TORRES STRAIT ISLAND REGIONAL COUNCIL
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Our Ref: Chief Executive Officer **BY EMAIL**
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11 October 2012

Agriculture, Resources and Environment
Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Committee,

TORRES STRAIT ISLAND REGIONAL COUNCIL – ABORIGINAL AND TORRES STRAIT ISLANDER LAND HOLDING BILL 2012 SUBMISSION

The Torres Strait Island Regional Council ("Council") wishes to make submission in relation to the proposed *Aboriginal and Torres Strait Islander Land Holding Bill 2012* (Qld) ("the Bill").

BACKGROUND

Council's local government area comprises 15 distinct remote Indigenous island communities between the tip of Cape York and Papua New Guinea. In 1985, the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) was introduced enabling the grant of perpetual leases (colloquially named "Katter leases" after the Hon. Bob Katter MP who introduced the Bill) for residential and commercial purposes to Aboriginal or Torres Strait Islander persons. Unfortunately, the process was flawed resulting in only some of the applications being processed and others left, nearly 27 years later, pending. The Bill, amongst other things, seeks to rectify the misgivings of its predecessor. To this end and on other factors with propensity to affect the electorate, Council makes submission.

LAND TENURE

As a fundamental proposition, Council repeats and relies upon its submission made to the State Development, Infrastructure and Industry Committee earlier this year in its recent inquiry into Land Tenure (copy **attached**). This submission is materially relevant to all aspects of land tenure, including leasing. It is Council's submission that true land tenure reform in Indigenous communities is effected by deregulation, roll-back of paternalistic policy that is Deed of Grant in Trust and Reserve, realising true home-ownership (house and land) in freehold equivalent and self-determination.

THE BILL

Council makes the following submissions in relation to the Bill, namely: -

	Comment(s)
c24(c)(i)	It is not defined what "reliance" will suffice to enable hardship to be claimed by an applicant, for instance construction of a dwelling, construction of a temporary home, planting of gardens or simply advising others etc.
Part 6	Council is concerned that there will be a number of boundary relocations necessary in its local government area due to encroachments and improvements whilst leases have been held pending. Council is concerned lessees of both 1985 leases and pending leases may be forced to pay their own costs of and incidental to obtaining Land Court determinations, whether by consent or contested. It is noted that Council will also be a party to such proceedings. It is submitted that the State must indemnify the parties to such proceedings and for all associated travel and accommodation costs from the Torres Strait to the closest available Land Court (Cairns, Qld), failing which parties simply will not be able to afford to seek the grant of pending leases.

Should you have any queries in relation to the above, please do not hesitate to contact the writer.

Yours faithfully

Rodney John Scarce

Chief Executive Officer

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3 August 2012

The Research Director
State Development, Infrastructure and
Industry Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Sir,

TORRES STRAIT ISLAND REGIONAL COUNCIL - LAND TENURE INQUIRY

Reference is made to your correspondence dated 26 June 2012 requesting submissions to your Committee's inquiry into the future and continued relevance of Government land tenure across Queensland.

The Torres Strait Island Regional Council ("Council") wishes to contribute towards your Committee's research as it impacts dramatically on its operations in the Torres Strait and the wellbeing and security of its constituents.

BACKGROUND

Council's local government area comprises 15 distinct remote Indigenous island communities between the tip of Cape York and Papua New Guinea. Torres Strait Islanders have inhabited the Torres Strait for over 10,000 years. The basic principles that governed them for thousands of years prior to colonisation, was a Chieftain system of governance, with philosophical similarities to that of the Monarchy in the United Kingdom. With that system, much like Torres Strait Islanders, individuals owned, worked and occupied land. Tribes derived their superiority and respect by their use of the land and sea.

LAND TENURE

Land tenure in the Torres Strait region is arguably the most complex land tenure system in Australia, comprising of both determined Native Title rights to land under the *Native Title Act 1993* (Cth) ("the NTA") and Deed of Grant in Trust in Fee Simple interests under the *Land Act 1994* (Qld) ("the LA").[1] Council's principal concerns with the current land tenure system is with the level of complexity, prohibitive cost, delay and over-regulation. Particularly, Council takes issue with the following features of the Queensland land tenure system as it affects Council and its constituents, namely :

[1] Declared in 1985 as DOGIT under the former *Land Act 1962* (Qld)

1. the interaction between Native Title rights in land and DOGIT is problematic as: -

    a. common law holders of Native Title under the NTA in order to obtain "interest" status under the Torres Title System ("Torrens") of land tenure in Queensland in order to occupy land in accordance with determined Native Title rights, must obtain an ideologically inconsistent leasehold interest under the *Torres Strait Islander Land Act 1991* (Qld) ("the TSILA"), and in turn surrender (albeit temporarily due to the Non-Extinguishment Principle)[2] their determined Native Title rights in the affected land for the period of inconsistency;

    b. as Native Title is not a recognised statutory "interest" in land under Torrens, it cannot be: -

        i. presently recognised as an interest in its own right; or

        ii. encumbered in its own right, by for instance mortgage, to facilitate security for home loans for construction of private dwellings from financial institutions to effect the Council of Australian Governments ("COAG") objectives of "closing the gap" and reduce the reliance on social welfare, social housing and overcrowding;

    c. in light of Native Title and DOGIT coexistence, land is inalienable in the Torres Strait, which further restricts wealth creation and land value;

    d. DOGIT is a philosophically paternal concept which restricts the rights of Indigenous persons to freely elect how they deal with their own lands, and is grossly inconsistent with the COAG objective in "closing the gap";

