Acknowledgement of Country

I acknowledge that the Aboriginal and Torres Strait Islander peoples of Australia, the First Peoples of Australia, are one of the oldest, continuing and living cultures on Earth, with one of the oldest continuing land use planning and management systems and one of the oldest and continuing land tenure systems in the World.

I acknowledge that the Aboriginal and Torres Strait Islander peoples of Australia have suffered the indignity of their land, water and resources taken from them without their consent, without a treaty and without compensation. I also acknowledge that these matters are yet to be resolved.

I acknowledge First Nations peoples' continuing governance systems, diverse languages, customs and traditions, and rich knowledge of ecological systems. I recognise and I am grateful for the enduring connection and stewardship of Country that is integral to First Nations peoples' identity and culture for thousands of generations and will continue well into the future. I pay my respects to Traditional Owners, past and present.

Introduction

It is acknowledged that The Yoorrook Commission's inquiry is first and foremost about truth telling.

For thousands of years before the colonisers arrived in 1778, sovereign First Peoples governed themselves. They managed traditional lands according to their law and lore, cultural knowledges, practices and customs. These knowledges and practices were passed down through generations and encompassed holistic and interconnected relationships and obligations between First Peoples and their ancestral lands.

Colonisation disrupted these connections through violence, dispossession through forced removals, denial of culture and language, discrimination and the destruction of systems of governance. The impacts of colonisation are still being experienced today.

Australia has not come to terms with the fact that all its cities, towns and settlements are on the stolen lands of the Aboriginal and Torres Strait Islander peoples who owned and occupied this land for many thousands of years before colonisation by the British in 1788 (Wensing, 2019b).

Aboriginal and Torres Strait Islander peoples continue to assert they never ceded their sovereignty, their land was stolen from them without their consent, and extinguishment is alien to their law and custom. Under Aboriginal law and custom, the settler state's assertion of ownership and sovereignty over land has no legitimacy. Aboriginal and Torres Strait Islander peoples' persistent desire is that the two systems of law and custom relating to land be accorded an equal and non-discriminatory status. This position is supported by various international human rights instruments and recent developments in Australia (Wensing, 2019b). My recently completed doctoral research focussed specifically on how these two systems can co-exist alongside each other in parity and justice.

In response to the Yoorrook Commission's call for submissions on land, waters, sky and resources, I am offering my perspectives about the impact that colonisation and the enduring contemporary land use policy and planning landscape are continuing to have on First Peoples ability to exercise their connections to, and responsibilities for, Country under their law/lore and custom, and on their rights to self-determination and to free, prior and informed consent about matters that affect them and their connections to and responsibilities for Country.

Based on my research over the past 30 years, I can speak to the injustices embedded within the land use policy and planning systems that are inherently western, colonial, political and legal frameworks, the assumptions employed by planning agencies that are based on inherently Eurocentric assumptions, and more specifically about how the current planning systems in every jurisdiction in Australia are failing to take First Peoples land rights and interests into account.

Contemporary Australian planning has for too long ignored its fundamental responsibilities in its relations with Aboriginal and Torres Strait Islander peoples in urban and regional Australia. Australian land-use planning and development processes do not have a good track record of taking account of the rights and interests of Aboriginal and Torres Strait Islander peoples, or of adequately involving them, especially in our capital cities and major regional centres where the larger proportion of Aboriginal and Torres Strait Islander peoples live and the where the extent of dispossession is perhaps at its greatest.

It is a sad indictment of our land use policy and planning systems that more than 30 years after the High Court of Australia's landmark decision in *Mabo (No. 2)*, that 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 decision-making about land uses for an area of land or waters. I have been researching and writing about these matters for almost three decades and what follows is a synopsis of my research, which I hope will be of some assistance to the Commission in its deliberations.

Why land use planning matters to Aboriginal and Torres Strait Islander peoples

Land, land use, and planning are essentially about the relationships between people and land, and the uses to which land and resources can be put, in both urban and non-urban contexts. Planning is an ongoing process of setting objectives, exposing connections, presenting alternatives and their likely consequences, guiding and making choices, monitoring and reviewing progress, and revisiting the objectives and outcomes in a timely manner. The contribution of planning therefore lies in optimising the connections and linkages, the functional as much as the visual, within a structured landscape (Wensing and Small 2012). The essence of planning is not in the individual elements of society, economy, environment, or culture, but in their combination and interactions with each other. As Johnson (2018: 41) puts it, planning is 'a purposeful intervention' aimed at 'formulating a better future', echoing Throgmorton's (1992: 17) maxim that 'good planning is persuasive storytelling about the future' and Jackson's (1997: 226) assertion that any future narrative 'must be a new story, not the kind of fiction which legitimised terra nullius and rationalised unjust and racist land use decisions'.

Planning's praxis includes zoning and development controls that shape the environment (Wensing 2019a). Our land-use planning and development systems operate by requiring compliance with permitted uses set out in land-use zoning plans and through planning permits or development assessment processes. As Spiller (2021a) argues, the only right that property owners have is the right to continued enjoyment of lawfully sanctioned uses of their land, and to trade in the land, within these limits, if they so wish. This right cannot be taken away without compensation, as we see when governments compulsorily acquire property for roads, airports, hospitals, and other public purposes. Every other right as to how land may be used or developed is reserved by the community through planning laws.

In Australia, land administration and land-use planning are essentially public functions within each state and territory, which have their own unique laws for administering land tenure and regulating the use and enjoyment of land for present and future generations. The rationales and legitimacy of land-use planning are largely based on maintaining or improving the common good, on the assumption that the Crown holds ultimate control over all land in Australia, including the power to grant or transfer land in whatever form of tenure it decides, and to control what landholders do with their land (Wensing, 2019a; Spiller, 2021a). Planning matters to everyone because it affects everyone's everyday lives, including Aboriginal and Torres Strait Islander peoples because most of them live in our major cities and their proximate inner regional areas (Wensing and Porter, 2015).

The state's control over what landowners (public and private) can or cannot do, must be seriously questioned after the High Court of Australia's decision in *Mabo (No. 2)* (1992) because the Crown now shares its interests in land with native titleholders. That most certainly applies in circumstances where native title exists or may exist under the Commonwealth's *Native Title Act*

1993. However, Aboriginal and Torres Strait Islander peoples' rights and interests still apply elsewhere, including on private land, because Aboriginal cultural heritage is regulated under different legislation which is tenure neutral (Wensing, 2021a), and because extinguishment is alien to their law and custom (Yu, 2016:2)

Law and culture are deeply entwined, shaping each other (Nolan, 2011). Our laws reflect the culture in which they were made and reinforce that culture once made. Whether the law is just or unjust, it also shapes behaviour (Tapsell, 2014). That is the problem in Australia (Wensing 2021a): urban policy and land-use planning law continue to curtail Aboriginal and Torres Strait Islander peoples' rights to economic self-determination.

For more than two centuries, the existence of the Aboriginal and Torres Strait Islander peoples of Australia was denied, they were alienated and dispossessed from their lands, and forcibly relocated to missions and reserves. The law and the judiciary have played 'an important, but hardly creditable, part in the interaction between Aborigines and white society' (Cranston, 1974: 60). These laws confined Aboriginal people to reserves or missions to which many had no cultural connection, deprived them of their civil rights, and sought to justify their supposed inferiority (Cranston, 1974).

The material and geographical manifestations of Aboriginal cultures that developed over 65,000 years are rapidly being destroyed by resource extractions, urban development, and public infrastructure, such as roads and other public works, and our regulatory regimes fail to prevent their destruction (Langton, 2020; Wensing, 2021a).

It was not until *Mabo (No. 2)* that Aboriginal and Torres Strait Islander peoples were accorded any legal recognition of their pre-existing land rights and interests. In many respects, our laws are still playing 'catchup' after *Mabo (No. 2)*. The High Court's decision was as much about the substance of the Meriam people's claim to their ancestral lands in the Torres Strait as it was about the essence of a system of Aboriginal and Torres Strait Islander law and custom, including rights to their ancestral lands and waters (Wensing 1999, 2016). While the *Native Title Act 1993* deals with the former, we have not really come to terms with the wider implications of the latter for the way we deal with land and cultural heritage matters more generally. This is principally why mistakes like the destruction of Juukan Gorge in Western Australia, occur (Wensing, 2021c).

International and domestic imperatives

Other international and domestic imperatives are also driving a greater focus on the dysfunctional relationship between law and culture in relation to indigenous peoples' land and development rights.

