act processes under the Native Title Act 1993 (Cth)*. Issues Paper No. 5, ALGA, Canberra. (21 pages)

(P) Wensing, E. and Menin, M. (2000) *Future acts in areas where native title holders are unknown*. Issues Paper No. 6, ALGA, Canberra. (5 pages)

Wensing, E. (1999) *Financial Assistance by the Attorney-General in Native Title Cases.* Issues Paper No. 2, ALGA, Canberra. (5 pages)

(P) Wensing, E. (1999) *Comparing Native Title and Anglo-Australian Land Law: Two different timelines, two different cultures and two different laws,* The Australia Institute, Discussion Paper No. 25, Canberra. (43 pages) http://www.tai.org.au/sites/defualt/files/DP25_8.pdf

(P) Wensing, E. (1998) *An overview of the Agreements provisions in the Native Title Act 1993 (Cth)*. Issues Paper No. 3, ALGA, Canberra. (10 pages)

Wensing, E. (1998) *Managing Native Title.* Information Paper No. 2, ALGA, Canberra. (5 pages)

Wensing, E. (1998) *An overview of the amendments to the Native Title Act 1993 (Cth).* Information Paper No. 3, ALGA, Canberra. (15 pages)

(P) Sheehan, J. and Wensing, E. (1998) *Indigenous Property Rights: New developments for planning and valuation,* The Australia Institute, Discussion Paper No. 17, Canberra. (68 pages) www.tai.org.au

(P) Wensing, E. and Sheehan, J. (1997) *Native Title: Implications for Land Management*, The Australia Institute, Discussion Paper No. 11, Canberra. (32 pages) www.tai.org.au

(P) Wensing, E. and Sheehan, J. (1997) *Native Title: Background Paper*, 2nd Edition, Royal Australian Planning Institute and the Australian Institute of Valuers and Land Economists, Melbourne and Canberra. (30 pages)

(P) Wensing, E. (1997) *Is Native Title Rateable?* Information Paper No. 1, ALGA, Canberra. (7 pages)

Conference Papers

(Listed chronologically)

Wensing, E. (2015) *In denial and disarray: Recent history of funding for municipal and essential services in discrete/remote Aboriginal Communities*, a paper presented to the 2015 National Centre for Indigenous Studies' Graduate Research Retreat, 14-15 October, Canberra. Posted on Academia in October 2015. (72 pages)

Wensing, E. (2015) *Land Justice for Indigenous Australians: Dealings in native title lands and statutory Aboriginal land rights regimes in Australia and why land tenure reform is critical for the social reconstruction of Aboriginal people and communities*. Presentation to 'Engaging Indigenous Economy Conference', 4 & 5 September 2014, The Australian National University, Canberra. (An updated version was published in the Monograph of the Conference proceedings in 2015.) (10 pages)

Wensing, E. (2014) *Land Justice for Indigenous Australians: Dealings in native title lands and statutory Aboriginal land rights regimes in northern Australia and why land tenure reform is critical for the social, economic and cultural reconstruction of Aboriginal people and communities.* Presentation to 'CRN Northern Australia Development Conference, A Northern Perspective', The Australian National University, Canberra, 27 November 2014. (18 pages)
http://cdu.edu.au/northern-institute/nad-conference-2014

Wensing, E. (2013) *Managing Canberra's National Heritage Values.* A paper presented to the Australia ICOMOS 2013 National Conference—Centenary of Canberra, 31 October – 3rd November 2013. Canberra. (32 pages)

Wensing, E. (2013) *Nominating Canberra for National Heritage Listing*. A paper presented to the ACT and Region Annual Australian Heritage Partnership Symposium 20 July 2013, Canberra. (22 pages)
http://hdl.handle.net/1885/10300

(P) Wensing, E. and Taylor, J. (2013) *Secure tenure for home ownership and economic development on land subject to native title – Further research.* Paper presented to the 7th Australasian Housing Researchers' Conference, 6-8 February 2013, hosted by Curtin University, Fremantle, Western Australia. (14 pages)

(P) Wensing, E. (2013) *Indigenous land tenure reforms: Implications for land use planning*. Paper presented to the Planning Institute of Australia National Congress 25-27 March 2013, Canberra. (27 pages)

http://www.planning.org.au/whatson/2013-2
http://www.planning.org.au/documents/item/5002