2. Where leases are sought under the TSILA: -

    a. survey plans must be obtained to accompany registration of a lease.[3] Costs may be in the vicinity of $5,000 to $10,000 due to the remoteness and cost of travel of Surveyors to the Torres Strait. Proponents are responsible for this cost;

    b. where the term is greater than 10 years, the lease requires a Development Approval under the *Sustainable Planning Act 2009* (Qld) ("the SPA") for reconfiguration of a lot. Development Approval required Development Application in the approved form (IDAS) and payment of processing fees which are presently in the vicinity of $1,500 per application;

    c. they may require Ministerial Consent under the TSILA;[4]

    d. they shall be inconsistent with the grant of Native Title rights in land and constitute a Future Act[5] under the NTA and can only be validated by the Proponent: -

        i. giving prescribed Notice under Part 2, Division 3 of the NTA; or

        ii. entering into an Indigenous Land Use Agreement[6] with the Native Title Prescribed Body Corporate ("PBC's"), being representative for the common law holders of Native Title for the island. There is no set formula for assessing compensation payable under the NTA. It is

[2] Section 238 NTA.
[3] Section 111 TSILA.
[4] Part 8, Division 2 TSILA.
[5] Section 233 NTA.
[6] Part 2, Division 3, Subdivision B NTA.

therefore subject to extensive negotiation which in Council's experience, generally takes no less than 18 months;

e. compensation may be payable by the Proponent to compensate the common law holders of Native Title for the suspension/ suppression of their determined Native Title rights in land for the term of the inconsistent use (term of the lease);

f. Proponents do not negotiate directly with common law holders of Native Title with respect to obtaining Native Title consent, but instead negotiate with PBC's who in turn have a statutory duty to consult with affected common law holders of Native Title. Ultimately, the PBC has the final say on levels of compensation payable. Therefore, it may be determined by the PBC that notwithstanding the affected common law holder of Native Title is the Proponent of the lease, it is conceivable that they may nonetheless determine Native Title to be payable by the Proponent to the PBC and distributed in accordance with the PBC's objectives set out in their Rule Book (which may not necessarily result in distribution to the affected common law holders of Native Title);

g. PBC's are under-resourced and their Boards generally under-qualified to consider Proponent leasing proposals. They are assisted by the Torres Strait Regional Authority, Native Title Office as statutory legal representative body for PBC's in the Torres Strait, however Board members are unremunerated and as such, justifiably lack urgency;

h. ILUA's need to be registered with the National Native Title Tribunal and nationally advertised for 30 days prior to registration. Only then may a lease be registered with the Department of Environment and Resource Management ("DERM"). Registration is effected by the Proponent.

Presently, Council is the Trustee of the DOGIT's for all islands other than Mer (Murray) Island which is Reserve Land and held by the Aboriginal and Islander Affairs Corporation (now the State of Queensland as represented by the Department of Communities). Council continuously grapples with the abovementioned incidences of prohibitive complexity, cost, delay and over-regulation in administering its infrastructure and service delivery projects in its local government area. De-regulation in this area would greatly facilitate Council's ability to service its electorate and for constituents to obtain security of tenure.

DERM is presently seeking to transfer DOGIT's and the Mer Reserve under the TSILA to PBC's to supplement determined Native Title rights with Torrens recognition, albeit in substantially the same inalienable communal nature as presently held by Council and the Department of Communities. In Council's opinion, PBC's are presently under-resourced and Board members under-qualified to take on this responsibility.

As part of a Master of Laws thesis at the University of New England, Council's Chief Legal Officer, Mr Chris McLaughlin submitted a paper highlighting the conflict between ideologically inconsistent systems of land tenure in Queensland as they pertain to the Torres Strait, copy of which is **enclosed** for the Committee's consideration.[7] I must stress that this paper does not reflect or represent the views of Council, however raises interesting concepts which may be of interest to your Committee in light of Council's below submissions.

[7] McLaughlin C, *'The Indigenous Home-Ownership Paradox'* (2012).

SUBMISSION

We would ask that your Committee considers in its inquiry, the following Council submissions, namely: -

1. **to undertake a review into de-regulation of land tenure in Queensland, particularly in remote Indigenous communities to remove undue complexity and restriction, and consider options to reduce cost and increase expediency in process;** and

2. **to undertake a review into revoking DOGIT and Reserve in the Torres Strait with a view to working collaboratively with the Commonwealth Government and stakeholders in statutorily recognising determined Native Title rights as an interest in land under Torrens, in its own right.**

Council calls for legitimisation and true recognition of Indigenous Ailan Kastom and Ailan Lore in its own right in Indigenous communities to effect true legal pluralism in Queensland.

Council is mindful that the Native Title reform would have wide legislative implications on multiples levels of government and would require further research and modelling over an extensive period, however Council considers that progressing discussions in moving towards the above-mentioned objectives would go a long way towards meeting COAG objectives of "closing the gap" in Indigenous communities. Council is committed to assisting the State in such research and modelling.

Should you have any queries in relation to the above, please do not hesitate to contact the writer.

