

**A Just Accommodation of Customary Land Rights in  
Conventional and Contemporary Land Use Planning Systems (V2)**

Ed Wensing  
Visiting Lecturer  
Urban and Regional Planning  
Faculty of Business and Government  
University of Canberra  
Canberra ACT  
E: [ewensing@bigpond.net.au](mailto:ewensing@bigpond.net.au)

Garrick Small  
Associate Professor  
Faculty of Business Informatics and Education  
Central Queensland University  
Rockhampton, QLD  
E: [g.small@cqu.edu.au](mailto:g.small@cqu.edu.au)

For bibliographical purposes this paper should be cited as follows:

Wensing, E. and Small, G. (2011) *A Just Accommodation of Customary Land Rights in Conventional and Contemporary Land Use Planning Systems (V2)*. Paper Presented to the 2012 Institute of Australian Geographers Conference, Macquarie University, Sydney, NSW, 2-4 July 2012.

## **A Just Accommodation of Customary Land Rights in Conventional and Contemporary Land Use Planning Systems**

### **Summary**

*Customary owners hold superior land title to the government and therefore they should be involved in land use planning decisions by virtue of the nature of their rights to land and waters.*

### **Abstract**

*Australia does not have a system of implicit recognition of the prior and continuing ownership of its land and waters by its First Nations Peoples (Customary Owners) according to their traditional law and custom. Such recognition has to be sought and determined through the Federal Court of Australia. Its recognition is based on the pre-existing superior right to the whole of the land of Australia, which must be shown not to have been extinguished by legal acts by the Australian government. Customary owners understand their connection to land in somewhat more substantial terms than is currently countenanced by western civilization.*

*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 freehold or leasehold owners, 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.*

*The logic of customary ownership implies that they should have a right of veto against development proposals comparable to that which is the operational power of urban and regional planners. Customary Owners have a highly developed sense of responsibility for maintaining their land which suggests involvement in the planning system would respect the fundamentals of customary ownership and lead to enhanced land use planning outcomes.*

**Keywords:** *Customary owners, customary land rights, colonial culture of planning.*

## Introduction

Australia does not have a system of implicit recognition of the prior and continuing ownership of its land and waters by its First Nations Peoples (Customary Owners)<sup>1</sup> according to their traditional law and custom. Such recognition has to be sought by Aboriginal and Torres Strait Islander people<sup>2</sup> and determined through the Federal Court of Australia which is highly constrained in delivering positive determinations. Its recognition is based on the pre-existing superior right to the whole of the land of Australia, which must be shown not to have been extinguished by legal acts by the Australian government since colonisation in 1788.

The level of recognition and the conditions for extinguishment create a hurdle for customary owners and a gap between their understanding of the extent of their relationship with their land and that accepted by Western law. Within that gap lies the matter of land use planning. Planning law as understood in the planning discipline is an offshoot of Western law. It consists of the regulation of land use by planners in various levels of government for the purpose of achieving a superior overall utilisation of the land for the community as a whole. Planning has been defined in contemporary planning literature as ‘deliberately achieving some objective, and proceeds by assembling actions into some orderly sequence’ (Hall 1992). As such it is an instrumentality for realising the common good with respect to land use. It derives its authority from statutory law and its understanding of the common good predominantly from Western society. It has been criticised for inadequacies in both respects: it is in need of engaging in the wider legal spectrum that includes customary law, and it needs to develop an openness to a wider comprehension of the dimensions of the common good and its realisation.

This paper begins with a brief discussion of the colonial underpinnings of land use planning in Australia, noting our concerns that planners need to be aware of the perceptual limitations of planning, and that appropriate and meaningful consultation with Aboriginal and Torres Strait Islander Australians is often precluded. Several ethical, political and legal reasons why planners and conventional land use planning processes need to change to take

---

<sup>1</sup> In Australia, Aboriginal and Torres Strait Islander people are in some circumstances referred to as Traditional Owners. In this paper the term Traditional Owner is used when referring to Aboriginal and Torres Strait Islander people and the term customary owner is used when referring to Indigenous people more generally

<sup>2</sup> The authors recognise the diversity of cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. In this paper, the term Indigenous People is only used when referring to First Nations peoples in a global context.

better account of customary land and water values as well as their continuing connections to their traditional lands. The paper explores the nature of the customary interest in land and waters, and discusses why this is difficult for non-Indigenous stakeholders to come to terms with. The paper concludes with some propositions about a just integration of customary rights into conventional planning systems.

