Indigenous Customary Rights and Contemporary Land Use Planning

Ed Wensing FPIA

Disclaimer: The information provided in this presentation is provided as guidance only. The author has endeavoured to provide a general guide to the Native Title Act 1993 (Cth) and the impact of native title rights and interests on contemporary planning processes. It should not be relied upon as a substitute for independent professional advice or as a basis for making decisions in relation to any particular matter.

SLIDE 2
Acknowledgements

My first duty is always to acknowledge the Traditional Owners, the Gimuy Waluabarra people on whose ancestral lands we are meeting today, to pay my respects to their elders past and present. I also want to express my appreciation for their care and custodianship of the land on which we are meeting. And to thank you to Henrietta for her Welcome to Country.

My second duty is to acknowledge the support of the School of Earth and Environmental Sciences at James Cook University for making this event possible.

For those who don’t know me, I am a planner and policy analyst. I have worked in planning and policy development for over 40 years. I first came to work on native title matters in 1996 while I was National Policy Director for the Planning Institute of Australia where I developed guidance notes in conjunction with the Australian Property Institute, the professional association for land valuers, and then went on to develop a series of resources and training materials for Local Government to work with native title. Since that time, I have worked across Australia in many different capacities with many Aboriginal or Torres strait Islander organisations and communities and for all levels of government on a wide range of policy areas, including native title and land tenure, land use and environmental planning, cultural heritage protection and natural resource management to mention a few.

Introduction

SLIDE 3
I have been asked to talk to you today about how native title rights and interests can be accommodated in contemporary land use planning systems.

I plan to cover a lot of ground.

In the first few minutes I want to reflect on planning, what it is, who are planners, the important ‘temporal questions’ we have to consider in any planning process and the limitations of our craft, planning’s cultural blindness, before moving on to...
recognising that there are now two sets of laws and customs in Australia, and how they interact, especially when it comes to land use and environmental planning.

Then I want to cover some of the legal, ethical and moral reasons why planners and contemporary planning processes must engage with Aboriginal and Torres Strait Islander people’s relationships to land and waters, and I will focus on the importance of the UN Declaration on the Rights of Indigenous Peoples as THE most appropriate guide to ethical conduct when working with Indigenous people.

And I will conclude with some challenges to planning practitioners.

Then I trust you will have lots of questions.

If time permits and depending on what Andrew has covered. I might focus quickly on the essential elements of the future act regime in the Commonwealth’s Native Title Act 1993.

SLIDE 4
What is Planning?

SLIDE 5
Land use and environmental planning is broadly concerned with the way we use land and natural resources in both urban and rural contexts and environments.

Planning is an ongoing process of:
- setting objectives;
- exposing connections;
- presenting alternatives and their likely consequences; and
- making choices about strategies, policies, projects and developments.

SLIDE 6
The essence of planning is not in the individual elements of our environment, but in their combination and the interactions with each other.

Planning’s contribution therefore lies in optimising the connections and linkages, the functional as much as the visual within a landscape that is structured by areas, nodes, networks, zones and boundaries.

Planning matters because it affects our everyday lives.

SLIDE 7
‘Planning is a calling that implies an ethical commitment to the future, a commitment to making a difference in the world’. (Friedman 2002:151)

SLIDE 8
Who are Planners?

Planners are professionals.
We are actors that influence the shape of society.
We are mediators of competing interests.
We are custodians of the ‘public interest’.
And we have to be interested in ethics.

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Temporal Questions!

Strategic planning and decision making processes need to canvas a wide range of questions. Some of the questions that planners need to consider from time to time when we undertake planning exercises include the following. Many of these questions are at the very core of planning and I therefore call these ‘temporal questions’.
SLIDE 10
Questions such as:
- What does the planner know?*
- What are the sources of knowledge?*
- How is knowledge produced in planning?*
- How secure are the planners in their knowledge?*
- How adequate is the planner’s knowledge for the purpose at hand?*

SLIDE 11
- What level of uncertainty or ambiguity can be tolerated?*
- What is valid knowledge in planning?*
- Who decides?*
- Who possesses knowledge that is relevant to planning?*
- How should the fundamental questions be framed?**
- What forms of knowledge offer the planner the most confidence?*
- Who should be involved?**

SLIDE 12
- What information is required to better inform key planning decisions?**
- How does the community know to make sound choices or judgements?**
- How will decisions or choices be monitored in terms of their effectiveness in achieving the desired strategic objectives?**
- How will the community know when to review its strategic objectives and policies?**


SLIDE 13
Limiting Factors

These questions are not uncommon within strategic thinking and planning, and they are a good place to start because we each bring our own experiences, our own professional training and our own values to the task.

There are however, some important cognitive factors that limit finding effective answers to those questions, including for example:
- Lack of understanding of important causal relationships (i.e. what are the key drivers in the process and how do they relate to strategic outcomes);
- The wrong information serving as the basis for strategic land use decisions;
- The inability to connect strategic objectives to everyday operating activities;
- Dormant vs dynamic learning processes (i.e. basing decisions on conventional wisdom and intuition rather than transforming information to knowledge for better decisions);
- Poor analytical tools to support strategic planning decisions (i.e. the need for potentially more effective use of simulation techniques and scenario planning);
- Narrow organisational focus at all levels of government;
- A failure to differentiate – organisations at all levels that fail to differentiate their respective roles in the strategic planning process need to rethink how they are allocating resources and how they are choosing certain courses of action; and
- Issues related to framing and bias (e.g. ‘confirmation bias’ is when we look for evidence that confirms rather than challenges, conventional beliefs and ‘recency bias’ that results when strategies are based on recent events or information).

When we undertake strategic planning exercises we will no doubt have to deal with some of these issues.

Nevertheless, as Friedmann (2002: 151) has remarked, planning is ‘a calling that implie(s) an ethical commitment to the future, a commitment to make a difference in the world’.

Or as Throgmorton (1992: 17) asserts ‘good planning is persuasive storytelling about the future’.

SLIDE 14
Planning’s cultural blindness

SLIDE 15
But as Jackson (1997: 226) asserts, any future narrative ‘must be a new story, not the kind of fiction which legitimised terra nullius (land belonging to no-one) and rationalised unjust and racist land use decisions’.
Planning is a public function. Planning is the practice of social ordering.

Its primary purpose is to promote a more convenient, attractive and equitable pattern of development than the kind of development produced through unregulated markets.

If it is to do so, it must confront the challenges before it. These challenges include:

- the place of planning in the economy;
- the role of planning in democracy and the right of people to participate and influence decisions affecting their community;
- the environmental challenge to address the depletion of natural resources for present and future generations;
- the potential for planning to influence social outcomes, and in particular, contribute to equity and fairness, and
- the need to embrace cultural diversity and difference.

Australian land-use planning and development processes do not have a good record of taking account of the rights, interests, needs and aspirations of Aboriginal and Torres Strait Islander people, or of adequately involving Aboriginal and Torres Strait Islander people, especially in the development of new suburbs, towns and cities in provincial Australia, where the extent of dispossession is perhaps at its greatest (Jackson 1996: 90).

For example, many of the planning statutes around Australia do not require prior consultation with or the direct involvement of Traditional Owners during plan formulation or decision-making about land uses for an area of land or water.

This is despite the fact that the *Mabo (No. 2)* decision was handed down as long ago as 1992.

**SLIDE 16**
The problem seems to be that rational approaches to land-use planning fail ‘to come to reasonable or sustainable terms with cultural difference’ (Jackson 1997a, p. 221), such as Aboriginal and Torres Strait Islander people’s ‘aspirations for recognition of their different identity expressed in their relationships with their traditional estates, and their rights to control and manage their country’ (Jackson 1997b:92).