At the international level, in 2007, the UN General Assembly adopted the *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN, 2007). Declarations are adopted by the General Assembly because they are considered universally applicable (Amnesty International, 2022). While Canada, Australia, Aotearoa New Zealand, and the United States originally opposed the declaration, all four countries have since reversed their opposition (Wensing, 2021b). While the UNDRIP may not be a direct source of law (UN, 2013), it carries considerable normative weight and legitimacy. It was 30 years in the making, compiled in consultation with, and the support of, Indigenous peoples worldwide (Daes, 2008), and it reflects 'an important level of consensus at the global level about the content of indigenous peoples' rights' (UN, 2013: 16). It also 'reflects

the needs and aspirations of Indigenous peoples' (Eide, 2006: 157), as well as the concerns of states (Wensing, 2019b).

The UNDRIP expresses rights and, in so doing, explains how Indigenous peoples want nation-states (and others) to conduct themselves in relation to matters that affect their rights and interests (Wensing 2019b). Most importantly, it enshrines the inextricably linked principles of self-determination and free, prior, and informed consent. There is therefore an expectation by indigenous peoples and others that the UNDRIP imposes obligations on states and third parties to conform to the standards expressed in the Declaration when it comes to making decisions that affect their rights and interests, including in land. Therefore, nation-states can no longer make decisions affecting indigenous peoples by imposition, but rather have a duty to consult with them based on free, prior, and informed consent when dealing with matters that will affect their rights and interests (Wensing 2021b). Where an activity impacts on the rights of an Indigenous group, attention should be given to whether the group's free, prior, and informed consent was obtained, 'which is determined by reference to the relevant international standards and not whether the arrangement is valid under Australian domestic law' (Southalan, 2016: 902–3). In many respects, the UNDRIP therefore establishes a moral and ethical compass to guide urban policy and land-use planning in Australia.

At the domestic level, the most significant development is the *Uluru Statement from the Heart*, which emerged from the First Nations National Constitutional Convention at Uluru, in the Northern Territory, in May 2017 (Referendum Council, 2017). The *Uluru Statement* resulted from a series of dialogues around the country with Aboriginal and Torres Strait Islander peoples about constitutional reform. It is the most recent of several declarations that Aboriginal and Torres Strait Islander Peoples have made about their rights and interests over the past 80 years (Wensing, 2019b). It is also the most profound statement because it outlines the issues they want the nation to address, and how. And how they can be addressed through Voice, Treaty and Truth.

The *Uluru Statement* is relevant to urban and regional planning because, as Professor Mick Dodson, a Yawuru man from Broome in the Kimberley region of Western Australia and Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner, states:

> *No consent was given to the colonisers to occupy and settle this land. What the colonisers did was wrong in so many ways. And the nation-state continues to refuse to address these wrongs comprehensively within a human rights framework … We can fix your problem. Sit down and talk to us about it. Let's negotiate our way through this.* (Personal communication with Ed Wensing, 16 October 2016)

These assertions apply to our cities and regions, as much as they apply to the rural and remote parts of Australia (Wensing and Porter, 2015).

Both the UNDRIP and the *Uluru Statement* represent significant shifts in the recognition of Indigenous peoples' rights and interests (Davis and Williams, 2021). Consequently, there have been significant shifts in public sentiment towards better accommodation of their rights and interests in urban policy and city and regional planning (Porter and Arabena, 2018; Mayfield and Porter, 2020).

What must change therefore are our approaches to engagement with Aboriginal and Torres Strait Islander peoples and their land rights and interests in urban and regional contexts. Our current approaches are deeply flawed because we continue to focus on reconciliation and

inclusion. While those approaches have been necessary and good, it is now time to shift the focus to reparation, restitution, and redistribution of power and resources.

The scope of State/Territory planning statutes (with a focus on Victoria)

As part of my PhD research in 2017, I examined Australia's State and Territory land use planning statutes to ascertain how they require engagement with Aboriginal and Torres Strait Islander peoples in the execution of their functions. For two reasons. Firstly, because Aboriginal and Torres Strait Islander peoples now own, manage or control over 50 per cent of terrestrial Australia through native title determinations, statutory land rights grants or transfer schemes and through Indigenous Land Use Agreements or other joint management arrangements (Altman, 2014, Altman and Markham, 2015). This proportion is expected to continue growing as outstanding native title and land rights claims are resolved and more Indigenous Protected Areas are identified and declared. Secondly, because Aboriginal and Torres Strait Islander peoples continue to have ongoing connections to, and responsibilities for, Country under their laws and customs regardless of whether their native title rights and interests may have been extinguished under the *Native Title Act 1993* (Cth) (Wensing, 2019a).

In each State and Territory there is a land use planning statute and a suite of related legislation that governs land use and environmental planning and development. **Table 1** shows the primary planning statute in each jurisdiction, a summary of the provisions regarding Aboriginal and Torres Strait Islander peoples' rights and interests, and the extent to which those provisions provide for a level of recognition and protection is shown in the column on the right.

Table 1. The primary Planning statutes and the extent to which they address Aboriginal and Torres Strait Islander peoples' rights and interests

Jurisdiction	Statute	Summary of provisions regarding Aboriginal and Torres Strait Islander peoples' rights and interests	Incorporates Aboriginal & Torres Strait Islander peoples' rights and interests?
Cth (ACT only)(a)	*Australian Capital Territory (Planning and Land Management) Act 1988* (Cth)	Nil	No
ACT(a)	*Planning and Development Act 2007* (ACT)	Nil	No
NSW	*Environmental Planning and Assessment Act 1979* (NSW)	Regulations under this Act may require the NSW Aboriginal Land Council to consent to applications for certain approvals on land owned by a Local Aboriginal Land Council, if the consent of the Local Aboriginal Land Council is required as owner of the land.	Only where the Local Aboriginal Land Council is the landowner under the *Aboriginal Land Rights Act 1983* (NSW)
NT	*Planning Act 2015 (NT)*	Nil	No
Qld	*Planning Act 2016* (Qld)	All entities performing functions under this Act must do so in a way that advances the purpose of the Act. Advancing the purpose of the Act includes 'valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition'.	Yes. Applies to all entities performing functions under the Act throughout Queensland.
SA	*Planning, Development and Infrastructure Act 2016* (SA)	Nil	No
Tas	*Land Use Planning and Approvals Act 1993* (Tas)	Nil	No
Vic	*Planning and Environment Act 1987* (Vic)	Definition of 'owner' amended to include 'traditional owner' as defined in the *Traditional Owner Settlement Act 2010* (Vic).	Yes, but only where agreements have been reached under the *Traditional Owner Settlement Act 2010* (Vic).
WA	*Planning and Development Act 2005* (WA)	One person of the Western Australian Planning Commission is to have practical knowledge of and experience in one or more of the fields of planning and provision of community affairs or Indigenous interests. The Coastal Planning and Coordination Council will have two persons as having practical knowledge in one or more of several different fields including but not limited to Indigenous affairs.	No

(a) There are two primary planning statutes for the Australian Capital Territory (ACT). When the Commonwealth granted the ACT self-government in 1989, the Commonwealth enacted legislation that retained control over designated areas in the ACT (as defined in the National Capital Plan) and a level of oversight over land use planning by the Territory Government (NCA 2016: 12-13). It is also relevant to note that the ACT has a leasehold system of land tenure, not ordinary freehold (Brennan 1971; Wensing 1992).

Source: Wensing, 2023.

Disappointingly, the statutes in the Australian Capital Territory, the Northern Territory, South Australia, Tasmania and Western Australia are silent on Aboriginal and Torres Strait Islander matters. The only jurisdictions with some kind of trigger in them to engage with Aboriginal and Torres Strait Islander people at some point in the planning process are Victoria, New South Wales and Queensland.

In this submission, I will only dwell on Victoria and Queensland, as the details of other jurisdictions can be found in published research journals (Wensing and Porter, 2015; Wensing, 2016; Wensing, 2018; Wensing, 2023).

There are only two triggers in *the Planning and Environment Act 1987* (Vic) which require the consideration of Aboriginal cultural values in the planning system.

The first is in relation to the preparation of Statements of Planning Policy for distinctive areas and landscapes in Part 3 of the Act. Among other things, the contents of a Statement of Planning Policy for a declared area must 'set out Aboriginal tangible and intangible cultural values, and other cultural and heritage values, in relation to the declared area.'