Yours faithfully

Rodney John Scarce

Chief Executive Officer

THE INDIGENOUS HOME-OWNERSHIP PARADOX

by Christopher McLaughlin[*]

INTRODUCTION

June 3, 2012 marks 20 years since the handing down of the landmark High Court of Australia decision of *Mabo and Others v Queensland (No.2),*[1] which first recognised the survival of traditional indigenous rights of indigenous persons to land on Murray (Mer) Island and surrounding Dauar and Waier islands in the Torres Strait, Queensland upon annexation of sovereignty on 1 August 1879.[2] At this historically-significant juncture, there is an overwhelming social and professional responsibility for legal scholars and practitioners alike to critically examine how the concept of native title has evolved since its first acknowledgment in 1992 and to test the notion of whether legal pluralism[3] is achievable in a deeply entrenched Western common law system of governance with its origins so fundamentally seeded in liberal ideology since the 17th century.[4]

This paper does not seek to merely summarise judicial treatment of native title in Australia since 1992. On the contrary, this paper seeks to demonstrate the ever-increasing void between, on the one hand, the High Court's findings in Mabo that *sui generis*[5] communal usufructary rights are capable of recognition by the common law,[6] and on the other hand, the practical application of these findings to the development and implementation of an evolving body of law and public policy in Australia. The writer will assert that it cannot be said that native title rights and interests in land or waters are recognised and protected by the common law in any real sense in Australia at present. It can only be said that native title is recognised by the common law to the extent of its susceptibility to extinguishment, suppression, suspension in furtherance of common law dominion, and is further defined by such susceptibility to being 'affected'. This paper seeks to test this assertion with specific reference to empirical evidence and the misconceived public policy behind home-ownership in indigenous communities, particularly in the Torres Strait, Queensland. The focus shall be from a conflict of laws perspective, rather than human rights.

The Torres Strait comprises 274 islands between the tip of Cape York, Queensland and north to the Western Province of Papua New Guinea. 17 of these islands are inhabited and

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[*] Christopher Neil McLaughlin LLB (James Cook University), solicitor of the High Court of Australia and Supreme Court of Queensland, LLM candidate at the University of New England. I wish to acknowledge the Traditional Owners of the Torres Strait on whose lands and upon whose experiences I have researched and prepared this paper. I wish to acknowledge and pay my respects to the Elders past and present of the Torres Strait. I wish to acknowledge the full body of Ailan Lore and Ailan Kastom practiced widely in the Torres Strait. *Mina big esso* (big thank you) to the people of the Torres Strait who have openly accepted my family into their communities. I wish to acknowledge Councillor Fredrick Gela, incumbent Mayor of the Torres Strait Island Regional Council and member of the Erubam Le People of Darnley (Erub) Island, who assisted as cultural advisor on and provides endorsement to, this paper. Finally, I wish to acknowledge the plaintiffs in *Mabo and Others v the State of Queensland (No. 2)* (1992) 175 CLR 1, upon whose dedication and successes this paper is premised. The views expressed in this paper, and any errors, are my own.

[1] (1992) 175 CLR 1 ('Mabo').

[2] Ibid, per Brennan J at 60 and 61; *Wacando v The Commonwealth* (1981) 148 CLR 1. Sovereignty was annexed by the passage of *The Queensland Coast Islands Act 1879* (Qld).

[3] Bottomley S & Bronitt S, *Law in Context*, 4th ed, The Federation Press, Sydney, 2012 at 3. Legal pluralism is the recognition of two co-existing legal systems, in this instance the common law doctrine of tenure and *sui generis* traditional lore and kastom.

[4] Supra, n 3.

[5] *Sui generis* is a Latin word translated to "of its own kind" or "unique in its characteristics" <http://www reference.com>.

[6] Supra, n 2.

comprise two (2) separate local government areas.[7] Resident populations range from 40 to 800 people per inhabited island.[8]

TENURE

(a) Native Title

In Mabo, the plaintiffs were traditional owners of lands on the islands of Mer, Dauar and Waier to the East of the Torres Strait region. The plaintiffs principally sought an order from the High Court of Australia recognising their pre-existing rights and interests to their lands and waters, as surviving annexure of sovereignty in 1879. Sovereignty was not asserted by the plaintiffs. Mabo is authority for the following legal propositions as succinctly summarised by Justice French in his commentary,[9] namely: -

1. *that the colonisation of Australia by England did not extinguish rights and interests in land held by Aboriginal and Torres Strait Islander people according to their own law and custom;*[10]

2. *that the native title of Aboriginal and Torres Strait Islander people under their law and custom will be recognised by the common law of Australia and can be protected under that law;*[11]

3. *that when the Crown acquired each of the Australian colonies it acquired sovereignty over the land within them. In the exercise of that sovereignty native title could be extinguished by laws or executive acts which indicated a plain and clear intention to do so – eg. grant of freehold title;*[12]

4. *that to demonstrate the existence of native title today, it is necessary to show that the Aboriginal and Torres Strait Islander group said to hold the native title: -*

    a. *has a continuing connection with the land in question and has rights and interests in that land under Aboriginal or Torres Strait Islander traditional law and custom, as the case may be;*[13]
    b. *the group continues to observe laws and customs which define its ownership of rights and interests in the land.*[14]

5. *that under common law, native title has the following characteristics:*

    a. *it is communal in character although it may give rise to individual rights;* [15]
    b. *it cannot be bought or sold;*[16]
    c. *it may be transmitted from one group to another according to traditional law and custom;*[17]

