REGIONAL AUSTRALIA INSTITUTE

COAG INVESTIGATION INTO INDIGENOUS LAND ADMINISTRATION AND USE

Submission to the Department of Prime Minister & Cabinet

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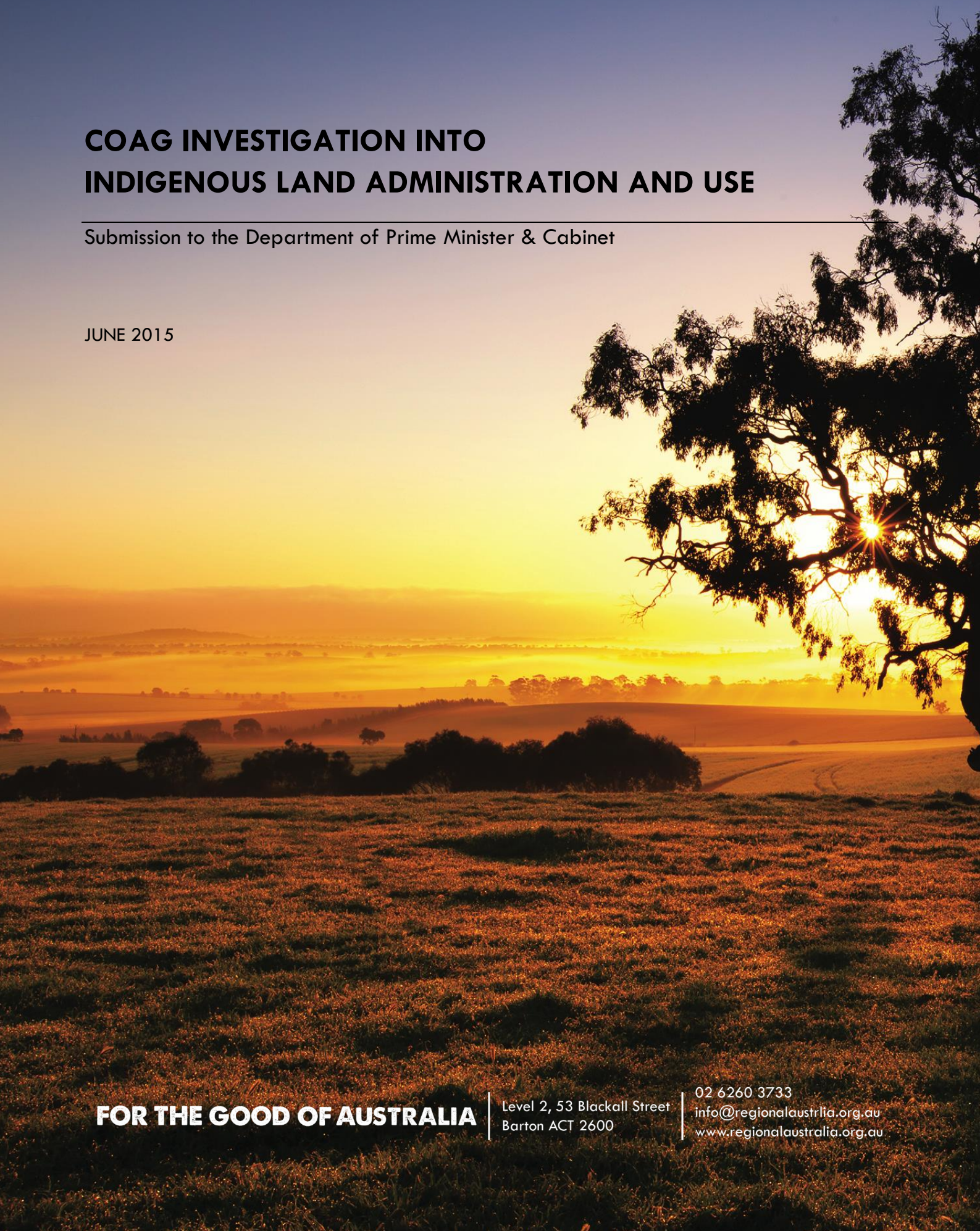

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COAG INVESTIGATION INTO INDIGENOUS LAND ADMINISTRATION AND USE

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The Department of Prime Minister and Cabinet has sought the views of the Regional Australia Institute (RAI) in relation to '…how Indigenous land administration systems and processes could be improved to encourage or support better economic development outcomes for Indigenous people.'

