

# THE ABUSE OF INDIGENOUS LAND TENURE AS A TOOL OF SOCIAL ENGINEERING

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## I. INTRODUCTION

In recent years, there has been much speculation about the benefits of communal land ownership. Proponents for individual property rights claim that communal title has entrenched poverty and discouraged individual enterprise within Indigenous communities.<sup>1</sup> Their detractors, however, have argued that land tenure reform in itself is no answer to the underlying causes of socioeconomic disadvantage.<sup>2</sup> This paper will not consider the merits of such arguments. Rather, it takes the position that the debate over Indigenous land tenure is problematic because it masks the reality that Australian parliaments are yet to genuinely engage with the Indigenous land question.

To date, the recognition of Indigenous rights to land has been largely confined to remote areas, leaving the majority of Indigenous Australians without a land base. But even the minority who are able to benefit from native title and land rights regimes often find themselves in a legal quagmire, made all the more arduous by the reluctance of Australian parliaments to respond in a meaningful way to their claims.

This obstructive approach came to light when the Federal Court recognised the Noongar people's native title over Perth.<sup>3</sup> In spite of an expressed preference for mediated outcomes, both the State of Western Australia and the Commonwealth immediately announced their intention to appeal. The former Commonwealth Attorney-General, Philip Ruddock, went so far as to claim that the decision was untenable because it would block public access to beaches and parklands;<sup>4</sup> an assertion that appeared to have no foundation in Wilcox J's judgment.

This paper will argue that such ambivalence is part of an historical continuum. Throughout the past two centuries, Indigenous rights to land have been recognised, but only ever to the extent that such recognition has reinforced dispossession. Early colonial authorities made provision for land to be granted to, or for the benefit of, Indigenous people. Such gestures were neither compensatory nor attempts to recognise customary land titles, but incidental to European settlement. Consequently, early Indigenous property rights tended to be ad hoc and vulnerable to manipulation as tools of social regulation. This paper argues that contemporary Indigenous interests in land share those characteristics.

This paper is divided into six parts. Part II discusses 19<sup>th</sup> century Indigenous property rights. Part III draws commonalities between native title and early Indigenous interests in land. Part IV applies the same analysis to the *Aboriginal Land Act 1991* (Qld). Part V discusses the *Aboriginal and Torres Strait Islander Land Amendment Act 2008* (Qld).

## II. INDIGENOUS PROPERTY RIGHTS IN THE 19<sup>TH</sup> CENTURY

According to conventional legal thought, recognition of Indigenous rights to land is a creature of the late 20<sup>th</sup> century. While this is true in respect of land rights and native title regimes, it is only half the story of the history of Indigenous people's interaction with the construct of real property. Throughout the 19<sup>th</sup> century, practices of granting land to, or for

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1 Helen Hughes, *Lands of Shame* (2007) 45.

2 Jon Altman, Craig Linkhorn and Jennifer Clarke, 'Land Rights and Development Reform in Remote Australia' (Discussion Paper No 276, Centre for Aboriginal Economic Policy Research, 2005) 3.

3 *Bennell v Western Australia* [2006] FCA 1243.

4 'Native Title Could Lock Up Parks: Ruddock', *The Australian* (Sydney), 22 September 2006 <<http://www.theaustralian.news.com.au/story/0,20867,20456963-2702,00.html>> at 3 December 2008.

the benefit of, Indigenous people operated throughout Australia. In the minds of some colonial officials, Indigenous people's salvation was dependent upon the adoption of idealised attributes of the Europeans, such as agriculture and Christian marriage. Assimilation also offered the advantage of quelling resistance to dispossession.