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[7] Torres Strait Island Regional Council and the Torres Shire Council.
[8] Within the electorate of the Torres Strait Island Regional Council, comprising 15 divisions, including Murray (Mer) Island.
[9] French, Justice R.S, 'A Hitchhikers Guide to the Native Title' (1999) 25 No.2, *Monash University Law Review* 375-420 at 376.
[10] Supra, n 1 per Brennan J (with whom Mason CJ and McHugh J agreed) at 57 and 69; per Deane and Gaudron JJ at 81; per Toohey J at 184, 205.
[11] Ibid, per Brennan J at 60 and 61; per Deane and Gaudron JJ at 81, 82, 86-7, 112-113, 119; per Toohey J at 187.
[12] Ibid, per Brennan J at 64; per Deane and Gaudron JJ at 111, 114, 119; per Toohey J at 195-196, 205.
[13] Ibid, per Brennan J at 59-60, 70; per Deane and Gaudron JJ at 86, 110; per Toohey J at 188.
[14] Ibid, per Brennan J at 59; per Deane and Gaudron JJ at 110.
[15] Ibid, per Brennan J at 52, 62; per Deane and Gaudron JJ at 85-86, 88, 119.
[16] Ibid, per Brennan J at 60, 70; per Deane and Gaudron JJ at 88, 110.

d. the traditional law and custom under which native title arises can change over time and in response to historical circumstance;[18] *and*

6. that native title is subject to existing valid laws and rights created under such laws.[19]

The High Court declared that the common law of Australia recognises *"a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands."*[20] Traditional lore and kastom[21] have their origins outside of the common law sphere. Native title however, is the recognition of traditional lore and kastom through the lens of the common law, and is therefore a product of the common law and capable of recognition by it.[22] It is, if you will, a common law dish inspired by indigenous ingredients. Such *sui generis* rights and interests in land were preserved under the common law and were *"effective as against the State of Queensland and as against the whole world unless the State, in valid exercise of its legislative or executive power, extinguishes the title."*[23] Under the theory of common law possessory title, it was asserted by Dawson and Toohey JJ, that under the common law, the possessor of title to land held a fee simple estate in absence of proof of better title held by another.[24] A logical consequence of this finding is the proposition that the Meriam People[25] obtained a fee simple estate upon annexation, subject to the radical title obtained by the Crown.[26]

Following the decision of Mabo, the concept of native title recognition and protections were codified by the Parliament with the passing of the *Native Title Act 1993* (Cth) ("the NTA"), followed closely by the State and Territory equivalents. For the first time, the *sui generis* native title interests in land were codified, much like the codification of the common law doctrine of tenure in relevant property law statute.[27] Since the introduction of the NTA, the concept of native title was at first bolstered by the 1996 High Court decision of *Wik People v Queensland*[28] with the recognition that pastoral leases, not conferring exclusive possession, did not necessarily extinguish native title. Since then, native title has been systematically and calculatedly eroded by judicial consideration and legislative amendment. In the 1998 High Court decision of *Fejo v Northern Territory of Australia,*[29] it is was recognised that native title was inconsistent with a grant of fee simple or freehold title and was therefore extinguished. This extinguishment was permanent and native title could not revive. It was found in Mabo that *"sovereignty carries the power to create and extinguish private rights and interests in land within the sovereign's territory."*[30] Justice French explains the concept of extinguishment as *"paradoxical*" in so far as: -

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[17] Ibid, per Brennan J at 60; per Deane and Gaudron JJ at 110.
[18] Ibid, per Brennan J at 61; per Deane and Gaudron JJ at 110; per Toohey J at 192.
[19] Ibid, per Brennan J at 63, 69, 73; per Deane and Gaudron JJ at 111-112.
[20] Ibid, per Mason CJ and McHugh J at 15.
[21] A traditional concept presented in Torres Strait Creole to emphasise its *sui generis* character, translated to English as "law and custom".
[22] Supra, n 1 per Brennan J at 58.
[23] Ibid, per Brennan J at 75.
[24] Ibid, per Dawson and Toohey JJ at 163 and 210.
[25] Determined beneficiary of native title to the lands and waters of Mer, Dauar and Waier Islands in Mabo.
[26] Supra, n 1 per Dawson and Toohey JJ at 209-210 and 211.
[27] Secher U, 'Native Title – An exception to indefeasibility and a ground for invoking the deferred indefeasibility theory' [2000] James Cook University Law Review 2 at 18 citing the *Property Law Act 1974* (Qld), ss 20, 21.
[28] (1996) 187 CLR 1.
[29] (1998) 195 CLR 96.
[30] Supra, n 1 as per Brennan J at 63.

> *"The essence of the Mabo decision is that the common law of Australia can recognise and protect rights and interests arising out of the traditional laws and customs of indigenous people. But the recognition of indigenous law and custom does not alter its content. Nor can the withdrawal of recognition alter that content. Extinguishment effected by legislative action or executive grant has reality only in the non-indigenous legal system. It can be characterised as a limitation on the capacity of the common law imposed by or under statute to recognise native title. Extinguishment in this sense is to be distinguished from the loss of native title rights and interests by abandonment of indigenous law and custom. There, the foundation of those rights disappears. That is not a consequence of the operation of non-indigenous law."*[31]

In the decision of *Milirrpum v Nabalco Co Pty Ltd,*[32] Blackburn J considered that in order to attain common law recognition, native title rights must be proprietary in nature. This test was overturned in Mabo in favour of a test which did not conform strictly to the *"social and legal mores of England or Europe".*[33] Native title is founded on socialist ideology that recognises collective ownership and communal titles and requires only an entitlement to occupy or use the particular land under existing traditional laws and customs. Bottomley and Bronitt suggest that socialism (community focus) is in direct ideological competition to that of Western liberal individualist ideology (individual focus).[34] By its very nature, native title is a 'communal usufructary'[35] right of occupation and inalienable title; a focus on community.[36] Mabo is authority for the overarching proposition that proprietary estate is not necessary to establish native title, but rather consideration was to be had to 'the way of life, habits, customs and usages' of the particular aboriginal peoples, in dictating the mode of occupation required.[37]