The Investigation is considering the legislative, regulatory, operational and policy frameworks that underpin Indigenous land use across Australia. The Investigation is focused on getting the settings right to ensure these frameworks effectively support Indigenous land owners to use their land for economic development, as part of the mainstream economy. The Investigation will report to COAG in 2015.[1]

Executive Summary

The RAI is supportive of reform efforts directed towards an Indigenous land administration framework that is efficient, responsive and provides certainty to partners in economic development. Providing a reformed framework that enables Indigenous title holders to make good and timely decisions about a range of potential lease arrangements over their native title is the core goal.

Constraints embodied in the current Indigenous land framework impose significant costs upon a range of governments, public institutions, industry, private persons and most acutely, upon Indigenous persons. These constraints limit the ability of Indigenous land holders to fully exercise decision making rights over their land and to realise the full benefits of native title.

The examination of the complex and technical legal and administrative structures is being undertaken through a variety of other channels.[2] The focus of this submission from the RAI is to emphasise the critical general systemic considerations necessary for *framing* policy in relation to economic development on Indigenous land.

Key Points

- *Structural Impediments within Native Title*

  An objective of the *Native Title Act* in 1993 has always been to provide mechanisms for negotiations in relation to, among other things, 'proposals for the use of such land for economic purposes'[3]. Under this framework established by the *Native Title Act* and related instruments, agreements between Indigenous land-holders and private sector investors that enable Indigenous land owners to derive economic benefits from their land *can* be achieved, however practically 'they face complex legislative and bureaucratic regulations that impede their capacity to use their

native title to achieve economic development'.[4] Addressing these impediments will be critical for Indigenous people.

- *The Potential for Economic Development*

  Translating the potential of native title into economic development requires overcoming barriers to investment in communally-held land, enabling Indigenous title-holders to develop more flexible processes for approval of land-use activities and acknowledging that any reform of Indigenous land administration arrangements must be driven by Indigenous land-holders themselves.

  Government investment in Indigenous communities through housing, community facilities, roads and other infrastructure has often occurred without the certainty of title that would be required in other contexts. While government may wish to achieve more secure title to the assets and investments, this represents a real or perceived conflict of interest to reforms with an objective of enabling Indigenous economic development.

  Certainty of tenure will be essential to achieve economic development.

- *Self-Determination Within an Economic Development Context*

  Within Indigenous communities and their leadership, while there has undoubtedly been a shift in priorities including initial priorities of land acquisition, the recognition of culturally significant sites and access rights for traditional hunting, gathering and fishing activities, the emphasis is now towards economic development.

  Developing the capacity of Indigenous land-holders in relation to the negotiation of future acts and securing mutually-beneficial agreements is a critical component of economic development. Any reform of Indigenous land administration arrangements must be driven by Indigenous land-holders themselves.

  Developing trust in the reformed system and a willingness to engage in the reform process amongst native title holders is essential to future economic development. This trust and willingness to engage will be critically undermined by any accompanying agenda of using reformed administrative arrangements as a platform or means of securing government interests on native title land.

About the Regional Australia Institute

Independent and informed by both research and ongoing dialogue with the community, the RAI develops evidence-based policy and advocates for change to build a stronger economy and better quality of life in regional Australia – for the benefit of all Australians.

The RAI was specifically formed to help bridge the gap between knowledge, debate and decision-making for the potential and future pathways of regional Australia. It exists to ensure local, state and federal policy makers, researchers, business and members of the community have access to the information they need to make informed choices about the future of regional Australia.

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Structural Impediments within Native Title

The *Native Title Act* is 'the scheme under which the determination [of native title] '"translates" rights under Aboriginal tradition into rights enforceable in the ordinary legal system'. According to the Australian Law Reform Commission, 'The *Native Title Act* has the capacity to improve the economic circumstances of Aboriginal and Torres Strait Islander peoples.'[5]

A critical question remains, however, whether or not the essential incompatibility of native title with the common law doctrines of tenure and estates 'provide(s) a useful basis for the practical management of an interest in land in a highly developed society'[6]. These particularly relate to the ability to access finance for economic development and the process of securing agreement amongst communal title holders.

Access to Finance

Native title is inalienable: as such it can be leased but cannot be sold or transferred through usual legal processes, including those related to debt recovery. It has been asserted that access to capital investment is thereby constrained.