We also refute the arguments (in particular by Smith 2011) that native title holders are not 'owners' of land and therefore have no right to be involved in plan making and development assessment processes.

### **The colonial underpinnings of planning<sup>3</sup>**

Planning in Australia is considered to be “centrally concerned with land use and related environmental, social and economic activities within a legislative, administrative and political context” (PIA 2002a:1). Land use planning and management is ultimately about people and their relationships with land and other natural resources. The skills that planners and land managers bring to these processes are those of recognising and accommodating competing or multi-layered and co-existing interests, not only socially, economically, environmentally and culturally, but also spatially. Or as Porter (2010:2) puts it, planning is “the social practice of spatial ordering”.

In this context, planners need to be aware of the perceptual limitations of planning and its particular discourse (Wensing 2007:236). The rational technocratic focus of much land use planning (i.e. survey, assess, design) often precludes appropriate and meaningful consultation with Australia's Indigenous people, the Aboriginal and Torres Strait Islander Australians. Planners also need to be aware of the norms of Anglo-Australian culture with its emphasis on liberalist ideas of individual property ownership, the rights of the individual (remembering the past connection between property ownership and voting rights, especially in Local Government), materialism, free enterprise, competition, nuclear families and written sources of history and law. These are in stark contrast to the non-competitive, communal and extended families, and a dependency on oral traditions and customary laws of Aboriginal and Torres Strait Islander societies (Wensing 1999).

---

<sup>3</sup> Some of the content of this discussion is drawn from a paper prepared by the Planning Institute of Australia's Indigenous Planning Working Group, of which Ed Wensing is a member and a principal author. (IPWG 2010)

Cross cultural issues and challenges are much talked about and widely debated in planning (Healey 1997, Sandercock 2003), and there is a growing interest in important theoretical and practical work to understand the interactions between Indigenous peoples and state-based planning processes, in Australia and internationally (see Porter 2006 and 2010, Stuart and Thompson-Fawcett 2010, Barry and Porter 2011). However, planning in Australia has very strong colonial underpinnings which sought to impose a different view of space on Indigenous communities. This has and continues to have significant implications for the way in which customary rights and values are (or more often, not) accommodated in conventional land use planning processes.

We share Porter's concerns that planning "dominates discursive practices in and about place, and in doing so has marginalising and oppressing effects on the rights and lives of Indigenous peoples" (2010:2). In order to understand these effects we need to examine the culture of the practice of planning. Failing to do so may "render the 'inclusion' of Indigenous people in land management decisions a new form of colonial oppression" (Porter 2010:12).

A considerable body of theoretical work has developed in planning in the past 20 years that addresses the issue of cultural difference and planning (Jacobs 1996, Jackson 1997a and b; Sandercock 1997 and 2003; Reeves 2005; Thomas 2000; Beebejaun 2004; Harwood 2005). More significantly, there is new work being applied to the particular differences that Indigenous cultures represent for planning (Lane and Williams 2008; Hibbard 2006; Umemoto 2001; Porter 2010). All of these critique the notion of rational planning that was applied to what is often regarded as 'vacant' Crown land or 'waste land' (including obsolete land uses) and suggest that planning methods need to begin from a different premise. This premise must of course respect Aboriginal or Torres Strait Islander culture and heritage and Aboriginal and Torres Strait Islander people's needs, aspirations, rights and responsibilities, especially in terms of caring for country (Sheehan and Wensing 1998:28 and Wensing 2007:236 and 2012:264). It must also acknowledge the particular assumptions underpinning planning practice itself.

Both the rational-comprehensive model of planning and its more nuanced and socio-politically aware development of deliberative planning, begin from certain presumptions of knowledge, expertise and values. The rational-comprehensive model suggests that planning

often begins from a 'blank slate' approach. The deliberative model assumes that we can learn about others by creating a space within the planning system to hear their voices. Sandercock (2003:76) argues that planners need to acknowledge there are other ways of knowing and learning, without discarding the scientific and technical ways of knowing, as the rational-comprehensive model suggests, that planners learn as their core skills. In many situations planners are dealing with people's passions and vested interests as much as they are dealing with their own 'earnest technical predictions'. Sandercock maintains that planners need to understand that other ways of knowing may be important to culturally diverse populations and that it is important to be able to discern which ways of knowing are most useful in what circumstances. "Such an epistemology of multiplicity for planning would consist of at least six different ways of knowing, in addition to what is usually taught in planning schools: knowing through dialogue; from experience; through seeking out local knowledge of the specific and concrete; through learning to read symbolic, non-verbal evidence; through contemplation; and through action-planning" (Sandercock 2003:76).

