INDIGENOUS RIGHTS AND INTERESTS IN STATUTORY AND STRATEGIC LAND USE PLANNING: SOME RECENT DEVELOPMENTS

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EPIGRAPH

Planning in Australia is fundamentally out of step … with the expectations of contemporary Aboriginal and Torres Strait Islander communities. It is long past time this situation was addressed.[1]

A considered and informed discussion within the [planning] profession about its relationship with Indigenous people, and a commitment to building a more just relationship, is long overdue.[2]

ABSTRACT

Land administration and land use planning in Australia are public functions. Each State and Territory has its own unique laws for administering land tenures and regulating the use and enjoyment of land for present and future generations. The extent to which planning systems around Australia take account of Aboriginal and Torres Strait Islander peoples' rights and interests is woefully inadequate.

Aboriginal and Torres Strait Islander peoples are continuing to assert their ongoing presence, connection to and responsibilities for their traditional country. It is inherent in their culture and an integral part of who they are and their wellbeing for present and future generations. The problem is, these realities have barely penetrated the conventional planning systems in Australia.[3]

However, two significant developments occurred in 2016 that are likely to have longer term implications for integrating Aboriginal and Torres Strait Islander peoples' rights and interests in conventional land use planning. Firstly, the Queensland Parliament passed a new planning statute which includes Aboriginal and Torres Strait Islander knowledge, culture and tradition as being an integral part of advancing the purpose of the Act. Secondly, the Planning Institute of Australia (PIA) amended its education accreditation policy to include Aboriginal and Torres Strait Islander peoples' knowledges as an integral Supporting Knowledge Area for the recognition of Australian planning qualifications. This paper explores what these developments mean for land use planning and for Aboriginal and Torres Strait Islander peoples' rights and interests.

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[1] Libby Porter, 'Indigenous people and the Miserable Failure of Australian Planning' (May 2017) *The Urban Observer* 17.

[2] Libby Porter, 'Indigenous peoples and planning in Australia: a proposal urging capacity development and leadership', Letter from Libby Porter to the National President and Board of Directors of the Planning Institute of Australia, 24 July 2016.

[3] Porter, 'Indigenous people and the Miserable Failure of Australian Planning' (n 1).

I LAND USE PLANNING AND ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES' RIGHTS AND INTERESTS

Land administration and land use planning in Australia are public functions. Each State and Territory has its own unique laws for administering land tenures and regulating the use and enjoyment of land for present and future generations.[4]

The right to enjoy land is limited by the use and development of abutting and nearby land. These controls or limits are generally imposed by State/Territory Governments and local government through planning and/or environment and heritage protection legislation and regulated through development and building controls, or in the case of leases, through lease conditions. The Australian approach is firmly rooted in statute law which controls the Crown's power to grant interests in land and to regulate and change those rights and interests.[5] Conceptually at least, the system is designed to balance public and private interests as well as the interests of present and future generations, although the degree to which these ideals are achieved in practice is highly debatable.[6]

The extent to which planning systems around Australia take account of Aboriginal and Torres Strait Islander peoples' rights and interests is woefully inadequate. Planning in Australia does not have a good track record and is yet to grapple in a meaningful way with its responsibilities to them.[7] As Porter notes, the extent to which the land planning systems in Australia integrate Aboriginal and Torres Strait Islander peoples' rights and interests and ultimately justice and equity, remains a vexed question.[8]

Other disciplines, such as anthropology and law, have been dealing with the interactions between Indigenous peoples and their fundamental human rights for a very long time, and more especially in relation to land matters since the High Court of Australia's landmark decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*').[9] But there has

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[4] Gerry Bates, *Environmental Law in Australia* (Butterworths, 4th ed, 1995).
[5] See, eg, *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 (Privy Council) and *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd* [2016] 49 WAR 476.
[6] See, eg, Robert Freestone, *Urban Nation: Australia's Planning Heritage* (CSIRO Publishing, 2010); Susan Thompson and Paul Maginn (eds), *Planning Australia. An Overview of Urban and Regional Planning* (Cambridge University Press, 2nd ed, 2012); Jason Byrne, Neil Sipe and Jago Dodson (eds), *Australian Environmental Planning. Challenges and Future Prospects* (Routledge, 2014).
[7] See, eg, Ed Wensing, 'Aboriginal and Torres Strait Islander peoples' relationships to "Country"' in Jason Byrne, Neil Sipe and Jago Dodson (eds), *Australian Environmental Planning. Challenges and Future Prospects* (Routledge, 2014).
[8] The plural is used because I respect the fact that in 1788 there were over 500 Aboriginal and Torres Strait Islander nations scattered about the Australian continent, each with their own distinct laws and customs and land tenure systems: Nii Lante Wallace-Bruce, 'Two Hundred Years on: A Reexamination of the Acquisition of Australia' (1989) 19 *Georgia Journal of International and Comparative Law* 87, 88.
[9] The term 'Indigenous' has evolved through international law and acknowledges a particular relationship of Aboriginal people to the territory from which they originate. In this paper, unless otherwise specified, the term 'Indigenous peoples' refers to the diverse international community of Indigenous Peoples, whose distinct identity and rights are recognised: *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*UNDRIP*'). Where the term 'Indigenous' is used by government agencies or other sources, their use of the term is reflected.

been very little, if any, cross over from the disciplines of anthropology and law[10] to the discipline of planning.

Most practising planners will have little or no contact with Aboriginal and Torres Strait Islander peoples on planning matters. Minor gestures are made toward acknowledging the prior existence and ongoing stewardship of the Aboriginal and Torres Strait Islander peoples of Australian lands and waters, often 'tokenistically' on the inside front covers of plans and policy documents, in the preface or introductory paragraphs, or reflected in the content to comply with other legal requirements.[11] Some statutory plans do a reasonable job, but they are still a rarity.

Whether or not a statutory planning instrument constitutes a future act under the *Native Title Act 1993* (Cth) ('*Native Title Act*') is still an open question.[12] But it is a sad indictment that more than 25 years after the High Court's landmark decision in *Mabo [No 2]*, most of the planning statutes around Australia still do not require prior consultation with, or the direct involvement of, registered native title holders or claimants during plan formulation or in land use decision-making, even as a matter of due process, if not as a matter of law or out of respect for our First Peoples.

Aboriginal and Torres Strait Islander peoples are continuing to assert their ongoing presence, connection to and responsibilities for their traditional country. It is inherent in their culture and an integral part of who they are and their wellbeing for present and future generations. The problem is, these realities have barely penetrated the conventional planning systems in Australia.[13]

Against this backdrop, two significant developments occurred in 2016 that are likely to have longer term implications for integrating Aboriginal and Torres Strait Islander peoples' rights and interests in conventional land use planning. Firstly, in May 2016 the Queensland Parliament passed a new planning statute which includes Aboriginal and Torres Strait Islander knowledge, culture and tradition as being an integral part of advancing the purpose of the Act.[14] Secondly, in September 2016 the Planning Institute of Australia (PIA)

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[10] In relation to anthropology: see, eg, Sandy Toussaint (ed), *Crossing Boundaries: Cultural, legal, historical and practice issues in native title* (Melbourne University Press, 2004); Toni Bauman (ed), *Dilemmas in applied Native Title Anthropology in Australia* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2010); Toni Bauman and Gaynor Macdonald (eds), *Unsettling Anthropology: The demands of Native Title on worn concepts and changing lives* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2011); Jon Altman and Melinda Hinkson (eds), *Culture crisis: anthropology and politics in Aboriginal Australia* (UNSW Press, 2010).
In relation to law: see, eg: H McRae, G Nettheim, L Beacroft and L McNamara, *Indigenous Legal Issues, Commentary and Materials*, (Thomson Lawbook Co, 2003); M Perry and S Lloyd, *Australian Native Title Law*, (Thomson Lawbook Co, 2003); L Strelein, *Compromised Jurisprudence. Native Title cases since Mabo*, (Aboriginal Studies Press, 2nd ed, 2009); R Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2015); and S Brennan, M Davis, B Edgeworth and L Terrill (eds), *Native Title from Mabo to Akiba. A vehicle for Change and Empowerment?* (The Federation Press, 2015).