According to Jackson, planning theory and practice are ‘noticeably silent about the difference culture makes to the efficacy and equity of the planning system and land use outcomes’.

Rather, ‘planners … have assumed a homogeneous public throughout the development of land use plans’ (Jackson 1997b:87) and pursues an ideal “the public interest” – that simply does not exist in a society inevitably complicated by profound differences in cultural outlook, between individuals and groups (Gleeson and Low 2000: 134).

Notwithstanding the fact that planning has contributed directly to the dispossession and marginalisation of Aboriginal and Torres Strait Islander people in Australia, I agree with Marcus Lane (2006: 385) when he says that good planning is crucial to fashioning just and sustainable futures for Indigenous communities.

We have a long way to go, but if we don’t start somewhere, then we will never change the culture of planning.

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### Two sets of laws and customs

**SLIDE 18**

“Two different timelines, two different cultures, and two different laws.”

Mrs Margaret Iselin, Quandamooka Elder, at the signing of the *Native Title Process Agreement* between Redland Shire Council and the Quandamooka Land Council Aboriginal Corporation in August 1997.

**SLIDE 19**

“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

**SLIDE 20**

It is important to understand that in Australia there are now two sets of laws and customs:
• one deriving from colonisation;
• the other deriving from the prior traditional ownership of Australia by its First Nations peoples.

SLIDE 21
In substance, the High Court’s *Mabo (No. 2)* judgement recognised that Eddie Mabo and others on behalf of the Meriam People of Murray Islands in the Torres Strait had prior and continuing occupation and ownership of the Murray Islands. *Mabo (No. 2)* removed forever the myth that Australia was ‘terra nullius’ (meaning ‘land belonging to no one’, ‘vacant land’, or ‘land without a sovereign’).

In essence, the High Court’s *Mabo (No. 2)* judgement found that Aboriginal and Torres Strait Islander law and culture (specifically the Murray Islanders’ interests in land and waters) is recognised by the common law of Australia. This was a return to the position that British common law and policy had held since before the colonisation of Australia in 1788.

SLIDE 22
In light of *Mabo (No. 2)*, it is no longer tenable that Aboriginal people were not the owners of the land on which they lived, because the High Court declared that they had a form of tenure called native title which has survived unless it had been expressly extinguished by the Crown. According to Solomon, the High Court’s judgement in *Mabo (No. 2)* “can be likened to the imposition of a peace treaty on the winning side in a war that lasted more than two centuries”.

It is no longer tenable that Aboriginal and Torres Strait Islander people were not the owners of the land on which they lived.

SLIDE 23
A critical question for land managers and planners is: How do the property rights and interests of Australia’s First Nations peoples interact with the property rights and interests established since colonisation?

SLIDE 24
A Framework for Recognition

What I want to do at this point in the lecture is to explore the relationship between the two systems of law and custom, to help put the interrelationship between the two systems in a wider framework that I think will help you understand some of the tensions between the two different systems of law and custom and where we might be able to build some common ground.

I want to preface my framework outlined below, by saying this is just my personal and professional view. I am not a lawyer, so the framework I am about to outline is going to skip over a whole lot of legal issues. But I am a planner and a political scientist with four decades of experience in government, in private practice and in education. In that sense I am more of a pragmatist and a realist trying to find good public policy outcomes that are in everyone’s interests, rather than legal or political obstacles.

This framework will undoubtedly be criticized by others, probably more educated and informed than me. And that’s OK, that’s the nature of public debate. But I have been using this framework since 1998 and I haven’t had too much negative feedback or reaction.

SLIDE 25
This framework draws on Noel Pearson’s (1996 and 1997) diagram of overlapping circles depicted in Mantziaris and Martin (2000). Pearson’s diagram shows two circles overlapping:
• one circle represents Aboriginal and Torres Strait Islander traditional law and custom; and
• the other circle represents the Australian legal system.

Pre-Mabo (No.2), these two circles didn’t overlap. See Figure 1.
Figure 1. Two separate systems of law and custom – pre-Mabo (No. 2)

Post-Mabo (No. 2), these two circles now have to overlap, not entirely, but at last to some extent. See Figure 2.

SLIDE 26
Figure 2. Two systems of law and custom – post-Mabo (No. 2)

Pearson describes the area where the two circles overlap as the ‘recognition space’. That is, the ability or extent to which one system of law and custom is capable of recognising the existence of another system of law and custom.

And it is this overlap between the two systems that I want to focus on.

SLIDE 27
In the framework in Table 1, Pearson’s diagram is divided into three columns:

- Column A on the left hand side represents the system of Aboriginal and Torres Strait Islander traditional law and custom.
- Column C on the right hand side represents Australian law and custom as represented by the Australian legal system.
- Column B in the middle represents the area described by Pearson as the ‘recognition space’ or the ‘interface’ between the two systems of law and custom.
Table 1. Framework for comparison of two sets of laws and customs

<table>
<thead>
<tr>
<th>Column A</th>
<th>Column B</th>
<th>Column C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Column B</td>
<td>Column C</td>
<td>Column C</td>
</tr>
<tr>
<td>The Recognition Space or Interface</td>
<td>Australian法律 mechanisms for interaction with other systems</td>
<td>Australian Laws and Customs</td>
</tr>
<tr>
<td>Aboriginal and Torres Strait Islander Traditional Laws and Customs</td>
<td>Aboriginal and Torres Strait Islander legal mechanisms for interaction with other systems</td>
<td>Australian Laws and Customs</td>
</tr>
<tr>
<td>Column A</td>
<td>Column B</td>
<td>Column C</td>
</tr>
<tr>
<td>Row A1</td>
<td>Row C1</td>
<td>Row C1</td>
</tr>
<tr>
<td>Indigenous law and custom</td>
<td>Australian law and custom</td>
<td>Australian law and custom</td>
</tr>
<tr>
<td>Row A2</td>
<td>Row C2</td>
<td>Row C2</td>
</tr>
<tr>
<td>Traditional land and water management techniques</td>
<td>Australian land and water management techniques</td>
<td>Australian land and water management techniques</td>
</tr>
<tr>
<td>Row A3</td>
<td>Row C3</td>
<td>Row C3</td>
</tr>
<tr>
<td>Content of Indigenous rights and interests in land and waters</td>
<td>Content of statutory land use and development controls</td>
<td>Content of statutory land use and development controls</td>
</tr>
</tbody>
</table>
Table 2. Detailed Framework for comparison of two sets of laws and customs

<table>
<thead>
<tr>
<th>THE INTERFACE BETWEEN TWO SETS OF LAWS AND CUSTOMS</th>
<th>Column B</th>
<th>Column C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Column A</td>
<td>Aboriginal and Torres Strait Islander traditional laws and customs</td>
<td>Column B</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Column B1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Aboriginal and Torres Strait Islander legal mechanisms</td>
</tr>
<tr>
<td>Box A1</td>
<td>Indigenous law and custom (generally)</td>
<td>As a consequence of terra nullius, the traditional laws and customs of Aboriginal peoples and Torres Strait Islanders was ignored for over two hundred years.</td>
</tr>
<tr>
<td></td>
<td>E.g. Estimated to be 40-50,000 years old; traditions through art, dance etc.; decision making by consensus.</td>
<td>The common law with respect to native title is informed by the following: Precedent from other Common Law countries (i.e. NZ, USA, Canada, UK)</td>
</tr>
<tr>
<td>Box A2</td>
<td>Traditional land and water management techniques</td>
<td>High Court decisions including for example: Mabo, WA v Commonwealth, Wik, Fejo, Yanner, Yarmirr Ward v WA (Miriwun and Gajerrong), Yorta Yorta, Anderson v Wilson</td>
</tr>
<tr>
<td></td>
<td>E.g. Land is integral to belief system; spiritual and physical connections; collective/communal responsibility for country; decisions made by those with connection to country.</td>
<td>Federal Court decisions, including for example: Fourmile, Hayes</td>
</tr>
<tr>
<td>Box A3</td>
<td>Content of Indigenous rights and interests in land and waters</td>
<td>Constitutional Law The Constitution (S.51 (xxxi))</td>
</tr>
<tr>
<td></td>
<td>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>Statutory Law Racial Discrimination Act 1975 (Cth) Native Title Act 1993 (Cth) Native Title Amendment Act 1998 (Cth) &amp; State and Territory complementary legislation.</td>
</tr>
</tbody>
</table>

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

Note, that Column B is divided into two columns, because in the middle here, we can begin to look at what it is in each of the systems of law and custom that enables it look interact with another system of law and custom.