If the assumptions of planning are rooted in western cultural attitudes to place and its use, then it follows that we need to understand and unpack those assumptions. Porter's recent work (2010:17) argues that the planning systems of western settler states such as Australia bear the cultural assumptions of place and how place can be used appropriately of western (non-Indigenous) cultures. These are quite distinct from Indigenous productions of space, which means that when planning systems come into contact with Indigenous peoples, as they now must, it becomes a difficult task to bridge the difference. As Porter (2010:11) states the first and most important theoretical work that needs to be done is "to turn our analysis toward the culture and practice of planning" for without this, the 'inclusion' of Indigenous people in land management decisions can be viewed as "a new form of colonial oppression" (2010:12).

The concern we share with Porter is that unless the processes of planning make some fundamental changes to the way planning accommodates 'difference' and reconstitutes the power relations between Indigenous and non-Indigenous parties, then there is a strong possibility that planning "will always act as a basis for pervasive forms of colonial dominance and continue to oppress and marginalise Indigenous peoples" (Porter 2010:18).

## **The rationale for change**

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

Firstly, because Aboriginal and Torres Strait Islander people have maintained strong links with their country as well as core elements of their spiritual association with their land and waters (Rose 1996). Aboriginal and Torres Strait Islander people have, for several decades through their land rights campaigns, been most vociferous about trying to secure a future that acknowledges their complex and continuing relationships between them and their environment. For their culture to survive, Aboriginal and Torres Strait Islander people must be able to access, protect and revitalise their country, sites and objects through rituals and customary practices. Through various means over recent decades, Aboriginal and Torres Strait Islander people and communities now own or manage approximately 22 per cent of Australia's land mass (Pollack 2001 and Altman *et al* 2007). Therefore, they have a crucial and legitimate stake in planning processes affecting their lands and waters (SAMLIV 2003:15).

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

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

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

Finally and most significantly, in 2007 the General Assembly of the United Nations endorsed the '*Declaration on the Rights of Indigenous Peoples*' (UN 2007). Under Article 3 of the Declaration, Indigenous people have the right to self-determination, and under Article 19 Indigenous people have the right to be consulted in good faith in order for governments to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Under Article 23, Indigenous people have the right to determine and develop priorities and strategies for exercising their right to development. Under Article 6, Indigenous people have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and the right to own, use, develop and control the lands, territories and resources they possess by reason of their customary ownership. And under Article 32, they have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

The rights in Articles 3, 19 and 26 can be seen as enabling rights that are fundamental to the realisation of the full suite of development rights, including the right to cultural difference and the right to pursue a pathway to social and economic development that is determined and controlled by the Indigenous people themselves. These three rights can be considered as the concession made at the international level for the loss of the opportunity for Indigenous peoples living within established States to claim statehood and therefore sovereignty over territory. Without these enabling rights there is no meaningful 'site' for aspirations towards cultural difference and economic development that are exclusively under the determination and control of Indigenous peoples. This has the implication that any State interested in the development of Indigenous peoples living within its territory must choose between formal recognition and implementation of these enabling rights, or otherwise be prepared to either objectively determine the development of Indigenous peoples paternalistically, or else assimilate them. (Howarth, P. *personal comments*)



As Robinson (2001:6) observed in a lecture to the World Bank in 2001, the then:

*“Draft Declaration [on the Rights of Indigenous Peoples] makes clear the link between human rights and development, namely that the one is not possible without the other. Thus economic improvements cannot be envisaged without protection of land and resource rights. Rights over land need to include recognition of the spiritual relation Indigenous people have with their ancestral territories. And the economic base the land provides must be accompanied by recognition of Indigenous people’s own political and legal institutions, cultural traditions and social organisations. Land and culture, development, spiritual values and knowledge are as one. To fail to recognise one is to fail in all.”*

### **The nature of the customary interest in land and waters**

It is one thing to stand at a place in history where customary rights are accorded such high regard, but it is another to appreciate the logic that underpins the claim Indigenous people have to their land, and the contrast between it and that understood by modern western people.

In the absence of such a logic of rights, the claims of Indigenous people can, and often are, dismissed as merely the serendipitous windfall they currently enjoy due to some odd sense of political embarrassment experienced by the modern west, perhaps an irrational and unfortunate hangover of socialist sensitivities.