[11] For example, aboriginal heritage or native title law.

[12] Ed Wensing and Garrick Small, 'A just accommodation of customary land rights in land use planning systems' (Conference Paper, International Urban Planning and Environment Association Symposium, 24–27 July 2012) <http://acquire.cqu.edu.au:8080/vital/access/manager/Repository/cqu:8797>.

[13] Porter, 'Indigenous people and the Miserable Failure of Australian Planning' (n 1).

[14] *Planning Act 2016* (Qld) ('*Planning Act*').

amended its education accreditation policy to include Aboriginal and Torres Strait Islander peoples' and Indigenous peoples' knowledges as an integral Supporting Knowledge Area for the recognition of Australian planning qualifications.[15]

This paper explores what these developments mean for land use planning and for Aboriginal and Torres Strait Islander peoples' rights and interests. References in this paper to the rights and interests of Aboriginal and Torres Strait Islander peoples relate to their human rights arising from international treaties, covenants, conventions and declarations,[16] and to their rights and interests relating to land arising from native title claims and/or determinations and the statutory land rights grants/transfer schemes operating in most jurisdictions around Australia.[17] Part 1 of this paper addresses the challenges presented by passage of Queensland's new *Planning Act*. Part 2 suggests reforms for planning education to meet the requirements of the new legislation's mandates for inclusion of Indigenous interests in planning decisions.

II PART 1: QUEENSLAND'S NEW *PLANNING ACT*

In May 2016, the Queensland Parliament passed new legislation to reform the State's statutory land use planning and development system. In doing so the new *Planning Act*, for the first time in the history of planning law in Australia, includes a provision which requires all entities performing functions under the Act to perform the function in a way that advances the purpose of the Act.[18] Advancing the purposes of the Act includes, amongst other matters, 'valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition'.[19] This provision applies to all entities performing functions under the Act and it applies throughout the State of Queensland.

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[15] Planning Institute of Australia, 'Policy for the Accreditation of Australian Planning Qualifications', *Planning Institute of Australia* (Policy Document, 29 September 2016) <https://www.planning.org.au/documents/item/48>.

[16] To many of which Australia is a signatory. The Instruments (and relevant Articles) include the *Charter of the United Nations* art 51, the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 2, the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 993 UNTS 171 (entered into force 23 March 1976) art 27, the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1, the *United Nations Declaration on the Right to Development*, GA Res 41/128, UN Doc A/RES/41/128 (4 December 1986) art 5, the *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, ILO No 169, 28 ILM 1382 (adopted 27 June 1989, entered into force 5 September 1991) art 1, the *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 8(j), the *UNESCO Universal Declaration on Cultural Diversity*, 41 ILM 57 (2 November 2001) art 4, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 2440 UNTS 311 (adopted 20 October 2005, entered into force 18 March 2007) Preamble paras 8, 15, art 2.3, 7, and the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*UNDRIP*').

[17] Ed Wensing, *The Commonwealth's Indigenous land tenure reform agenda: Whose aspirations, and for what outcomes?* (Australian Institute of Aboriginal and Torres Strait Islander Studies Research Publications, 2016).

[18] *Planning Act* s 5(1).

[19] Ibid s 5(2)(d).

It is no accident this provision was included in the Planning Bill 2015 (Qld) when it was tabled in the Queensland Parliament in November 2015. In a submission to the Queensland Government in August 2015, Dr Sharon Harwood from James Cook University, stated that Aboriginal and Torres Strait Islander peoples are 'invisible' in land use planning and that they need to be made legally visible.[20] Several provisions in the *Nature Conservation Act 1992* (Qld) ('*NCA*') were cited as demonstrating that the State of Queensland is capable of incorporating 'Aboriginal tradition and Island custom' into legislation.[21] These sections provide for the management principles on Aboriginal land, Torres Strait Islander land, Cape York Peninsula Aboriginal land, conservation parks and resources reserves. By way of example, s 18 of the *NCA* states:

> **18. Management principles of national parks (Aboriginal land)**
>
> (1) A national park (Aboriginal land) is to be managed as a national park.
>
> (2) Subject to subsection (1), a national park (Aboriginal land) is to be managed, as far as practicable, in a way that is consistent with any Aboriginal tradition applicable to the area, including any tradition relating to activities in the area.[22]

Harwood also argued that the test contained in s 4 of the *Legislative Standards Act* 1992 (Qld) ('*LSA*') needed to be applied to the Planning Bill 2015 (Qld). The *LSA* prescribes the minimum standards for legislation in Queensland. This Act includes a set of fundamental legislative principles which require that legislation (both bills and subordinate legislation) should have sufficient regard to the rights and liberties of individuals and to the institution of Parliament. In turn, sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom. Specifically, *LSA* s 4 reads as follows:

> **4. Meaning of fundamental legislative principles**
>
> (1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.
>
> Note—
>
> Under section 7, a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.
>
> (2) The principles include requiring that legislation has sufficient regard to—
>
> (a) rights and liberties of individuals; and
>
> (b) the institution of Parliament.
>
> (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation— …
>
> (j) has sufficient regard to Aboriginal tradition and Island custom.

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[20] Sharon Harwood, Submission No 13 to Infrastructure, Planning and Natural Resources Committee, Parliament of Queensland, *Queensland Planning Reform* (5 August 2015) table 4.1 item 10 <www.parliament.qld.gov.au/documents/committees/IPNRC/2015/PB2015/submissions/013PM.pdf>.

[21] *NCA* ss 18-21A.

[22] Sections 19-21A of the *NCA* read similarly.

The Queensland Government and the Queensland Parliament applied this test, and the *Planning Act* now includes s 5(2)(d). Sections 5(1) and 5(2) need to be read together.

> **5. Advancing purpose of Act**
>
> (1) An entity that performs a function under this Act must perform the function in a way that advances the purpose of this Act.
>
> (2) Advancing the purpose of this Act includes (amongst other matters):
>
> …
>
> (d) valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition.

This provision opens up new possibilities for Aboriginal and Torres Strait Islander peoples to be integrally involved in land use planning processes from the very outset, rather than as a belated after-thought.

It is worth examining this provision in more detail, because the location of the *Planning Act* s 5(2)(d) places this responsibility in a much wider context. Indeed, ss 3 to 5 of the *Planning Act* need to be read comprehensively.

The purpose of the *Planning Act* is to establish an efficient, effective, transparent, integrated, coordinated, and accountable system of land use planning (planning), development assessment and related matters that facilitates the achievement of ecological sustainability.[23]

The definition of 'ecological sustainability' includes the protection of ecological processes and natural systems at local, regional, State, and wider levels,[24] economic development,[25] and the maintenance of the cultural, economic, physical and social wellbeing of people and communities.[26]

The maintenance of cultural, economic, physical and social wellbeing of people and communities includes creating and maintaining well-serviced, healthy, prosperous, liveable and resilient communities with affordable, efficient, safe and sustainable development;[27] conserving or enhancing places of special aesthetic, architectural, cultural, historic, scientific, social or spiritual significance;[28] providing for integrated networks of pleasant and safe public areas for aesthetic enjoyment and cultural, recreational or social interaction;[29] and accounting for potential adverse impacts of development on climate change, and seeking to address the impacts through sustainable development.[30] For example, sustainable settlement patterns or sustainable urban design.