Column B therefore, attempts to identify the features that govern or influence the interface or the interaction between the two systems.
Column B is divided into two vertical columns.

- On the left hand side, we can identify the features of Aboriginal and Torres Strait Islander law and custom that enable it to recognise the existence of the Australian legal system.
- On the right hand side, we can identify the features of the Australian legal system that enable it to recognise the existence of Aboriginal and Torres Strait Islander law and custom.

This is an important point which I will return to shortly.

In Table 1, you will also see three rows below the headings in Columns A and C.

At this point I would like to acknowledge the assistance of Kado Muir, an Aboriginal elder from the Western Goldfields in WA, and former Director of the Native Title Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) in Canberra. Kado assisted me in understanding much of what appears in Column A.

On each side (A and C), we can identify the various elements or characteristics of each of the two systems of law and custom at three levels.

- Row 1 identifies the general characteristics.
- Row 2 identifies the elements dealing with land and water management.
- Row 3 identifies the range of activities that may occur on land and waters.

There are two systems of law in Australia. There is the older system of laws of the Aboriginal peoples and Torres Strait Islander people and there is, by comparison, the relatively young system of Australian laws.

The recognition and protection of Indigenous rights and interests in land and waters has faced strong opposition from many of Australia’s core institutions. This is largely because systems of land management and land tenure are under the direct control of State and Territory Governments in the Australian Federal system and are clearly central to state control of land and natural resources.

The point I want to make about the two systems is that there is nothing inherently better in one system of law and custom compared to the other. THEY ARE JUST DIFFERENT.

But, on reading the High Court’s native title judgements from Mabo (No. 2) to Ward and Yorta Yorta\(^2\) and all of the major judgements of the Federal Court, there can be no doubt that Australian law is asserting its dominance.

Muir (1995:5) poses the question:

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?

As Muir (1998:3) rightly states: ‘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’.

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.

\(^2\) Western Australia v Ward [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002) and Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58; 214 CLR 422; 194 ALR 538; 77 ALJR 356 (12 December 2002)
The term ‘title’ has two distinct senses in Australian land law.

Primarily, it denotes ‘ownership’ – to the extent that ‘ownership’ of land is possible, consistent with the notion that land is held ‘of the Crown’. When a person has ‘title’ to land, the accepted meaning is that the person ‘owns’ the land. It guarantees security of title.

Secondly, 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 ownership’. The folio is allocated a ‘distinctive reference’, which is quoted in all transactions affecting the land. The title guarantees the priority of interests in the land.

Under this system, all rights and interests in land, except Indigenous rights and interests, are ‘held of the Crown’.

Over the past 150 years the eight States and Territories have 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).

There is a hierarchy in the different types of tenurial rights and interests in land that have been created or reserved by governments, ranging from unallocated Crown land, co-existing public and private, communal, public (for present and future generations), and private rights and interests. Private freehold, or an estate in fee simple, is regarded as the most secure form of tenure and the closest thing to absolute ownership that exists in the Australian system of land tenure.

Table 3 shows a hierarchy of Australian tenures or tenurial interests, starting with Crown land and cascading down to private freehold or absolute fee simple at the bottom of the table.

Crown land is land that is owned the Crown, as represented by the States and Territory Governments (and only in certain locations the Commonwealth), and it is not allocated to someone else.

The rights and interests in land can be grouped into various categories. From the top of the table under Crown land, they include:

- Co-existing public and private rights and interests;
- Communal rights and interests;
- Public rights (for present and future generations); and
- Private rights and interests.

In this last category, the tenures include permits, licences, leases and private freehold. Private Freehold or absolute fee simple is where a private person(s) or private corporations own the land.

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3 Commonwealth v. NSW (1923) 33 CLR 1, 42 per Isaacs J.
Table 3. Hierarchy of Australian Tenurial Interests*

<table>
<thead>
<tr>
<th>Crown land</th>
</tr>
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<tbody>
<tr>
<td>- Unallocated Crown land</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Co-existing public and private rights and interests</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Crown-to-Crown tenures (e.g. railways, educational institutions, health facilities)</td>
</tr>
<tr>
<td>- Roads</td>
</tr>
<tr>
<td>- Stock routes</td>
</tr>
<tr>
<td>- Public access, rights of way</td>
</tr>
<tr>
<td>- Parks or reserves (e.g. town parks and gardens, botanical gardens, public playing fields)</td>
</tr>
<tr>
<td>- Easements (e.g. electricity and telecommunications access, water, sewer and stormwater)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Communal rights and interests</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Community titles</td>
</tr>
<tr>
<td>- Strata titles</td>
</tr>
<tr>
<td>- Aboriginal Land Rights Acts grants (held communally and inalienable)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Public rights (for present and future generations)</th>
</tr>
</thead>
<tbody>
<tr>
<td>- National parks or World Heritage areas</td>
</tr>
<tr>
<td>- State Forests</td>
</tr>
<tr>
<td>- Reserves, conservation areas</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Private rights and interests</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Permits (e.g. water rights, access, profit-a-prendre (i.e. timber collecting))</td>
</tr>
<tr>
<td>- Licences (e.g. exploration, mining activity)</td>
</tr>
<tr>
<td>- Leasehold – lesser rights (e.g. pastoral, mining)</td>
</tr>
<tr>
<td>- Leasehold – exclusive possession (e.g. residential, commercial, conditional purchase)</td>
</tr>
<tr>
<td>- Private freehold or absolute fee simple</td>
</tr>
</tbody>
</table>

* This is a highly simplified table. The nature of land title systems in each Australian jurisdiction is far more complex than this table suggests.

SLIDE 35
So where does native title sit in this hierarchy?
Native title sits alongside most of these forms of tenure.

SLIDE 36
The legal, ethical and moral imperatives

There are several imperatives operating at both the domestic and international levels as to why planners and conventional land use planning processes must engage with Aboriginal and Torres Strait Islander people’s relationships to land and waters, and in particular to their cultural ties and obligations (SAMLIV 2003). These imperatives are significant for ethical, political and legal reasons.

SLIDE 37
Firstly, because Aboriginal and Torres Strait Islander people have maintained strong links with their country as well as core elements of their spiritual association with their land and waters (Rose, 1996). Aboriginal and Torres Strait Islander people have, for several decades through their land rights campaigns, been most vociferous about trying to secure a future that acknowledges their complex and continuing relationships between them and their environment. For their culture to survive, Aboriginal and Torres Strait Islander people must be able to access, protect and revitalise their country, sites and objects through rituals and customary practices. Through various means over recent decades, Aboriginal and Torres Strait Islander people and communities now own or manage approximately 23 per cent of Australia’s land mass (Pollack 2001 and Altman et al. 2007). Therefore, they have a crucial and legitimate stake in planning processes affecting their lands and waters (SAMLIIV 2003:15).

Secondly, the High Court’s rejection of the notion of terra nullius in Mabo [No. 2] forces an acknowledgement of the special land rights and interests of Aboriginal and Torres Strait Islander people. Such acknowledgment leads in turn to the recognition of past wrongs. This recognition is essential for moving on to more positive forms of planning and community-building (Gurran and Phibbs 2004:2; Jackson 1997a and b; Guest 2009:13).