The second trigger in the Act is in relation to Crown lands which are subject to a Traditional Owner Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic), which is the State's alternative to the *Native Title Act 1993* (Cth) in Victoria. That trigger exists because the definition of 'owner' in the planning statute had to be amended to include the traditional owner group entity within the meaning of the *Traditional Owner Settlement Act 2010* (Vic). While the change to the definition of 'owner' was a consequential necessity, the implication in the planning context is that where the State has struck an agreement with the relevant traditional owner group entity under the *Traditional Owner Settlement Act 2010* (Vic), their rights and interests in the agreement with the State will be triggered under the planning statute if they will be affected by a Development Application (DA) that is being assessed under the planning statute.

But in all other contexts, the *Planning and Environment Act 1987* (Vic) is silent on the recognition and protection of Aboriginal and Torres Strait Islander peoples' rights and interests in planning actions under the Act.

Queensland is the only jurisdiction that includes a specific and positive provision because in May 2016, the Queensland Parliament passed a new planning statute which for the first time in the history of planning legislation in Australia includes a provision which requires entities performing planning functions under the Act to, amongst other things, also value, promote and protect Aboriginal and Torres Strait Islander peoples' knowledge, culture and tradition and their cultural heritage (Wensing, 2018).

The absence of any more specific requirements in our planning statutes to take account of Aboriginal and Torres Strait Islander peoples' rights and interests means that they remain invisible and largely as an afterthought in most planning exercises, and not as a pre-requisite from the outset. And sometimes with very adverse consequences for the Aboriginal and Torres Strait Islander peoples concerned and with no access to redress or compensation for the loss, diminution or impairment of their rights and interests.

As part of my analysis of the planning statutes around Australia, I examined whether any of the definitions of 'owner' included traditional owners and/or registered native title claim group/holders as per s.253 the *Native Title Act 1993* (Cth).

A land 'owner' has significant property rights in planning and development matters and in most jurisdictions plays a vital role in the Development Assessment process. For example, a landowner has the discretion to lodge an application for development on their land in compliance with the local planning scheme, they can give their consent to a third party to undertake development on their land, and they will be notified and given the opportunity to comment on development proposals on any adjoining land. They may also be able to enter into agreements with others about development on their land, appeal planning decisions affecting their land and be able to claim compensation for losses or damages to their land.

In a conference paper I co-authored with Dr Garrick Small in 2012 (Wensing and Small, 2012), we canvassed the idea that one way of making a significant improvement to the recognition and accommodation of Aboriginal and Torres Strait Islander peoples' land rights and interests, would be to include them in the definition of 'owner' in planning and related statutes.

Table 2 shows the current status of whether the definition of 'owner' in each of the primary planning statutes around Australia includes registered native title holders/claimants or traditional owners.

In every State and Territory (with the exception of Victoria and Western Australia), the definition of 'owner' does not include traditional owners or registered native title holders or claimants. Where they are included, they have only very limited application.

In Victoria, as discussed earlier, the definition of 'owner' in the *Planning and Environment Act 1987* was amended following the passage of the *Traditional Owner Settlement Act 2010* (Vic). While this amendment to the definition of owner to include traditional owners as defined in the *Traditional Owner Settlement Act 2010* (Vic) is commendable, it has limited application in relation to Crown land reserved under the *Crown Land (Reserves) Act 1978* (Vic) or the *Land Act 1958* (Vic) and included in a land agreement reached under the *Traditional Owner Settlement Act 2010* (Vic).

Generally, where a land 'owner' is not the proponent of a land use change or development proposal, the planning statute requires either the proponent or the relevant local government to notify and obtain the relevant landowner's consent. Without this prior consent, most third party development proposals cannot proceed. While the provisions vary between the jurisdictions, their general intent is much the same: to protect the landowner's property rights.

Table 3 shows the various procedural rights in our land use and planning systems, and where they apply or don't apply in the different jurisdictions.

This analysis is not intended to be a comparative assessment of the relative merits of the various procedural rights, it is only based on an assessment of whether such procedural rights exist in the relevant primary planning statutes in each jurisdiction. However, what **Table 3** does show is that in most jurisdictions an owner is entitled to most of the procedural rights in relation to Development Assessment decisions that may affect the owner's land directly or on adjoining land.

If the definition of 'owner' or 'proprietor' in planning and land administration statutes is broadened to include registered native title holders/native title claim group, then they would be entitled to the same procedural rights that 'ordinary title holders' are entitled to under land use and environmental planning statutes. These procedural rights are not currently available to registered native title holders/native title claim groups, unless they are negotiated into an

Indigenous land use agreement (ILUA) under the *Native Title Act 1993* (Cth) or a Land Use Activity Agreement under the *Traditional Owner Settlement Act 2010* (Vic) in Victoria.

Table 2. Status of whether the definition of 'owner' in planning/land administration statutes includes traditional owner and/or registered native title holder/claimant

Jurisdiction	Statute	Traditional owner	Registered native title holder/claimant
Cth (ACT only)(a)	*Australian Capital Territory (Planning and Land Management) Act 1988* (Cth)	Not defined	Not defined
ACT(a)	*Planning and Development Act 2007* (ACT)	Not defined	Not defined
NSW	*Environmental Planning and Assessment Act 1979* (NSW). 'Owner' as per the *Local Government Act 1993* (NSW)	No	No
NT	*Planning Act 2015 (NT)*	No	No
Qld	*Planning Act 2016* (Qld)	No	No
SA	*Planning, Development and Infrastructure Act 2016* (SA)	No	No
Tas	*Land Use Planning and Approvals Act 1993* (Tas)	No	No
Vic	*Planning and Environment Act 1987* (Vic)	Yes. Definition of 'owner' includes 'traditional owner' as defined in the *Traditional Owner Settlement Act 2010* (Vic).	The definition for traditional owner in the *Traditional Owner Settlement Act 2010* (Vic) replaces the native title holder in the *Native Title Act 1993* (Cth).
WA	*Planning and Development Act 2005* (WA). 'Proprietor' is defined in the *Land Administration Act 1997* (WA)	No	Yes

(a) As for Table 1.

Source: Wensing, 2023.

Table 3. Procedural rights that owners are entitled to under the primary Planning statutes around Australia.

Jurisdiction	Statute	Notification	Consultation	Give consent to access	Enter into agreements	Appeal decisions	Compensation for losses or damages	Give consent to third party development
Cth (ACT only)(a)	*Australian Capital Territory (Planning and Land Management) Act 1988* (Cth)	No	Yes	No	No	No	No	No
ACT(a)	*Planning and Development Act 2007* (ACT)	Yes	Yes	Yes	Yes, but not explicitly	Yes but not explicitly	Yes	Yes
NSW	*Environmental Planning and Assessment Act 1979* (NSW)	Yes	Yes	Not explicitly	Yes	Yes	Yes	Yes
NT	*Planning Act 2015* (NT)	Yes	Not required, but may be undertaken	Not explicitly	Not specified	No	Yes	Yes
Qld	*Planning Act 2016* (Qld)	Yes	Yes, but not explicitly	Not explicitly	Yes	Yes	Yes	Yes
SA	*Planning, Development and Infrastructure Act 2016* (SA)	Yes	Yes	Yes	Yes	Yes	No	Yes
Tas	*Land Use Planning and Approvals Act 1993* (Tas)	Yes	Not clear!	Not clear!	Not clear!	Yes	Yes	Not clear!
Vic	*Planning and Environment Act 1987* (Vic)	Yes	Yes	Not explicitly	Yes	Yes	Yes	Yes
WA	*Planning and Development Act 2005* (WA)	Yes	Yes	Not explicitly	Yes	Yes, implied	Yes	Not explicitly

(a) The Commonwealth's statute (the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth)) sets the general framework for the planning and land administration system to be administered by the Territory Government. The Commonwealth is responsible for preparing and administering the National Capital Plan, and the Territory Government is responsible for preparing and administering the Territory Plan which must not be inconsistent with the National Capital Plan. Most lessees in the ACT are not directly impacted by the National Capital Plan and therefore have few procedural entitlements under the Commonwealth's planning statute. Most lessees are more likely to be affected by planning decisions made by the Territory Government and the analysis shows that lessees are entitled to the full suite of procedural rights under the *Planning and Development Act 2007* (ACT).

Source: Wensing, 2023.

It is debatable whether the outcomes of a Development Assessment application would be any different, but the registered native title holders'/ native title claim group's rights and interests would at least have been considered as an integral and normal part of the due process, rather than being completely ignored. It is incongruous that such oversights are continuing to occur as part of our contemporary land use and environmental planning and development systems in the light of the High Court of Australia's repeated assertions that native title rights and interests are indeed significant property rights that should properly be taken into consideration in land use planning and management decision making.