The legal structure underpinning the recognition of customary rights in land is now well established in Australian law. Brennan J. set out the parameters for the relationship between customary property rights and titles derived from the Crown when he recognised the pre-existence of customary ownership and that the English crown only obtained radical title to the land of Australia when Captain Cook claimed it for the English Crown on Possession Island on 22 August 1770. The radical title was only crystalised into functional titles with the passing of sovereign acts (*Mabo No. 2* at 50). That is, all western systems of land law come after the pre-existing allodial rights of Australian Indigenous people (Pearson 2003).

Simply put, Indigenous people owned all rights to the land of Australia before white settlement. Furthermore, Reeve (1986) noted that western property rights focus more on the ownership of rights, and not property itself, however Indigenous people see their relationship more directly, not as rights, but as an intimate and indelible connection to the thing itself, their land. This led Small and Sheehan (2005) to conclude that the connection is incomparably deeper, more comprehensive and more intimate than anything understood by western people.

The strength of the metaphysical connection and meaning of land for Indigenous people is difficult for western people to appreciate, because it requires an openness to spirituality—to the active and dynamic relationship between humanity and the Creator that has been largely lost through the modern period. Small (2003) demonstrated that all societies ultimately ground their economic systems on their metaphysical beliefs. Whereas the modern west is grounded on the spontaneous atomistic generation of the cosmos, Indigenous people universally view this as an unlikely possibility and ground their entire culture on the supernatural generation of the earth and its people in a way that passed ownership of land directly from its maker to the customary owners.

Indigenous people believe that the land was connected to the tribe in the supernatural creative event that originally caused it into being and that connection passes unchanged from generation to generation along with the laws and customs of the tribe which also have their origin in the agency of creation. The particular creation stories differ from tribe to tribe, but they tend to share these fundamental commonalities. The Murray Islanders, of whom Eddie Mabo was a member, believed that a supernatural octopus named Malo created the islands, the islanders and the laws and customs for the people which included their inalienable connection to the land. This means that their very existence revolves about an understanding of laws, customs and relationships to the land which cannot be undone by mere political means.

Modern western culture has a far weaker notion of property where the state sanctioned exercise of possession is the test of ownership following the positivist theory of property posited by Adam Smith (1778). Ownership is only ever an arbitrary system of government sponsored permissions to use the land in particular ways. Owners in western societies have their land rights at the grace of the government and land use planning fits

comfortably within that paradigm of ownership that places land owners at the bottom of the cascade of rights distributions. This is an inversion of the customary conception and given the recognition of the latter, requires a major rethink by land administrators and planners.

Western legal minds tend to seek evidence of active occupation as proof of ownership and believe the connection with the land is limited by the dimensions of occupation in space, time and activity. This is meaningless to Indigenous people. The fact that they never dug gold from their land does not mean that they do not believe that they own all the minerals. Too much emphasis has been placed on identifying the nature of the customary interest through investigations into how particular Indigenous people used their land. Temporary separation also does not impact on their understanding of their connection to land, despite the current western rules for recognising customary ownership. A parallel could be drawn to one's mother, who will continue to have an intimate and complete kin connection to a person regardless of how physically close, or actively intensive, the positive expression of the relationship is.

It is not only land ownership that is affected by this universal deference to the spiritual source of society. Land use planning is directly impacted by the relationship between Indigenous and modern western systems of law. Land use planning consists of the reservation of certain rights of land use determination by the state, at its various levels, in practical opposition to the preferences of private owners. Its exercise is always a form of sovereign act. Its rationale may be traced to two lines of support: its object is the common good, which is the legitimate role for government action, and under the feudal system of property ownership it implicitly depends on the assumption of superior title to the land by the Crown.

Any land use planning initiative constitutes a sovereign act, but it has been recognised that any sovereign act that removes rights to land that can be shown to belong to customary owners violates the *Racial Discrimination Act 1975* (Cth). These violations constitute some level of extinguishment of customary rights for which compensation 'on just terms'<sup>4</sup> must be paid. This means that the recent trends in land use planning that perceive customary owners

---

<sup>4</sup> Under S,51(xxxi) of the Australian Constitution, the Commonwealth can only acquire property on just terms from any State or person for any purpose for which the Australian Parliament has the power to make laws. A similar clause is contained in many State compulsory acquisition statutes.

as merely another class of private property owner to be regulated by land use control is entirely erroneous (Wensing and Sheehan 2002:131). Once customary ownership is recognised it must be upheld as the superior system of land law leaving western land use control the subordinate manifestation of law.

This does not totally eliminate the role of western land use planning with respect to customary land. Western law reserves the right to restrain the exercise of Indigenous law in cases where the latter would result in outcomes incompatible with the common good as understood from the perspective of Western law and its cultural backdrop. The provision of infrastructure may be one area where western land use schemes necessitate restrictions on customary land.