(b) **Deed of Grant in Trust**

In 1985, unallocated State land on the islands of the Torres Strait, with the exception of Mer, Dauar and Waier Islands, were declared by the Minister of the day administering the *Land Act 1962* (Qld), to be Deed of Grant in Trust ("DOGIT") land,[38] that is a grant of a freehold estate to be held in trust by the Island Councils of the day[39] as trustee for and on behalf of the Torres Strait Islanders particularly concerned with the land. The interest was communal in nature and was inalienable. The land was to be used for public purpose only.

Of lesser commentary in Mabo, the plaintiffs also sought a declaration from the High Court restraining the State of Queensland under the *Racial Discrimination Act 1975* (Qld), from declaring a DOGIT under the *Land Act 1962* (Qld) over their lands. Mer Island and its surrounding islands remained and to this day remain, Reserve land[40] held by the Aboriginal and Islander Affairs Corporation (now the State of Queensland as represented by the Department of Communities). It was argued by the plaintiffs that the grant of leasehold estate in DOGIT land by the trustee was inconsistent with a determination of native title as it

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[31] Supra, n 9 at 392.
[32] (1971) 17 FLR 141.
[33] Supra, n 1 as per Deane and Gaudron JJ at 84.
[34] Supra, n 9 at 4.
[35] Supra, n 1 as per Deane and Gaudron JJ at 87, quoting from *Amodu Tijani* [1921] 2 AC 399 at 409 – 410.
[36] Ibid, as per Brennan J at 51.
[37] Cassidy J, 'Observations on Mabo & Ors v. Queensland' (1994) 1(1) Deakin Law Review 37 at 60 – 61 quoting from Supra note 1 per Dawson and Toohey JJ at 188.
[38] s10, *Torres Strait Islander Land Act 1991* (Qld).
[39] Island Councils were constituted under the now repealed *Community Services (Torres Strait) Act 1984* (Qld) and were amalgamated to form the Torres Strait Island Regional Council on 15 March 2008, now constituted under the *Local Government Act 2009* (Qld).
[40] *Torres Strait Islander Land Act 1991* (Qld), s11.

conferred a right of exclusive possession and therefore was contrary to the *Racial Discrimination Act 1975* (Cth).[41] The Court elected not to determine the question on the basis that Mer, Dauar and Waier Islands were not, and were not intended to be, the subject of a grant of DOGIT. It was suggested however by Brennan J that such grant may not necessarily invalidate a grant under the *Racial Discrimination Act 1975* (Cth)[42] as it could be considered a "special measure" within the Act.[43] Cassidy writes that Brennan J is suggesting that a provision designed to protect positive discrimination could validate the denial of aboriginal territorial rights. Cassidy asserts that it is an *"anomalous notion that s. 8 Racial Discrimination Act 1975 (Cwth) could be used against such disadvantaged groups, facilitating, for example, the extinguishment of their indigenous rights."*[44] It is now established that the executive grant of freehold DOGIT did not extinguish native title as it was deemed not to be inconsistent as such interest did not confer rights of exclusive possession.[45]

Negotiations are presently underway between the State, the Meriam People and the Local Government to convert the Reserve on Mer, Dauar and Waier Islands into Torres Strait Islander Land[46] to be held by the Registered Native Title Prescribed Body Corporate ("PBC")[47] (rather than the Local Government) in trust in the same manner previously held by the former trustee, covertly asserting that which was strenuously argued against in Mabo by the plaintiffs. The freehold estate shall remain communal in nature and is inalienable. The State considers the process as necessary so as to provide "white man's recognition" of communal ownership to supplement the *sui generis* native title already held by the Meriam People. Such a proposition fundamentally offends the notion of common law recognition of native title and indirectly asserts that indigenous ownership can only be truly recognised in a practical sense in Australia, by reference to a grant of common law freehold or leasehold estate under the feudal doctrine of tenure.

LEGAL PLURALISM

It is suggested that the concept of legal pluralism, that is a notion that two legal systems may co-exist in Australia, offends the rule of law which mandates a commitment to equality before the law or, 'one law for all'.[48] Inconsistent legal application offends the rule of law, an ideal deeply rooted in liberal ideology.[49] The underlying difficulty in recognising legal pluralism in Australia is directly attributable to the common law's fascination with codification and definition. Native title, although founded on traditional indigenous lore and kastom, derives its codified and legal recognition through its interpretation with reference to common law principles. That is, it is viewed through a common law lens, being a common law interpretation of a non-common law concept. This dilemma is further propounded by a clear reluctance at present by all levels of government to recognise indigenous ownership solely by reference to determined *sui generis* native title, but instead supplements such determined native title with common law estates in order to confer rights of communal ownership.[50]

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[41] Supra, n 1 as per Brennan J at 74.
[42] s10.
[43] s8.
[44] Supra, n 37 at 84-85.
[45] *Pareroultja v Tickner* (1993) 42 FLR 32 per Lockhart J at 218 with whom Whitlam and O'Loughlin JJ agreed.
[46] ss7 and 8, *Torres Strait Islander Land Act 1991* (Qld).
[47] Torres Strait Islander Corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and appointed by the Federal Court of Australia as representative of the common law holders of native title in the native title determination.
[47] s238 of the *Native Title Act 1993* (Cth).
[48] Supra, n 3 at 124.
[49] *Walker v New South Wales* (1994) 182 CLR 45, 49-50.
[50] For example, DOGIT freehold.