The omission of the rights and interests of Aboriginal and Torres Strait Islander traditional owners and registered native title holders/claimants from the definition of 'owner' or 'proprietor' in the relevant statutes are denying them the opportunity to be integrally involved in planning and development decisions affecting their land or native title rights and interests. These omissions from our planning praxis and lexicon need to be rectified. This can be done by amending planning statutes to include the consideration of Aboriginal and Torres Strait Islander peoples' rights and interests in the preparation of all planning documents from the outset and not as an afterthought. This is exactly what the insertion of s.5(2)(d) and (e) in the Queensland *Planning Act 2016* was intended to do. (Wensing, 2018).

In its simplest interpretation, s.5(2)(d) of the *Planning Act 2016* (Qld) places the onus on the entity performing the function under the Act to take Aboriginal and Torres Strait Islander knowledge, culture and traditions into account from the outset of planning activities regardless of whether there is a native title determination, a registered place or site of cultural heritage significance, or a land grant under a statutory Aboriginal or Torres Strait Islander land rights

grants/transfer scheme. S.5(2)(e) relates to conserving places of cultural heritage significance to Aboriginal and Torres Strait Islander peoples.

The significance of s.5(2)(d) is that the provision is tenure-blind, land-rights-blind, and cultural-heritage-blind. 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 and whether or not there are listed or registered sites of Aboriginal or Torres Strait Islander heritage significance under Aboriginal or Torres Strait Islander cultural heritage legislation in Queensland.

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. Each of those systems or schemes 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 have 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 any of those rights and 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 and their connections to, and responsibilities for, Country under their law and custom.

In contrast, s 5(2)(d) in the *Planning Act 2016* (Qld) 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, including State Government departments and agencies, local government councils and any other organisations or persons performing particular functions under the *Planning Act 2016* (Qld).

Entities performing functions under the *Planning Act 2016* (Qld) may well ask how can these 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)? The answer to this question lies in the entity needing to ask and seek answers to the following questions:

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

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

c) *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?*

d) *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?*

e) *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?*

f) *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?*

Answers to these questions are explored in a recent article by Dr Ed Wensing published on the James Cook University Law Review Journal (Wensing, 2018). The short answer is that they must be worked through with the relevant Aboriginal or Torres Strait Islander people for the subject planning area.

Observations about the *Aboriginal Heritage Act 2006* (Vic)

Good intentions aside, the *Aboriginal Heritage Act 2006* (Vic), still reflects the assumptions and objectives of colonial political and legal frameworks. These include in the words of staff from the former managing body Aboriginal Victoria, a focus on providing "land users, developers, local government and Traditional Owners certainty that any Aboriginal cultural heritage identified will be managed without imposing unforeseen costs and delays during development activities". This emphasis on certainty and protection of economic value for others, leads to a preoccupation with boundaries and delineations.

This boundary-setting is influenced by colonial framings that ascribe value that relates to traditional practices and objects that existed in the past. Aboriginal culture, on the other hand, reflects a view of heritage as an ongoing relationship and as defined by the situation of places within their Country to which they have cultural connections, and for which they have custodial responsibility to manage.

The *Aboriginal Heritage Act 2006* (Vic) also provides for the appointment of Registered Aboriginal Parties (RAPs). RAPs have a range of particular cultural heritage responsibilities, including the evaluation of cultural heritage management plans and decisions about cultural heritage permit applications.

RAPs also:

- provide advice to government and to the Victorian Aboriginal Heritage Council about Aboriginal places and objects;
- negotiate the return of Aboriginal cultural heritage and Ancestral Remains;
- participate in cultural heritage agreements, protection declarations and intangible heritage processes;
- consult with sponsors and heritage advisors; and
- undertake cultural heritage assessments and engage in compliance and enforcement activities.

The central role of Registered Aboriginal Parties (RAPs) comes laden with limitations too. Their role is tightly defined. For example, Cultural Heritage Management Plans (CHMPs) can only be refused on quite limited grounds within the Act, framing the CHMP as an exercise in harm minimisation rather than a threshold test of whether a proposal should be allowed. This can place a RAP in a position where they are complicit in the destruction of their own cultural heritage.

RAPs also privilege one set of views within the Aboriginal community over others, threatening to create conflict within those communities. Aboriginal peoples who are not RAPs can engage in the planning process through the normal objection process, but this occurs long after the CHMMP approval has, for the purposes of the planning framework, essentially resolved any Aboriginal issues and largely placing them outside of the view of planning decision-making.

In short, there is at best a limited degree of self-determination for First Nations peoples over matters that directly affect them, and at worst, a system that is set up to actively limit their involvement in those same matters. Needless to say, the Aboriginal heritage system in Victoria needs revisiting.

Observations about the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) is a statute that sets out the basic rights, freedoms and responsibilities of all people in Victoria. It is essentially about the relationship between government and the people it serves. The Charter protects twenty fundamental human rights and it requires public authorities, such as Victorian state and local government departments, agencies and people delivering services on behalf of government, to act consistently with the human rights in the Charter. Interestingly, the Victorian Equal Opportunity and Human Rights Commission maintains that some rights may be limited, but there must be clear and reasonable grounds for doing so (VEOHRC: n.d. (a)).

S.19(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides a right to protection of cultural rights:

> *(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.*

The right to culture therefore provides for people to practise and maintain shared traditions and activities and allows for those belonging to minority groups to enjoy their own culture, to profess and practise their own religion and to use their own language (in private and in public), as well as to participate effectively in cultural life. (VEOHRC: n.d. (b)).

s.19(2) focuses on the rights of Aboriginal persons regarding their cultural institutions, ancestral lands, natural resources and traditional knowledge:

> *(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—*
>
> *(a) to enjoy their identity and culture; and*
>
> *(b) to maintain and use their language; and*
>
> *(c) to maintain their kinship ties; and*
>
> *(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.*

According to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), this right puts an onus on public authorities to adopt measures for the protection and promotion of cultural diversity, enabling people from diverse communities to engage freely and without

discrimination in their own cultural practices and take appropriate measures or develop programs to support minorities or other communities, including Aboriginal and Torres Strait Islander communities, in their efforts to preserve their culture. For example, the cultural rights of Aboriginal Victorians were taken into account in the development of the *Traditional Owner Settlement Act 2010* (Vic) and agreement-making between the state and traditional owner groups (VEOHRC: n.d. (b)).

The Charter requires public authorities, including local councils, to consider the Charter in the way they go about their work, deliver services, apply laws and make decisions, including planning decisions because human rights are a key consideration when addressing the social and economic impacts of planning applications. The Charter also requires public authorities, including councils, to consider human rights when making a decision and to not act incompatibly with human rights. It also provides a framework for considering when human rights may be lawfully limited (VEOHRC: n.d. (c))

The Victorian Equal Opportunity and Human Rights Commission's website contains an example of how the application of s.19 played out in relation to a planning application for the development of a mosque next to a church of another religious denomination in an industrial zone in the matter of *Rutherford & Ors v Hume City Council* [2014] VCAT 786. (VEOHRC: n.d. (c)).

It should be noted however, that s.7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

It remains to be seen therefore how the Charter may be applied in relation to Aboriginal peoples' rights with respect to maintaining their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs, especially in locations where it may be difficult to establish the continuing existence of native title rights and interests under the *Native Title Act 1993* (Cth) or to reach an out-of-court settlement under the *Traditional Owner Settlement Act 2010* (Vic) or not sufficient to meet the requirements for protection under the *Aboriginal Heritage Act 2006* (Vic).

Observations about the *Local Government Act 2020* (Vic)

In Victoria, the *Local Government Act 2020* (Vic) enables the Minister for Local Government to issue Ministerial Good Practice Guidelines (MGPGs) (S.87). While MGPGs are not mandatory for councils (unlike regulations), in the spirit of having a principles-based Act, it is intended that MGPGs be developed where there is a clear need to support councils.

A MGPG has been issued to assist councils when engaging with Traditional Owners, Aboriginal Organisations and Community by providing a step-by-step guide for councils on how to identify, engage and build connections and develop mutually beneficial relationships with the Aboriginal Victorians. The MGPG requires councils to take reasonable steps to give effect to the engagement principles contained within the MGPG when seeking advice and guidance from Traditional Owners when developing and maintaining their community engagement policy under the *Local Government Act 2020* (Vic).