(P) Wensing, E. and Small, G. (2012) *A Just Accommodation of Customary Land Rights in Land Use Planning Systems,* Paper Presented to the 10th International Urban Planning and Environment Association Symposium, University of Sydney, 24-27 July 2012, pp. 164-180.
(This is a later edition of the previous paper and the paper we also presented to the World Planning Schools Congress, Perth, 4-8 July 2011.)

www.upe10.org pages 164-180. (16 pages)
http://sydney.edu.au/architecture/documents/prc/UPE10/UPE10%20Proceedings.pdf
http://hdl.cqu.edu.au/10018/927758

Wensing, E. and Small, G. (2012) *A Just Accommodation of Customary Land Rights in Conventional and Contemporary Land Use Planning Systems*. Paper Presented to the 2012 Institute of Australian Geographers Conference, Macquarie University, Sydney, 4-8 July 2012. (This is a later edition of a paper that we also presented to the World Planning Schools Congress in Perth in July 2011.) (17 pages)

Wensing, E. (2011) *Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Reforming Planning Education in Australia*, Paper No. 112, Presented in Track 12 'Planning Education and Planning Practice' at the 3rd World Planning Schools Congress, Perth (WA), 4-8 July 2011. (20 pages)

(P) Wensing, E. and Howorth P (2011) *Measuring Indigenous Development: Working in a 'recognition space' between two cultures.* Paper No. 113, Presented in Track 13 'Comparative Development Planning' at the 3rd World Planning Schools Congress, Perth (WA), 4-8 July 2011. (24 pages)

(P) Wensing, E. and Small, G. (2011) *A Just Accommodation of Customary Land Rights in Conventional and Contemporary Land Use Planning Systems,* Paper No. 118, Presented in Track 15 'Planning Law, Administration and Property Rights' at the 3rd World Planning Schools Congress, Perth (WA), 4-8 July 2011. (17 pages)

Wensing, E. (2011) *Canberra's National Planning Heritage: 100 Years of Planning from 1911 to 2011* (with acknowledgment of contributions and comments from Grahame Crocket and Ilse Wurst.) Paper 411, Presented in Track 7 'Planning History' at the 3rd World Planning Schools Congress, Perth (WA), 4-8 July 2011. (21 pages)

Crocket, G., Wensing, E. & Wurst, I. (2006) *Canberra's National Planning Heritage*. Paper presented to Eighth Australasian Urban Planning History / Planning History Conference, Wellington, New Zealand. Published in Miller, C. L. & Roche, M. M. (eds.) '*Past Matters, Proceedings of the Eighth Australasian Urban History/Planning History Conference'*, Massey University, Wellington, 9-11 February 2006. (14 pages)

Wensing, E. (2002) *Linking Native Title and Council Processes*, Paper presented to *The Cutting Edge of Change, Shaping Local Government for the 21st Century,* Conference 14-17 February 2002, University of New England, Armidale, NSW and to the Australian Planning Institute Conference, Wellington, New Zealand, April 2002. (13 pages)

Wensing, E. (2001) *Planning with Native Title in Western Australia: Recent Experiences in Broome*, Paper presented to the 2nd Native Title Representative Bodies Legal Conference and National Environmental Law Association National Conference, Townsville, August. (19 pages)

Wensing, E. & Olsauskas, D. (2001) *'Toward a National Education Strategy on Strategic Planning'*, Paper presented to the Australia and New Zealand Association of Planning Schools Biennial Conference (ANZAPS), UNSW, Sydney, 22 September. (16 pages)

Wensing, E. (1997) Native Title Conference, Sydney, 22 May, organised by the Australian Institute of Valuers and Land Economists. Audio held by the National Library of Australia. http://trove.nla.gov.au/work/23976169?q=Ed+Wensing&c=music&versionId=28994384

Wensing, E. (1996) *The future of the planning profession and its national role*, an address as National Policy Director of the Royal Australian Planning Institute to its Queensland Division's Annual Conference, Cairns, August. (10 pages)

Briggs, S. and Wensing, E. (1995) *Cairns Housing Crisis: Roles for Cairns City Council*, A paper prepared for the 'Cairns Housing Summit' 18 July 1995, Far North Queensland Family Resource Centre, Cairns. (20 pages)

Wensing, E. (1991) *The Draft Land Administration Bill - Genuine Leasehold or Pseudo Freehold?* Paper presented to a Seminar on the ACT's New Planning Legislation organised by the ACT and South Eastern Region Conservation Council, Canberra, February. (20 pages)

Public Lectures

(Listed chronologically)

Wensing, E. (2018) *Land Justice for Indigenous Australians: Conceptual, theoretical and practical contributions to the research*, 2 March, Nulungu Research Centre, University of Notre Dame Australia, Broome, WA.