Moreover, if it is accepted that land use control constitutes a form of property right that has been withheld from the bundle of rights that constitute freehold title, then it may well be a right that is still available to customary owners, given the current rules for recognition adopted in Australia from *Mabo No. 2* onwards. To qualify for recognition, customary owners must prove a continued connection to the land and the rights they seek must not have been alienated by a valid sovereign act. Land use controls exist in the negative. Their positive expression consists in the granting of permission to a private landholder to use the land in some way. In cases where land has never been permitted for some higher value land use, it could be argued that the right to use the land for that higher use has never been alienated. If this is the case then it may be available to the customary owners. This could well see Indigenous customary owners recognised as the natural owners of all land use permissions not yet enacted over freehold land.

### **Parameters for Adequate Inclusion of Customary Interests**

Some fundamental changes to contemporary land use planning and decision-making processes are therefore required to recognise and better accommodate the rights of Aboriginal and Torres Strait Islander people and communities, such that:

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

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

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

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

For example, Hewitt (1998:359), Dorsett and Godden (2000:382) and Neate (2004:50) have long argued that planning needs to take a more holistic approach to integrating the aspirations of Aboriginal and Torres Strait Islander people in both their role as an 'owner' of land and as part of the wider community. Indeed, Neate (2004:49-50) states that the participation of indigenous communities in having an input into decision making is highly relevant, especially where planners and planning agencies do not have the requisite knowledge nor the expertise or skills to fully understand or assess the possible impact of a proposed development on the rights, interests, needs or aspirations of Aboriginal and Torres Strait Islander people and communities. This includes situations where Aboriginal and Torres Strait Islander people have maintained strong connections to their land and waters and as a matter of Australian statute law, native title has been extinguished or survives in a limited way (Neate 2004:50).

In complete contrast and in a very poorly argued paper published in the Queensland Environmental Practice Reporter, Smith (2011:36) argues it is unlikely that many, if any, native title holders would meet the definition of 'owner' derived from the S.3 of the *Local*

*Government Act 1936* (Qld) (Repealed) and which now appears in Schedule 3 of the *Sustainable Planning Act 2009* (Qld), and there is no requirement therefore for native title holders to be involved in plan making processes under that Act in Queensland. While this may be the case on a simple reading of the *Sustainable Planning Act 2009* (Qld) in isolation of other statutes and established planning practices, Smith fails to appreciate the significance of the High Court's comments in *Western Australia v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002) in relation to native title rights including the right to maintain, protect and prevent the misuse of cultural knowledge. In *Western Australia v Ward* (at 587), Gleeson CJ and his fellow Justices on the High Court stated that:

*"Recognition of the native title right to protect cultural knowledge is consistent with the aims and objectives of the Native Title Act 1993 (Cth), reflects the beneficial construction to be utilised in relation to such legislation and is consistent with international norms declared in treaties to which Australia is a party. It recognises the inherent spirituality and land-relatedness of Aboriginal culture. In my view it is within the scope of s 223 of the Native Title Act 1993 (Cth)".*

We agree with Dorsett and Godden (2000:382) that the High Court's comment mandates a more holistic approach to the integration of native title rights and interests and planning to give practical effect to these rights and interests, rather than finding ways to ignore them as Smith seems to suggest in his paper.

The title of Smith's paper, *'Queensland's planning law – a lost opportunity to deliver justices to native title holders – or is it?'* suggests an attempt at finding ways in which the statutory planning law in Queensland may be able to deliver some of the long awaited justice that native title holders have been seeking with respect to their pre-colonial land and water rights and interests. However, a closer read of the paper reveals that it lacks depth in its analysis and ignores a number of imperatives articulated by Wensing (2007, 2011 and 2012) and the rationale for change discussed in earlier parts of this paper in the way conventional planning processes deal with Aboriginal and Torres Strait Islander peoples' rights, interests, needs and aspirations arising from the *Mabo No. 2* decision and the enactment of the *Native Title Act 1993* (Cth). It could be argued that Smith's paper is yet another attempt at ensuring Anglo-Australian law continues to assert its dominance over Aboriginal and Torres Strait Islander peoples' traditional laws and customs. Smith could do well to take note of Muir's (1998:3) perceptive observation that:

*“In Australia we have two systems of law. There are the laws of Aboriginal and Torres Strait Islander peoples (Indigenous law) and the non-indigenous law of Australia. The non-indigenous law asserts that it is dominant. This assertion of dominance has little to do with the inherent characteristics of the laws; rather it has more to do with the weight behind the hammer.”*

### **A just integration of customary rights into conventional planning systems**

A strategy for the just integration of Indigenous peoples' customary rights in land use planning systems can be developed from the fundamentals of the rights relationships. As the primary and complete owners of the land of Australia they have the primary right of control of land use. Their customary laws include some land use elements that deserve respect due primarily to their primacy.

