Submission to Yorrook Justice Commission: Land, Sky and Waters Inquiry
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Thank you for the opportunity to contribute the Yoorrook Justice Commission's examination of the past and ongoing injustices caused by colonisation in relation to land, water and sky. I write as someone who has benefited directly from the dispossession and attempted genocide of First Peoples. I pay respects to Ancestors and Elders, and especially to the Jardwadjali, Dja Dja Wurrung, Wurundjeri Woi-wurrung and Boonwurrung/Bunurong peoples whose lands have been home to me over my life, even though I was never invited to be here. I acknowledge the centrality of Country to First Peoples and that the taking of lands, waters, sky Country and other resources has done profound and lasting damage to the lives, laws / lores, governance, culture, knowledge systems, economies and languages of First Peoples.

This submission draws from my 25 years of research on the role of urban planning and development in the dispossession of First Peoples and how state policy regimes sustain the structure of dispossession that First Peoples continue to experience. The research that I have been privileged to conduct over this time has been primarily located in so-called Victoria, where I have had the honour of learning with Elders and knowledge-holders across many Nations. I have also worked in partnership with Indigenous peoples in other parts of the world including Canada, Chile and Aotearoa-New Zealand. I acknowledge Elders and knowledge-holders in all these places for sharing their expertise so that I may more humbly understand my own responsibility.

My submission focuses on the role played by the state and non-state entities in taking First Peoples lands; the ways that institutions, policies and legislation have changed over time to sustain that dispossession; the concerning ways that regimes of state recognition such as native title or cultural heritage can dilute and deny First Peoples rights; and some suggested reforms for redress.

1. How dispossession occurred and continues to occur in Victoria

The settler-colonial state has been and remains central to the dispossession of First Peoples from their lands and waters. The historical record very clearly demonstrates the auspicing, funding, organisation and policing of the establishment of a settler colony on this continent. In what is now Victoria, while it was privateers led by John Batman that organised the incursion that ultimately took root here, the colonial state lent its force of imposed law and military backing to shore up the settlement that Batman began. The duplicitous 'treaty' that Batman concocted helped secure his Port Phillip Association's claim and access to the lands to which he thought he was entitled, but also importantly forced the hand of the colonial officials to formally grant him the land. This occurred through Governor Bourke's annulment of the 'treaty' in the eyes of British law which also had the effect of affirming that the only colonial legal basis of land access would be via the Crown.

Batman's occupation and Bourke's eventual approval catalysed an extremely swift invasion, of the most rapid of any area across the continent[1]. One of the first activities of the state after Batman's arrival was to lay out a town made to replicate European settlements. Robert Hoddle as the colony's surveyor laid out the grid of streets that is now Melbourne's city centre in 1837. Hoddle based his township layout on surveying practices developed in NSW earlier including Governor Darling's layouts proclaimed in 1829 which established size of lots and configuration of roads and lanes. New regulations at the same time stipulated that all lands had to be sold by auction. These actions had the immediate effect of beginning to create property out of stolen land. A new colonial regulation at the same time stipulated that all lands had to be sold at auction, and Hoddle was appointed auctioneer. So began the rampant speculation on which the rest of the city of Melbourne was built[2]. Hoddle himself bought land, and all lands rose rapidly in colonial monetary value as they were further subdivided. Surveying, mapping, subdividing and auctioning land was central to the establishment of the early colony and enabling colonists to get a foothold. Auctions became an income for the colonial government and the wealth of settlers alike, from which enormous profits were made and continue to be made.

To establish these surveyed plots with the requisite fences and emerging buildings required the removal of First Peoples from their lands and waters. In a book I co-authored with Sue Jackson and Louise Johnson, we wrote about the particular urban policy actions that supported and enabled this dispossession[3]. There were three main policy actions that secured this:

1. The surveying and eventual sale of land itself;
2. The creation of reserved lands onto which Aboriginal people were forcibly moved;
3. Establishment of the City Corporation in 1842, which had the power to determine who could and who could not be residents of the city.

These were all policies of removal and containment of First Peoples from the burgeoning township of Melbourne. In this sense, urban planning and policy is demonstrably central to the violence and dispossession of settler colonialism. In many respects, it was the colonies where European imperial powers perfected different kinds of town layout and formation[4]. Land is fundamental to establishment of a settle colony, and the making of 'new' territory for an imperial power such as Britain had to be secured through state rule and the creation of economic growth. Land use planning was the principal instrument of this state control of land and the coordination of economic growth opportunities, as it is to this day. This means that urban and environmental planning has been and remains central to dispossession.