Wensing, E. (2018) *Unsettling Planning's Paradigms: Toward a Just Accommodation of Aboriginal rights and interests in Australian urban planning? An update.* 13 April, Built Environment Faculty, University of New South Wales.

Wensing, E. (2017) *Unsettling Planning's Paradigms: Toward a Just Accommodation of Aboriginal rights and interests in Australian urban planning?* 12 April, Built Environment Faculty, University of New South Wales.

Wensing, E. (2017) *Changing Planning's Policy and Praxis towards Indigenous Australians*, 28 August, Built Environment Faculty, University of New South Wales.

Wensing, E. (2017) *Changing Planning's Policy and Practice toward Indigenous Australians: How can it be done?* Talking Heads Seminar Series, 11 September, Nulungu Research Centre, University of Notre Dame Australia, Broome, WA.

Wensing, E. (2017) *Changing Planning's Policy and Practice toward Indigenous Australians: How can it be done?* 13 September, Geography and Planning Discipline, University of Western Australia, Perth, WA.

Wensing, E. (2016) *Indigenous Rights in Planning: Complicities, Incongruities, Prospects.* 29 August, Built Environment Faculty, University of New South Wales, Sydney.

Wensing, E. (2016) *Indigenous Rights in Planning: Complicities, Incongruities, Prospects.* Second Semester Seminar Series, 10 August, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra. http://caepr.anu.edu.au/Seminars/16/Seminar-Topics%E2%80%94Series-2/10_8_Seminar.php

Wensing, E. (2016) *Indigenous Rights in Planning: Complicities, Incongruities, Prospects.* Canberra Urban and Regional Futures Forum, 25 July, University of Canberra, Canberra. http://www.curf.com.au/events/article/?id=curf-seminar-25-july-co-existence-recognising-and-respecting-indigenous-rights-in-planning

Wensing, E. (2014) *Land Justice for Indigenous Australians: Dealings in native title lands and statutory Aboriginal land rights regimes in northern Australia and why land tenure reform is critical for the social, economic and cultural reconstruction of Aboriginal people and communities*, A Northern Perspective: CRN Northern Australian Development Conference, Canberra (ACT), 27 November.
https://www.cdu.edu.au/sites/default/files/the-northern-institute/docs/wensing.pdf

Wensing, E. (2014) *Land Justice for Indigenous Australians: Dealings in native title lands and statutory Aboriginal land rights regimes in Australia and why land tenure reform is critical for the social reconstruction of Aboriginal people and communities*. Public lecture for a seminar on 'Development on Aboriginal Freehold Land', 30 October, James Cook University, Cairns.

Wensing, E. (2014) *Why land tenure reform is critical for the social reconstruction of Aboriginal people and communities.* Public Lecture, Talking Circle 22 August, University of Notre Dame in Australia, Broome Campus

Wensing, E. (2013) *Indigenous Customary Rights and Contemporary Land Use Planning*. Planning Institute of Australia, Queensland Division Seminar, 'Indigenous Planning, Tenure and Planning', Cairns Regional Council, Cairns, 19 March.
http://www.planning.org.au/documents/item/4923
https://www.youtube.com/watch?v=qVsvQRlMIEg

Wensing, E. (1997) *Native Title: Can it be regulated?* The Inaugural Lewis Keeble Memorial Lecture, Customs House, August, for the Queensland Division of the Royal Australian Planning Institute.

Resource Guides

(Listed chronologically)

(P) National Native Title Tribunal (2011) *Developing Indigenous Land Use Agreements. A guide for local government,* National Native Title Tribunal, Perth. (60 pages)
http://www.nntt.gov.au/Information%20Publications/Developing%20indigenous%20land%20use%20agreements%20-%20a%20guide%20for%20local%20goverment.pdf

(P) National Native Title Tribunal (2009) *Working with Native Title. Linking native title and local government processes*. 3rd Edition – August 2009, National Native Title Tribunal, Perth. (20 pages)
http://www.nntt.gov.au/Information%20Publications/Native%20Title%20and%20local%20government%20processes_.pdf

(P) Australian Local Government Industry Training Advisory Board (2003) *Learning About Native Title*, with Fraynework Multimedia, Swinbourne University of Technology TAFE and an Indigenous Reference Group. www.nativetitle.edu.au (online and CD Rom)

- Learning Resources (300 pages)

- Final Report (12 pages)
- This project won an *Award for Excellence in Educational Publishing* in the TAFE Teaching and Learning Category from the Australian Publishers Association and *The Australian* newspaper in 2003.