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Thirdly, declarations by government that the extinguishment of native title has occurred (partly or wholly) will not make the laws and customs of Aboriginal and Torres Strait Islander people disappear. The term ‘extinguishment’ is just a metaphor for placing limits upon the extent to which recognition will be accorded to Aboriginal and Torres Strait Islander people under Australian law. Aboriginal and Torres Strait Islander people and communities throughout Australia will always retain their special relationship with and responsibility for land and sea country (Rose 1996, Dodson 1998:209).

SLIDE 39
Fourthly, good planning is persuasive storytelling about the future (Throgmorton 1992). Any future narrative must be a new story, not the kind of fiction which legitimised terra nullius and rationalised unjust and racist land use decisions (Jackson 1997b:226). As professional practitioners, planners have an ethical and moral responsibility to ensure past wrongs are not repeated.

SLIDE 40
Fifthly and most significantly, in 2007 the General Assembly of the United Nations endorsed the ‘Declaration on the Rights of Indigenous Peoples’ (UN, 2007).

The UN Declaration on the Rights of Indigenous Peoples is the most appropriate guide to ethical conduct when working with Indigenous people.

SLIDE 41
Indigenous Peoples and International Law
(I am indebted to Paul Howorth for the following segment of slides).

SLIDE 42
Statehood gives high status under international law, not easily gained or granted.

As nation states are collectives of people, the term ‘people’ is defined very technically. In short, surviving Indigenous people do not qualify as peoples for the purposes of international law. This defies them statehood and heavily limits their access to the system.

SLIDE 43
Notwithstanding the above, since WWII, indigenous peoples have achieved extraordinary things within the system. Since WWII, there has been a rise of international human rights law to moderate and regulate conduct of states towards citizens. Until this time, only nation states were subjects of international law.

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From late 1940s to the present, a suite of human rights conventions and declaration have emerged from the United Nations. For example:

- The Universal Declaration on Human Rights (1948)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Economic, Social and Cultural Rights (1967)
- International Covenant on Civil and Political Rights (1967)

For historical reasons, human rights law is very interested in the treatment of marginalised minorities.
Indigenous minorities are among the world’s most marginalised peoples.

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Thus, they are picked up by, and rely on the international human rights law movement. Minimal conventional treatment: subjects of 2 International Labour Organisation (ILO) agreements, & minor mentions in the mainstream human rights agreements.

For Example: C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)
Convention concerning Indigenous and Tribal Peoples in Independent Countries (Entry into force: 05 Sep 1991) which is entirely focused on the rights of Indigenous Peoples.

However, long running engagement between Indigenous peoples and the human rights movement results in a major declaration.

SLIDE 46
The Declaration on the Rights of Indigenous Peoples was adopted by the United Nations in Sept 2007, under sponsorship of UN High Commissioner for Human Rights.

Highly legitimate from both an Indigenous perspective (deeply involved) and from a human rights perspective (deeply resonant).

SLIDE 47
Declarations not binding, but are highly persuasive and can become binding if & as nation states practice in line with them.

This Declaration expresses rights and by doing so, explains how Indigenous peoples want nation states (& others) to conduct themselves when it comes to dealing with Indigenous peoples.

SLIDE 48
- Under Article 3 of the Declaration, Indigenous people have the right to self-determination.
- Under Article 10, Indigenous people shall not be forcibly removed from their lands or territories.
- Under Article 19, Indigenous people 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.
- Under Article 23, Indigenous people have the right to determine and develop priorities and strategies for exercising their right to development.
- Under Article 26, 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.
- And under Article 32, they have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

SLIDE 49
The rights in Articles 3, 19, 23 and 26 can be seen 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. These three rights 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 and therefore sovereignty 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. This has the implication that any State interested in the development of Indigenous peoples living within its territory must choose between formal recognition and implementation of these enabling rights, or otherwise be prepared to either objectively determine the development of Indigenous peoples paternalistically, or else assimilate them. (Howorth, P. personal comments)

SLIDE 50
**Accommodating Aboriginal and Torres Strait Islander people in contemporary planning processes**

SLIDE 51
Native title should not be seen as just another one of those things that we need to ‘tick-off’ in the list of matters to be dealt with in planning processes like environment and heritage. I share Dorsett and Godden’s view that to simply assume
that native title is just another one of those matters that you divert into and out of as required, ignores one of the most important and fundamental changes that has occurred in Australia. And that is, that Aboriginal and Torres Strait Islander people owned and occupied the land long before the British colonised Australia, and Aboriginal and Torres Strait Islander people also knew how to maintain the land. As I and many others have argued elsewhere, we need to integrate Aboriginal and Torres Strait Islander people’s rights, interests, needs and aspirations into our planning processes from the very outset and consistent with the general direction that good strategic and environmental planning is heading toward, adopt a more holistic understanding of sustainability and how people interact with the complex surroundings that we now denote as ‘the environment’.

SLIDE 52
Contemporary land use planning and decision making processes therefore need to make some significant changes in order to better accommodate the rights, interest, needs and aspirations of Aboriginal and Torres Strait Islander people and communities, such that:

- Aboriginal and Torres Strait Islander people’s rights and interests are properly recognised and protected in no lesser way than anyone else’s property rights and interests;

SLIDE 53
- Aboriginal and Torres Strait Islander people are able to be meaningfully involved in planning processes in a way that is consonant with their relationship to the land and the relationship between the modern western and customary systems of law; and that
- Aboriginal and Torres Strait Islander people are able to participate in economic development opportunities on their lands and in ways that give priority to their rights, interests, needs and aspirations.

This means that planners as key players in land use planning, land management and development decision making will need to understand the contextual history of Aboriginal and Torres Strait Islander people and communities in the location they are working in, as well as how to engage constructively with the relevant people and understand how they absorb information and make decisions.

It also poses some significant challenges to the current power imbalances between Aboriginal and Torres Strait Islander people’s rights and interests and the rights and interests of others with respect to land use planning and development processes.

SLIDE 54
For example, Hewitt (1998:359), Dorsett and Godden (2000:382) and Neate (2004:50) have long argued that planning needs to take a more holistic approach to integrating the aspirations of Aboriginal and Torres Strait Islander people in both their role as an ‘owner’ of land and as part of the wider community.

Indeed, Neate (2004:49-50) states that the participation of Indigenous communities in having an input into decision making is highly relevant, especially where planners and planning agencies do not have the requisite knowledge nor the expertise or skills to fully understand or assess the possible impact of a proposed development on the rights, interests, needs or aspirations of Aboriginal and Torres Strait Islander people and communities. This includes situations where Aboriginal and Torres Strait Islander people have maintained strong connections to their land and waters and as a matter of Australian statute law, native title has been extinguished or survives in a limited way (Neate 2004:50).

The recognition of native title rights and interests demands that both planners and the institutions we work for, examine the implications of native title for land allocation and management decisions and consider how the historical exclusion of Aboriginal and Torres Strait Islander people from land-use decision-making can be redressed. The critical challenge facing contemporary planning processes and professional planners is to dismantle a practice that has allowed one culture to exert its dominance and authority over another, building in its place a relationship based on mutual respect, with the potential to enrich and strengthen Australia’s national life.

We have to work out new ways of working with Aboriginal and Torres Strait Islander people and how we involve them in contemporary planning and land use decision making. We have to learn new ways of accommodation Aboriginal and Torres Strait Islander peoples, rights, interests, needs and aspirations into conventional planning schemes in ways that respect their culture.