This approach of pacification through assimilation was favoured by Governor Lachlan Macquarie. In 1816, he proclaimed that he would

always be willing and ready to grant small Portions of Land, in suitable and convenient Parts of the Colony, to such of them as are inclined to become regular Settlers and such occasional Assistance from Government as may enable them to cultivate their Farms.<sup>5</sup>

Coinciding with Macquarie's plan to transform Indigenous people into yeoman farmers was the establishment of the Blacktown Native Institution. Indigenous parents were told to relinquish their children to the Institution with the promise that they would be reunited at an annual event, always falling on 28 December.<sup>6</sup> The links between civilisation, land and Christian marriage were highlighted by an account of the celebration of two marriages at the Institution:

With the Reverend Richard Hill, secretary to the Native Institution, performing both ceremonies by special licence — Michael Yarringguy, an Aboriginal constable from Richmond, was married to Polly, and Robert (Bobby) Nurrangingy ... to Betty Fulton. Two members of the committee gave the girls away, and the rest of the students attended the ceremony. Shortly after the marriages, the two couples set off, accompanied by the deputy surveyor-general, to have their respective farms beside Richmond Road measured. There, in a short time, comfortable huts would be erected and furnished with the necessary fittings, and supplied with domestic and farming utensils. Each family would be allocated 10 acres (4 ha) of land and given a cow, all provided at the government's expense.<sup>7</sup>

As European settlement progressed, Aboriginal reserves were created throughout Australia. Some commentators have pointed out that the original purpose of the reserves was compensation, which had its origins in the British anti-slavery movement.<sup>8</sup> However, in the eyes of the settlers, Aboriginal reserves were born out of benevolence rather than entitlement. Consequently, they could be revoked in order to accommodate settler demands.<sup>9</sup>

The impacts of the civilisation project were gendered. Indigenous women were alternatively caricatured as jezebels and the insipid chattels of black men.<sup>10</sup> In some instances, there were attempts to 'save' Indigenous women by solemnising interracial unions and, once again, land played an integral role. Between 1848 and the 1900s, plots of Aboriginal reserve lands in South Australia were granted to Aboriginal women who married European men. What began as an informal policy matured into the (*Aboriginal Marriage*) *Licence to Occupy Waste Lands of the Crown*. Mandy Paul and Robert Foster have described the rationale behind such interests:

The (almost literally) paternal state provided Aboriginal women with a dowry to encourage marriage, to a non-Aboriginal person, and through it settlement of the land and the 'civilisation' of its people.<sup>11</sup>

The first was granted to one Kudnarto, who married an English shepherd, Thomas Adams, in 1848. The licence was granted in order to 'encourage the adoption of settled habits and

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5 Jack Brook and Jim Kohen, *The Parramatta Native Institution and the Black Town* (1991) 33.

6 Jane Lydon, 'Men in Black: The Blacktown Native Institution and the Origins of the Stolen Generations' in Jane Lydon and Tracy Ireland (eds), *Object Lessons: Archaeology and Heritage in Australia* (2005) 201, 202.

7 Brook and Kohen, above n 5, 83.

8 Henry Reynolds, *The Law of the Land* (1987).

9 Peggy Brock and Doreen Kartinyeri, *Poonindie: The Rise and Destruction of an Aboriginal Agricultural Community* (1989).

10 Hannah Robert, 'Disciplining the Female Aboriginal Body: Inter-racial Sex and the Pretence of Separation' (2001) 16(34) *Australian Feminist Studies* 69.

11 Mandy Paul and Robert Foster, 'Married to the Land: Land Grants to Aboriginal Women in South Australia 1848-1911' (2003) 34(121) *Australian Historical Studies* 48, 56.

civilized usages.<sup>12</sup> Aboriginal marriage licences could be revoked for bad behaviour or upon the death of the wife. In the case of Kudnarto's licence, the land reverted to the Crown upon her death in 1855. Finding himself destitute, her widower placed their children into an institution.<sup>13</sup>

There was an element of Indigenous agency to the civilisation project. Some groups petitioned colonial authorities for land, presumably in order to overcome their dispossession and impecuniosity. For example, Aboriginal people of Cumeragunja petitioned for 'a sufficient area of land to cultivate and raise stock ... that we may form homes for our families ... and in a few years, support ourselves by our own industry.'<sup>14</sup> Such gestures were often fruitful, with 32 Aboriginal reserves being created in New South Wales between 1861 and 1884.<sup>15</sup> However, like the Aboriginal marriage licences, such interests were vulnerable to revocation. At the turn of the 20<sup>th</sup> century, many Aboriginal farmers found themselves dispossessed once again, by not only neighbouring usurpers, but also the Aborigines Protection Board. In Cumeragunja, for example, lands that Aboriginal people had farmed for two decades were seized by the Board in 1907.<sup>16</sup>