The system for achieving ecological sustainability includes State planning policies, regional plans, planning schemes, temporary local planning instruments (TLPIs), planning

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[23] *Planning Act* s 3(1).
[24] Ibid s 3(2)(a).
[25] Ibid s 3(2)(b).
[26] Ibid s 3(2)(c).
[27] Ibid s 3(3)(c)(i).
[28] Ibid s 3(3)(c)(ii).
[29] Ibid s 3(3)(c)(iii).
[30] Ibid s 3(3)(c)(iv).

scheme policies; the development assessment system including the State Assessment and Referral Agency (SARA); and a limited range of other functions. [31]

And, as stated above, any entity performing a function under the *Planning Act* must perform the function in a way that advances the purpose of this Act, which includes (among other matters) valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition.[32]

Therefore, developing or amending any of the above listed instruments under the *Planning Act* would involve 'advancing the purpose of the Act' and therefore needs to address the requirement to value, protect and promote Aboriginal and Torres Strait Islander knowledge, culture and tradition, consistent with the intention in s 5(2)(d). It could also be argued that this provision is consistent with, and adds value to, the maintenance of cultural, economic, physical and social wellbeing of people and communities in s 3(c), especially discrete Aboriginal or Torres Strait Islander communities.

The significance of s 5(2)(d) is that the provision is tenure-blind, it is land-rights-blind, and it is cultural-heritage-blind.[33] In other words, the provision operates regardless of whether or not native title exists under the *Native Title Act*, whether or not the land is subject to a land grant or transfer under the *Aboriginal Land Act 1991* (Qld) or the *Torres Strait Islander Land Act 1991* (Qld), and whether or not there are listed or registered sites of Aboriginal or Torres Strait Islander heritage significance under the *Aboriginal Cultural Heritage Act 2003* (Qld) or the *Torres Strait Islander Cultural Heritage Act 2003* (Qld).

The native title, statutory land rights grants/transfer and cultural heritage systems present some difficulties because of the way they interact with the land use planning system. The native title, statutory land rights grants/transfer and cultural heritage systems place the onus on Aboriginal and Torres Strait Islander peoples to mount a claim, obtain a determination of native title rights and interests, obtain a transfer of land under the statutory land rights system or seek to obtain a heritage place listed or registered, and then respond to a proposal at the tail end of the planning assessment process that may impact on those interests. This tends to place Aboriginal and Torres Strait Islander peoples in a 'deficit discourse', rather than a more positive discourse based on attributes and strengths and recognising the value of Indigenous knowledges.[34]

In contrast, s 5(2)(d) places the onus on the entity performing the function under the *Planning Act* to take Aboriginal and Torres Strait Islander knowledge, culture and traditions into account from the outset of planning activities regardless of any of those other factors. This gives Aboriginal and Torres Strait Islander peoples the opportunity to be on the offensive from the outset of a planning activity, rather than being on the defensive at the tail end. And the provision applies to all planning functions performed under the Act and all entities performing those functions under the Act, namely the Queensland Department of Infrastructure, Local Government and Planning as well as a host of other

[31] Ibid s 4.
[32] Ibid ss 5(1), 5(2)(d).
[33] In this context I use the term cultural heritage to refer to Aboriginal and Torres Strait Islander heritage as defined under the relevant statutes in Queensland.
[34] Cressida Fforde et al, 'Discourse, deficit and identity: Aboriginality, the race paradigm and the language of representation in contemporary Australia' (2013) 149 *Media International Australia* 162.

State Government departments and agencies, all local governments in Queensland, and any other entities performing functions under this Act throughout Queensland.

The Act binds all persons, including the State, other than the Coordinator-General when performing functions under the *State Development and Public Works Organisation Act 1971* (Qld) and the Commonwealth and the other States, to the extent the Queensland Parliament's legislative power allows because neither the Commonwealth nor a State can be prosecuted for an offence against the *Planning Act* s 7.

But entities performing functions under the *Planning Act* may well ask how can these new provisions be applied and how can they be applied in such a way that respectfully includes the peoples who hold Aboriginal and Torres Strait Islander knowledge, culture and tradition in relation to the area that is the subject of the planning function (i.e. the preparation of a regional strategic plan or a local planning scheme)?

A *Applying the Planning Act s 5(2)(d)*

As this is the first time a provision such as s 5(2)(d) regarding Aboriginal and Torres Strait Islander knowledge, culture and tradition has been included in land use planning legislation in Australia, there is little precedent for how the provision is to be applied in practice.

The Queensland Division of the Planning Institute of Australia (QPIA) has prepared a *Position Statement* and a *Background Report* on Aboriginal and Torres Strait Islander Planning Policy in the wake of the enactment of s 5(2)(d) of the *Planning Act*.[35] The *Position Statement* outlines the Queensland Division's approach to the new provision in the Act and states that it 'requires fundamental changes to the way in which planning systems and processes embrace the requirement for "valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition"'.[36] The *Position Statement* also states that the 'Queensland Division of PIA understands that Aboriginal and Torres Strait Islander peoples' knowledge, culture and tradition is held by them and that undertaking functions under the *Planning Act* will require developing a working relationship with Aboriginal and Torres Strait Islander peoples based on mutual trust and respect'.[37] The *Background Report* states that matters that will require consideration with respect to applying s 5(2)(d) raise several questions, including: Who holds the appropriate information? What constitutes Aboriginal and Torres Strait Islander knowledge, culture and tradition? How can that information be accessed by other parties? How can the information provided by Aboriginal and Torres Strait Islander peoples be protected from misuse? And what criteria are relevant to ascertaining whether Aboriginal and Torres Strait knowledge, culture and tradition have been appropriately valued, protected and promoted in relation to functions being performed under the planning statute?[38] To provide some guidance, these questions are explored below.

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[35] Queensland Division of the Planning Institute of Australia, 'PIA Queensland Position Statement: Aboriginal and Torres Strait Islander Planning Policy', *Planning Institute of Australia* (Policy Statement, 2017) ('*Position Statement*') <https://www.planning.org.au/documents/item/8606>; Background Paper from Queensland Division of the Planning Institute of Australia to Ed Wensing, 2018 ('*Background Report*').

[36] *Position Statement* (n 35) [5].

[37] *Position Statement* (n 35) [7].

[38] *Background Paper* (n 35) [9]-[10].

B *Why is 'valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition' included in Queensland's new planning statute?*

The simple answer is, as discussed above, the Queensland Government and the Queensland Parliament decided it was appropriate to do so. It is noteworthy that the provisions of s 5(2)(d) were not opposed as the Bill moved through the Queensland Parliament in May 2016.

There is also a more challenging answer. The time is now right to acknowledge and respect the fact that Aboriginal and Torres Strait Islander peoples are the First Peoples of this country. They are the oldest surviving culture on Earth,[39] they have the oldest continuing system of land ownership and tenure,[40] and, in all likelihood, they also have the oldest continuing system of land use planning and management in the World.[41] As such, they have a special place in the nation. Successive State and Federal governments have failed to acknowledge these simple truths for far too long. And there is nothing wrong with accepting these simple truths now. Furthermore, there are also a number of compelling factors, internationally, nationally and locally that governments and the wider community can no longer continue to ignore.

There are several international human rights instruments that are relevant to Australia's Indigenous peoples. The most significant of these is the *UNDRIP*. The *UNDRIP* expresses rights and by doing so, explains how Indigenous peoples want nation states (and others) to conduct themselves when dealing with Indigenous peoples about matters that affect their rights, interests, knowledges, values, needs and aspirations. While the *UNDRIP* is not binding on Australia, there is nothing preventing any of the jurisdictions within Australia from applying its provisions in any of their dealings with Aboriginal and Torres Strait Islander peoples, if for no other reason that it just makes good sense to do so.