Contemporary land use planning and decision making processes therefore need to make some significant changes in order to better accommodate the rights, interest, needs and aspirations of Aboriginal and Torres Strait Islander people and communities, such that:

- Aboriginal and Torres Strait Islander people’s rights and interests are properly recognised and protected in no lesser way than anyone else’s property rights and interests, and that
• Aboriginal and Torres Strait Islander people are able to be meaningfully involved in planning processes in the same way that other people are able to participate in planning processes.
• Aboriginal and Torres Strait Islander people are able to participate in economic development opportunities on their lands and in ways that give priority to their rights, interests, needs and aspirations.

This means that planners as key players in land use planning and development decision making will need to understand the contextual history of Aboriginal and Torres Strait Islander people and communities in the location they are working in, as well as how to engage constructively with the relevant people and understand how they absorb information and make decisions.

SLIDE 55
In a paper that I co-authored with others for the Indigenous Planning Working Group for PIA, I wrote that formal planning education for new entrants into the profession as well as for those already working in the profession is in need of reform. Four areas require urgent attention:

• Planning theory and methodology. New theories of planning need to be devised that are more sensitive to cultural differences and which facilitate greater recognition of the important role that Aboriginal and Torres Strait Islander law, lore and custom play in their lives.

SLIDE 56
• Normative values and processes. Current normative values and processes are, in certain situations, no longer relevant, and new values and processes of planning need to be devised that records, interprets and absorbs Aboriginal and Torres Strait Islander people’s intrinsic knowledge of country and the environment.

SLIDE 57
• The administrative and legal context. Administrative processes need to change to enable Aboriginal and Torres Strait Islander people to be involved in planning processes at least to the same extent as other interested parties and to have more control over the planning of their communities and traditional lands and waters.

SLIDE 58
• Communication skills and ethics. Aboriginal and Torres Strait Islander people have different ways of making decisions and different community structures, and it is important for planning processes to take account of these cultural differences in ensuring effective community engagement.

That paper can be accessed from the PIA website: http://www.planning.org.au/documents/item/2381
The PIA paper includes the details of many of the references cited above.

SLIDE 59
I have three final messages.

SLIDE 60
Firstly, as a consequence of Mabo (No. 2), Aboriginal people and Torres Strait Islanders now have enforceable rights. Therefore, local Councils no longer have a choice about whether there will be relationships between Indigenous Australians and the Council, and between Indigenous Australians and other Australians. Our choice is about the quality of those relationships and whether those relationships enrich and strengthen our local communities, or whether those relationships continue to be fraught with tension and disharmony.

I agree with the Rt Hon Douglas Graham, a former Minister of Justice in the New Zealand Government, when he said in the New Zealand context ‘We do not have a choice about whether or not there will be relationships between Maori and New Zealanders. Our choice is whether those relationships enrich and strengthen our national life, or whether those relationships are fraught and painful’ (Graham 1998:8).

The same applies to Australia.

SLIDE 61
Secondly, local Councils are part of the governance of this country. All the Local Government Acts around Australia have been significantly overhauled or amended over the last decade, and all of them without exception include statements to the effect that Councils have powers of general competence. That is, that they are able to do whatever is necessary for the peace, order and good governance of their local communities. This also means that they inherit responsibilities to all communities that make up this nation. They govern for all in their communities, Indigenous and non-Indigenous people.

SLIDE 62
The third issue, while not native title specific, is nevertheless relevant and very important. And that is, how well local Councils respond to Aboriginal and Torres Strait Islander inclusiveness. The endemic belief systems that Aboriginal and Torres Strait Islander people and communities confront daily is that mainstream culture is superior and better, and that
Aboriginal and Torres Strait Islander culture while interesting and commending itself to tourism opportunities, is inferior. In relation to native title, it is neither superior nor inferior to freehold title or any other title issued by the Crown – it is simply different and must be treated with the same respect and due processes shown to other forms of land title.

Democracy is about meeting the needs of all people, having particular regard to minorities, and governance needs to be delivered in a way that is appropriate to all members of its community. Aboriginal and Torres Strait Islander people need to be included in the processes of local democracy and government, and services need to be delivered in culturally appropriate ways.

**TIME PERMITTING – SECOND SESSION**

**The Native Title Act 1993 (Cth) and the ‘future act’ provisions**

The following information is structured under the following headings:

- General information about Future Acts;
- What scenarios are State Governments, Councils and other proponents likely to find?
- Future Act provisions;
- How the Future Act regime works;
- The ‘future act’ hierarchy in the *Native Title Act 1993* (Cth);


**General information about Future Acts**

Where native title exists or may exist and the native title holders or claimants are known, parties proposing future acts must comply with the ‘future act’ provisions in the *Native Title Act 1993* (Cth), and you have the option of either:

- developing an Indigenous Land Use Agreement (ILUA), or
- following the future act processes.


Under the *Native Title Act 1993* (Cth), the provisions relating to ILUAs take precedence over all other procedures for dealing with future acts. If the proponent of a future act can negotiate an Indigenous Land Use Agreement (ILUA) with the registered native title body corporate and/or registered native title claimants about a future act or classes of future acts, the subsequent provisions for dealing with future acts do not apply.

In other words, the complex processes for dealing with future acts in the *Native Title Act 1993* (Cth) can be set aside and the parties can seek to work it out directly between themselves.

Or, if it is not possible for whatever reasons to develop an ILUA about a particular future act or entire classes of future acts, then a proponent of a future act will need to follow the future act processes in the *Native Title Act 1993* (Cth).

These processes must be followed in areas where native title exists or may exist, irrespective of whether or not there are any native title determination applications or determinations in relation to the area.

**SLIDE 63**

*What scenarios are there likely to be in relation to native title?*
A native title assessment should be carried out at the beginning of any work plan or project assessment process. The first step is to ascertain which of the following scenarios may be applicable in the location of the proposed activity or future act.

**SLIDES 64 and 65**
There are five possible scenarios that State Governments, local Councils and other proponents of future acts are likely to come across in relation to native title. Each scenario requires a different response. Table 1 below sets out the five scenarios and the possible courses of action in relation to future acts.

Table 1. Native Title Scenarios and Proposed Actions

<table>
<thead>
<tr>
<th>SCENARIO</th>
</tr>
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<tbody>
<tr>
<td><strong>Scenario 1.</strong></td>
</tr>
<tr>
<td>An application for a determination of native title has been lodged with the Federal Court and is being processed. It may be a registered application or an unregistered application.</td>
</tr>
<tr>
<td>Native title may exist or may have been extinguished. Council needs to undertake a risk assessment and ascertain whether the proposed act is in an area where native title exists or may exist. Before a determination is made by the courts, options include developing an ILUA or following the other processes for future acts in the <em>Native Title Act 1993</em> (Cth).</td>
</tr>
</tbody>
</table>

| **Scenario 2** |
| The applicants may have discontinued an application with the leave of the Court, or the Court may have struck out or dismissed an application. |
| As with the above scenario, native title may exist or may have been extinguished. Council needs to undertake a risk assessment to ascertain whether the proposed act is in an area where native title exists or may exist. Council may decide it wishes to work with the former applicants to seek associated outcomes. Aboriginal or Torres Strait Islander heritage protection may still need to be considered. |

| **Scenario 3.**  |
| A determination has been made that native title exists in some areas and/or has been extinguished in other areas. |
| If a determination has been made by the Federal Court or High Court that native title has been extinguished, then native title is no longer a consideration for that area. If this is the case, and it is appropriate to do so, Council may wish to work with the native title party to seek associated outcomes. Aboriginal or Torres Strait Islander heritage protection may still need to be considered. However, if a determination has been made by the courts that native title exists, then options include developing an Indigenous Land Use Agreement (ILUA) or following the other processes for future acts in the *Native Title Act 1993* (Cth) as required. |

| **Scenario 4.**  |
| There are no known native title holders, but native title may exist. |
| Council needs to undertake a risk assessment to ascertain whether the proposed act is in an area where native title exists or may exist. |
| If native title may still exist in an area, then Council can lodge a non-claimant application with the Federal Court and may be able to obtain s24FA protection for a particular future act(s) in the area. Aboriginal or Torres Strait Islander heritage protection may still need to be considered. |

| **Scenario 5.**  |
| There is a registered Indigenous Land Use Agreement (ILUA) on the Register of Indigenous Land Use Agreements. |
| If a registered ILUA exists for a particular area then it may provide that certain procedures must be followed. If Council is a party to the ILUA, any future act processes already agreed under the ILUA must be followed. If not, then another ILUA can be negotiated, or the other processes for future acts under the *Native Title Act 1993* (Cth) will need to be followed. If the ILUA includes the surrender of native title for a particular area, then native title is no longer a consideration in relation to |
that particular area. However, Aboriginal or Torres Strait Islander heritage protection may still need to be considered.