By the time the farmers of Cumeragunja were dispossessed, protectionism had become the dominant paradigm in Indigenous policy. Although protectionism originated in Victoria, the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) was the most popular model for Australian protectionist legislation.<sup>17</sup> As a consequence of this Act, all Indigenous people in Queensland were deemed to be wards and as such became vulnerable to removal to isolated reserves, where they were detained indefinitely. Once incarcerated, most aspects of their lives, including employment, marital status and even child rearing, were subject to official regulation.<sup>18</sup>

One of the few decisions to consider the nature of Indigenous interests in land during the protectionist era was *Bray v Milera*.<sup>19</sup> The regulations of the *Aborigines Act 1911* (SA) empowered the Chief Protector to remove an Indigenous person from any institution if he was of the opinion that the individual's presence was 'inimical to the maintenance of discipline or good order'. The Chief Protector issued a notice to Milera forbidding him to be in any Indigenous institution in South Australia.

Milera argued unsuccessfully that the regulations were ultra vires and deprived him of natural justice. The brief judgment of the South Australian Supreme Court makes few references to the facts, but one paragraph illustrates the precariousness of life as a ward:

Mr Penhall, the Protector of Aborigines for the Central District, was called. He said that he was acquainted with the Point Pearce Mission Station; that the respondent was occupying a cottage there with his family, and was employed on the station when there was work available; that the buildings on the station are Government property, and the Superintendent of the station allots the cottages, and can eject the occupants at will; that they are not granted any lease, not even a weekly or daily tenancy. I see no reason to suppose that any aboriginal or half-caste inhabitant, as such, has any right to be in an institution. Having regard to the nature of the places coming within the definition of "aboriginal institution" and to the term "institution" itself, it does not seem likely that the aboriginals and half-castes in them would, as such, be more than bare licensees.<sup>20</sup>

In summary, 19<sup>th</sup> century Indigenous property rights existed primarily to serve European settlement. As a consequence, they were ad hoc and invariably expired when the land was required by Europeans. Once Indigenous resistance to dispossession had been broken and protectionism entrenched, Indigenous property rights disappeared into the ether of history.

12 Ibid 55.

13 Ibid 56.

14 Heather Goodall, *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1970-1992* (1996) 77.

15 Ibid 85.

16 Ibid 126.

17 John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (1997) 39.

18 Rosalind Kidd, *The Way We Civilise* (1997).

19 [1935] SASR 210.

20 Ibid 216.

### III. THE NATIVE TITLE ACT 1993 (CTH)

The invisibility of Indigenous rights to land was maintained during the assimilation era and it was not until the advent of the Whitlam Government that there was significant change. Whitlam's election promise of national land rights legislation culminated in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA'). The ALRA transferred ownership of former reserves to Aboriginal land trusts and established a process for Aboriginal people in the Northern Territory to claim freehold title over Crown lands. Although the ALRA would result in almost half of the Northern Territory being returned to Indigenous ownership, national land rights legislation never became a reality.

At the State level, land rights regimes began to emerge in the 1960s. These developments were followed by the enactment of the *Native Title Act 1993* (Cth) ('NTA'); the Commonwealth's response to *Mabo v State of Queensland*.<sup>21</sup> Together with the ALRA and State land rights regimes, the NTA forms the matrix that is the foundation for contemporary Indigenous interests in land.