Australian Local Government Association (ALGA) in conjunction with the National Native Title Tribunal (NNTT) (1999 to 2003) *Native Title Information Seminars and Training Workshops.* Conduct of over 80 Information Seminars and 75 Training Workshops for local government across Australia. As the ALGA's Native Title Project Manager, I facilitated these events with average audiences of between 15-25 people. The content of the training workshops consisted of five modules based on the *Working with Native Title* and *Working Out Agreements* Guides.

(P) Australian Local Government Association (ALGA) and the National Native Title Tribunal (NNTT) (2002) *Working with Native Title: Linking native title and Council processes*. A kit containing:

- 10 checklists for different occupations in local government (10 x 4 pages each);
- Brochure explaining how to apply the six-step action plan in the '*Working with Native Title*' Guide.

ALGA, Canberra. (22 pages).
http://alga.asn.au/site/misc/alga/downloads/indigenous-issues/nativeTitleGuide.pdf

(P) Australian Local Government Association (ALGA), the National Native Title Tribunal (NNTT) and the Aboriginal and Torres Strait Islander Commission (ATSIC) (1999) *Working with Native Title: A practical guide for Local Government*. 2nd Edition, ALGA, Canberra. A resource manual comprising a 6-step guide and several appendices of resources and additional information, authored and compiled by Ed Wensing and Lucy Macmillan. (345 pages)

(P) Australian Local Government Association (ALGA) and the Aboriginal and Torres Strait Islander Commission (ATSIC) (1998) *Working out Agreements: A Practical Guide to Agreements between Local Government and Indigenous Australians,* ALGA, Canberra. A resource manual, authored and compiled by Ed Wensing. (134 pages)

(P) Planning Institute of Australia (PIA) and the Australian Property Institute (API) (1997) *Guidance Notes on Native Title for Planners and Valuers.* PIA, Canberra. (Authors: Ed Wensing and John Sheehan.)

Book Reviews

(Listed chronologically)

Wensing, E. (2019) 'Australia's Metropolitan Imperative. An Agenda for Governance Reform' Book Review, *Urban Policy and Research*. DOI: 10.1080/08111146.2019.1585024.

Wensing, E. (2018) 'Planning in Indigenous Australia: From imperial foundations to postcolonial futures', Book Review, *Australasian Journal of Environmental Management*. DOI: 10.1080/14486563.2018.1478772.

Wensing, E. (2014) 'Reclaiming Indigenous Planning', Book Review, *Urban Policy and Research*, Volume 32, Number 3. pp. 386-390. (5 pages)
DOI: 10.1080/08111146.2014.926583.
http://www.tandfonline.com/eprint/rNGK6TjjqBmUviK9jgQE/full

Wensing, E. (2013) 'The Right to Landscape: Contesting Landscape and Human Rights', Book Review, *Australian Planner*, Volume 50, Issue 3, pp. 274-275. (3 pages)
DOI: 10.1080/07293682.2012.739568.
http://www.tandfonline.com/doi/full/10.1080/07293682.2012.739568#.VYqPBWcw-po

Wensing, E. (2013) 'People on Country. Vital Landscapes. Indigenous Futures', Book Review, *Australian Planner*, Volume 50, Issue 4, pp. 362-365. (4 pages)
DOI: 10.1080/07293682.2012.745889.
http://www.tandfonline.com/doi/full/10.1080/07293682.2012.745889#.VYqP9Wcw-po

Wensing, E. (2001) 'Home Truths: Property Ownership and Housing Wealth in Australia', Book Review, *Urban Policy and Research*, Volume 19 Number 1, pp. 101-104. (4 pages)
DOI: 10.1080/08111140108727866.
http://www.tandfonline.com/doi/pdf/10.1080/08111140108727866

Wensing, E. (2000) 'The Australian Metropolis. A Planning History', Book Review, *Australian Journal of Environmental Management*, Volume 7 Issue 3, pp. 182-183. (3 pages)
DOI: 10.1080/14486563.2000.10648499.
http://www.tandfonline.com/doi/pdf/10.1080/14486563.2000.10648499