Local governments can also Integrate issues of Aboriginal peoples' rights and interests into their broader strategic corporate and integrated planning requirements, so these matters are not treated separately as a 'specialised' or 'unusual' area of concern, but rather as a corollary to finding ways of expanding forms of engagement with Aboriginal peoples and effectively linking their systems of community governance with 'western' local government.

The Federation of Victorian Traditional Owner Corporations (FVTOC) in their Treaty Discission Paper numbers 5 and 6 suggest that local Treaty negotiations should be on a sovereign-to-sovereign basis with Traditional Owner groups, and that the content of any final local Treaty be left open and undefined by any framework. They also suggest that a Treaty Representative Body (TRB) could exercise sovereign power by taking on local government functions and make laws and regulations in place of local governments; have reserved seats within local government; and /or act as a voice to local government. Furthermore, FVTOC suggests that depending on the particular interests of the TRB, that it could also seek to take responsibility for the localised services provided by the Department of Energy, Environment and Climate Action (DEECA) and Parks Victoria (FVTOC, 2021:37).

There is considerable merit in these suggestions as a way of restoring Country and enabling self-determination on matters affecting their connections to and responsibilities for Country at the local Traditional owner scale.

Observations about recent Machinery of Government changes in Victoria

The change of Premier in Victoria in October 2023 precipitated new Administrative Orders for Victoria[1] which saw the former Department of Planning, Environment, Land, Water and Planning (DELWP) being dismantled and its former responsibilities being given to several new Departments, including the Department of Energy, Environment and Climate Action (DEECA); the Department of Transport and Planning (DTP); and Local Government Victoria (LG Victoria).

DEECA's Corporate Plan for 2023-27 states that the Department is committed to Aboriginal self-determination through genuinely partnerships and meaningfully engagement with Victoria's Traditional Owners and Aboriginal communities to support the protection of Country, the maintenance of spiritual and cultural practices and their broader expectations and aspirations in the 21st century and beyond (DEECA, 2023:8).

Guided by the Victorian Government's Self-Determination Reform Framework (SDRF), DEECA has retained the *Pupangarli Marnmarnepu 'Owning Our Future' – Aboriginal Self-Determination Reform Strategy 2020-2025* (DELWP, 2019a) and the *Pupangarli Marnmarnepu Implementation Action Plan* (DELWP, 2019d).

[1] https://www.vic.gov.au/general-order-dated-2-october-2023

DEECA has continued with the Statewide Caring for Country Partnership Forum (SCfCPF) in partnership with Parks Victoria and the 11 formally recognised Traditional Owner Corporations (TOCs) under the TOC Caucus as a Traditional Owner-led mechanism to hold DEECA accountable for the implementation of *Pupangarli Marnmarnepu*. The SCfCPF was initially established under the DELWP portfolio in 2020 and continues to meet and develop strategies that enable the transfer of relevant decision-making powers and resources to Traditional Owners, and enables decision-making, leadership and self-governance on state-wide matters across DEECA's portfolios as determined by TOC Caucus (DEECA, 2023:8).

The Department of Transport and Planning's (DTP) Strategic Plan brings together the Department's vision, purpose and mission across six focus areas, consistent with Government objectives, priorities and budget decisions (DTP, 2023). DPT's Strategic Plan states that it is committed to self-determination and working closely with First Nations people to drive reform and improve the impact of outcomes and that the DOT has an *Aboriginal Self-Determination Plan 2020-2023.* However, at the time of writing this document could not be located on the Department's website.

What is clear from the suite of documents discussed above, is that DELWP took a very broad and inclusive approach to its commitment to working with Traditional Owners and Aboriginal communities. Collectively, the four documents demonstrate that DELWP wanted to keep building on previous work, have a strategy based on Aboriginal cultural authority to steer the Department's directions, priorities and outcomes, and ensure that its engagement with Traditional owners and Aboriginal Victorians was carried out in a culturally safe and competent manner. DELWP's cultural safety strategy was centred on cultural awareness, cultural respect, sensitivity, and self-determination. It required the Department to put cultural safety at the forefront of all its interactions with Traditional Owners and Aboriginal communities to ensure meaningful and genuine relationships and partnerships were experienced.

The Department of Environment, Land, Water and Planning (DELWP) had also developed two other key documents: the *Traditional Owner and Aboriginal Community Engagement Framework*, (DELWP, 2019b) and the *Aboriginal Cultural Safety Framework*, (DELWP, 2019c), to guide its work with Aboriginal Victorians. And DELWP had also adopted an Indigenous Data Sovereignty Protocol that was produced by Terri Janke & Associates for DELWP, which has also disappeared.

Sadly, it appears that these three documents have not been carried forward into the new Departmental structures following the reshuffle of portfolio responsibilities that occurred in October 2023.

On the bright side, a Treaty Negotiation Framework has been agreed between the First Peoples' Assembly of Victoria, a Treaty Authority has been established and Treaty negotiations are about to get underway in Victoria. There is no doubt that land related matters will be brought to the treaty negotiation table at both the State level and at Traditional Owner group level. What emerges from the negotiations is up to the parties and what they can reach agreement on at the negotiating table.

First Nations peoples and development rights / rights to land/resource values

In Australia, the consent of the Aboriginal (and Torres Strait Islander) peoples was neither sought nor given when the British Crown took possession of the land from 1788 onwards. The

notion of *terra nullius* enabled the British Crown to extend its law over this continent with no legal consequence for infringing on the sovereignty of those already in possession and occupation of the land.

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

Aboriginal peoples' persistent desire is that the two systems of law and custom relating to land be accorded an equal and non-discriminatory status. This is not mere historical or symbolic posturing. They want to use their property rights to engage in the economy on their terms and at their choosing. Their position is supported by various international human rights instruments. In particular, the United Nations *Declaration on the Rights of Indigenous Peoples* (UN, 2007).

Under planning laws which operate throughout Australia, the Crown retains certain rights to land even when supposedly 'absolute' ownership is granted to other parties as in the issue of freehold title in our towns and cities. The Crown always retains ownership of development rights on land. These rights do not automatically attach to freehold or most other forms of land title granted across Australian jurisdictions. Rather, they must be secured through the planning system and the Crown may give or withhold development permission at its absolute discretion.

Land may be zoned for certain purposes and development types. And it may be traded privately in anticipation of development rights foreshadowed by these plans. But, until a permit is issued, no compensable right exists. Moreover, the Crown may change the planning rules at any time, again, at its absolute discretion.

Land use planning's rationale and legitimacy are largely based on maintaining or improving the common good, on the assumption that the Crown holds the ultimate control of all land in Australia, including the power to grant or transfer land in whatever form of tenure it decides and to control what landholders do with their land.

As my colleague Dr Marcus Spiller has observed, leaving aside the arbitrary limitations imposed by statute, if the Crown has not alienated property development rights, a logical consequence of *Mabo (No. 2)* is that these rights default to their original owners. Or, at the very least, the original owners have a clear claim to co-sovereignty over these rights (Spiller, 2021b).

Every time a development approval is issued, and the associated uplift in land value is captured by governments, or far more commonly, by private land holders, one could say that the injustice embedded in *Terra Nullius* is given fresh voice (Spiller, 2021b).

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 stark reality of Australian planning that we have yet to come to terms with. The British planning tools and practices of surveying, mapping, bounding, selecting, zoning, naming, regulating and town-building were never intended to support the interests and livelihoods of First Nations peoples, but rather were, and continue to be the tools of dispossession. As planners, we have to accept our history.

The reality of customary ownership and its relationship to western law have implications for planning. Planning is effectively the right, held by the government against private landholders, to

control land uses. Since customary owners hold superior title to the government, it is consistent that they are not only exempt from most normal actions of planning control, but also merit some level of involvement in the planning process by virtue of the nature of their rights to the land (Wensing and Small, 2012).

A model for co-existence in planning

The failure to recognise Aboriginal and Torres Strait Islander peoples' sovereignty and rights to self-determination and free, prior, and informed consent is at the heart of the discourse about land rights and land-tenure reforms. The current situation is underpinned by an entrenched belief among governments that Aboriginal and Torres Strait Islander cultures are incompatible with economic development and that native title must be extinguished or somehow suppressed.

The recognition of Aboriginal and Torres Strait Islander peoples' land rights and interests as being at least equal, if not superior, to the Crown's land rights and interests is the unfinished business of the colonisation of Australia by the British.