Source: Adapted from NNTT & ALGA 2009.

**SLIDE 66**

**Future Act provisions**

**SLIDE 67**

Future acts that affect native title are classified as valid or invalid under the *Native Title Act 1993 (Cth)* because of the existence of native title. In this context ‘valid’ means ‘having full force and effect’.

The *Native Title Act 1993 (Cth)* provides processes, in tandem with existing land management systems, whereby future acts that take place over land or waters where native title exists or may exist are valid. If a proponent of a future act does not follow these processes, the particular future act may be rendered invalid at a later date. Unless a provision of the *Native Title Act 1993 (Cth)* provides otherwise, a future act is invalid to the extent that it affects native title. If an act is declared or found to be invalid in terms of its effects on native title, the native title holders may be entitled to compensation, damages or any other remedy, such as an injunction.

If an act does not affect native title in any way, the future act regime will not apply.

In order to ensure that future acts are valid in so far as native title is concerned, certain processes under the *Native Title Act 1993 (Cth)* must be followed. This means that proponents of future acts must become familiar with the processes in the *Native Title Act 1993 (Cth)* to ensure that whatever it does in an area where native title exists or may exist, is valid in so far as native title is concerned. The options available for obtaining validity are discussed below, but see also the NNTT Booklet titled ‘Working with Native Title: Linking native title and Council processes’:


The effects of invalidity are less certain. Native title holders may be entitled to damages or other common law remedies for any activities that invalidly impact on their native title rights and interests. The Federal Court may award damages or remedies in proceedings relating to the invalidity of a future act.

Following the correct native title processes and adopting a precautionary approach to native title matters will ensure that:

- everyone’s legal rights are recognised;
- exposure to any claim for damages is minimised if not eliminated; and
- following the proper procedures will ensure that land dealings or development outcomes are lawful and valid in so far as they affect native title.

Whether a planning scheme ‘affects’ native title rights and interests is a moot point. To date there has no authoritative judicial decisions on whether a statutory planning scheme constitutes a future act within the meaning of the *Native Title Act 1993 (Cth)*.

Non-statutory planning documents such as strategic plans and master plans, do NOT affect native title rights and interests because they do not fall within the definition of ‘act’ within the *Native Title Act 1993 (Cth)* and because they are not the documents on which land tenure decisions and specific development approvals are made.

Under s.227 of the *Native Title Act 1993 (Cth)*, an act affects native title if it ‘extinguishes the native title rights and interests or if it is wholly or partly inconsistent with their continued existence, enjoyment or exercise’. If a statutory planning scheme or the designation of land within such schemes, results in the extinguishment of native title rights and interests and in particular the native title right to control the use of land, it follows that they constitute future acts within the meaning of the *Native Title Act 1993 (Cth)*. And their validity will depend upon compliance with the future act regime established by the *Native Title Act 1993 (Cth)*.

In answer to the specific questions about planning schemes:

- A planning scheme is a legal instrument with the force of law and thereby falls within the definition of an ‘act’ in the *Native Title Act 1993 (Cth)*. The making, amendment or repeal of a statutory planning scheme may constitute a future act if the enactment of the scheme ‘extinguishes the native title rights and interests or if it is wholly or partly inconsistent with their continued existence, enjoyment or exercise’. However, Dorsett and Godden (2000:381) have argued that while a planning scheme is statutory in nature, native title holders would be

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4 S.240A Native Title Act 1993 (Cth)
affected in the same way as ordinary title holders, and that as such, it is unlikely that the adoption of a planning scheme will trigger the future act processes. It nevertheless remains the position that the issuing of leases or licences and approvals pursuant to the planning scheme may trigger the future acts regime.

- Approving a development application or acting on a development approval may or may not constitute a future act. It depends on whether acting on the approval will affect the native title rights and interests within the terms of the Native Title Act 1993 (Cth). Use the discussion on Scenarios to ascertain which scenario applies, and then ascertain whether approving a development within a planning scheme or acting on a development approval will affect the native title rights and interests. And be sure to ask the native title holders this question as only they may know how the proposed development will affect their native title rights and interests.
- Yes, the reconfiguration of a lot may affect native title rights and interests, especially if it involves the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters, or the creation, variation, extension, renewal of extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise.

How the future act regime works

SLIDE 70
There are three critical factors involved in dealing with future acts:
1. working out whether the proposed act or activity is a future act;
2. who will be responsible for carrying out the future act (i.e. Council, State Government or private person/organisation);
3. working out which procedure must be followed for the act to be lawful and valid in so far as native title is concerned.

1. Is the proposed activity a ‘future act’?

SLIDE 69
A future act has three essential characteristics. The act or activity:
- must occur on or after 1 January 1994 for non-legislative future acts or 1 July 1993 for legislative future acts;
- must occur in an area where native title exists or may exist; and
- must affect (extinguish, impair, or in some way limit) the continued existence or enjoyment of native title.

In determining whether a proposed activity is a future act, the following questions will be of assistance.

a) Is the act or activity to occur on or after 1 January 1994 for non-legislative acts or on or after 1 July 1993 for legislative future acts?
b) Is the act or activity going to occur in an area where native title exists or may exist?
c) Will the act affect native title?

For the act or activity to be a future act, the answer to all three questions must be ‘yes’.

If an act does not affect native title in any way, the future act regime will not apply.

2. Who is going to carry out the ‘future act’ and who is responsible for ensuring its validity?

It is important to establish clearly who is going to be responsible for carrying out the future act. For example:
- Is the Council going to be carrying out the activity? or
- Is the State or Territory going to be carrying out the activity? or
- Is the Council going to carry out the activity under delegated authority from the State or Territory?

This will assist in identifying who will be responsible for making sure the correct processes are followed and who should be parties to an Indigenous Land Use Agreement that validates the doing of a future act. The State or Territory government may not need be party to the ILUA so long as it is satisfied that a registered ILUA covers the doing of a future act.

A Council may identify the officer responsible on a project by project basis, or allocate this responsibility for all projects to a specific officer. It should be clear who is responsible within a Council for either completing or overseeing the completion of the necessary native title compliance procedures.

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5 For an act to be a future act the act must consist of the making, amendment or repeal of legislation on or after 1 July 1993, or if it is any other act it must take place on or after 1 January 1994. However, if native title does not exist because of certain valid past acts or certain valid intermediate period acts or where the extinguishment of native title has been has been confirmed under the Native Title Act 1993 (Cth) (ss23A to 23JA), then the future act provisions of the Act do not, indeed cannot, apply.
3. Which procedure must be followed?

Under the future act provisions of the *Native Title Act 1993* (Cth), native title holders and registered native title claimants are entitled to certain procedural rights. This means that they have certain rights that should be afforded as part of the procedures that are to be followed when it is proposed to do the act. These rights include:

- The right to be notified; and
- the opportunity to comment; or
- the right to be consulted; or
- the right to negotiate; or
- the right to object; or
- the same rights as an ordinary title holder (freeholder).