Wensing, E. (1998) 'Canberra 1912: Plans and Planners of the Australian Capital Competition', Book Review, *Urban Policy and Research*, Volume 16, Number 2, pp. 171-172. (2 pages)
DOI: 10.1080/08111149808727762.
http://www.tandfonline.com/doi/pdf/10.1080/08111149808727762

Wensing, E. (1998) 'Immigration and Australian Cities', Book Review, *Australian Journal of Environmental Management*, 5:1, pp. 61-62. (2 pages)
DOI: 10.1080/14486563.1998.10648400.
http://www.tandfonline.com/doi/pdf/10.1080/14486563.1998.10648400

Submissions

Wensing, E. (2016) *'Going deeper than the rhetoric' Comments on the PIA Draft Accreditation Policy for the Recognition of Australian Planning Qualifications.* Submission to the Planning Institute of Australia's review of its Planning Education Accreditation Policy, May. DOI: 10.13140/RG.2.2.25414.06725.
https://www.researchgate.net/publication/306229140_Going_deeper_than_the_rhetoric_Comments_on_the_Planning_Institute_of_Australia_Draft_Accreditation_Policy_for_the_Recognition_of_Australian_Planning_Qualifications_May_2016

Wensing, E. (2014) *Submission to the Australian Law Reform Commission Inquiry into the Native Title Act 1993* (Cth). http://www.alrc.gov.au/sites/default/files/subs/13._ed_wensing.pdf

Wensing, E. (2007) *Some ideas for improving planners' understanding of Aboriginal and Torres Strait Islander Australians*, Submission to the Review of Planning Education by the Planning Institute of Australia, August.

Wensing, E. (1993) *Private Submission to the Industry Commission Inquiry into Public Housing*, March. (Prepared in response to personal invitation from the Industry Commission).

Wensing, E. (1986) *Canberra's Leasehold Tenure System: Still in Crisis*. Submission No. 2 to the Parliamentary Joint Committee on the ACT - Inquiry into the Metropolitan Policy Plan.

- *This submission was the catalyst for a subsequent study of leasehold administration by Professor Max Neutze for the Parliamentary Joint Committee and a further inquiry by a Sub-Committee of the Senate Standing Committee on Transport, Communications and Infrastructure which reported to Parliament in November 1988.*

Wensing, E. (1984) *Kingston - A study of the impact of comprehensive redevelopment on an inner Canberra suburb*, November. Submission No. 1 to the Parliamentary Joint Committee on the ACT – Inquiry into the Metropolitan Policy Plan.

Radio Interviews

Wensing, E. (2000) Fran Kelly talks with Ed Wensing, Native Title Project Manager for the Australian Local Government Association and co-author of a practical guide to working with Native Title legislation about the role of Local Government in the process. Accessed 6 June 2000. http://www.abc.net.au/radionational/programs/breakfast/pxt-tuesday-30-may-200/3463472

During the 1970s, 1980s and early 1990s, I gave several interviews on ABC Local Radio 666 on the administration of the leasehold system in the ACT. I did not record all of these interviews, only some of them. Tapes of the following interviews are held on file by the author.

Tape 1

ABC Afternoon Show Monday **18 August 1986** – Ed Wensing on the need for a judicial inquiry into the leasehold system. (Interviewer: Hugh McKenzie)

ABC Morning Show Tuesday **30 June 1987** – Ed Wensing with Richard Arthur following the Federal Court's decision on the Morpath case in Turner. Richard Arthur was the lawyer for the lessee. (Interviewer: Terry Malcolm)

ABC Morning Show **28 Nov 1995** – Ed Wensing and Sandy Vigar following Ed's appointment as National Policy Director for the Royal Australian Planning Institute. Sandy was the National President of RAPI. (Interviewer: Julie Derritt)

Tape 2

ABC Breakfast **June 1988** – Ed Wensing on the Canberra leasehold system and evidence to Parliamentary Committee about the maladministration and miscalculation of betterment. (Interviewer: Pru Goward)

ABC Breakfast **24 July 1989** – Ed Wensing on winning the Canberra Times site case in the ACT Supreme Court. Larry King from the Australian Federation of Construction Contractors also participated in the interview. (Interviewer: Pru Goward)

Selected Unpublished Works

(Listed chronologically)

Wensing, E. (2014-15) *Canberra's urban planning and governance: Declining Commonwealth commitment to the Nation's Capital.* (Unpublished, held by the author) (20 pages)