Land is an integral component of Aboriginal and Torres Strait Islander peoples' being and wellbeing. Their obligation to care for and nurture their ancestral Country for present and future generations is an integral and inherent part of their law and custom. This obligation cannot be extinguished by the Australian State, which explains why Aboriginal and Torres Strait Islander peoples see extinguishment as 'repugnant' (Yu, 2016: 2). Aboriginal peoples' connections to and responsibilities for Country remain over our capital cities and major regional centres, even though many of the native title claims over our capital cities have been unsuccessful for a variety of reasons (Wensing and Porter, 2015). At stake is a long-sought reconfiguration of power relations between two culturally different societies (Wensing, 2019b).

If property in land is an essential component of any society, and how that society controls, uses, and transmits its property determines the wellbeing of its citizens and ultimately the planet, then the elements of land rights and interests, land use, and land tenure constitute the points of commonality in property. By separating these three constitutive elements, it is possible to ascertain how they are applied in different cultural domains to manage who owns the land, what use is made of the land, and how transmission or tenure are managed, including over time and through generations. The elements of rights, interests, use, and tenure can form a basis for comparing and managing interactions between Indigenous and Western systems of property.

It is time to move beyond mere recognition of divergence to viewing the two culturally distinct systems of law and custom on a level playing field, interacting with each other on matters of mutual concern with relatively equal autonomy through agreement-making, rather than hierarchically and in adversarial fashion through the courts.

The model presented in the **Figure 1** places the two systems of law and custom side by side with their three constitutive elements operating separately, but consecutively.

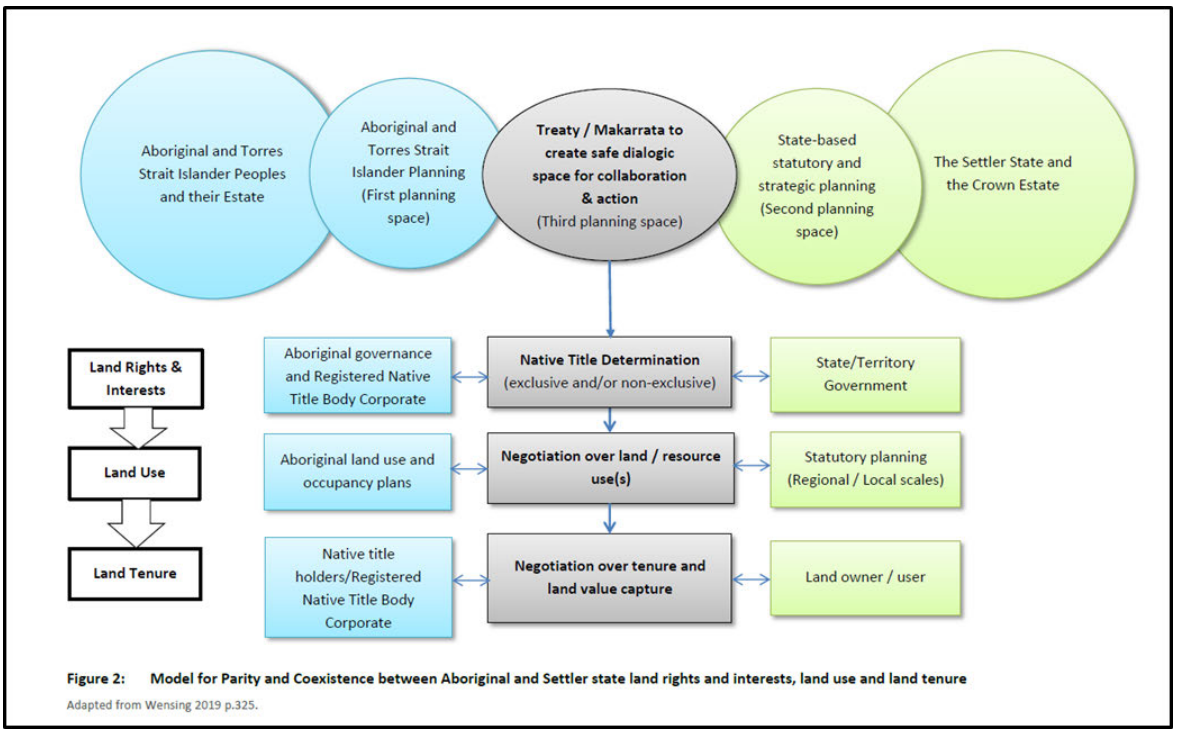

Figure 1: Model for parity and co-existence between Aboriginal and Settler state land rights and interests, land use and land tenure. (Wensing and Kelly, 2024:300)

The top layer in **Figure 1** shows 'three sites of/for planning' (Matunga, 2017). On the left-hand side is the Aboriginal and Torres Strait Islander peoples and the Indigenous estate, which includes land subject to native title, land grants, transfers, reserves, and other arrangements enabling Aboriginal and Torres Strait Islander peoples to own, manage, or control land. On the right-hand side is the settler state or the Crown estate, which includes land held by the Crown or the public 'such that the sovereign power has the ultimate right to make grants in land or leases over land' (Porter, 2017: 61), except native title rights and interests.

Moving inwards from the left-hand side is Aboriginal and Torres Strait Islander planning—the first planning space—something they have done for thousands of years and continue to do (Howitt and Lunkapis 2010). Moving inwards from the right-hand side is state-based statutory and strategic planning—the second planning space—which includes the state-based planning and environmental management statutes. In the middle is what Matunga (2017: 644) refers to as the third planning space, 'where the coloniser and colonised, oppressed and oppressor can come together to dialogue reconciliation, emancipation, collaboration and collective action for the future'. This middle space becomes a dialogic space for collaborative planning and action.

Placing the two sovereigns on the same level opens the assumptions and predilections underpinning their relations (Wensing, 2019b). Matunga (2013: 4) asserts that 'planning' as an activity 'isn't owned by the West, its theorists, or practitioners' but is a 'universal human function with an abiding and justifiable concern for the future'. Indigenous planning is a legitimate form of planning and must be recognised through formal institutional and statutory connectors with settler-state-based planning. Planning across all three spaces is critical to our collective future.

Figure 1 also shows that the model can be further expanded into each of the three constitutive layers, as follows:

- The top layer deals with rights and interests in land, especially the continued existence of native title rights and interests as per the *Native Title Act 1993* (Cth)with all its merits or demerits.
- The middle layer deals with land use and planning and this is where Indigenous planning can be seen as having equal status with state-based planning.
- The bottom layer deals with tenure, the instrumentation used to register interests in land, any dealings with land, and its transactional value for taxation purposes as well as collateral for finance.

The model is aimed at enabling a more equitable coexistence of rights and interests based on mutual respect and justice. The primary goal is to remove the necessity for Aboriginal and Torres Strait Islander peoples to sever their cultural connections with, and responsibilities for, their ancestral lands through extinguishment of their rights and interests against their will.

The model is about restitution and reparation of Aboriginal peoples' landownership and decision-making over their ancestral lands on their terms without outside interference and based on free, prior, and informed consent, consistent with Articles 18 and 19 in the UNDRIP (UN, 2007).

The dialogic space in the middle is an 'intercultural contact zone' between two systems relating to property in land (Wensing, 2019b: 14). While an intercultural contact zone may be an emergent and unpredictable space, it can also be a space where concerns are raised and the parties work together, creatively and collaboratively, based on mutual respect, reciprocity, and justice. A key ingredient is for the parties to come to the negotiating table as equals, and not with one side always having some form of superiority over the other (Wensing, 2019b).

The model has the potential to make a valuable contribution to planning and governance *if* the parties are prepared to consider a different kind of relationship based on parity, mutual respect, reciprocity, and a willingness to negotiate over land rights and interests, land use, and land tenure. The 'if ' is emphasised here because the model rests on a significant paradigm shift in the relationships between Aboriginal and Torres Strait Islander peoples and the nation-state over land rights and interests, land use, and land tenure. As the Uluru Statement from the Heart states, Aboriginal and Torres Strait Islander peoples' aspirations are 'for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination' (Referendum Council, 2017).

Conclusion

While the Referendum for recognition of Aboriginal and Torres Strait Islander peoples in Australia's Constitution was rejected by the majority of voters around Australia in October 2023, should not be seen as meaning that Voice, Treaty Truth do not have a role to play in urban policy and planning. As Wensing and Kelly (2024:303) have stated:

> *"Quite the contrary, it reinforces the need for Voice, Treaty and Truth-telling, especially at the local or regional scales. A stronger system of implicit recognition of the prior and continuing ownership of all land and waters in Australia by Aboriginal and Torres Strait Islander peoples under traditional law and custom is required to embed their consideration in conventional and contemporary land use and environmental planning systems. Otherwise, we remain a nation built on the stolen lands of the Aboriginal and*

Torres Strait Islander peoples who owned and occupied these lands for thousands of years before colonisation."