Traditional lore and kastom is inherently un-codified. It is passed down generation to generation by song, dance, story, ceremony and art. The concept of native title as determined in Mabo is essentially "white man's definition of black man's law". Government at all levels typically adopt a public policy agenda, inherently suffering from an acute case of 'the common law god-complex', that is a misconception that native title was made in the image of the common law and should therefore be defined by reference to it. This has prevented the common law from truly coming to grips with reconceptualising native title not according to feudal liberal ideological origin, but according to its own *sui generis* characteristics and uniqueness, in the recognition of equality as a recognition of difference. This 'common law god-complex' is demonstrated by reference to indigenous home-ownership in Australia.

INDIGENOUS HOME-OWNERSHIP

(a) National Partnership on Remote Indigenous Housing

In 2008, the Commonwealth Government and all State and Territory Governments entered into the *National Partnership on Remote Indigenous Housing* ("the NPA"), whereby the Commonwealth Government pledged $5.5 billion in funding over a 10 year period to construct up to 4,200 new social homes and upgrade up to 4,800 existing social homes in remote indigenous communities around Australia to combat significant overcrowding, homelessness, poor housing conditions and severe housing shortage in remote areas.[51] The Torres Strait region was promised $300 million of this funding over 10 years, expiring 30 June 2018.

(b) 40 year Social Housing Leases

A condition of the Commonwealth Government in providing its significant financial investment into indigenous housing was the requirement that DOGIT and Reserve trustees grant 40 year trustee leases[52] to the State and Territory Governments to manage the social housing stock. The condition was to ensure security of the large investment for the purpose of social housing over a 40 year period, to the exclusion of all others. That said, there is no recurrent funding beyond 30 June 2018 to sustain 40 years of social housing. Grant of a leasehold interest in DOGIT or Reserve land[53] constitutes a "Future Act" under the NTA,[54] requiring native title validation by way of native title consent from the common law holders of native title. Native title consent is obtained by way of an Indigenous Land Use Agreement ("ILUA"),[55] being an agreement between the PBC's as representative for the common law holders of native title, the trustee of the DOGIT or Reserve, and the State or Territory Governments. The ILUA provides for payment of compensation for suspension of native title for the period of operation of the lease, namely 40 years. In this instance, the non-extinguishment principle applies[56] to prevent extinguishment of native title due to inconsistent use, but rather suspends native title for the period of inconsistency, namely 40 years. The effect is that native title survives the inconsistent grant of a leasehold interest, however such rights cannot be exercised until the inconsistent grant is surrendered or expires and is not renewed, thereby reviving. Under the 40 year lease arrangement between the trustee and the State or Territory Governments, the social housing tenant will sign fixed

[51] Commonwealth of Australia, <http://www.fahcsia.gov.au/sa/indigenous/progserv/housing/pages/remoteindigenoushousing.aspx> (2009)
[52] In Queensland under the *Torres Strait Islander Land Act 1991* (Qld).
[53] In Queensland under the *Land Act 1994* (Qld), *Land Title Act 1994* (Qld), and *Torres Strait Islander Land Act 1991* (Qld).
[54] s233.
[55] Ibid, s24BA.
[56] Ibid, s238.

or periodic term General Tenancy Agreements under the relevant State or Territory legislation.[57] Tenancy management is undertaken by the State and Territory Governments.

Where an indigenous person wishes to obtain social housing in an indigenous community (which in reality is the only housing available given inalienability of land which cannot be taken as security for advancement of loans for construction of private dwellings), the common law holders of native title for the land upon which the social house currently rests, or is proposed to be constructed, must consent to suspension of his[58] native title right for 40 years in exchange for a tenancy he may not hold if not residing there. If he is the tenant, under the terms of the tenancy agreement, where he fails to comply with the terms of the tenancy, for instance, in failing to pay rent, he can lawfully be evicted by the State or Territory from his native title land and replaced with another tenant.

(c) 99 year Residential Leases

The Queensland Government has also introduced a 99 year residential lease option for residents in indigenous communities.[59] This option is presented by the Queensland Government as facilitating "home-ownership" in indigenous communities. Residents may elect to seek a 99 year residential lease from the trustee over a social housing lot, in exchange for a nominal sum for the lease and payment of the value of the improvements thereon. This can occur any time before, during or after the grant of a 40 year social housing lease to the State. Where approved, if a 40 year social housing lease is in operation, it will be surrendered by the State and replaced with a 99 year residential lease to the resident(s). The 99 year residential lease option, just like the 40 year social housing lease option, suspends native title interests in the land.

(d) The Indigenous Home-Ownership Paradox

Both the 40 year social housing and 99 year residential lease models are misconceived and are grossly inconsistent with the grant and spirit of native title in Australia. Although the 99 year residential lease option may confer "home-ownership" within its literal interpretation as ownership of bricks and mortar, it does not confer land ownership as native title intended; *the indigenous home-ownership paradox*. Sadly, the illusion of free choice under the NPA options are further tarnished by the Commonwealth Government's passing of section 24JAA of the *Native Title Act 1993* (Qld), introduced under the assent of the *Native Title Amendment Bill (No.2) 2009* (Cth). This section permits government to proceed with the construction, operation, use, maintenance or repair of existing or new public housing in indigenous communities, without the need for the consent of the common law holders of native title; an expropriation if you will, albeit subject to the non-extinguishment principle. The question of monetary compensation for this mass suppression of native title rights and interests in the Torres Strait is moot, but in any case, insufficiently budgeted for under the project.