Under the *Native Title Act*, native title is 'protected from debt recovery processes'[7]. As such, land held under native title is therefore unusable as security against a loan. According to the *Aboriginal Land Rights Act 1976*, a lease granted under the Act 'must not be used as security for a borrowing'[8].

That the security required by private sector investors is therefore absent is considered a significant constraint upon economic development on Indigenous-held land:

> *'Native title produces increased legal and financial risk management for businesses. These contexts include invalidity of title, compensation and the ability to raise finance. Native title affects financial institutions as providers of finance for business investment purposes. The Native Title Act and Aboriginal Land Rights Act, both place limitations on using land as a security for debt financing. Thus, inadequate title audits or financial and security assessments with regard to potential impacts of native title on the twin commercial requirements of security of title and compensation liability are likely to cause commercial difficulties.'*[9]

Whether for business enterprise development or for public investment in infrastructure, certainty of tenure is the key requirement for raising capital to support any economic development.

Communal Title requires Communal Decisions

Both the *Aboriginal Land Rights (N.T.) Act 1976* and the *Native Title Act 1993* clearly envisage the use of inalienable Aboriginal freehold land by individuals. According to the *Native Title Act* (S.223(1)):

> *'The expression native title or native title rights and interests means the communal, group or individual rights and interest of Aboriginal people or Torres Strait Islanders in relation to land or waters….'*

A fundamental constraint upon economic development remains obtaining agreement amongst the land-holders about what the granting of title means for them.

The requirement for wide consultation embodied in the *Native Title Act*, 'has led to intractable conflict and debate in many situations, concerning the proposed utilisation of land by even the traditional owners of such land'[10]. The communal or group land tenure system constrains access to that land for those purposes:

> *'[I]n practice, it has often been difficult for an Indigenous individual, or family group, to access land on which to establish a business when land is owned or under the control of either a community or a group of traditional owners. For example, it has been extremely difficult for individuals to own community stores in the Northern Territory as these are normally located on land held under traditional land tenure. Often collective land ownership has meant that joint ventures with Non-Indigenous companies have had to be with Indigenous communities or organisations rather than with individuals or families. This has been a major constraint to the use of land as a basis for successful entrepreneurial ventures.'*[11]

It is a momentous challenge to reconcile the property rights derived from native title with an economic system founded upon private property rights.

Proposals for the individuation of communal land appear to lack widespread Indigenous support[12]. Further, according to international case studies, individuation of communal land does not always result in economic growth.[13] Support for any significant legislative reform to overcome this conundrum is also non-existent[14].

At this stage there may be no single perfect solution to this issue. The RAI encourages the reform process to fully explore the range of concerns amongst title holders providing individual or family rights. Enabling several alternative ways in which title holders can overcome this constraint may be the best way to begin facilitating economic development by individuals and families in the short term.

Negotiating Agreements

Achievement of native title is not the end of the journey. Formal titles that exist under native title schemes operate essentially as a 'trigger to negotiations' about access to land and resources.

The importance of stable and mutually-beneficial agreements between Indigenous land-holders and commercial interests cannot be overstated. Broader settlements that include grants of land, joint management arrangements or employment opportunities are required[15].

The system of Prescribed Bodies Corporate and Indigenous Land Use Agreements, although not immune from criticism, has meant that 'Hundreds of agreements in relation to exploration and mining (including some ILUAs) have been negotiated.'[16,17] Some benefits have been substantial.

Revenue from development activities of the resources or extractive industries has been significant and agreements usually establish long-term benefits though investment, employment and training.

A review conducted by the CSIRO for the Department of Agriculture's *Caring for* Country initiative found significant benefits had also been derived from land management agreements. Whilst generally not quantifying the economic development gains, success factors identified included the 'Indigenous (culturally-based) motivation', governance and co-governance arrangements that are 'responsive to customary institutions' and 'hybrid economies that generate multiple benefits'[18].

Nevertheless, the process of incorporating other mutually beneficial elements within agreements for commercial land use is generally protracted. Very often the post-determination process takes longer than the initial legal process of determination. Large-scale development projects with the resources of large commercial enterprises are better placed to negotiate the complexities of Indigenous land tenure arrangements. As a goal, however, a set of post-determination arrangements that provide for simple efficient approval of small and medium scale economic development by title holders is essential to a more diverse set of economic activities on Indigenous land.