Essentially, the *Mabo* decision recognised the continuing existence of native title as a burden on the Crown's radical title. The concept of a radical or ultimate title arose as a result of both the acquisition of sovereignty and the doctrine of tenure. Upon the change in sovereignty, the Crown became the Paramount Lord of all who held an interest in land in the colony. The radical title enabled the Crown to grant interests in land to others, and for itself to acquire an absolute beneficial interest in land. But the Crown's radical title did not in itself extinguish the native title of the Indigenous inhabitants.<sup>22</sup> This watershed decision has been described as Australia's version of *Brown v Board of Education* because it forced the nation to confront its history of brutal repression of a racial minority.<sup>23</sup> That similar aspirations were held for the NTA was evident in Prime Minister Paul Keating's second reading of the *Native Title Bill*:

For today, as a nation, we take a major step towards a new and better relationship between Aboriginal and non-Aboriginal Australians. We give the indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent, the standing they are owed as seminal contributors to our national life and culture ... and the standing they are owed as victims of grave injustices, as people who have survived the loss of their land and the shattering of their culture ... Today we offer a modicum of justice to indigenous Australians because we have reached an understanding of their experience—and our responsibility. Today we move that much closer to a united Australia which respects this land of ours, values the Aboriginal and Torres Strait Islander heritage and provides justice and equality for all.<sup>24</sup>

Those ambitions would remain largely unfulfilled by the NTA. Popular culture, epitomised by films such as *Crocodile Dundee*, commonly positions Indigenous people in the exotic and sparsely populated outback. In reality, however, the majority reside in Australia's major cities, with only 24 per cent of the Indigenous population located in remote and very remote areas.<sup>25</sup> These facts find little reflection in the NTA because, to date, the recognition of native title has been concentrated in northern Australia.<sup>26</sup>

21 (1992) 175 CLR 1.

22 Ibid [50] – [51] (Brennan J).

23 Dan Tarlock, 'Australian and United States Law of Aboriginal Land Rights: A Comparative Perspective' (1998-1999) 1 *Vermont Journal of Environmental Law* <<http://www.vjel.org/journal/VJEL10002.html>> at 3 December 2008.

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2877 (Paul Keating, The Prime Minister).

25 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006* (2007) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4705.0Main+Features12006?OpenDocument>> at 3 December 2008.

26 National Native Title Tribunal, *National Maps: Determinations of Native Title* (2008) <<http://www.nntt.gov.au/Publications-And-Research/Maps-and-Spatial-Reports/Pages/National-Maps.aspx>> at 3 December 2008.

In the main, the Act preserved the immense power imbalance between Australian parliaments and Indigenous communities. The *NTA* purports to protect native title by way of s 11(1), which provides that ‘Native title is not able to be extinguished contrary to this Act.’ However, the protection offered by s 11(1) is meagre in light of the future act regime. A ‘future act’ is an act that may impact upon the enjoyment of native title.<sup>27</sup> Part 2, Division 3 prescribes conditions for the validity of future acts which, for the most part, allow minimal procedural rights for native-title holders. By way of example, native-title holders only have a right to comment on legislation relating to the management of water and airspace.<sup>28</sup>

The inferiority of 19<sup>th</sup> century Indigenous property rights finds resonance in the extinguishment and validation provisions of the *NTA*, that give primacy to virtually all other interests in land over native title. That native title occupies the lowest rung on the hierarchy of Australian property rights is borne out by provisions concerning ‘previous exclusive possession acts’ (‘PEPA’). If an interest falls within the definition of a PEPA, it is deemed to have extinguished native title.<sup>29</sup> The definition includes interests listed in the first schedule of the Act.<sup>30</sup> Among them are leases granted under the *Land Act 1994* (Qld) for the purposes of mere recreational pursuits, such as archery clubs and basketball clubs.<sup>31</sup>

For the minority of Indigenous Australians whose native title may still exist, the processes for recognition are rigorous and painfully slow. The unwieldiness of the native title system attracted the censure of McHugh J in *Western Australia v Ward*:

At present the chief beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits.<sup>32</sup>

#### *A. The Test of Continuity of Traditional Connection*

The historical use of Indigenous interests in land as tools of social regulation finds resonance in the test of continuity of traditional connection. The test is rooted in the definition of native title in s 223 of the *NTA*, which relevantly provides:

- (1) The expression native title ... means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
  - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
  - (c) the rights and interests are recognised by the common law of Australia.