We digress for a moment in order to compare the underpinnings of the NPA with reference to arguably the most entrenched liberal and capitalist Western body of law; the corporations law. In corporations law, a hostile corporate takeover occurs where there is an acquisition of a controlling interest in a target company by the purchasing company through the acquisition of a sufficient proportion of the target company's shares.[60] A hostile takeover of a company occurs where the Board of Directors of the target company do not agree to the takeover, however the shareholders accept an open tender offer (usually offered on the Australian

[57] In Queensland being the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).
[58] Native title rights in Torres Strait Islander communities may only attach to males via Ailan Kastom and Ailan Lore.
[59] *Torres Strait Islander Land Act 1991* (Qld).
[60] Butt, P.J, *Butterworths Concise Australian Legal Dictionary*, 3rd edition, Butterworths, Sydney, 2004.

Stock Exchange by the purchasing company at a higher price than market), resulting in a controlling interest being acquired by the purchaser. Hostile takeovers are regularly used to control market share by removing competitors. Hostile takeovers are effective because they target investor motivations, namely: -

1. maximisation of financial gain; and

2. minimisation of financial loss.

Each investor is aware that the open tender offer is often inflated (maximisation of financial gain), however they are further aware that if the offer is not accepted by them, but is accepted by the majority shareholders, the takeover will be effected which may result in the demise of the company and with it, the share value and investment of the investor (minimisation of financial loss). Shareholders may be prepared to reject the takeover bid and await greater fortunes through current management, however a missed opportunity to take a higher value may prove irresistible to the investor, particularly if the takeover seems almost certain.

The concept of corporate takeover adequately demonstrates the ideological premise of the NPA. On the one hand, government offers minimal financial incentive (compensation) and significant social incentive (to reduce the incidence of overcrowding in their communities and to provide new and improved housing for residents) to common law holders of native title, but on the other hand, requires the relinquishment of the traditional owners' 'stock' in the land, albeit temporarily. These dynamics are also propounded by the knowledge that if not accepted by them, the acquisition may proceed regardless under s24JAA. That said, when the native title is returned at some future time, it may not hold the same significance or value. The NPA epitomises the art of covert social coercion, effectively deflecting social responsibility from government to common law holders of native title who in refusing to proceed under the NPA, potentially condemn their communities to ongoing overcrowding and associated health and education implications, and associated misconceived public ridicule in 'failing to help oneself'.

NATIVE TITLE – A REGISTRABLE INTEREST UNDER TORRENS

It cannot be said that native title rights and interests in land or waters are recognised and protected by the common law in any real sense in Australia at present. One should not have to forfeit, surrender, suspend, or suppress, temporarily or otherwise, a determined communal usufructary interest in land recognizing a right of occupation which *"in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional land,"*[61] a right purportedly recognized and protected by the common law, in order to live how such traditional lore and kastom intended. Legal pluralism may only exist where there is a bona fide desire of government to develop and implement indigenous solutions to indigenous problems. This concept, for the purposes of land tenure, does not suggest infringement of the rule of law. Conversely, this simply means that government must consider departing from strict reliance on liberal individualism and embrace that which is unique to indigenous communities; community itself. Government should consider investing in communal living in indigenous communities consistent with the communal nature of native title rights and interests in the land. This statement is propounded by the fact that there is limited land in island communities to facilitate separate homes and limited money to maintain them.

[61] Supra, n 20.

It is settled law in Australia that native title exists where not extinguished. It is clear that communal fee simple title is recognised by the common law.[62] Native title is now codified in the NTA. The principle question then is whether native title is capable of being codified as an interest in land in its own right, capable of registration under the Torrens Title System in Australia. The Canadian Saskatchewan Court of Appeal decision of *James Smith Indian Band v Saskatchewan (Master of Titles)*[63] considered this issue in a Canadian context. In this case, the plaintiff's sought to register a caveat to protect a non-determined native title right in Canada. It was held that a caveat could only be registered over an "interest in land" and that native title could not be construed at law as an interest in land in Canada capable of maintaining a sufficient caveatable interest. In commenting on this decision, Paul Babie suggests with respect to native title in Australia, that *"native title is explicitly recognized as a sui generis interest in land. To support a caveat, Torrens systems require a caveator to demonstrate an interest in land. If native title is indeed an interest in land there is simply no good reason, in law or in logic, why that interest should not be given protection as such, both at general law and under a Torrens system."*[64] Babie makes this assertion on the basis of his assumed ability for claimants to lodge a caveat over unallocated state land prior to the determination of native title to protect native title rights and interests into the future from inconsistent grant and the effects of indefeasibility.[65]

It is asserted in this paper that not only is native title sufficiently defined as an interest in land so as to advance a caveatable interest, it is sufficiently defined so as to enable registration in its own right under the Torrens System upon determination. Any attempt by government to argue that native title does not provide a sufficient interest in land capable of conferring rights of communal 'ownership' of land in its own right as opposed to mere occupational rights, is unsustainable and grossly inconsistent with reference to the premise of the proposed grant of Torres Strait Islander Land in freehold in Queensland by it to facilitate communal indigenous ownership and management where native title is determined. Mabo can be distinguished from that of *James Smith Indian Band* in so far as it is well established that a recognition of native title interests in land in Australia will not override the Torrens system of land law, but can in fact co-exist. If it is said that the common law recognizes native title interests in land, then by extension such recognition must flow beyond the common law's mere ability to affect native title, to the common law's ability to protect native title by registration of such interests alongside other executive grants under the doctrine of tenure. Any other result is grossly illogical. It is suggested by Babie that *"all Torrens legislation will soon need legislative overhaul to take account of the recognition of native title within the hierarchy of interests in land."*[66] This proposition is premised on the assumption that a grant of a native title interest in land would remain subject to the radical title of the Crown obtained at annexation of sovereignty.