Nationally, there are an increasing number of native title determinations and Indigenous Land Use Agreements under the *Native Title Act*. Currently, approximately 34 per cent of Australia is subject to a native title determination of exclusive or non-exclusive possession and/or an Indigenous land use agreement (ILUA).[42] There is also the ongoing debate over the recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia and the recent Report of the Referendum Council which recommended the insertion into the *Australian Constitution* of a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament and an extra-constitutional Declaration of Recognition to be enacted by legislation passed by all Australian Parliaments.[43] The 'Uluru Statement from the Heart' issued by delegates to the

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[39] Josephine Flood, *The Original Australians: The Story of the Aboriginal People* (Allen & Unwin, 2006).
[40] Henry Reynolds, *Why weren't we told? A personal search for the truth about our history* (Viking Penguin Books, 1999).
[41] Ed Wensing, 'Planning in Indigenous Australia: From imperial foundations to postcolonial futures' (2018) 1 *Australasian Journal of Environmental Management* 475.
[42] 'Native Title Determinations', Native Title Tribunal (Map, 30 September 2018) <http://www.nntt.gov.au/Maps/Determinations_map.pdf>.
[43] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Report, January 2012) <www.pmc.gov.au/sites/default/files/publications/Recognising-Aboriginal-and-Torres-Strait-Islander-Peoples-in-the-constitution-report-of-the-expert-panel_0.pdf>.

National Constitution Convention also called for the establishment of a Makarrata Commission with the function of supervising agreement-making and facilitating a process of local and regional truth telling.[44]

In recent years, most of the States, including Queensland, have amended their Constitutions to acknowledge the fact that Aboriginal and Torres Strait Islander peoples owned and occupied the land prior to colonisation and settlement by the British, and as a consequence have some kind of special status.[45] Most States, including Queensland, have a statutory land rights scheme for granting or transferring land to Aboriginal and Torres Strait Islander peoples and most States, including Queensland, signed up to the Council of Australian Government's (COAG) National Indigenous Reform Agreement and various National Partnership Agreements to 'Close the Gap' (SCFFR 2008) in inequalities that exist between Aboriginal and Torres Strait Islander peoples and other Australians.

All of the above initiatives, and many more, increasingly recognise the special place of Aboriginal and Torres Strait Islander peoples in Australia and their contribution to the life of the nation in all its facets (economically, socially, environmentally, culturally and spiritually).

C *Who holds the appropriate information about Aboriginal and Torres Strait Islander knowledge, culture and tradition?*

An integral part of Aboriginal and Torres Strait Islander peoples' knowledge, culture and tradition is the special nature of their relationship to land and waters and their ancestral country. Therefore, it is the Aboriginal and Torres Strait Islander peoples who draw their ancestral lines from, and are the traditional owners of, the land in question who hold this information. Governments can never profess to hold this information.

Despite the dispossession and dislocation of Aboriginal and Torres Strait Islander peoples from their ancestral country since colonisation, the remaining and continuing elements of their connection to country should no longer be under estimated. Land means much more to Aboriginal and Torres Strait Islander peoples than economic sustenance. Land is central to Aboriginal and Torres Strait Islander peoples' cultural, social, environmental and economic well-being. All Aboriginal societies recognise a very different principle of land ownership from that enshrined in British common law. Aboriginal peoples do not 'own' the land, the land 'owns' them. There is a mutual belonging which means that the land cannot be alienated from its rightful guardians and custodians, who are also its children. A person's own country forms the basis of his or her being and identity.[46]

It is no longer appropriate to interpret Aboriginal and Torres Strait Islander peoples' connection to country as cultural heritage alone, or to identify Aboriginal and Torres Strait Islander places by drawing lines on maps to designate particular land values. Instead,

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[44] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Uluru Statement from the Heart Final Report* (Report, 30 June 2017).

[45] For a discussion of recent amendments to State Constitutions, see Michael Mansell, *Treaty and Statehood: Aboriginal Self-determination* (The Federation Press, 2016). See also Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (The Federation Press, 2018) 38-40.

[46] Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996).

Aboriginal and Torres Strait Islander peoples must have the opportunity for genuine participation in planning and land management processes about their traditional country and about their knowledge, culture and tradition from the outset of planning processes and not as an after-thought.

D *What constitutes Aboriginal and Torres Strait Islander knowledge, culture and tradition?*

This is an important question. The nature of Aboriginal and Torres Strait Islander peoples' knowledge, culture and tradition is unique to them, and will vary from clan to clan, tribe to tribe and from group to group, as well as from place to place. There is not, and never will be, a single definition of what constitutes Aboriginal and Torres Strait Islander knowledge, culture and tradition which can be applied uniformly across any jurisdiction or the whole of Australia. We must accept that this will differ from place to place and over time.

It is only the Aboriginal or Torres Strait Islander peoples holding those values relating to a particular locality and the right to speak for country that can identify and explain what constitutes their unique 'knowledge, culture and tradition' and how they can be 'valued, protected and promoted' through contemporary planning systems.

E *When and how can entities operating under planning statutes go about accessing the necessary information about Aboriginal and Torres Strait Islander knowledge, culture and tradition so that it can be valued, protected and promoted?*

There are a number of well-established protocols for communicating and engaging with Aboriginal and Torres Strait Islander peoples and for establishing who the 'right people for country' are to speak for their country. These include, but are not limited to, the following.

The native title system under the *Native Title Act* has generated the establishment of a network of bodies with the responsibility to represent the interests of native title holders and claimants. These are known as Native Title Representative Bodies (NTRBs) or Native Title Service Providers (NTSPs).[47] For non-native title interests, these are the first port of call for establishing who the right people are to speak for country in any particular locality, and especially in areas where a native title application may not already have been made or determined, where native title may exist but the native title holders are unknown, and also in areas where native title may have been extinguished or no longer exists. Assisting non-native title parties with identifying the right people for right country is part of the statutory functions of NTRBs/NTSPs under the *Native Title Act*.[48]

Where a positive native title determination has been made by the Federal Court, there will most likely be a Registered Native Title Body Corporate (RNTBC) that has been established to hold and manage the native title rights and interests either in trust or as an agent. In such circumstances, the relevant RNTBC will be an important point of contact for ascertaining the right traditional owners for a particular locality.

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[47] For more information about NTRBs and NTSPs, see 'What are NTRBs and NTSPs?' *The Aurora Project* (Web Page) <http://auroraproject.com.au/what-are-ntrbs-and-ntsps>.
[48] *Native Title Act* ss 203B–203BK.

The Australian Human Rights Commission (AHRC) (AHRC 2012) has also developed a very helpful toolkit for engagement with Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples are increasingly referring to the principle of 'free prior and informed consent' as outlined in article 19 of the *UNDRIP* as the preferred method of negotiating with them over matters that will affect their rights and interests. The AHRC (2010) has prepared a useful Community Guide to the *UNDRIP* which includes details of how the principle of free, prior and informed consent can be applied in Australia. The Australian Government has also recently released a guide to communicating with Aboriginal and Torres Strait Islander audiences, including a guide to accepted terminology.[49] Some States have similarly prepared their own guidelines for engaging with Aboriginal and Torres Strait Islander peoples in their respective jurisdictions. All States and Territories have established an Aboriginal and/or Torres Strait Islander heritage protection scheme that, in most cases, also includes protocols for engaging with Aboriginal and Torres Strait Islander peoples on heritage matters.[50]

Regardless of whether there are provisions in the planning statutes for engaging with Aboriginal and Torres Strait Islander peoples, it is incumbent on all entities operating under planning statutes in Australia to ensure they make contact with the 'right people for right country' on matters that may affect their rights and interests.[51] 'Right people for right country' means that the relevant Aboriginal and Torres Strait Islander people are acknowledged by other Aboriginal and Torres Strait Islander peoples as having the right to speak for their traditional country. The most assured way of establishing this is to commence with the NTRBs/NTSPs and work from there. Of course, connections to country can include more than just the native title holders/claimants. It can also include other Aboriginal and Torres Strait Islander peoples with significant historical, familial, heritage or other connections. These other possible connections should never be overlooked.