In *Members of the Yorta Yorta Aboriginal Community v Victoria*,<sup>33</sup> the majority of the High Court interpreted ‘traditional laws’ and ‘traditional customs’ as those of the society that existed prior to the acquisition of British sovereignty.<sup>34</sup> In order for native title claimants to satisfy the test, they must establish that their traditional laws and traditional customs have been practiced continuously since the change in sovereignty.<sup>35</sup>

<sup>27</sup> *Native Title Act 1993* (Cth) s 233.

<sup>28</sup> *Native Title Act 1993* (Cth) s 24HA(7)(b).

<sup>29</sup> *Native Title Act 1993* (Cth) s 23C(1).

<sup>30</sup> *Native Title Act 1993* (Cth) s 23B(2)(c)(i).

<sup>31</sup> *Native Title Act 1993* (Cth) sch 1 pt 3, s 21(9).

<sup>32</sup> *Western Australia v Ward* [2002] HCA 28 [561] (McHugh J).

<sup>33</sup> [2002] HCA 58.

<sup>34</sup> *Ibid* [43] - [44] (Gleeson CJ, Gummow and Hayne JJ).

<sup>35</sup> *Ibid* [47].

Application of the test necessarily involves intense scrutiny of the beliefs and actions of native title claimants and their ancestors, which is problematic for various reasons.

Only those whose ancestors escaped the carnage of invasion and then protectionism are likely to be able to satisfy the test, creating arbitrary distinctions between Indigenous people. The test also dehumanises native title claimants because the scope of customs and traditions considered is so wide that it can extend to matters of great sensitivity. For example, in the *Single Noongar Claim*, the Court received evidence on customs and traditions relating to marriage, burial, religious beliefs and male circumcision.<sup>36</sup> Arguably, it is necessary for Courts to consider such matters because of their nexus with the rules pertaining to land ownership in Indigenous societies. However, it is difficult to imagine a contest over non-Indigenous property rights ever hinging upon such an invasive examination.

In common with early Indigenous interests in land, the test buttresses dispossession in two ways. Firstly, the test accommodates popular myths that ‘real’ Aborigines live only in remote locations, effectively erasing the claims of urban Indigenous communities from the public consciousness. Secondly, by placing the actions of native title claimants and their ancestors under the microscope, the test enables those of colonial authorities to escape scrutiny. Such an approach replaces the fiction of terra nullius with another that is equally accommodating of Indigenous dispossession. Most notoriously, a petition seeking land that was signed by the Yorta Yorta people’s ancestors, in which they claimed to have abandoned ‘the old ways’, was interpreted as confirmation of the cessation of their traditional law and custom. The desperate circumstances of the petitioners were irrelevant.<sup>37</sup>

#### IV. THE ABORIGINAL LAND ACT 1991 (QLD) (‘ALA’)

In common with the *NTA*, the *ALA* emerged as a result of a seismic event in Australian history. After three decades in the political wilderness, the Queensland Labor Opposition seized power from the Coalition in 1989. Two years later, the Goss Labor Government delivered its election promise of land rights legislation with the enactment of the *ALA*. The development of the legislation was controversial primarily because consultation with Aboriginal stakeholders had been minimal. In contrast, the Queensland Cabinet Office consulted extensively with representatives of the mining and pastoral sectors whose interests were largely contained from the legislation.<sup>38</sup> As parliamentarians were deliberating on the legislation, Aboriginal people engaged in heated protests outside.

The Preamble of the *ALA* refers to Parliament’s intention to ‘foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland.’ Under the Act, Aboriginal reserve lands and other lands held for the benefit of Aboriginal people became ‘transferable’ with the aim that inalienable freehold titles would be granted to Aboriginal land trusts.<sup>39</sup> Available Crown land could also be declared ‘claimable’ by regulation.<sup>40</sup>

Since the enactment of the *ALA*, 1.1 million hectares of transferable land have been granted to Aboriginal land trusts.<sup>41</sup> Some 2500 hectares of claimable land have also been granted.<sup>42</sup> Those lands have been located almost exclusively in north Queensland.<sup>43</sup> In

36 *Bennell v Western Australia* [2006] FCA 1243.

37 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 [119] – [121] (Olney J).

38 Roy Tatten and Djinbah, ‘Queensland Land Rights — An Illusion Floating on Rhetoric’ (1991) 2(52) *Aboriginal Law Bulletin* 13.