Western law exists below customary law and must respect it, except in cases where it would cause significant conflicts with the western evaluation of the common good. Those conflicts can be interpreted quite widely to include the national economic good as an aspect of the common good, but with a prudential limit as to how far land use control can intrude on customary law priorities. The further the limit is pushed by western planners, the less defensible it becomes. What this means in practice is that where customary ownership is established, there should be minimal intrusion by western planners.

In the case of land where customary title has been considered to have been extinguished by sovereign acts, such as the grant of freehold title, there is a strong argument for the recognition of a residual customary right pertaining to land use planning. This follows from the conceptualisation of planning in positive terms as the granting of land use rights that were previously withheld from freehold, and were therefore the reason that freeholders were not able to exercise the usual right of ownership, which is the power to choose the highest and best use as they might perceive it to be.

What this would mean in practice, is that where freehold has extinguished most customary rights, the right to grant the highest and best land use that has been withheld via the mechanism of land use planning, should be conferred on the customary owners. Given the role of the state in regulating for the common good, this would suggest a dual right of

regulation, split between the customary owners and the modern western state represented by planners from various levels of government. Land use planning is exercised in practice, as the power of restraint applied to lesser title holders; it acts as a right of veto exercised by the government against lesser title holders, i.e. freeholders. To include customary owners in this framework it would be necessary to extend to them a comparable right of veto.

The right to refuse an innovation in land use to a freehold title holder would take nothing from that landholder that is currently privately owned. A freehold landholder possesses a bundle of rights to land that includes a certain regime of land use rights that is set via particular planning and environmental management controls that apply or are in effect at a particular point in time. Changes in circumstances, say by population growth or infrastructure development, may suggest a higher potential use, but until that is permitted by the planning system, such a higher use is merely a potential possibility and not part of the bundle of rights enjoyed by the freehold landholder. Hence, there is no obligation for permission to be forthcoming, nor can any harm result unless it can be shown that a particular landholder has been treated inconsistently compared to others. Zoning regimes routinely bind land to lower uses than the landholders may have anticipated and consist of no more than the decision by the state not to gratuitously transmit to particular landholders additional rights pertaining to land use. For these reasons the inclusion of customary owners into the land use planning structures and decision making processes is consistent with the operation of the planning system as well as an expression of the natural relationship between customary and western law.

The significance of including customary owners in this way would be considerable. It would respect their inalienable connection to the land in a meaningful way by returning to them one of the natural rights of genuine ownership, that is, the right to determine the use of a thing. It would fit well into the hierarchy of land rights first identified in *Mabo No. 2* while not disturbing the rights of existing freehold landholders. The practice of undisturbed exclusive occupation that is more focal to western people would not be threatened, along with the convention of freehold title itself. Customary people have a considerable tradition of caring for the land with a long term view (Gammage 2011), and this perspective would add to the quality of planning decisions.



## **Conclusions**

The current culture of land use planning is derived in no small measure from the colonial history of Australia and the structure of its land laws. There are a number of pressures for change ranging from local recognition of customary title to international protocols of the United Nations.

The logic of customary rights to land and its relationship to western law provides the theoretical framework for its implications for land use planning. The theory of land ownership that dominates modern western thinking makes it difficult for western minds to conceptualise the dynamics of customary ownership in the way that Indigenous people understand it, however this is exactly what has been called for in the emerging emphasis on intercultural awareness and the need for planners to have a sensitivity to listening and learning from a greater number of sources than were previously admitted as appropriate.

The logic of customary ownership suggests very strongly that customary owners have both a real and a symbolic cause to be included in land use planning. As the original owners from whom most rights have been stripped in many cases, the right to have a voice against what they consider inappropriate development is arguable from the perspective of natural justice. By allowing customary owners the right of veto in land use planning, no right is being removed from western freehold landholders and the history of customary owners as prudent stewards of land and waters suggests that their exercise of such powers would be prudent and in the interests of the community, especially in the longer term.