F *How can 'valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition' be factored into planning functions under the Act, such as State Planning Policies, regional plans and planning schemes?*

This needs to be explored with the relevant Aboriginal and Torres Strait Islander peoples. Policy makers and planners will not know this information in advance.

One suggestion is to assist Aboriginal and Torres Strait Islander peoples to undertake their own land use and occupancy Indigenous planning. Peter Yu, the CEO of Yawuru RNTBC

[49] Department of the Prime Minister and Cabinet, 'Communicating with Aboriginal and Torres Strait Islander Audiences' (23 February 2016) <https://www.pmc.gov.au/resource-centre/indigenous-affairs/communicating-aboriginal-and-torres-strait-islander-audiences>.

[50] See, e.g., Australian Heritage Commission, *Ask First. A guide to respecting Indigenous heritage places and values* (Australian Heritage Commission, 2002).

[51] The Victorian Government runs a 'Right People for Country' program which supports Traditional Owners groups in the process of making agreements between groups — about boundaries and extent of Country, and within groups — about group representation and membership. These agreements can assist Traditional Owner groups who are seeking to become Registered Aboriginal Parties under the Aboriginal *Heritage Act 2006* (Vic) and/or seeking to negotiate settlements with the Victorian Government under the *Traditional Owner Settlement Act 2010* (Vic) and the *Native Title Act*. See State Government of Victoria, 'Right People for Country' (Web Page) <https://www.vic.gov.au/aboriginalvictoria/grants-funding-and-training/right-people-for-country-program.html>.

in Broome, has said on more than one occasion that Aboriginal people have always undertaken their own land use and occupancy mapping and that such mapping 'offers significant opportunities for the local community, government agencies and industry to discuss and devise strategies that will create a better future for the area and provide "good liyan"'.[52]

Very little has been written about the ethical, methodological, and epistemological approaches to community planning and design by Indigenous communities, and the mainstream planning professions in Canada, Australia, New Zealand, and the United States of America have overlooked these in favour of Euro-Western practices.[53] Jojola also notes:

> [w]hat distinguishes indigenous planning from mainstream practice is its reformulation of planning approaches in a manner that incorporates "traditional" knowledge and cultural identity. Key to the process is the acknowledgement of an indigenous world-view, which not only serves to unite it philosophically, but also to distinguish it from neighbouring non-land-based communities. A world-view is rooted in distinct community traditions that have evolved over a successive history of shared experiences".[54]

Australia has a history of neglect about the ways in which Aboriginal and Torres Strait Islander peoples undertake their planning and land management,[55] and governments need to create opportunities for Aboriginal and Torres Strait Islander peoples to do this in a culturally appropriate manner. This requires delicate negotiations with Aboriginal and Torres Strait Islander peoples and communities, and resourcing.

G *How can the information about Aboriginal and Torres Strait Islander knowledge, culture and tradition provided by Aboriginal and Torres Strait Islander peoples be protected from misuse?*

Aboriginal and Torres Strait Islander knowledge, culture and tradition may include their Indigenous cultural and intellectual property (ICIP) and extend to literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs), scientific, agricultural, technical and ecological knowledge, items of movable cultural property, knowledge about culture, roles and relationships, human remains and tissues, immovable cultural property including sacred sites, historically significant sites

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[52] Peter Yu, 'Notes from Infrastructure Australia Indigenous Infrastructure Reference Group' (12 August 2011); Peter Yu, 'Process from the other side: Liyan in the Cultural and Natural Estate' (2013) 139 *Landscape Architecture Australia: Connecting people and place* 26. 'Liyan' is about 'relationships, family, community and what gives meaning to people's lives': Pat Dodson, cited in Yawuru Registered Native Title Body Corporate, *Walyjala-jala buru jayida jarringbun buru Nyamba Yawuru ngan-ga mirli mirli = Planning for the future: Yawuru Cultural Management Plan: the cultural management plan for Yawuru coastal country and the Yawuru Conservation Estate* (Yawuru Registered Native Title Body Corporate, 2nd ed, 2013) 13.

[53] Ted Jojola, 'Indigenous Planning: Towards a Seven Generation Model in Ryan Walker' in Ted Jojola and David Natcher (eds), *Reclaiming Indigenous Planning* (McGill-Queen's University Press, 2013) 457.

[54] Ted Jojola, 'Indigenous Planning: An Emerging Context' (2008) 17(1) *Canadian Journal of Urban Research Supplement* 37, 42.

[55] See, eg, Bill Gammage, *The Biggest Estate on Earth: How Aborigines made Australia* (Allen & Unwin, 2011) and Bruce Pascoe, *Dark Emu, Black Seeds: agriculture or accident?* (Magabala Books, 2014).

and burial grounds, and documentation through archival materials, film, photographs, videotapes and audiotape and other forms of media.[56]

Articles 11 and 31 of the *UNDRIP* are most pertinent to the protection of ICIP. Article 11 states that Indigenous people have the right to practice their cultural traditions and customs and that effective mechanisms for redress should be provided where their cultural knowledge has been taken without their free, prior and informed consent and accessed and used without appropriate authorisation. Article 31 promotes the right of Indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions associated with their intellectual and cultural property.

Even though the *UNDRIP* is not binding on nation states, under both of these Articles nation states (and jurisdictions within them) are expected to take appropriate measures to ensure that Indigenous peoples' intellectual and cultural property is adequately protected. While the scale of ICIP in Australia and what it covers has been examined in numerous reviews in recent years, there has been very little legislative response to the numerous recommendations arising from these reviews to improve the level of protection.[57]

Information or knowledge provided or shared by Aboriginal and Torres Strait Islander peoples for incorporation into statutory planning processes and outcomes may also include sensitive information, Traditional Knowledge (TK) or Ecological Knowledge (EK). The release and use of Aboriginal and Torres Strait Islander peoples' traditional knowledge for whatever purposes by people other than those who have the right to hold and apply that knowledge is a very sensitive matter. Aboriginal and Torres Strait Islander peoples have long expressed serious concerns about the release and inappropriate use of their traditional knowledge.[58]

In these circumstances, the best approach is for the relevant parties to develop a set of protocols. Protocols are a voluntary means to managing access to ICIP in a respectful manner that benefits all parties. As Janke observes, 'protocols are a flexible means of establishing a framework for protection that can be adapted to particular projects, subject matter, regions or institutions … and can be enforced by way of contract'.[59] Although, for them to be successful, a level of goodwill and cooperation between the parties must be maintained.

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[56] National Congress of Australia's First Peoples, 'Position Paper on a National Indigenous Cultural Authority' (2013) 5.
[57] Productivity Commission, *Intellectual Property Arrangements* (Inquiry Report No 78, 23 September 2016) 60 <http://www.pc.gov.au/inquiries/completed/intellectual-property/report>.
[58] Hon Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Final Report, 1996) 49.
[59] Toni Janke, Submission to IP Australia and Office for the Arts, *Finding the Way: a conversation with Aboriginal and Torres Strait Islander peoples* (31 May 2012) 24 <www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_terri_janke_and_company_ip_lawyers.pdf>.