(P) Wensing, E. (2006) *Examining the inter-relationship between Native Title and Australian Land Law: "Two different timelines, two different cultures and two different laws.*

(Revision of Wensing E (1999) in the list of Published Papers above.) (23 pages)

Crocket, G., Wensing, E. and Wurst, I. (2006) *Canberra's National Planning Heritage*. A much longer version of a paper that was presented to the Eighth Australasian Urban History/Planning History Conference, Wellington, New Zealand, 9-11 February 2006. (34 pages)

Wensing, E. (1981) *ACT Leasehold: A failure to apply the concepts*, Paper prepared for the ACT Council of Social Service, November. (35 pages)

Manuscripts in the National Library of Australia: Papers of Ed Wensing, 1974-2001 [manuscript]

The following material is an example of a significant instance of data gathering on the administration of Canberra's unique leasehold system of land tenure. The National Library regards this collection of personal papers as the largest holding of private material on Canberra's planning and leasehold land tenure system outside of official government records.

http://catalogue.nla.gov.au/Record/358895?lookfor=author-browse:"Wensing,%20Ed%20(Edward%20George)"&offset=2&max=5

Bib ID	358895
Format	Manuscript
Author	Wensing, Ed (Edward George)
Access Conditions	**Part available for research; part requires permission for research; part not available for research. Not for loan.**
Description	10.01 m. (20 archival boxes)
Summary	Papers relating to Ed Wensing's involvement in the Canberra community, and his work and interests relating to Canberra planning and development issues. The bulk of the papers concern the campaign by residents of Torrens Street Braddon to stop commercial encroachments. There is also material on the A.C.T. Council of Social Service and on urban development in Canberra, especially Kingston. Includes correspondence, reports, articles, submissions, land title searches, maps, minutes, photographs and other papers. Papers relating to the redevelopment of the former Canberra Times site in Civic; Series A. Papers relating to the office boom in the Civic Centre, Canberra during the 1980s; Series B. Site specific files on Canberra Leasehold Administration Planning and Development. Includes files relating to public housing in the ACT.
Biography/History	Ed Wensing is a resident of Canberra with a long standing interest in planning and leasehold issues relating to the city. He worked for the National Capital Development Commission from 1973-1985, including in its Planning Division from 1979-1985.
Notes	Manuscript reference no.: MS 8028, MS Acc98/99, MS Acc98/138, MS Acc03/263.
Index/Finding Aid Note	Finding aid available (12 p.) in Manuscript Reading Room.
Occupation	Town planners

Manuscripts in the AIATSIS Collection

Call No.:	MS 5008
Accession No.:	MAR14.110
Title:	Edward George Wensing, Australian Local Government Association papers, documents and publications on Indigenous issues.
Creator:	Wensing, Ed (Edward George)
Publication Information:	1997-2007
Physical Description:	2.62 metres (15 archival boxes)
Abstract:	Ed Wensing worked for the Australian Local Government Association (ALGA) on its Local Government Native Title Information and Training Project in various capacities from 1997 to 2003. During a significant part of that period he was employed by the ALGA as the Native Title Project Manager, and in that capacity was responsible for the production of a number of resource materials aimed at assisting local government to understand its obligations and responsibilities on native title matters. The papers include guides, brochures, training resources, photograph albums, personal notebooks, correspondence, resources prepared by the National Native Title Tribunal and resource documents on Native Title for local government.
Access:	Open access - reading. Copying permitted for private study. Restricted access applies to Edward Wensing's notebooks, Series 11, folders 1-7, Closed access Principals permission - closed copying and quotation.
Corporate Subject:	Aboriginal Affairs
Collection:	Print
Source of acquisition:	Deposit (Deed of gift) Edward Wensing 2014 MAR14.110
Subject Term:	Aboriginal Australians -- Government relations Aboriginal Australians -- Land tenure Local government Politics and Government - Local government Native title - Law and legislation - Commonwealth Native title - Law and legislation - New South Wales Native title - Agreements - Indigenous Land Use
Electronic Access:	http://aiatsis.gov.au/research/guides-and-resources/collection-finding-aids Click link for access to Finding aid index. http://aiatsis.gov.au/sites/default/files/catalogue_resources/ms5008.pdf Click link for access to Finding aid

http://catalogue.aiatsis.gov.au/client/en_AU/external/search/detailnonmodal/ent:$002f$002fSD_ILS$002f0$002fSD_ILS:468090/ada?qu=MS+5008&te=ILS