The challenge is to develop a fit for purpose system. Facilitating economic development requires the capability for both rapid and simple decision making on minor economic developments (such as small business development) and very thorough, detailed agreements for very significant or permanent development (such as large resources projects). Although the legal underpinnings are very different, this is conceptually similar to the range of development controls exercised by local and state government to manage the full range of land and building development that occurs in the economy.

The driving force of reform towards this objective must be the land-holders themselves.

Capacity Building

As established above, once native title has been determined, the real action is in relation to the negotiation of future acts. The capacity of Indigenous land holders to engage in the complex administrative requirements and negotiations is a key factor in obtaining the best possible economic development outcomes.

Access to investment advice has also been identified as a constraint upon economic development. The recent review of the Indigenous Land Council identified 'commercial, business management and governance capacity issues… across Indigenous communities and organisations'. In particular, it was noted that existing small businesses operated by Indigenous Australians often required support in areas such as accounting, legal, human resources and logistics in order to scale up their business.[19]

The proliferation of Indigenous land management organisations has been clearly identified[20] and there is undoubtedly no shortage of resources available to address capacity building issues. The RAI shares the concern of the National Native Title Council of the potential for over-provision:

> *'Another concern of the NNTC is the potential prevalence of duplication and overlap of some functions amongst service providers that play a key role in one way of another to support the operations of NTRBs, NTSPs and PBCs across the country.'*[21]

The RAI also notes the recommendations of the Australian Law Reform Commission which seek to reduce costs, streamline procedures, and support effective decision-making structures[22].

Apart from the fundamental capacity challenge that communal title creates, the RAI encourages the reform process to separate the issues of capacity related to education, experience or otherwise by assuming that title holders are capable of exercising their rights and making good decisions in establishing the future administrative framework.

Identified capacity issues that may reasonably exist for some communities or title holders can then be dealt with separately rather than developing cumbersome administration systems that assume Indigenous people are not capable of fully understanding and exercising their rights.

Local Control

Over the last two decades the priorities of Indigenous land policy have shifted from priority of attaining title and management over areas of cultural significance[23] towards a focus on securing the benefits of that title for those who hold it[24]. Substantial progress *has* been made since the land rights movement's initial emphasis upon the recognition of the cultural significance of land.[25]

According to an Australian Institute of Aboriginal and Torres Strait Islander Studies discussion paper,

> *'Those people who have had their native title rights and interests in land legally recognised are contemplating the implications for their future prosperity. They are pondering the types of investments they can make to develop their land for social and economic purposes, the use and development rights they might temporarily exchange for income, or, as a last resort, the rights and interests they are prepared to relinquish in return for compensation.'*[26]

This approach is also reflected in the 2008 National Indigenous Reform Agreement (Closing the Gap) between the Commonwealth of Australia and all states and territories, and has bipartisan support. It committed those governments to effort in seven areas, one of which is economic participation. The Agreement notes that 'access to land and native title assets, rights and interests can be leveraged to secure real and practical benefits for Indigenous people'27.

Most importantly, Indigenous leaders have emphasised the importance of using native title for economic development. Warren Mundine, Chair of the Prime Minister's Indigenous Advisory Council, has said that native title rights, as well as compensation for loss of land…

> *'…can and should be used to generate commercial and economic development for Indigenous people through a real economy, real jobs and real for-profit businesses owned and operated by Indigenous people'*[28].

Of the broad range of factors relevant to Indigenous land administration and use, 'local control' is crucial if particular economic objectives are to be achieved[29]. Development imposed from above in a technical and managerial manner will not deliver outcomes. Whilst efforts must be developed through a coherent policy framework, they must be through an Indigenous-led development approach. Top-down prescriptive measures based upon bureaucratic imperatives are not the priority.

Economic development within the context of native title requires innovative thinking, in part due to the legal basis of native title and the inherent legal complexities involved. Critical, however, is the need to understand and appreciate the competing ideas about land ownership and use, and to develop policies that give precedence to Indigenous communities' as they seek to develop their land.

The key challenge is the provision of opportunity to land-linked Aboriginal people to negotiate and shape the diverse forms of development to which they aspire, through mechanisms driven by themselves according to 'the diversity and difference of Aboriginal values and norms'[30].

Endnotes

[1] http://www.dpmc.gov.au/Indigenous-affairs/about/jobs-land-and-economy-programme/coag-land-investigation

[2] Including the Commonwealth's reference to the Australian Law Reform Commission, *Review of the Native Title Act 1993*.

[3] See also the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), S.19.