H *What criteria can be applied to ascertaining whether Aboriginal and Torres Strait knowledge, culture and tradition have been appropriately valued, protected and promoted in the particular function(s) performed under planning legislation?*

To put the question more succinctly: What criteria can be applied to ascertain how entities performing functions under the *Planning Act* have fulfilled the requirement to 'value, protect and promote Aboriginal and Torres Strait Islander knowledge, culture and tradition'?

The answer to this question is very dependent on the answers to the preceding questions above, and will also need to be negotiated between the relevant Aboriginal and Torres Strait Islander peoples and the various entities performing functions under the Act. The answers will be different for different levels in the planning system (i.e. local, regional, state-wide) and in different locations.

I *Part 1: Summary*

Queensland can be justly proud of including Aboriginal and Torres Strait Islander knowledge, culture and traditions in its planning statute. The beauty of this provision is that it does not depend on the existence of native title, it does not depend on a heritage listing or site of significance being entered on a register, and it does not depend on a land grant or transfer to Aboriginal or Torres Strait Islander peoples. It depends entirely on the entity performing a function under the Act to demonstrate that it is performing the function in a way that advances the purpose of the Act. For these reasons it sets a very significant precedent for other jurisdictions to follow.

Justice Owen observed very early in the native title context that while evidence would still be sought from anthropologists and the significance of their evidence would still be given due regard, 'the best evidence lies in the hearts and minds of the people most intimately connected to aboriginal [sic] culture, namely the aboriginal people themselves'.[60] The same can be said about integrating Aboriginal and Torres Strait Islander knowledge, culture and tradition into contemporary land use planning systems. The key message is to recognise that the only way Aboriginal and Torres Strait Islander knowledge, culture and tradition can be successfully integrated into any planning action under the *Planning Act* in accordance with the requirement in s 5(2)(d) is by negotiation and partnership with the Aboriginal and Torres Strait Islander people who hold and own that knowledge, culture and tradition. That must be done on the basis of mutual respect and understanding. The seven questions posed above are framed to assist entities performing functions under the *Planning Act* to approach these matters with the due care and diligence that is required for the information to be applied in a way that respects its relevance and integrity. The answers to the questions will differ from group to group and from locality to locality, depending on the issues and concerns of the peoples for whom the functions are supposed to benefit or will affect.

The challenge for the Queensland Government and for any entity performing functions under the *Planning Act* is to negotiate these matters with the custodians and to work carefully and transparently with Aboriginal and Torres Strait Islander peoples across the

[60] *Ejai v Commonwealth* (Supreme Court of the Western Australia, Owen J, 18 March 1994) cited in Katie Glaskin, *Crosscurrents: Law and society in a native title claim to land and sea* (University of Western Australia Publishing, 2017) 113.

State if land use planning and decision making, and s 5(2)(d) in particular, is going to have any meaningful effect in making a difference to their longer-term wellbeing. The challenge for other jurisdictions is to follow the lead that Queensland has taken by amending their planning statutes to replicate the breadth of the application of Aboriginal and Torres Strait Islander knowledge, culture and tradition to planning outcomes.

The challenge we all face is for the institutions of governance and the wider community to be patient and transparent about how Aboriginal and Torres Strait Islander knowledge, culture and tradition may be interpreted and applied to land use planning activities in the contemporary sense. An open and inclusive approach has to be adopted if planning is to lose its cultural blindness and racist tendencies.

III PART 2: REFORMING PLANNING EDUCATION

A *Planning's nascent history*

In the Australian context 'the legal imaginary of terra nullius' enabled the creation of a property system — land disposal and titling, settlement and land use planning — as if the pre-existing land rights and interests of the Aboriginal peoples simply did not exist.[61] Planning and its nascent practices of surveying, mapping, bounding, selecting, zoning, naming, regulating and town-building activities that constituted the colonial endeavour, were applied from the very beginnings of colonial settlement in Australia in ways that were deeply complicit in the dispossession of Aboriginal and Torres Strait Islander peoples from their traditional country.[62] It resulted in the theft of their ancestral lands.[63]

The uncomfortable truth about Australia is that every settlement, every village, every town, every city is built on the stolen lands of the Aboriginal and Torres Strait Islander peoples of Australia. This is the 'dark side of Australian planning' that we have yet to come to terms with.[64] As Jackson et al note, the accounts of planning in Australia 'ignore the colonial roots and legacies of the discipline's assumptions, techniques and practices' and '[a]t its core, Australian planning continues to ignore the fact that its practice is intricately woven into the story of Indigenous dispossession and unjust relations with the Australian state, a story that reverberates across Australian history to the present'.[65] In sum, despite the passage of time, contemporary Australian planning still has an appalling record of ignoring its fundamental responsibilities in its relations with Aboriginal and Torres Strait Islander peoples.[66]

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[61] Richie Howitt, 'Scales of Coexistence: Tackling the tension between legal and cultural landscapes in Post-Mabo Australia' (2006) 6 *Macquarie Law Journal* 49, 50.
[62] Denis Byrne, 'Nervous Landscapes: Race and Space in Australia' (2003) 3(2) *Journal of Social Archaeology* 169; Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press, 2018).
[63] John Borrows, *Nookomis' Constitution: Revitalizing Law in Canada* (Toronto University Press, forthcoming).
[64] Sue Jackson, Libby Porter and Louise C Johnson, *Planning in Indigenous Australia: From imperial foundations to postcolonial futures* (Routledge, 2018) 20.
[65] Ibid 53.
[66] Ed Wensing and Libby Porter, 'Unsettling Planning's Paradigms: Toward a just accommodation of Indigenous rights and interests in Australian urban planning?' (2015) *Australian Planner* 91; Libby Porter,

B *A shared reality*

Indigenous societies and non-Indigenous planning systems share a common interest about 'place' and land use planning in Australia occurs over lands that were essentially stolen from Australia's First Peoples.[67] As Porter states, '[t]heir sovereignty was never ceded, their country never willingly traded or given'.[68] Unarguably, the Aboriginal and Torres Strait Islander peoples have recognisable, and where native title exists or may exist enforceable, rights and interests which places them in a very different position to other minority groups in our community.

We must accept the reality of our shared history: that the Aboriginal and Torres Strait Islander peoples never ceded their lands, that Australia has never settled the question of how the British established its sovereignty over this country and that Australia has never dealt fairly with the Aboriginal and Torres Strait Islander peoples of Australia about the loss of their lands. We can no longer deny that the root of all property in land for settler Australians was acts of dispossession of Aboriginal and Torres Strait Islander peoples, acts of theft for which no-one has ever been held responsible,[69] and no full and final compensation on 'just terms' has been paid for the taking of their lands and waters.[70]

The continuing denial of the existence of prior Aboriginal and Torres Strait Islander peoples' ownership of Australia has become an international embarrassment. It is no longer tolerable to continue constructing legal orthodoxies that suit the settler state. For example, the provisions in the *Native Title Act* declaring that the extinguishment of native title has occurred (partly or wholly) does not, and will not, make the laws and customs of Aboriginal and Torres Strait Islander peoples disappear.

While these are big questions that remain to be resolved by governments and the community at large, planning professionals dealing with land use and occupancy cannot ignore these realities because that is at the forefront of the minds of Aboriginal and Torres Strait Islander peoples when consulted about what is, in their view, their lands and waters. While we may want to argue about some of these points, based on my experiences of working with Aboriginal and Torres Strait Islander peoples and communities across the length and breadth of Australia over the past 20 years, these are the outstanding issues they continually bring to the table for resolution.

Unlearning the Colonial Cultures of Planning (Ashgate, 2010). See also Porter, 'Indigenous people and the Miserable Failure of Australian Planning' (n 1).

[67] Porter, 'Indigenous people and the Miserable Failure of Australian Planning' (n 1) 2.