It is conceivable that the NTA could lead the way in this reform, legislatively prescribing that upon determination of native title, such determination would then be capable of registration with State and Territory land title offices, and protection and regulation by consistent legislative amendment to State and Territory property law statute. It is then conceivable that if native title itself were recognized as a registrable interest in land, it may be capable of maintaining encumbrance, for instance mortgage without reference to another common law estate in furtherance of communal self-sustainability. The scope or appropriateness of such a concept is beyond the scope of this paper. That said, this would also mandate a change in strategy by the public and private sectors in requiring security of tenure for exclusive use of

[62] Supra, n 45.
[63] (1995) DLR (4th) 280.
[64] Babie, P '*Case Note: James Smith Indian Band v Saskachewan (Master of Titles) – Is Native Title Capable of Supporting a Torrens Caveat?* (1995) 20 *Melbourne University Law Review* 588 at 595-596.
[65] Consider the principle of indefeasibility of title (Rice v Rice (1854) 2 Drew 73; 61 ER 646); supra note 26
[66] Supra, n 65 at 599.

land in indigenous communities and a review of rights of forfeiture under mortgages in instances of default over inalienable land without a market.

CONCLUSION

Native title is presently defined by reference to its ability to be affected by competing interests in land, rather than by way of protection and acknowledgment in its own right. Unfortunately, in a democratic liberal system of governance, public choice theory[67] prevails and political imperative drives the public policy agenda. In practice, political imperative exists where there is sufficient public pressure to bring about reform in exchange for sufficient votes for re-election. It is a reality that non-indigenous Australians retain dominance on the electoral roll. Equality as a recognition of difference is said to fundamentally offend ingrained liberal ideology and the rule of law.[68] Non-indigenous Australians fear native title as intruding on the non-indigenous way of life, with the Mabo decision sparking mass public outrage and media sensationalism in 1992 in fear of suburban backyards being reclaimed.[69] It is these significant social and political hurdles and cultural misunderstandings which will delay, if not prevent, the realization of legal pluralism in Australia. With the Liberal National Party now elected to overwhelming majority government in Queensland, promising major change and reform in the management of indigenous communities for self-regulation, it is disappointing that the State continues to support roll-out of indigenous home-ownership under the NPA and the grant of Torres Strait Islander Land in freehold in indigenous communities masked as self-determination.[70]

Government should commence employing bona fide strategies to apply indigenous solutions to indigenous problems, constructed from the ground up. It is asserted that such a concept need not offend the rule of law in a land tenure context.[71] Such would provide true legislative recognition of native title as a registrable interest in land under Torrens, supplemented by appropriate legislative protections.[72] It is an untenable position, 20 years on from Mabo, for government, in the knowledge of well-established judicial authority on the topic, to continue blindly developing and implementing misconceived public policy based on inconsistent liberal ideology in indigenous communities, for instance requiring the effective trade-off of determined *sui generis* native title interests in land in exchange for common law estates from foreign lands. The argument that communal ownership can only be conferred by the grant of a common law estate such as freehold, leasehold or otherwise, whether mimicking native title characteristics or not,[73] is exposed as a convenient excuse by government to maintain

[67] Supra, n 3 at 318 – 319. Bottomley and Bronitt suggest that bureaucrats inherently tend to follow their own interests rather than the broad public good as self-interested, rational and utility maximisers.
[68] Supra, n 48.
[69] Supra, n 37 at 471.
[70] Premier Campbell Newman MP, (speech delivered Tuesday 20 March 2012); the Hon. Glen Elmes, Minister for Aboriginal, Islanders and Multi-Cultural Affairs (speech delivered at Indigenous Leaders Conference, Cairns, Queensland on 24 May 2012).
[71] Native Title is an interest in land which cannot be conferred upon anyone other than indigenous traditional owners of land in Australia. Such a concept would not be anymore in breach of the rule of law if deemed registrable, than it already is under the NTA determination provisions.
[72] Albeit a quasi-legal pluralistic solution, that is the recognition and protection of determined *sui generis* interests in land (native title) by way of further codification under statute, codification of which is an inherently liberal concept (see NTA). It does not remedy the fundamental defect that the native title to be protected as a registrable interest in land under Torrens is a concept of common law origin, with traditional lore and kastom inspiration; not traditional lore and kastom itself (which is inherently incapable of codification). Any attempts to define or codify traditional lore and kastom immediately offend its aboriginality. As such, traditional lore and kastom is arguably incapable of recognition in its unrefined form in liberal society.
[73] For example, DOGIT.

the *status quo*; an excuse that is no longer sustainable in a polity committed to "Closing the Gap".[74]

[74] A commitment adopted by the Council of Australian Governments (COAG) and implemented via various National Partnerships, one of which is the NPA.