The details of the procedural rights are discussed later in this paper.

**The ‘future act’ hierarchy in the Native Title Act 1993 (Cth)**

The ‘future act’ regime within the *Native Title Act 1993* (Cth) includes a hierarchy of categories for different types of future acts. A proposed future act in an area where native title exists or may exist may fall within any one of the future act provisions.

**SLIDE 72**

In order to follow the correct procedure, it is necessary to identify the correct category:

- The first category relates to situations where the native title holders or claimants are known and provides for the making of Indigenous Land Use Agreements or ILUAs.
- The second category relates to situations where there are no known native title holders. The procedure available is referred to as a ‘non-claimant application’. This is an application by a party that does not hold native title rights and interests for a determination that native title does not exist for a particular area. Many Councils have used this procedure to be sure their future act is valid and can’t be undone at a later date. However, this procedure is not available where there are registered native title claimants for the area or there is a determination that native title exists for the area.
- The remaining categories relate to specific types of activities. That is, the nature of the proposed future act will determine which procedural right the native title holders or registered claimants will be entitled to in order for the future act to be lawful and valid in so far as it affects native title.

**SLIDE 71**

The future act provisions are hierarchical (See Table 2). The order of application of the future act provisions, are as follows:

1. Indigenous Land Use Agreements (ILUAs) (ss.24BA, 24CA, 24DA);
2. Section 24FA protection (non-claimant applications) (s.24FA);
3. Primary production and associated activities (ss.24GB, 24GD, 24GE);
4. Management of water and airspace (s.24HA);
5. Renewals and extensions of leases, licences, permits etc. (s.24IA);
6. Public housing and other public facilities (such as public health, education, police, emergency facilities, staff housing and related infrastructure) being provided for Aboriginal or Torres Strait Islander people living in or in the vicinity of the area (s.24JAA) (this provision only operates for ten years from 2009);
7. Use of reserved land and reserved Council lease-holdings(s.24JA);
8. Providing or maintaining facilities for services to the public (s.24KA);
9. Low impact future acts (s.24LA);
10. Acts that pass the freehold test (s.24MD);
11. Acts affecting offshold test (s.24NA).
Table 2. Future Act Hierarchy: Outcomes or Procedural Rights in the Native Title Act 1993 (Cth)

<table>
<thead>
<tr>
<th>Future act category and Section of the NTA 1993 (Cth)</th>
<th>Outcome or procedural rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Indigenous Land Use Agreements (ILUA). (S24BA-24EC)</td>
<td>Does the proponent of a future act want to enter into an ILUA to validate a future act instead of using the other processes under the Act? Where relevant, ILUAs may provide for future act(s) to be done, or the surrender of native title, or to validate future acts that have already been done invalidly. In some circumstances it may not be possible to use an ILUA. For example, where there are competing claimants and there may not be sufficient time to negotiate an ILUA where the different claimant communities cannot agree on the carrying out of a future act.</td>
</tr>
<tr>
<td>2. Non-claimant applications. (S24FA) (unopposed)</td>
<td>Does the proponent of a future act want to lodge a non-claimant application in the Federal Court to find out whether or not native title exists in a particular area over which it has a non-native title interest? If no potential native title holders respond within a prescribed period there is automatic s24FA protection for future acts. If potential native title holders make a claim within the relevant period which is subsequently registered then the proponent may be able to negotiate an agreement or will have to use other relevant future act processes. <strong>Note:</strong> This process has no utility where there already are registered native title claimants for the area or if there is a determination that native title exists for the area.</td>
</tr>
<tr>
<td>3. Primary production and diversification and off-farm activities directly connected to primary production. (S24GB and s24GD)</td>
<td>Opportunity to comment applies. The upgrade of a pastoral lease to freehold requires a compulsory acquisition, which attracts the right to negotiate. <strong>Note:</strong> Councils generally do not carry out or authorise these kinds of activities.</td>
</tr>
<tr>
<td>4. Management of water and airspace. (S24HA)</td>
<td>Does the future act involve the regulation or management of water and airspace? If so, the opportunity to comment applies.</td>
</tr>
<tr>
<td>5. Renewals and extensions of leases and licences and grants of titles under pre-23 December 1996 agreements or commitments. (S24IA)</td>
<td>Does the future act authorise the renewal or extension of leases and licences that arise from agreements or commitments made on or before 23 December 1996? If so, the opportunity to comment applies. <strong>Note:</strong> in limited circumstances, the right to negotiate may apply (s24ID(4) in relation to mining.</td>
</tr>
<tr>
<td>6. Provision of public housing and other public facilities (such as public health, education, police, emergency facilities, staff housing and related infrastructure) being provided for Aboriginal or Torres Strait Islander people living in or in the vicinity of the area (s.24JAA) (this provision only operates for ten years from 2009)</td>
<td>Does the future act involve the provision of public housing and other public facilities (such as public health, education, police, emergency facilities, staff housing and related infrastructure) being provided for Aboriginal or Torres Strait Islander people living in or in the vicinity of the area? If so, the opportunity to comment applies.</td>
</tr>
<tr>
<td>7. Use of reserved land. Activities and dealings regarding pre-23 December 1996 reserve land consistent with purpose and leases to statutory authorities. (S24JA)</td>
<td>In the case of land reserved, proclaimed, dedicated, or conferred by some permission or authority for particular purposes on or before 23 December 1996, is the proponent involved in authorising or undertaking activities on the land that are consistent with the purposes for which it was reserved, proclaimed, dedicated, or conferred? If so, the opportunity to comment may apply.</td>
</tr>
<tr>
<td>8. Facilities for services to the public. (S24KA)</td>
<td>The Native Title Act 1993 (Cth) specifies what constitutes a ‘facility for services to the public’. Does the proposed activity constitute a facility for services to the public? If so, the same procedural rights apply as an ordinary title holder would be entitled to. If over a pastoral lease, then the same rights as pastoral lessees.</td>
</tr>
<tr>
<td>Provision</td>
<td>Description</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>9. Low impact future acts. (S24LA)</td>
<td>This provision does not apply if the future act is or requires the compulsory acquisition of native title rights and interests.</td>
</tr>
<tr>
<td></td>
<td>There are no procedural rights. Note: This provision applies only if the act is of low impact and takes place before and does not continue after a determination is made that native title exists in a particular area.</td>
</tr>
<tr>
<td>10. Acts that pass the freehold test. (S24MD)</td>
<td>Freehold test: if act could have been done had the native title holders instead had freehold and if legislation is in place to protect areas of Indigenous significance:</td>
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<tr>
<td></td>
<td>• the right to negotiate may apply;</td>
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<tr>
<td></td>
<td>• the right to be consulted may apply; or</td>
</tr>
<tr>
<td></td>
<td>• ordinary title rights apply. Note: The Native Title Act 1993 (Cth) specifies a number of circumstances where the freehold test applies. Refer to the Act for details.</td>
</tr>
<tr>
<td>11. Acts affecting offshore places. (S24NA)</td>
<td>Procedural rights for native title holders are the same as if they hold non-native title rights, that is, ordinary title rights. Note: Councils generally do not carry out or authorise these kinds of activities.</td>
</tr>
</tbody>
</table>

(Source: NNTT & ALGA 2011, updated 2013)

To the extent that a future act is covered by a particular provision in the future act hierarchy in the Native Title Act 1993 (Cth), it will be made valid by that particular provision and will not be covered by any provisions relating to a category lower in the list. It is also important to note that where a future act is covered by a registered Indigenous Land Use Agreement the other procedures for dealing with future acts do not have to be considered.