Planners no longer have a choice about whether they will have a relationship with Aboriginal and Torres Strait Islander peoples. The choice is about the quality of those relationships.

The critical challenge is to dismantle a practice that has allowed one culture to exert its dominance and authority over another, building in its place a relationship based on mutual respect with the potential to enrich and strengthen Australia's national life.

Recommendations

This submission has identified areas of misalignment and contestation between First Nations' land rights and interests and the Crown's land rights and interests through Victoria's land use policy and planning system. This submission also explored the possibility for commensurability and constructive alignment between two different world views about land and land and resource use and management, and how they can coexist with mutual respect based on parity and justice.

It is therefore recommended that the Yoorrook Commission:

1. Explores the possibility of recognising the sovereign land rights of the original owners of Victoria and develop an approach to mutual co-existence between First Nations' land rights and interests and the Crown's land rights and interests based on the principles of parity and justice.
2. Explores the possibility of recouping the associated uplift in land value arising from development approvals and directing a fair share of that uplift to the Traditional Owners of the land.
3. Explores mechanisms for ensuring continuity of relationships and policy documents already committed to by governments are not lost in milieu of machinery of government changes whenever they occur, between elections and following elections at the state level.

References

Legal Authorities:

Mabo v the State of Queensland (No. 2) (1992) 175 CLR1

Rutherford & Ors v Hume City Council [2014] VCAT 786

Statutes:

Aboriginal Heritage Act 2006 (Vic)

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Crown Land (Reserves) Act 1978 (Vic)

Land Act 1958 (Vic)

Local Government Act 2020 (Vic)

Native Title Act 1993 (Cth)

Planning Act 2016 (Qld)

Planning and Environment Act 1987 (Vic)

Traditional Owner Settlement Act 2010 (Vic)

Books, Book Chapters, Journals, Reports, Etc.:

Altman, J. (2014) 'The political ecology and political economy of the Indigenous titling "revolution" in Australia', *Maori Law Review – 2014 Indigenous Law Speaker Series*.

Altman, J. and Markham, F. (2015) 'Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities', Chapter 9 in S. Brennan, M. Davis, B. Edgeworth, and L. Terrill (eds) *From Mabo to Akiba: A Vehicle for Change and Empowerment?* The Federation Press, Annandale, NSW, pp. 126-142.

Amnesty International. (2022) *10 Ways to be a Genuine Ally to First Nations Communities*. 2 July. Sydney: Amnesty International Australia. Available from: www.amnesty.org.au/10-ways-to-be-an-ally-to-indigenous-communities/.

Cranston, R. (1974) 'The Aborigines and the Law: An Overview.' *University of Queensland Law Journal* 8: 60–78.

Daes, E. (2008) 'An Overview of the History of Indigenous Peoples: Self- Determination and the United Nations.' *Cambridge Review of International Affairs* 21(1): 7–26. doi.org/10.1080/09557570701828386.

Davis, M. and Williams, G. (2021) *Everything you need to know about the* Uluru Statement from the Heart. Sydney: UNSW Press.

Department of Environment, Land, Water and Planning (DELWP) (2019a) *Pupangarli Marnmarnepu 'Owning Our Future' Aboriginal Self-Determination Reform Strategy 2020-2025*, The State of Victoria. https://www.delwp.vic.gov.au/__data/assets/pdf_file/0038/483887/Pupangarli-

Marnmarnepu-Owning-Our-Future-Aboriginal-Self-Determination-Reform-Strategy-2020-2025.pdf

Department of Environment, Land, Water and Planning (DELWP) (2019b) *DELWP's Traditional Owner and Aboriginal Community Engagement Framework*, The State of Victoria. https://www.delwp.vic.gov.au/__data/assets/pdf_file/0031/508099/Traditional-Owner-and-Aboriginal-Community-Engagement-Framework-compressed-2.pdf

Department of Environment, Land, Water and Planning (DELWP) (2019c) *DELWP's Aboriginal Cultural Safety Framework*, The State of Victoria. https://www.deeca.vic.gov.au/__data/assets/pdf_file/0034/483946/DELWP-Aboriginal-Cultural-Safety-Framework.pdf

Department of Environment, Land, Water and Planning (DELWP) (2019d) *Cultural Safety Framework Implementation Action Plan*. The State of Victoria. https://www.deeca.vic.gov.au/aboriginalselfdetermination/cultural-safety

Department of Energy, Environment and Climate Action (DEECA) (2023) *Corporate Plan 2023-2027*. The State of Victoria Department of Energy, Environment and Climate Action. https://www.deeca.vic.gov.au/__data/assets/pdf_file/0035/677456/deeca-2023-27-corporate-plan.pdf

Department of Transport and Planning (2023) *Strategic Plan 2023-27. Thriving places and connected communities*. State of Victoria Department of Transport and Planning. https://content.vic.gov.au/sites/default/files/2024-02/Strategic-Plan-2023-27-%28Accessible-Final%29.pdf

Eide, A. (2006) 'Rights of Indigenous Peoples: Achievements in International Law during the Last Quarter of a Century.' *Netherlands Yearbook of International Law* 37: 155–212. doi.org/10.1017/S0167676806001553.

Federation of Victorian Traditional Owner Corporations (FVTOC) (2021) *A Comprehensive Treaty Model for Victoria*. Treaty Discussion Paper 6. https://fvtoc.com.au/news-media/discussion-papers/

Jackson, S. (1997) 'A Disturbing Story: The Fiction of Rationality in Land Use Planning in Aboriginal Australia.' *Australian Planner* 34(4): 221–26. doi.org/10.1080/07293682.1997.9657792.

Johnson, L.C. (2018) 'Australian Planning Texts and Indigenous Absence.' In *Planning in Indigenous Australia: From Imperial Foundations to Postcolonial Futures*, edited by S. Jackson, L. Porter, and L. Johnson, 34–51. London: Routledge. doi.org/10.4324/9781315693668-3.

Langton, M. (2020) 'The Destruction of the Juukan Gorge Caves: A Cultural Property Crime in Moral Terms.' *The Saturday Paper*, [Melbourne], No. 319, 19–25 September.

Mayfield, P., and L. Porter. (2020) *Urban Planning and Design Professions: Situational Analysis of Current Engagement Practices with Indigenous Communities Within Australia and Steps Towards Deepening Engagement Practices*. National Environmental Science Program. Sydney: Clean Air and Urban Landscapes Hub. Available from: nespurban.edu.au/wp-content/uploads/2020/10/Situational- Analysis.pdf.

Matunga, H. (2013) *Theorising Indigenous Planning*, Chapter 1 in R. Walker, T. Jojola, and D. Natcher (eds) *Reclaiming Indigenous Planning*, McGill-Queen University Press, Montreal.

Matunga, H. (2017) 'A Revolutionary Pedagogy of/for Indigenous Planning', in Porter L. (2017b). and Hirini Matunga, Leela Viswanathan, Lyana Patrick, Ryan Walker, Leonie Sandercock, Dana Moraes, Jonathan Frantz, Michelle Thompson-Fawcett, Callum Riddle & Theodore (Ted) Jojola (2017b) Indigenous Planning: from Principles to Practice/A Revolutionary Pedagogy of/for Indigenous Planning/Settler-Indigenous Relationships as Liminal Spaces in Planning Education and Practice/Indigenist Planning/What is the Work of Non-Indigenous People in the Service of a Decolonizing Agenda?/Supporting Indigenous Planning in the City/Film as a Catalyst for Indigenous Community Development/Being Ourselves and Seeing Ourselves in the City: Enabling the Conceptual Space for Indigenous Urban Planning/Universities Can Empower the Next Generation of Architects, Planners, and Landscape Architects in Indigenous Design and Planning, *Planning Theory & Practice*, 18:4, 639-666, DOI: 10.1080/14649357.2017.1380961

Nolan, J.L. (2011) *Legal Accents, Legal Borrowing*. Princeton, NJ: Princeton University Press.

Porter, L. (2017) 'Indigenous People and the Miserable Failure of Australian Planning', *Planning Practice & Research*, DOI: 10.1080/02697459.2017.1286885.

Porter, L., and L. Arabena. (2018) *Flipping the Table: Toward an Indigenous-Led Urban Research Agenda*. National Environmental Science Program. Sydney: Clean Air and Urban Landscapes Hub. Available from: nespurban.edu.au/wp-content/uploads/2018/11/interim-report-flipping-the-table-toward-an-indigenous-led-research-agenda.pdf.