39 *Aboriginal Land Act 1991* (Qld) pt 2 div 3.

40 *Aboriginal Land Act 1991* (Qld) s 18(1)(a).

41 Queensland Government, Department of Natural Resources and Mines, *Discussion Paper: Review of the Aboriginal Land Act 1991 (Qld)* (2005) 2.

42 *Ibid.*

43 See map at Queensland Government, Department of Natural Resources and Water, *Land Trusts Established Under the Aboriginal Land Act 1991 and the Torres Strait Islander Land Act 1991 as at 29 February 2008* <<http://www.nrw.qld.gov.au/nativetitle/pdf/land/landtrustsmap.pdf>> at 3 December 2008

common with the *NTA*, the *ALA* has had no real impact on the lives of the majority of Indigenous people in Queensland, who live in urban areas. Crown land in towns and cities cannot be declared claimable,<sup>44</sup> and transferable land is unlikely to exist outside of the former missions and settlements established during the protectionist era.

## V. THE *ABORIGINAL AND TORRES STRAIT ISLANDER LAND AMENDMENT ACT* 2008 ('*ATSILA*')

In May 2008, the Queensland Parliament passed the *ATSILA*. The object of the Act is 'to improve the lives of Indigenous Queenslanders, through Indigenous land tenure reform.'<sup>45</sup> The predominant means of achieving this object is the creation of a property market through long-term leases. Members of Aboriginal communities will now be able to purchase leases over Aboriginal lands for private residential purposes,<sup>46</sup> or other purposes as determined by the Minister.<sup>47</sup> Governments may also acquire 99-year leases for the purpose of providing social housing, infrastructure and accommodation for public servants.<sup>48</sup> Non-Indigenous entities will also be able to secure long-term commercial leases over Aboriginal lands.<sup>49</sup>

Although the object of the Act presumably encompassed all Indigenous people in Queensland, the amendments did not address the inability of Aboriginal communities in urban and metropolitan areas to gain land under the *ALA*. In common with earlier Indigenous property rights, the *ALA* has always fallen short of being a comprehensive response to dispossession.

In common with earlier Indigenous property rights, Aboriginal people are being encouraged to adopt an idealised attribute of mainstream society — home ownership — and presumably, the qualities of the ideal mortgagee, such as financial prudence, individualism and the protestant work ethic. But unlike the mainstream property market, the *ALA* leaves little room for choice. In fact, the process of acculturation is to be micromanaged by the State. By way of example, a lease for private residential purposes must be for 99 years.<sup>50</sup> The consideration, which will be a lump sum payment equivalent to the value of the land, is to be determined by a valuation methodology selected by the chief executive and the benchmark purchase price as prescribed by regulation.<sup>51</sup>

The State's micromanagement of discrete Indigenous communities extends from the accumulation of property to what actually goes on inside private dwellings. The *ATSILA* was only one element of a legislative package designed to transform social norms in Indigenous communities. Others were the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008* (Qld) ('*ATSIJLAA*') and the *Family Responsibilities Commission Act 2008* (Qld) ('*FRCA*').

The *ATSILA* and the *ATSIJLAA* were not only passed on the same day, but were also considered in the same parliamentary debate.<sup>52</sup> The *ATSIJLAA* is concerned primarily with the tightening of alcohol restrictions in discrete Indigenous communities in north Queensland. Alcohol Management Plans were introduced in those communities in 2002. A review last year found that in spite of the Plans, the communities still experienced high rates of alcohol-related harm, hence additional measures in the legislation that are designed to secure enforcement of alcohol restrictions.<sup>53</sup> It is beyond the scope of this paper to discuss the *ATSIJLAA* in any depth. Of relevance to this paper is the extension of alcohol

44 *Aboriginal Land Act 1991* (Qld) s 19(1)(b).

45 Explanatory Notes, *Aboriginal and Torres Strait Islander Land Amendment Bill 2008* (Qld) 1.

46 *Aboriginal Land Act 1991* (Qld) ss 40D(1)(a), 40E(1)(a).