The colonial survey and cadastral map, with its requisite instruments of measurement were essential tools of colonialism. The British government in its territories particularly in Australia funded exploration teams with surveyors to generate knowledge of use to imperialism about the features, extent and opportunities that lands and waters offered. Surveyors were powerful men in the colony because they served some essential functions of the colony. First, they enclosed territory as European space by marking it as known, legible

[1] Jackson Porter and Johnson 2018, see Chapter 6.
[2] See Sandercock 1975
[3] See Jackson Porter and Johnson 2018, Chapter 6.
[4] See Porter 2010

and available for settlement[5]. Second they produced knowledge about land that could be wielded in the interests of settler colonial development and expansion. The 'resources' of Country were quantified, mapped, measured and classified and turned into water supplies, drainage systems, urban settlements and pastureland. Studies of colonialism and its mechanics point out how "maps and cadastral surveys are generally treated as the handmaiden of property"[6].

Land itself was also classified into different kinds for the colonial imagination and order. An Order in Council on Squatting in NSW of 1847 classified lands as either 'settled', 'intermediate', or 'unsettled' organised between the binary that colonialism gives to land based on it being 'improved' or 'waste'. Land 'improvement' was a hallmark in colonial terms of progress in a colony, influenced heavily by the legal theories of John Locke who was an English philosopher. He argued a 'labour theory of value' which held that lands had to be improved to make them into property. Under this theory, improvement was a racist construct as it could only apply to the forms of improvement recognisable to European eyes and undertaken by white people, usually men. Any other lands were deemed 'waste' which under Locke's meaning meant they were surplus or not yet recognisably improved.

The 'problem' of waste lands was enormously controversial and vexing for the colonial powers in the early frontier periods of settler colonialism in what is now Victoria with much correspondence between the colonial Governors and London about how to manage and control 'waste' lands[7]. Progress was measured through this improvement and the indicators that such improvement was occurring. For example, in Victoria at the second colonial Exhibition held in the colony of Victoria in 1861 (the first was in 1851 and was the catalyst for the Exhibition Building), the then Governor announced that the colony was advancing through the use of waste lands illustrated through counts of sheep, grain harvested and rates of civic buildings developed[8]. Waste also helped organise a settler-colonial future imagination about land. The idea of 'settled land' carried the settler imagination of progress and pioneering. Achieving the potential of land through improvement, cultivation and 'civilisation' was a moral right and duty that came from Lockean thinking and was utilised to dispossess First Peoples.[9]

This classification of land also organised the colonial property system which remains intact to this day. This makes all land tied back to underlying Crown sovereignty, from which bundles of rights can be granted to others. Different types of tenure can thus arise through a settler-colonial system of property such as freehold and leasehold tenures. All are ultimately tied back to the Crown's power and ultimate right as sovereign to organise, distribute and manage land and rights to it.

The myth that First Peoples sovereignty lives in the past is a core sustaining lie of settler-colonialism. It is held up by a number of technologies and policy logics that together coordinate the sustainment of settler occupation and use of First Peoples lands and waters.

[5] See Jackson Porter and Johnson 2018, chapter 3.
[6] Blomley 2003, p.127
[7] See Jackson Porter and Johnson 2018, chapter 3 and 4
[8] See Porter 2010
[9] See Porter 2010 and Jackson Porter and Johnson 2018

Property is an essential technology in this regard. Country has been transformed into property by colonial actions of invasion, building, occupation and legislative authority. This was not a singular or 'original' event that caused an initial dispossession that is now located back in time. Current research I am undertaking with colleagues Dr David Kelly and Dr Priya Kunjan at RMIT is examining how dispossession is persistent and contemporary. One focus of our research is on land titles and how they operate. Our research on title demonstrates how dispossession is a *present* mode of imperialism, a persistent mechanism through which settler-colonial society organises its relationship with First Peoples. In that sense, titles are a register of the ongoingness of colonialism. Title documents are legal events that organise reality in the interests of the settler state. Sarah Keenan's work on Torrens titling as a system demonstrates that titles are like a time machine that "operate on the basis of fictional accounts of land which portray it as a market commodity with a short and entirely contained history", and that this produces "racial-temporal categories of white subjects whose entitlement to land is transcendental, and non-white subjects whose entitlement to land is either confined to the past or to a future that never comes"[10]. Even the listing of names on title documents gives an impression of a thickening of the distance between the rights of a property owner from First Peoples sovereignty and rights. This helps sustain the myth of First Peoples sovereignty being located in the past and both registers and reconciles land theft in the same twist[11].