By checking the hierarchy and following the correct processes for the relevant category set out in the Native Title Act 1993 (Cth), Council or a proponent is able to ensure that a proposed future act will be valid. Identifying which category in the future act hierarchy applies and how the procedures are to be complied with can be a difficult task and if a Council does not have a specialised officer trained in this area it may be necessary to obtain professional advice.

In some circumstances the future act requirements of the Native Title Act 1993 (Cth) can be satisfied by negotiating an Indigenous Land Use Agreement or ILUA, provided the relevant parties are willing to negotiate an agreement and have it registered. Some times ILUAs may be difficult to negotiate and get registered so it may be simpler for Council to follow the appropriate processes in the other relevant provision for future acts in the Native Title Act 1993 (Cth).

If a particular future act is not covered by any of the provisions in the future act hierarchy, it can only be validly done by way of an Indigenous Land Use Agreement (ILUA) or in some cases following compulsory acquisition of the native title rights and interests. Unless a future act is covered by one of the provisions in the future act hierarchy, including by way of an ILUA, the future act is invalid to the extent that it affects native title (s24OA of the Act).

If it is not possible or appropriate to use an ILUA, then the compliance procedures under the future act hierarchy must be followed in areas where native title exists or may exist. The Native Title Act 1993 (Cth) also stipulates who must receive notification of a proposed future act. These vary depending on the circumstances, but generally include:

- the Native Title Representative Body or Native Title Service Provider funded to perform the relevant functions of a Native Title Representative Body;
- the Registered Native Title Body Corporate in an area where a determination has been made by the Federal Court that native title exists and there is a registered native title body corporate for the area;
- the registered native title applicants where
  - a native title determination application has been filed with the Federal Court and entered on the Register of Native Title Claims maintained by the NNTT and
  - a determination that native title exists has been made by the Court but a determination as to the Prescribed Body Corporate to hold those rights is still pending.

Unless otherwise stated in the Native Title Act 1993 (Cth), the non-extinguishment principle generally applies to valid future acts. This means that native title rights and interests continue to exist in an area covered by a valid future act, but that native title cannot impede the doing of the act. Inconsistent native title rights and interest are suppressed for the duration of the future act.
The only valid future acts that will extinguish native title in relation to an area are:

- the surrender of native title by agreement;
- the exercise of a right created on or before 23 December 1996 that grants freehold or exclusive possession;
- the construction of a public work on reserved land or on a lease that has been granted to a statutory authority for that or a similar purpose;
- the compulsory acquisition of native title rights and interests.

**Procedural Rights for Future Acts**

The rights that registered native title bodies corporate and/or registered native title claimants may be entitled to in relation to a future act will depend on the kind of act being done. Failure to treat native title holders and registered claimants in the way set out under the *Native Title Act 1993 (Cth)* (and/or under complementary State or Territory legislation) may mean that a proponent’s future act is invalid.

The procedural rights that apply to the different categories of future acts are set out in Table 1 below. The list in Table 1 sets out the order of application of the future act provisions according to which a future act or classes of future acts must be considered and the nature of the procedural rights that apply in each case.

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The procedural rights include:

- the *opportunity to comment*;
- the *right to be consulted*; and
- the *right to negotiate*.

These rights sit between:

- the *same rights as a freeholder* is entitled to (the freehold test); and
- *no procedural rights*.

The hierarchy of procedural rights in conventional planning and land management processes is depicted in **Figure 1**.

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**Figure 1**  
Hierarchy of Procedural Rights in conventional planning and land management processes

(Source: Wensing and Macmillan 1999)
The **opportunity to comment** involves the right to be given:

- notification in writing including an adequate explanation of the future act; and
- a reasonable time to make comments.

The full bench of the Federal Court in *Harris v the Great Barrier Reef Marine Park Authority* [2000] FCA 603 (14) states that the opportunity to comment is a right to proffer information and argument to the decision-maker that it can make such use of as it considers appropriate.

The **right to be consulted** involves the right:

- to be notified about the act;
- to lodge an objection within two months of notification;
- for objectors to be consulted about ways of minimising the impact of the act on native title rights and interests, any access rights, and the way in which anything permitted by the act can be done;
- for objections to be heard by an independent body or person; and
- to seek compensation for loss or impairment of native title rights and interests.

The Federal Court in *Harris v the Great Barrier Reef Marine Park Authority* [2000] FCA 603 (9) citing a case from New Zealand observes that consultation may be a continuous process, with the happenings at one meeting forming the background to a later one.

The **right to negotiate** involves the right for all native title parties affected by the act to:

- be notified in writing, with an adequate explanation of the future act;
- become a party to the process within four (4) months after notification;
- lodge a claimant application within three months and to be registered within four months of notification, so as to become a party to the negotiations;
- be provided with an opportunity to make submissions in relation to the future act.

All parties must negotiate in good faith with a view to reaching agreement about the doing of the act, or the doing of the act subject to conditions. If any party so requests, the arbitral body must mediate among the parties to assist in reaching an agreement. If agreement cannot be reached, the relevant Commonwealth, State or Territory Minister may make a determination about the future act.

According to the Federal Court, again in *Harris v the Great Barrier Reef Marine Park Authority* [2000] FCA 603 (15), the right to negotiate is “designed to achieve agreement” and can be seen as an entitlement for the native title holders “to participate closely in the validation process”.

The **same rights as a freeholder** depends on the rights given to freeholders under relevant State/Territory or Federal legislation. Future acts that pass the freehold test must not put native title holders in a worse position than ordinary or freeholder owners.

**No procedural rights** means that the proponent of a future act need not take any action to notify or to consult about the doing of a particular act. The only type of future act that does not involve any procedural rights is a low impact future act. A low impact future act can take place over an area without public notice or negotiation with any potential native title holders before a determination that native title exists is made, although it may be useful to do so in the interests of good governance. However, low impact future acts cannot continue after such a determination is made unless the native title holders agree that the act may continue.
References


The American Productivity Centre (1998) (??)


Useful sources of information

The Federal Court of Australia plays a crucial role in the native title system. Information about the Federal Court’s role can be found here:

The judgements of the Court can be found in several places, including:
(Judgements are searchable by key word and in full-text.

http://www.austlii.edu.au/au/cases/cth/FCA/
Decisions can be searched alphabetically or by the year in which they were made.

There is a lot of information available on the National Native Title Tribunal’s website at:
Including information on how to access the registers held by the Tribunal:
The Tribunal produces an annual National Report:
(This is NOT its annual report to the Attorney-General and the Parliament.)

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) also produces a number of very helpful resources. AIATSIS has a Native Title Research unit dedicated to research on native title matters. This site is well worth exploring. http://www.aiatsis.gov.au/ntru/overview.html

The Federal Attorney-General’s Department website provides information on Native Title Respondent Funding (from 1 January 2013):

The Federal Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) website contains a lot of information about Indigenous policy generally, as well as information on parts of the native title system.
Overview:

Land and Native Title:

Native Title program and Native Title Reform

Office of the Registrar of Indigenous Corporations. Most Prescribed Bodies Corporate are registering as an Indigenous corporation under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act). The Registrar’s office supports and regulates the corporations that are incorporated under the Act. It does this in a variety of ways: by advising them on how to incorporate, by training directors, members and key staff in good corporate governance, by making sure they comply with the law and by intervening when needed. The Act is administered by the Registrar of Indigenous Corporations. http://www.oric.gov.au/Default.aspx?class=home

Since 1994, the Aboriginal and Torres Strait Islander Social Justice Commissioner has produced an annual Native Title Reports. These reports are quite valuable for the information they contain.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has also produced annual Social Justice Reports since 1996, and they are equally as valuable for the information they contain.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has also produced a Community Guide to the United Nations Declaration on the Rights of Indigenous Peoples.