## **References**

### ***Legal Authorities***

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

*Western Australia v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002)

### ***Legislation***

*Local Government Act 1936* (Qld) (Repealed)

*Native Title Act 1993* (Cth)

*Racial Discrimination Act 1975* (Cth)

*Sustainable Planning Act 2009* (Qld)

**Books/Edited Books/Book Chapters, Journal Articles:**

- Altman, J., Buchanan, G. J., and Larsen, L. (2007) *'The environmental significance of the Indigenous estate: Natural resource management as economic development in remote Australia'*, CAEPR Discussion Paper No. 287, CAEPR, ANU, Canberra.  
<http://www.anu.edu.au/caepr/discussion.php>
- Barry, J. And Porter, L. (2011) 'Indigenous recognition in state-based planning systems: Understanding textual mediation in the contact zone'. *Planning Theory*, 11(2) 170-187.
- Beebeejaun Y (2004) 'What's in a Nation? Constructing Ethnicity in the British Planning System', *Planning Theory and Practice* 5:4, 437-451.
- Dodson, M. (1998) *'Six years of native title: Extinguishment of native title'*. Public lecture at the University of New South Wales (UNSW), *Native Title: Facts, Fallacies and the Future, University Symposium*, 30 May 1998, Sydney: UNSW, pp. 205–11.
- Dorsett, S. And Godden, L. (2000) The Interaction of Planning Law and Native Title. *Environmental Planning Law Journal*, Vol. 17, No. 5, 374-382.
- Gammage, B (2011) *The Biggest Estate on Earth: How Aborigines made Australia*. Allen and Unwin, Sydney.
- Guest, K. (2009) *The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements*. AIATSIS Research Discussion Paper, Number 17.
- Gurran, N. & Phibbs, P. (2003) *'Reconciling Indigenous and non-Indigenous land management concepts in planning curricula'*. Paper presented to the Australian and New Zealand Association of Planning Schools (ANZAPS) Conference, Auckland, 26–28 September.
- Gurran, N. & Phibbs, P. (2004) *'Indigenous interests and planning education: Models from Australia, New Zealand and North America'*. Paper presented to the Australian and New Zealand Association of Planning Schools (ANZAPS) Conference, Perth, 24–26 September.
- Hall, P. (1992) *Urban and Regional Planning*, Routledge.
- Harwood S. A. (2005) 'Struggling to embrace Difference in Land-use Decision Making in Multicultural Communities', *Planning Practice and Research* 20:4, 355-371.
- Healey, P. (1997) *Collaborative Planning: Shaping Places in Fragmented Societies*, Hampshire, Macmillan Press.
- Hewitt, N. (1998) 'Administration of Native Title under the Integrated Planning Act 1997' (Qld). *Environmental Planning Law Journal*, Vol. 15, No. 5, 350-361.
- Indigenous Planning Working Group (IPWG) (2010) *Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Recommendations for Reforming Planning Education Curricula for PIA Accreditation*, Discussion Paper, Planning Institute of Australia, Canberra.  
<http://www.planning.org.au/documents/item/2381> (Accessed 28 March 2011)
- Jackson, S. (1997a) 'Land use planning and cultural difference', in D. Rose & A. Clark (eds), *Tracking Knowledge in North Australian Landscapes*, Darwin: North Australia Research Unit, Australian National University, pp. 87–103.