The racist ideology of 'waste' or improved land also underpins the classification of lands for land use and management. Settler-colonial spatial ordering ties, through its racist logics, the town or city to the notions of culture, civilisation and social organisation, and the 'bush' to notions of wild and untamed nature. Such an ideology catalysed land clearing and degradation, the reorganisation, use and pollution of rivers, creeks and other living water bodies. European racist ideas about primitiveness and civilisation are pivotal to the organisation of the difference between urban places and natural places, an ideology that has been completely normalised into the systems of land policy and management regimes in Victoria.

The term 'resources' signals a colonial attitude towards lands, waters, and all non-human living beings as raw material to feed into industrial-capitalist machine for the extraction of profit. That ideology along with the western philosophy that people are separate from something identifiable as 'nature' also serves a related colonialist ideology of 'conservation'. Here, land is classified, zoned and reserved for special uses and management regimes of nature preservation, or other kinds of resource extraction. This is the utilitarian-conservation binary logic around which the environmental management and planning system remain organised. Lands and waters are seen as either useful because they serve economic growth and wealth extraction, or special for their 'natural' values in which case they need to be preserved and conserved under special management regimes.

The evidence is clear of this at work in Victoria. Coloniser and first surveyor-general of NSW, Major Thomas Mitchell was influential and powerful in the organisation of these ideas, and the historical record identifies his role in massacres and deaths of First Peoples to clear land as he went on his expeditions. Mitchell catalysed the invasion of the western district of

[10] Keenan 2018 p3

[11] This is taken from work currently being prepared for publication, available from the authors

Victoria which he described as particularly excellent. Mitchell, along with Victorian Government Botanist Ferdinand von Mueller were both influential also in the emerging colonialist concern with resource preservation and protection[12].

The concern for preservation arose from the rapid clear felling of forests to serve agricultural expansion and urban development. In 1867 the Victorian colonial government began reserving lands for forest and timber reserves to try to control and manage timber clearing. But it was poorly funded and resourced and the activities of colonists themselves continued large-scale clearing right through the second half of the 19th century. A Royal Commission to inquire into clear felling practices recommended higher levels of protection and reservation, and this resulted in the Forests Act 1907, which established the first Forests Department to manage public lands[13].

This lineage, with its presumptions of managing a 'resource' are what shape the presumptions and policy directions of environmental management regimes in Victoria today. The system of classification of lands reserved as part of the protected area estate is organised through the hierarchy enshrined at the IUCN level ranging from 'wilderness' to 'managed resource' areas. The presumption is that land and resources can be classified according to a taxonomy of how useful the resources are for wealth extraction and the extent to which lands and resources need to be protected from use. Consequently, we have a protected area system to this day that classifies some land as available for resource extraction such as logging and some lands protected from that for the purposes of conservation. The latter is still based upon a racist ideology that those lands are relatively 'untouched', erasing the millenia of First Peoples law/lore, governance, responsibility and practice. Scientific knowledge remains the dominant way of classifying, measuring and therefore managing the protected area estate, in ways that exclude and undermine First Peoples knowledges.

The ideology and central lie of *terra nullius* has remained at the heart of the land-organising practices of colonial statecraft to this day. The racist thinking that underpinned declaring the continent as 'empty' is a viewpoint that remains largely unshaken in the presumptions about what land is in contemporary Australian planning. The land use and management regime of the settler state proceeds as if the places being planned are blank slates, empty or at least deficient (somewhere not quite fully improved) but waiting to be activated. This is evident in ideas about public land and its uses, the continued terminology of 'Crown land', and in development approval processes where notions of exclusivity, sovereignty and the correct use of land remain cornerstones of settler-colonial law and practice[14]. This can also be seen in contemporary debates about environmental policy more generally including in urban areas. This ideology is evident across all areas of the land use and management regime in Victoria, including the recent turn to 'urban greening' as a way of combating the effects of colonial-induced climate change[15] to the way that housing provision is organised and debated[16].

[12] See Porter 2007 and Porter 2010, chapter 4.
[13] Porter 2007 and Porter 2010, chapter 4.
[14] See Porter and Barry 2016
[15] See Porter Hurst and Grandinetti 2020
[16] See Porter and Kelly 2022

While planning as a profession was not established until well into the 19th century, the methods of statecraft by which state-based planning is now recognisable were all at work in the establishment of Victoria as a settler-colony. The strategies which planning uses to define and control land and resources by wresting them from First Peoples and making them available for the benefit of colonists can be summarised as:

1. Naming and boundary definition, which defines and orders space for settler-colonialism to thrive;
2. Surveying and mapping, which helps produce knowledge about place that serves settler-colonial interests;
3. Selection and zoning which assigns value to lands and waters for settler-colonial use and occupation.