[4] *Rights and Responsibilities Consultation Report 2015*, Australian Human Rights Commission 2015, page 42.

[5] *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Australian Law Reform Commission Report 126, Commonwealth of Australia 2015.

[6] Matthew Storey, 'Dealing in Native Title' pp.56-68 in *Australian Resources and Energy Law Journal, 26(1) 2007,* page 57.

[7] *Native Title Act 1993*, sections 56(5) and 56(6)

[8] S.19A(9)

[9] Don Fuller, Susan Bandias, and Darius Pfitzner, 'Utilizing Aboriginal Land in the Northern Territory for Economic and Human Development', Charles Darwin University, http://www.cdu.edu.au/sites/default/files/PaperLeasingAboriginalLand.pdf, page 9.

[10] *Ibid*, page 1.

[11] *Ibid*, page 22.

[12] Including from the Central Land Council, see 'Communal Title and Economic Development', Policy Paper, Central Land Council, 2005, pages 3–4.

[13] Lee, Penny, 'Individual Titling of Aboriginal Land in the Northern Territory: what Australia can learn from the international community', *University of New South Wales Law Journal 14*, 2006.

[14] As stated by the Australian Law Reform Commission, reform must proceed upon the basis of the proposition 'that native title rights and interests that are recognised must be possessed under laws and customs with origins in the pre-sovereign period. That proposition is now fundamental to the *Native Title Act* and its judicial interpretation.' ALRC *op cit*, page 17.

[15] Graeme Neate, '"It's the Constitution, It's Mabo, It's Justice, It's Law, It's the Vibe": Reflections on Developments in Native Title since *Mabo v Queensland [No 2]*' in Toni Bauman and Glick Lydia (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 188, 205; see also Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 6 on the importance of determinations with non-native title outcomes.

[16] 'The functions of the National Native Title Tribunal', Native Title, 28 May & 4 June 2010, page 22.

[17] Appreciation of land management in relation to areas of cultural significance on the part of those seeking to develop Indigenous lands has undoubtedly progressed. The National Title Council, for example, considers that 'Under the NTA, extractive industry practices have evolved so that a process of negotiation enables Traditional Owners to protect site of cultural significance…' (Submission to the Review of Native Title Organisations, page 12).

[18] Rosemary Hill et al, *Indigenous Land Management in Australia*, Department of Agriculture, Fisheries & Forestry, 2013, page 2.

[19] http://www.dpmc.gov.au/sites/default/files/publications/EY_final_report_review_of_ILC_IBA.PDF. Page 12.

[20] Langton, M 2015 (forthcoming), 'Maximising the potential for empowerment: the sustainability of Indigenous native title corporations', in S Brennan, M Davis, B Edgeworth and L Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*, Federation Press: Sydney.

[21] National Native Title Council Submission to the Review of Native Title Organisations, page 9.

[22] *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Australian Law Reform Commission Report 126, Commonwealth of Australia 2015, pages

[23] According to the National Native Title Tribunal, the main priority during [first] the term of the NILS 1996–2001 was acquiring land and transferring it to Indigenous corporations. The primary focus during that period was 'acquiring land of cultural significance.'

[24] 'Aboriginal land rights out of step', *The Australian*, July 31, 2014

[25] As part of its Inquiry into the scope of native title rights, the ALRC was asked to consider whether there should be clarification that native title could include native title rights of a commercial nature. Shortly after the ALRC received the Terms of Reference, the High Court of Australia handed down Akiba v Commonwealth ('Akiba HCA'), recognising that a native title right to access and take resources could be exercised for any purpose—commercial or non-commercial.

[26] *Secure tenure for home ownership and economic development on land subject to native title*, Ed Wensing & Jonathan Taylor, AIATSIS Research Discussion Paper No. 31, August 2012, page 5.

[27] COAG, 'National Indigenous Reform Agreement' 7.

[28] Warren Mundine, 'Australia Day Address' (2014).

[29] Associate Professor Maureen Tehan, Speech to a symposium on Indigenous Peoples, Economic Empowerment and Agreements with Extractive Industries, University of Melbourne, June 25th-26th 2013, http://player.vimeo.com/video/105609240

[30] Altman, J 2010, 'What future for remote Indigenous Australia? Economic hybridity and the neoliberal turn', in Jon Altman and Melinda Hinkson (ed.), pp.259-280 in *Culture Crisis: Anthropology and Politics in Aboriginal Australia*, UNSW Press, Sydney, page 279.