- Jackson, S. (1997b) 'A disturbing story: The fiction of rationality in land use planning in Aboriginal Australia', *Australian Planner* 34: 221–6.
- Jacobs J (1996) *Edge of Empire: Postcolonialism and the City*, London: Routledge.
- Lane M. B. & Hibbard M (2005) 'Doing it for themselves: Transformative planning by Indigenous peoples', *Journal of Planning Education and Research*, Vol. 25, pp. 172-184
- Muir, K. (1998) "This Earth has an Aboriginal Culture Inside" Recognising the Cultural Value of Country. Land, Rights, Laws: Issues of Native Title, Issues Paper No. 23. Australian Institute of Aboriginal and Torres Strait Islander Studies (accessed 29 June 2012).  
<http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip98n23.pdf>
- Neate, G. (2004) *Planning in the native title era: some obstacles, options and outcomes*. Lecture notes for 'Planning with Native Title' course, Griffith University, Brisbane, Queensland (unpublished).
- Pearson, N. (2003) *Land is susceptible of Ownership*. High Court Centenary Conference, Canberra.
- Pollack, D. P. (2001) *Indigenous land in Australia: A quantitative assessment of Indigenous landholdings in 2000*. CAEPR Discussion Paper No. 221/2001, CAEPR, ANU, Canberra  
<http://www.anu.edu.au/caepr/Publications/DP/2001DP221.php>
- Porter, L. (2006) 'Planning in (Post) Colonial settings: Challenges for theory and practice', *Planning Theory and Practice*, Vol. 7 No. 4, pp. 383-396.
- Porter, L. (2010) *Unlearning the Colonial Cultures of Planning*, Ashgate, Surrey, England.
- Reeve, A. (1986) *Property*. Houndsmills, Hampshire, England, Macmillan.
- Reeves D. (2005) *Planning for Diversity: Policy and Planning in a World of Difference*, Routledge, London.
- Robinson, M. (2001) 'From Normative Principles to Operational Relevance', United Nations High Commissioner for Human Rights, Lecture To The World Bank, Washington D.C., 3 December.  
<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/2DA59CD3FFC033DCC1256B1A0033F7C3?opendocument>
- Rose, D. B. (1996) *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness*, Australian Heritage Commission, Canberra.  
<http://www.ahc.gov.au/infores/publications/generalpubs/nourishing/index.html>
- SAMLIV Project Team (2003) *Draft Strategy for Aboriginal Managed Lands in Victoria*, SAMLIV Steering Committee, Melbourne.
- Sandercock, L. (2003) *Cosmopolis II Mongrel Cities of the 21st Century*. Continuum, London.
- Sheehan, J. and Wensing, E. (1998) *Indigenous Property Rights: New Development for Planning and Valuation*, Discussion Paper Number 17, The Australia Institute, Canberra.
- Small, G. (2003) 'Human action and Property'. *Pacific Rim Property Research Journal* 9(4):348-360.

- Small, G. (2008) *A Just Integration of Western and Customary Land Rights in Australia*, pp. 121-143 in Simons R., Malmgren R., Small (eds.) (2008) *Indigenous Peoples and Real Estate Valuation*, Springer Science and Business Media and the American Real Estate Society.
- Small, G. and Sheehan, J. (2005) *Selling Your Family: Why customary title is incomparable to Western conceptions of property value*. Pacific Rim Real Estate Society Annual Conference, Melbourne, Pacific Rim Real Estate Society.
- Small, G. and Sheehan, J. (2008) *The Metaphysics of Indigenous Ownership: Why Indigenous Ownership is Incomparable to Western Conceptions of Property Value*, pp.103-119 in Simons R., Malmgren R., Small (eds.) (2008) *Indigenous Peoples and Real Estate Valuation*, Springer Science and Business Media and the American Real Estate Society.
- Smith, A. (1778) *The Wealth of Nations*. London, J.M. Dent.
- Smith, P. (2011) 'Queensland's planning law – a lost opportunity to deliver justice to native title holders – or is it?' *Queensland Environmental Practice Reporter* Vol. 16, Issue 73, 127-135.
- Stuart, K. and Thompson-Fawcett, M. (2010) *Taone Tupa Ora: Indigenous knowledge and sustainable urban design*. Steele Roberts Aotearoa, NZ.
- Thomas, H. (2000) *Race and Planning: The UK Experience*. UCL Press, London
- 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.
- United Nations (2007) *Declaration on the Rights of Indigenous Peoples*  
<http://www.un.org/esa/socdev/unpfii/en/declaration.html>
- Umemoto, K. (2001) 'Walking in Another's Shoes: Epistemological Challenges in Participatory Planning', *Journal of Planning Education and Research* 21:17-31.
- 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, The Australia Institute, Canberra.
- Wensing, E. And Sheehan, J. (2002) 'Planners and native title', Letter to the Editor of Australian Planner, *Australian Planner*, Vol. 39, No. 3, pp131-132. See also Letter to the Editor (1998) *Environmental Planning Law Journal*, Vol. 15. No. 6, 375-376.
- Wensing, E. (2007) 'Aboriginal and Torres Strait Islander Australians', Chapter 11 in Thompson S (ed.) *Planning Australia: An overview of Urban and Regional Planning*, Cambridge University Press, Melbourne.
- Wensing, E. (2011) *Improving Planners' Understanding of Aboriginal and Torres Strait Islander Australians and Reforming Planning Education in Australia*. Paper Presented in Track 12 (Planning Education and Planning Practice) at the 3<sup>rd</sup> World Planning Schools Congress, Perth (WA), 4-8 July 2011.
- Wensing, E. (2012) 'Aboriginal and Torres Strait Islander Australians', Chapter 11 in Thompson S and Maginn, P. (ed.) *Planning Australia Second Edition: An overview of Urban and Regional Planning*, Cambridge University Press, Melbourne.