In this way, the activities of planning have been and remain an instrumental activity to settler-colonialism, because it helps organise and sustain dispossession. These are some of the ways that dispossession is organised and sustained in the settler-colony.

2. The effectiveness of current legislative regimes of recognition

The founding of colonial spatial organisation at the moment of colonial invasion is the beginning of a continuous and as-yet unending process of dispossession[17]. A significant and powerful network of policy regimes sustains this trajectory particularly the centrality of the colonial property system and the structural incentives to continue to see First Peoples' land and water as a resource of wealth extraction.

The forms of state-based recognition that have emerged from generations of First Peoples resistance and resurgence demonstrate the adaptability of colonial policy regimes to this task. Key frameworks in Victoria are the Traditional Owner Settlement Act and related native title processes, cultural heritage management legislation and joint management of protected areas. My own work in urban and environmental planning has over two decades generated a body of evidence about the effectiveness and limitations of these different kinds of regimes. For context, I see these regimes as part of a liberal mode of recognition[18] or 'bounded recognition'[19] that always seeks to incorporate First Peoples law/lore, knowledges and rights into an unchanged status quo that preserves the power and dominance of settler-colonial institutions and society. While some of these modes of recognition can open up possibilities for First Peoples, they tend always to be ultimately framed on the terms of the settler state and to significantly constrain and limit First Peoples agency and rights. In this section, I offer some of the insights from my own research on these matters.

While native title and its attendant state-based legislative responses might be thought of as a 'land titling revolution'[20] in Australia, there is an argument to suggest that it operates

[17] See Wensing and Porter 2015
[18] See Coulthard 2014; Watson 2002; Povinelli 1998
[19] See Porter and Barry 2016
[20] See Altman 2014

more as a regime of extinguishment than a regime of recognition. Even under the more expansive possibilities of the Traditional Owner Settlement Act, First Peoples come up against enduring logics of erasure and dispossession that are tremendously difficult to overcome. Earlier research I undertook with Dr Ed Wensing in 2015 of native title outcomes in urban areas across Australia revealed that at that time, only 13% of the then 52 applications for native title which included urban lands had resulted in positive determinations. Most native title applications in urban areas end up being withdrawn, dismissed or discontinued[21].

The Traditional Owner Settlement Act 2010 is an important legislative framework for First Peoples to seek greater recognition of their rights. Yet, here again the settler state contains those rights to procedural rights as part of a liberal politics of inclusion within existing settler-colonial systems that retain settler power. The agreements process enabled under the Traditional Owner Settlement Act tends to limit both the geography of claims, much as native title does to non-urban areas[22] and the extent of authority to inclusion in already existing legislative regimes of land use and management.

Heritage management is one of few policy and legislative frameworks available to First Peoples in Victoria to assert some kind of authority and control in relation to land development. The establishment of the Aboriginal Heritage Act in Victoria in 2006 was the first time that the planning system in Victoria was forced to directly encounter First Peoples rights and obligations[23]. What is recognised, however, is a procedural right to be involved in an already-established planning decision-making process. While the regulations provide Registered Aboriginal Parties with some powers to make a determination on the impact of development on cultural heritage, this is highly constrained by the system of determining who can hold those rights, and the spatial areas and types of development to which the Act will apply[24].

The cultural heritage management regime in Victoria derives from enduring colonial tropes about cultural loss and degradation, privileges scientific archaeological knowledge and practices of determining heritage and serves to limit the locations where First People's rights and interests are seen to have any legitimacy in land use and management decision-making processes[25]. It also furthers a political economy[26] of land claiming in Victoria and sometimes pits First Peoples against each other in divisive contestations mired in the historical conditions produced by invasion and dispossession. The settler state never takes responsibility for these conditions it has produced, instead placing that burden back on First Peoples.