[68] Ibid 4.

[69] Valerie Kerruish and Jeannine Purdy, 'He "Look" Honest: Big White Thief' (1998) 4 *Law Text Culture* 146.

[70] *Australian Constitution* s 51(xxxi). Compensation on 'just terms' has been incorporated in the relevant statutes in South Australia, New South Wales, the Northern Territory and the Australian Capital Territory in addition to the Commonwealth. Victoria, Queensland, Western Australia and Tasmania do not use this term, but normally where property is compulsorily acquired in accordance with the law, the property owner is compensated justly. See Gary Newton and Christopher Connelly, *Land Acquisition* (LexisNexis Butterworths, 7th ed, 2017) 13-15.

C *Planning's rationalities and unmet obligations*

The problem is that planning's rational approaches to land use and development still persist as a mechanism for alienating Aboriginal and Torres Strait Islander peoples from meaningful involvement in land use planning and decision making that affects their rights and interests.[71] As Porter notes, this gives rise to several unmet obligations of planning.[72]

Firstly, there is no accountability and redress for planning's complicities in systematically stealing land from Aboriginal and Torres Strait Islander peoples through occupation, defining boundaries, mapping, renaming, erecting fences, constructing buildings, using land and resources and usurping their authority and governance for their traditional country without proper treaties or other negotiated agreements.[73]

Secondly, current planning practices fail to recognise the need for coexistence between two different systems of planning. Contemporary land use planning 'must come to just terms … with the fact that it is not the sole jurisdiction, knowledge base or set of laws that govern any particular place, regardless of whether formally recognised or not' and that 'it will always be possible to negotiate different terms, new approaches and finding opportunities for transforming social relations.' From now on, planning's future should always be different from its past legacies.[74]

Thirdly, planning systems need to recognise the applicability of the international human rights norms and standards with respect to Indigenous peoples and the requirement for sustained relationships with Aboriginal and Torres Strait islander peoples as well as recognise their distinct social and governance arrangements, so the principle of free, prior and informed consent can be applied with consistency and in accordance with article 19 of the *UNDRIP*.

Fourthly, the legal and policy obligations arising from the mechanisms for the recognition of native title rights and interests, statutory land rights grants, transfers and/or acquisitions, and cultural heritage protection regimes need to be incorporated in contemporary planning regimes.[75]

D *Planning education's role*

Planning education and the Planning Institute of Australia (PIA) play a pivotal role in influencing how planning — the profession, practitioners, scholars, educators and students — come to terms with understanding the special position of Aboriginal and Torres Strait Islander peoples and how planning can contribute to better outcomes. Several suggested actions for change have been made including an acknowledgement of past mistakes and an

[71] Naama Blatman-Thomas and Libby Porter, 'Placing property: Theorising the Urban from Settler Colonial Cities' (2018) *International Journal of Urban and Regional Research* 1.
[72] Porter, 'Indigenous people and the Miserable Failure of Australian Planning' (n 1) 3.
[73] Ibid.
[74] Ibid 4-5.
[75] Ibid 5-6.

apology,[76] updating PIA's Reconciliation Action Plan,[77] and amending PIA's planning education accreditation policy to include Indigenous content in planning education.[78]

Planning education is particularly pertinent, because as Porter observes, 'Indigenous knowledge systems, methods of environmental care and land-use are virtually unheard of in planning degrees'.[79] This is not to say that planning education has been totally remiss about these matters. A study of Indigenous content in planning education in 2008 found that there is a great deal of variety in the approach to incorporating Aboriginal and Torres Strait Islander issues into the curricula of urban and regional planning courses in Australia, and that Aboriginal and Torres Strait Islander issues are considered 'marginal' compared to 'mainstream' planning subjects in University planning courses accredited by PIA.[80]

In its assessment of the state of planning education in 2010, the Indigenous Planning Working Group (IPWG) within PIA concluded that while planners and planning approaches in a variety of contexts are inclusive and adaptive in response to the recognition of Aboriginal and Torres Strait Islander peoples' rights and interests, research indicates that the complex layers of legislation imposed by the various jurisdictions and their relationship to planning and land management tools, policy and State/Territory planning Acts, present challenges for urban and regional planners.[81] The IPWG also noted that recent research had concluded that many aspects of contemporary land use planning 'remain unquestioned' in their approach and planners are often unaware of the impact of

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[76] Ed Wensing and R Davis, 'Letter to the Editor: A response to Sue Jackson, A Disturbing Story: The fiction of rationality in land use planning in Aboriginal Australia' (1998) 35(1) *Australian Planner* 2; Wensing and Porter, 'Unsettling Planning's Paradigms: Toward a just accommodation of Indigenous rights and interests in Australian urban planning?' (n 66) 8.

[77] Porter, 'Indigenous people and the Miserable Failure of Australian Planning' (n 1) 11.

[78] John Sheehan and Ed Wensing, 'Indigenous Property Rights: New developments for planning and valuation' (Discussion Paper No 17, The Australia Institute, 1998); Indigenous Planning Working Group, 'Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Recommendations for Reforming Planning Education Curricula for PIA Accreditation' (Discussion Paper (Planning Institute of Australia, 21 October 2010) <http://www.planning.org.au/documents/item/2381>; Ed Wensing, Submission to Planning Institute of Australia Education Accreditation Review Committee, *Review of the Planning Education Accreditation Policy* (10 May 2016); Libby Porter, Submission to Planning Institute of Australia Education Accreditation Review Committee, *Review of the Planning Education Accreditation Policy* (26 May 2016). Planning Institute of Australia's 'Code of Professional Conduct' was amended in 2014 to ensure members will use their best endeavours to ensure that planning matters for which they are responsible will pursue an appropriate balance of, amongst other things, considered account of Aboriginal and Torres Strait Islander connections to country. See Planning Institute of Australia, 'Code of Professional Conduct' (Web Page, 31 January 2018) <https://www.planning.org.au/documents/item/6014>.

[79] Porter, 'Indigenous people and the Miserable Failure of Australian Planning' (n 1) 8.

[80] Sarah Oberklaid, 'Indigenous issues and planning education in Australia' (MArch Thesis, University of Melbourne, 2008); Indigenous Planning Working Group, 'Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Recommendations for Reforming Planning Education Curricula for PIA Accreditation' (n 78) 8.

[81] Indigenous Planning Working Group, 'Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Recommendations for Reforming Planning Education Curricula for PIA Accreditation' (n 78) 8; Richard Margerum, Victor Hart and Jo Lampert, 'Native title and the planning profession: Perceptions, challenges and the role of professionals' (2003) 40 *Australian Planner* 46; Bev Kliger and Laurie Cosgrove, 'Local cross-cultural planning and decision-making with indigenous people in Broome, Western Australia' (1999) 6 *Cultural Geographies* 51.

biases in Australian planning history, theory and methodology on planning policies and outcomes for Indigenous peoples and communities. Furthermore, the implications of recent legislative recognition of Indigenous land rights and common law recognition of native title rights and interests was also poorly understood and included in planning education.[82]

As a planning practitioner and educator, I have long held the view that it is no longer appropriate for planning education to be turning out planners without a better understanding of the rights and interests of Aboriginal and Torres Strait Islander peoples and communities. I have consistently called for a review of the Planning Institute of Australia's (PIA) accreditation policy for the recognition of Australian planning qualifications.[83]

E *PIA's role in planning education accreditation*

PIA has finally listened. In September 2016 PIA released a revised policy for the accreditation of Australian planning qualifications which for the first time includes 'Aboriginal and Torres Strait Islander peoples' and Indigenous peoples' rights and interests and planning approaches' as a Supporting Knowledge Area 'that encapsulate techniques of planning methodology and generally accepted content that would normally be expected in planning degree programs'.[84] This is a very welcome development.