Referendum Council (2017) *Final Report of the Referendum Council and Uluru Statement from the Heart*. https://www.referendumcouncil.org.au/final-report

Southalan, J. (2016) 'Human Rights and Business Lawyers: The 2011 Watershed.' *Australian Law Journal* 90: 889–907.

Spiller, M. (2021a) 'Windfall Tax Backlash Misunderstands Property Rights.' *Sourceable*, 15 June. https://sourceable.net/windfall-tax-backlash-misunderstands-property-rights/

Spiller, M. (2021b) 'First Nations people deserve better deal on development rights'.. *Sourceable*, 8 December. https://sourceable.net/search/?text=First+Nations+people+deserve+better+deal+on+development+rights#

Tapsell, K. (2014) *Potiphar's Wife: The Vatican's Secret and Child Sexual Abuse*. Adelaide: ATF Press. doi.org/10.2307/j.ctt163t8c3.

Throgmorton, J.A. (1992) 'Planning as Persuasive Story Telling about the Future: Negotiating An Electric Power Rate Settlement in Illinois.' *Journal of Planning Education and Research* 12: 17–31. doi.org/10.1177/0739456X9201200103.

United Nations (UN) (2007) *Declaration on the Rights of Indigenous Peoples*. General Assembly Resolution 61/295. Available at: http://legal.un.org/avl/pdf/ha/ga_61-295/ga_61-295_ph_e.pdf

United Nations (2013) *Report of the Special Rapporteur on the rights of indigenous peoples*. General Assembly Sixty-eighth session, A/68/317. Available at: http://unsr.jamesanaya.org/docs/annual/2013-ga-annual-report-en.pdf

Victorian Equal Opportunity and Human Rights Commission (VEOHRC) (n.d. (a)) *Victoria's Charter of Human Rights and Responsibilities*. http://www.humanrightscommission.vic.gov.au/index.php/the-charter#what-are-the-benefits-of-having-the-charter

Victorian Equal Opportunity and Human Rights Commission (VEOHRC) (n.d. (b)) *The Charter of Human Rights and Responsibilities > Section 19 – Right to protect cultural rights*, Fact Sheet. http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Charter_FS_IND_SECT_19.pdf

Victorian Equal Opportunity and Human Rights Commission (VEOHRC) (n.d. (c)) *Good decision making with the Charter of Human Rights and Responsibilities – How council planning decisions can consider human rights*. http://www.humanrightscommission.vic.gov.au/index.php/about-us/confidentiality-a-impartiality/privacy-policy/item/1232-good-decision-making-involves-the-charter-%E2%80%93-how-council-planning-decisions-can-consider-human-rights

Wensing, E. (1999) *Comparing Native Title and Anglo-Australian Land Law: Two Different Timelines, Two Different Cultures and Two Different Laws*. Discussion Paper No. 25. Canberra: The Australia Institute.

Wensing, E. (2016) *The Commonwealth's Indigenous Land Tenure Reform Agenda: Whose Aspirations, and for What Outcomes?* AIATSIS Research Report, 1 July. Canberra: AIATSIS. Available from: aiatsis.gov.au/sites/default/files/research_ pub/the-commonwealths-indigenous-land-tenure-reform_2.pdf.

Wensing, E. (2018) 'Indigenous rights and interests in statutory and strategic land use planning: Some recent developments', *James Cook University Law Review*, Volume 24, pp. 169-190.

Wensing, E. (2019a) '*A Planner's Response to the Uluru "Statement from the Heart".*' Paper presented to Planning Institute of Australia National Congress, Gold Coast, Qld, 16 May.

Wensing, E. (2019b) *Land Justice for Indigenous Australians: How Can Two Systems of Land Ownership, Use and Tenure Coexist with Mutual Respect Based on Equity and Justice?* PhD thesis, The Australian National University, Canberra. http://hdl.handle.net/1885/157200

Wensing, E. (2021a) 'Indigenous peoples' human rights, self-determination and local governance' – Part 1. *Commonwealth Journal of Local Governance.* 24: 98-123, https://doi.org/10.5130/cjlg.vi24.7779

Wensing, E. (2021b) 'Indigenous Peoples' Human Rights, Self-Determination and Local Governance: Part 2.' *Commonwealth Journal of Local Governance* 25: 1–28. doi.org/10.5130/cjlg.vi25.8025.

Wensing, E. (2021c). 'The Destruction of Juukan Gorge: Lessons for Planners and Local Governments.' *Australian Planner* 56(4): 241–48. DOI:10.1080/0729 3682.2020.1866045.

Wensing, E. (2023) Planning laws and Aboriginal and Torres Strait Islander peoples' rights and interests, *Australian Planner*, DOI: 10.1080/07293682.2023.2216318.

Wensing, E. and Kelly, M. (2024) *Voice, Treaty, Truth: Planning for coexistence in Australia's cities and towns*. Chapter 15 in Freestone, R., Randolph, B. and Steele, W. (eds) (2024) *Australian Urban Policy: Prospects and Pathways*. ANU Press. https://press-files.anu.edu.au/downloads/press/n12024/pdf/ch15.pdf

Wensing, E., and L. Porter. (2015) 'Unsettling Planning's Paradigms: Toward a Just Accommodation of Indigenous Rights and Interests in Australian Urban Planning?' *Australian Planner* 53(2): 91–102. doi.org/10.1080/07293682. 2015.1118394.

Wensing, E., and G. Small. (2012) *'A Just Accommodation of Customary Land Rights in Land Use Planning Systems.'* Paper presented to the Tenth International Urban Planning and Environment Association Symposium, University of Sydney, Sydney, 24–27 July.

Yu, P. (2016a) *Keynote Address*, Northern Development Conference, Darwin, 20 June 2016. http://northaust.org.au/plans-develop-northern-australia-not-embracing-indigenous-population-says-peter-yu/

About Dr Ed Wensing (Life Fellow) FPIA FHEA

Dr Ed Wensing has over half a century of experience in urban and regional policy and planning throughout Australia. Dr Wensing's career has included stints in the public and private sectors and in the tertiary education sector. For almost the past 30 years, Dr Wensing has worked extensively with Aboriginal and Torres Strait Islander peoples and communities around Australia on a wide range of matters including native title, statutory land rights, natural and cultural heritage protection and management, land use planning (statutory and strategic), environmental planning and natural resource management.

Dr Wensing has extensive knowledge and practical understanding of Commonwealth, State and Territory laws and regulations relevant to land administration and tenure, land use planning, environmental protection, conservation and management, cultural heritage protection, natural resource management, water management, local government, statutory Aboriginal land rights and native title rights and interests. Dr Wensing has a sound understanding of Commonwealth/State/Territory intergovernmental arrangements, annual budgetary cycles, Executive Government processes, legislative drafting and the workings of Federal/State/Territory Parliaments, having appeared before several Parliamentary Committees of Inquiry in both official and private capacities on numerous occasions. Dr Wensing has also had experience as an expert witness and a private litigant in planning matters before the ACT Supreme Court and the Federal Court of Australia.

Dr Wensing's academic career has involved the development and delivery of specialised full semester courses in on Aboriginal and Torres Strait Islander involvement in land use planning and environmental management for Griffith University, University of Canberra, James Cook University, and the University of New South Wales.

Recent consultancy projects have included:

- A review of Indigenous engagement in the National Environmental Science Program.
- An assessment tool for the application of the UN Declaration of the Rights of Indigenous Peoples in the delivery of public health programs.
- National Local Government Workforce Skills and Capability Survey.
- Advice on increasing the level of Indigenous engagement in the Atlas of Living Australia.
- The development of a training module on Aboriginal and Torres Strait Islander entrepreneurship, partnerships and inclusive economic development.
- Specialist advice on First Nations water rights and interests in the context of the Commonwealth's commitment to renewing the National Water Initiative.
- Review of Local Governance reform options to increase ethe level of Aboriginal community engagement in Local Government in the NT.
- Specialist technical advice on land tenure options for the township of Nhulunbuy following the closure of Rio Tinto's Bauxite Mine on the Gove Peninsula in the NT.
- First Nations Employment and Training in Clean Energy.
- Feasibility Assessment of a Traditional Owner-led entity for Victoria's native foods, fibres, and botanicals sector.
- An economic roadmap for Traditional Owner Corporations in Victoria.

Dr Wensing has published widely in academic texts and journals on a broad range of topics.