3. Potential mechanisms to redress past, present and ongoing injustice

[21] Wensing and Porter 2015
[22] See Porter and Barry 2016 chapter 4
[23] ibid
[24] See Porter and Barry chapters 4 and 5.
[25] Porter 2006 and see Jackson, Porter and Johnson 2018 chapter 10
[26] See Zorzin 2012

There are many instances and precedents around the world that have more systematically paid attention to reparation and redress for First Peoples in relation to dispossession. This can help move the 'liberal politics of recognition' framework beyond the limited activities around reconciliation and processes of inclusion to more concrete dimensions of redistribution and particularly land access and control. Treaty negotiations should be fostering a new relationship between the settler state and society and First Peoples, but this requires from the State a substantive commitment to self-determination and First Peoples sovereignty. In other settler states, such as Canada, there is evidence of an emphasis on the importance of appropriate fiscal arrangements for Indigenous nation building, the material logistics of governance and the deprivation and theft of these material means over two centuries of dispossession. This reckoning is yet to occur in Victoria.

Economic development and sustainability of First Peoples in Victoria and across the continent has been framed in a mostly paternalistic way, tied to resource extraction or government funding for resources. This has the consequence of locking First Peoples into often intractable and divisive conflicts between caring for Country and fiscal and economic sustainability. A crucial aspect of any self-determining governance system is the ability to maintain, distribute and redistribute resources. Some existing frameworks do exist in Victoria that may present opportunities for some substantive action.

Work I undertook with colleagues at RMIT Dr Ben Cooke, Ani Landau-Ward and Dr Rebecca Leshinsky[27] examined the powers available in the Local Government Act 1989 to use rate rebate mechanisms on private land to pursue land justice. Clause 169 of the Act provides for rate rebates or concessions that can be granted to 'restore or maintain… places of historical, environmental, architectural or scientific importance' (LGA 1989 s169, p237). To date, the use of this rebate mechanism clause appears to have centred on cases of ecological value and settler colonial heritage. A number of local Councils in Victoria partner with organisations like Trust for Nature to provide rate rebates where private landholders agree to a legal covenant on their property title to protect ecological values on that site. These rebates are generally determined on a per hectare basis and our research at that time revealed examples such as Mitchell Shire Council in central Victoria offering a rebate of $20 per hectare for land covered by a conservation covenant, with a minimum rebate of $100 and a maximum rebate of $500 per property.[28] The category *historical* importance may offer an avenue for using this mechanism for addressing land justice for First Peoples.

The international evidence suggests agreements as part of Treaty and other legislated outcomes on land can also offer forms of redress, when they are framed outside the constraints of an inclusionary logic. In Canada, the shift to a 'government-to-government' (G2G) understanding of agreement-making ensures a repositioning of First Peoples as governing entities in their own right (in the eyes of settler colonial states) rather than as recipients of settler largesse. A G2G approach has enabled some transformations for example in the agreement making between the Gitanyow people of north-central British Columbia and the BC Provincial Government[29].

[27] See Landau-Ward, Porter, Cooke and Leshinsky 2018
[28] Ibid
[29] See Porter and Barry chapter 8.

4. **Recommendations** to address ongoing land injustice

The continued sale of the category 'public' land in Victoria should be of immediate concern to First Peoples and is an abrogation by the state of its obligations to a meaningful and respectful Treaty dialogue. I recommend calling for an immediate moratorium on the sale of public land and the institution of an appropriate process of oversight through Treasury of how government-owned land is being used and also identified surplus to government requirements.

The complexity of state operations and the private and overlapping tenure arrangements across First Peoples' Country is a source of ongoing concern and difficulty for traditional custodians. I recommend calling for dedicated activity resourced by the Victorian Government to enable First Peoples to understand the complexity of tenure and government land holding and use across their Country. Existing databases and maps could be coordinated to this end, and the significant resources and skills of University research and teaching areas in disciplines such as urban planning, geomatics and geography would offer potential partners to assist in this regard. Such mapping and inventory work would need to include paying attention to the condition of lands, waters and sky resources, and the damage caused in these parts of Country.

A related recommendation is to call for the establishment of dedicated resourcing for 'treaty, lands and resources' type capacities for all traditional custodians / First Nations in Victoria. The international evidence[30] demonstrates the importance of in-house mapping and land research capacities to enable First Peoples to produce knowledge on their own self-determining terms and then be able to translate that knowledge into settler planning and environmental management regimes.

I recommend consideration be given to a wider scheme based out of the Local Govenrment Act clause described earlier which may be able to generate more substantive lines of resource less tied to specific extractions or industries for First Peoples.

Finally, I recommend a state-wide methodology be developed to map and quantify the loss of economic value to First Peoples from dispossession of their lands, waters and skies which may be able to form the basis of more informed negotiation toward reparations.

[30] See for example Porter and Barry, chapters 7, 8 and 9

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All works cited of my own authorship are available on request – contact me at libby.porter@rmit.edu.au

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