As at June 2016, 24 universities around Australia have 30 undergraduate and 30 post graduate courses in place that are accredited by PIA. Their re-accreditation is either currently underway or scheduled to be completed by June 2021. This is an ongoing undertaking by PIA, as the procedures for accreditation are undertaken by Visiting Boards appointed by PIA's National Education Committee and involve the collaboration and support by the university seeking accreditation. The review process is spread over a two to three-day program of activities designed to review the course content and its merits against the *Accreditation Policy*.[85]

The challenge for PIA and the University planning schools around Australia is how they respond to the requirements for the new Supporting Knowledge Area of 'Aboriginal and Torres Strait Islander peoples' and Indigenous peoples' rights and interests and planning

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[82] Indigenous Planning Working Group, 'Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Recommendations for Reforming Planning Education Curricula for PIA Accreditation' (n 78) 15.

[83] Sheehan and Wensing, 'Indigenous Property Rights: New developments for planning and valuation' (n 78); Ed Wensing, 'Aboriginal and Torres Strait Islander Australians' in Susan Thompson (ed) *Planning Australia: An overview of Urban and Regional Planning* (Cambridge University Press, 2007); Ed Wensing, 'Aboriginal and Torres Strait Islander Australians' in Susan Thompson and Paul Maginn (eds*), Planning Australia. An Overview of Urban and Regional Planning* (Cambridge University Press, 2nd ed, 2012); Wensing, 'Aboriginal and Torres Strait Islander peoples' relationships to "Country"' (n 7); Wensing, Submission to Planning Institute of Australia Education Accreditation Review Committee (n 78).

[84] Planning Institute of Australia, 'Policy for the Accreditation of Australian Planning Qualifications', *Planning Institute of Australia* (Policy Document, 29 September 2016) <https://www.planning.org.au/documents/item/48> ('*Accreditation Policy*'). The *Accreditation Policy* defines three components or levels in relation to skills and knowledge in planning education: Generic Capabilities and Competencies, Core Curriculum Competencies, and Supporting Knowledge Areas, which, in addition to Indigenous knowledges, includes Economic Planning; Environmental Planning; Social Planning; Transport Planning; and Urban Design.

[85] Ibid.

approaches'. Just because the reviews are scheduled to be completed by 2021, does not necessarily mean that every planning course should have the requisite Supporting Knowledge Area as an integral part of all the University's planning curriculum. One of the issues that the University planning schools will have to contend with is the critical shortage of highly skilled and committed planning educators in this field with the necessary experience of working with Aboriginal and Torres Strait Islander peoples and committed to relationships that advance land and planning justice on Indigenous terms and they will therefore have limited capacity to support the development of curricula that is appropriate, culturally safe, and accurate from an Indigenous perspective.[86]

PIA and the Australian University planning schools should not rush with their responses to this new requirement. It is important to understand that it takes time to develop deep, meaningful and respectful relationships with the relevant Aboriginal and Torres Strait Islander peoples in the university's geographic catchment areas and/or research activity localities. The primary aim should be to involve the relevant Aboriginal and Torres Strait islander peoples in the development of curricula that takes account of their rights and interests diligently, respectfully and in culturally appropriate ways. This will be more challenging in locations where it is difficult to establish who has the right to speak for country, especially where there is a long history of dislocation and dispossession. Indeed, the questions raised earlier in this paper about the application of s 5(2)(d) of the *Planning Act* are also relevant to the development of curricula for the inclusion of Indigenous knowledges in planning education.

F *Part 2: Summary*

In summary, historically, there has been a critical lack of discussion within the planning profession about the relationship between planning and Indigenous peoples in Australia.[87] PIA, in its planning education accreditation and continuing professional development role for the profession, is in a pivotal position to resource and drive a substantive capacity building program across the sector. Such a program could include a number of components, including for example, the establishment of an advisory body with Indigenous and non-Indigenous experts in the field of Indigenous planning to guide the implementation of the new accreditation policy; guidance on relationship building with Aboriginal and Torres Strait Islander peoples and communities and the development of partnerships; resourcing of appropriate cross-cultural training for planning educators with Indigenous peoples; resourcing of the preparation of appropriate and accurate teaching units with supporting materials that can be used as baseline resources; and the inclusion of Indigenous experts on accreditation boards with the specific remit to support and guide the development of appropriate curricula.[88]

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[86] Porter, Submission to Planning Institute of Australia Education Accreditation Review Committee (n 78) 4; Porter, 'Indigenous people and the Miserable Failure of Australian Planning' (n 1) 12; Indigenous Planning Working Group, 'Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Recommendations for Reforming Planning Education Curricula for PIA Accreditation' (n 78) 10.

[87] Porter, Submission to Planning Institute of Australia Education Accreditation Review Committee (n 78) 5;

[88] Ibid 4-5.

The outcomes are hanging in the balance. The call to the profession is to take up these challenges, otherwise the profession risks being out of step with the expectations of Aboriginal and Torres Strait Islander peoples in Australia, as well as with Indigenous peoples around the World.

IV CONCLUSION

This paper argues that the omission of Aboriginal and Torres Strait Islander peoples in Australia's land use planning systems needs to be addressed and that there is more than adequate justification for change in contemporary approaches to land use planning that take better account of Aboriginal and Torres Strait Islander peoples' rights and interests.

Land use planning systems and practices must also undergo fundamental change. Everyday planning practice must involve a habitual engagement with Aboriginal and Torres Strait Islander peoples about their country, about proposals that affect their lands and waters, and in a manner that acknowledges and respects the parity of two co-existing land ownership and governance approaches. Ultimately, contemporary land use planning must be about recognising the parity of Indigenous governance authority with Western systems to seek agreements on matters of mutual concern.[89]

The provisions in ss 5(1)-(2)(d) of the *Planning Act* clearly demonstrate that it is possible to embrace a more inclusive approach to the recognition, protection and promotion of Aboriginal and Torres Strait Islander peoples' knowledge, culture and tradition. This is an initiative that other jurisdictions should embrace.

Aboriginal and Torres Strait Islander peoples' law and custom with respect to their ancestral lands 'have helped them to successfully sustain life' for many thousands of years, and we should appreciate that they have much to teach us about humanities need for a symbiotic relationship with the earth.[90] As Tom Trevorrow, a Ngarrindjeri Elder, states so eloquently as his peoples' prescription for sustainability in the context of the Murray Darling Basin:

> Our traditional management plan was: don't be greedy, don't take more than you need and respect everything around you. That's the management plan — it's such a simple management plan, but so hard for people to carry out.[91]

Aboriginal and Torres Strait Islander peoples have a considerable tradition of caring for the land with a long-term view.[92] Their world view can only enhance the quality of land use planning and decision making. It's time we took some notice of their wisdom and foresight as our collective futures hang in the balance.

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[89] Ed Wensing, 'The Commonwealth's Indigenous land tenure reform agenda: Whose aspirations, and for what outcomes?' (Research Paper, Australian Institute of Aboriginal and Torres Strait Islander Studies Research Publications, July 2016) 51 <aiatsis.gov.au/sites/default/files/products/report_research_report/the-commonwealths-indigenous-land-tenure-reform.pdf>.

[90] Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Routledge, 2014) xxi.

[91] Tom Trevorrow, 'Murrundi Ruwe Pangari Ringbalin: "River Country Spirit Ceremony: Aboriginal Perspectives on River Country"' (YouTube, 24 Nov 2010) <www.youtube.com/watch?v=GqrRfyVNqIo>.

[92] Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (n 46); Jim Sinatra and Phin Murphy, *Listen to the People, Listen to the Land* (Melbourne University Press, 1999).