47 *Aboriginal Land Act 1991* (Qld) ss 40D(1)(a), 40E(1)(b).

48 *Aboriginal Land Act 1991* (Qld) ss 40D(1)(b), 40E(2)(a).

49 *Aboriginal Land Act 1991* (Qld) s 40D(1)(c).

50 *Aboriginal Land Act 1991* (Qld) s 40J(1)(a)(i).

51 *Aboriginal Land Act 1991* (Qld) s 40J(1)(iii).

52 Queensland, *Parliamentary Debates*, Legislative Assembly, 13 May 2008, 1520.

53 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 April 2008, 1243 (Lindy Nelson-Carr, Member for Mundingburra).

restrictions to private dwellings; a step that would never be contemplated in mainstream suburbs. Of particular concern are amendments to the *Police Powers and Responsibilities Act 2000* (Qld) that will enable police officers to conduct searches of private dwellings without first obtaining warrants.<sup>54</sup>

The *FRCA* was passed by the Queensland Parliament in April 2008. Its objects include the restoration of 'socially responsible standards of behaviour' in discrete Indigenous communities in north Queensland.<sup>55</sup> They are set to be achieved through the establishment of the Family Responsibilities Commission.<sup>56</sup> The Commission has the powers that are 'necessary or convenient' to discharge its functions.<sup>57</sup> Its authority over welfare recipients will be triggered by events that include the breach of a residential tenancy agreement.<sup>58</sup>

The nexus between morality and reverence for the home is one in which 19<sup>th</sup> century Indigenous property rights find particular resonance. There is also an echo of the historical surveillance of the Indigenous domestic sphere that characterised the protectionist era. For example, if a lessor believes that rental premises are being used for an illegal purpose, the lessor must provide a notice to the Commission.<sup>59</sup> It is not clear what amount of proof is required for the lessor to form the requisite opinion and it is possible that a visit by a relative with a criminal history would suffice.

On the one hand, it is commendable that the Queensland Parliament has responded to problems that have been exacerbated, if not caused, by prolonged neglect of Indigenous communities. However, there is an element of social engineering to the reforms. Like the Blacktown Native Institution, discrete communities have become laboratories for attempts to transform the fabric of Indigenous societies and, once again, land will play an integral role.

In common with earlier Indigenous property rights, the above legislative package surreptitiously reinforces Indigenous dispossession in two ways. Firstly, the ultimate outcome of the package is the merging of Indigenous communities into the mainstream and the corresponding loss of their cultural distinctiveness. Secondly, it conveniently overlooks the majority of Indigenous people, who live in urban areas. Such schemes give the illusion that the Indigenous land question has been resolved and, therefore, remain attractive to Australian parliaments.

## VI. CONCLUSION

Throughout our shared history, the measure of recognition of Indigenous entitlement has always been compatibility with the interests of the colonisers. In the 19<sup>th</sup> century, Indigenous property rights were incidental to European settlement; whether by transforming Indigenous men into farmers, or encouraging interracial marriage. In common with their forebears, contemporary Indigenous interests in land remain ad hoc and vulnerable to manipulation as tools of social regulation. The test of continuity of traditional connection is an exercise in diagnosing 'real' Aborigines, while rendering those in urban areas invisible. Reforms embodied by the *ATSILA* are part of a larger project to transform social norms in Indigenous communities. No doubt some individuals will sincerely embrace 99-year leases and more power to them for doing so. However, scattered pockets of Indigenous mortgagees will never be a substitute for meaningful engagement with the Indigenous land question. After 220 years, the nation's oldest elephant in the corner can no longer be ignored.

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54 *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008* (Qld) pt 7.

55 *Family Responsibilities Commission Act 2008* (Qld) s 4(1)(a) and Dictionary for definition of 'welfare reform community area'.

56 *Family Responsibilities Commission Act 2008* (Qld) s 4(2).

57 *Family Responsibilities Commission Act 2008* (Qld) s 11(1).

58 *Family Responsibilities Commission Act 2008* (Qld) s 44.

59 *Family Responsibilities Commission Act 2008* (Qld) s 44(1)(a).