Submission into the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Native Title Amendment Bill 2012

By

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Thank you for your email invitation of December 2012 to make submission to this Inquiry into the Native Title Amendment Bill 2012 and for granting us an extension to lodge a brief late submission.

By way of background, one of us made an earlier submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Native Title Amendment (Reform) Bill 2011 that addressed several issues that are covered in the current Inquiry. We draw attention to that submission to provide background to a number of the observations we make here.[1]

Since November 2012 we have collaborated on an ongoing research project, currently at an early stage of development, that is looking to deploy the latest available official information and GIS techniques to update understanding of Indigenous land holdings nationally. Using this new data set, we are not only analyzing the extent of these diverse forms of tenure nation-wide but also using a series of resource atlas and mining and mineral deposit datasets to better understand their composition. We plan to link this spatial land ownership information with statistics from the latest 2011 Census, although to date our research has focused on population only.

In the following submission we do two things. First we provide a small number of our work-in-progress maps, one table and one diagram. While this information is preliminary we think it provides important context for understanding land rights and native title today and into the future. Second, we provide a very brief interpretation of this 'big picture' information to consider two of the major proposals in the current Bill: first that historical extinguishment of native title in parks and reserves dedicated for the preservation of the natural environment be disregarded when there is agreement to do so between parties, presumably Commonwealth and State/Territory environmental agencies and registered native title claimants; and second that the right to negotiate provisions in the Bill be strengthened.

Your Inquiry's terms of reference seek an assessment whether a sensible balance has been struck in the Bill between the views of various stakeholders. In the second part of our submission we make some observations based on the mapping work that we have undertaken on this issue; ultimately though questions of sensible balance are political and

[1] available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/native_title_three/submissions.htm as submission No. 16 and as CAEPR Topical Issue No 10/2011 http://caepr.anu.edu.au/sites/default/files/Publications/topical/TI2011_10_Altman%20NTA.pdf.

based on value judgments; we add our perspective as university-based researchers to those of other interest groups some with a more direct pecuniary interest in eventual statutory amendments than us.

We note at the outset that the two issues we address are potentially in conflict, one focused on the conservation of the natural environment and the extension of native title interests onto the parts of the conservation estate where there has been past extinguishment; the other looking to streamline the future acts regime for extraction of minerals from lands where native title interests are legally recognised in Australian law.[2] Our overarching framework for addressing this potential conflict is encapsulated in the hybrid economy framework that one of us (Altman) has developed and deployed over the past decade. This framework both theorises and empirically demonstrates that the economy on lands held by Indigenous interests is made up of three interlinked sectors, the market, the state and the customary.[3] This framework demonstrates that both market or capitalist and customary or non-capitalist forms of production that might encapsulate both nature conservation and resource extraction might provide pathways to Indigenous employment, enterprise and productive activity and eventual improved socioeconomic circumstances.

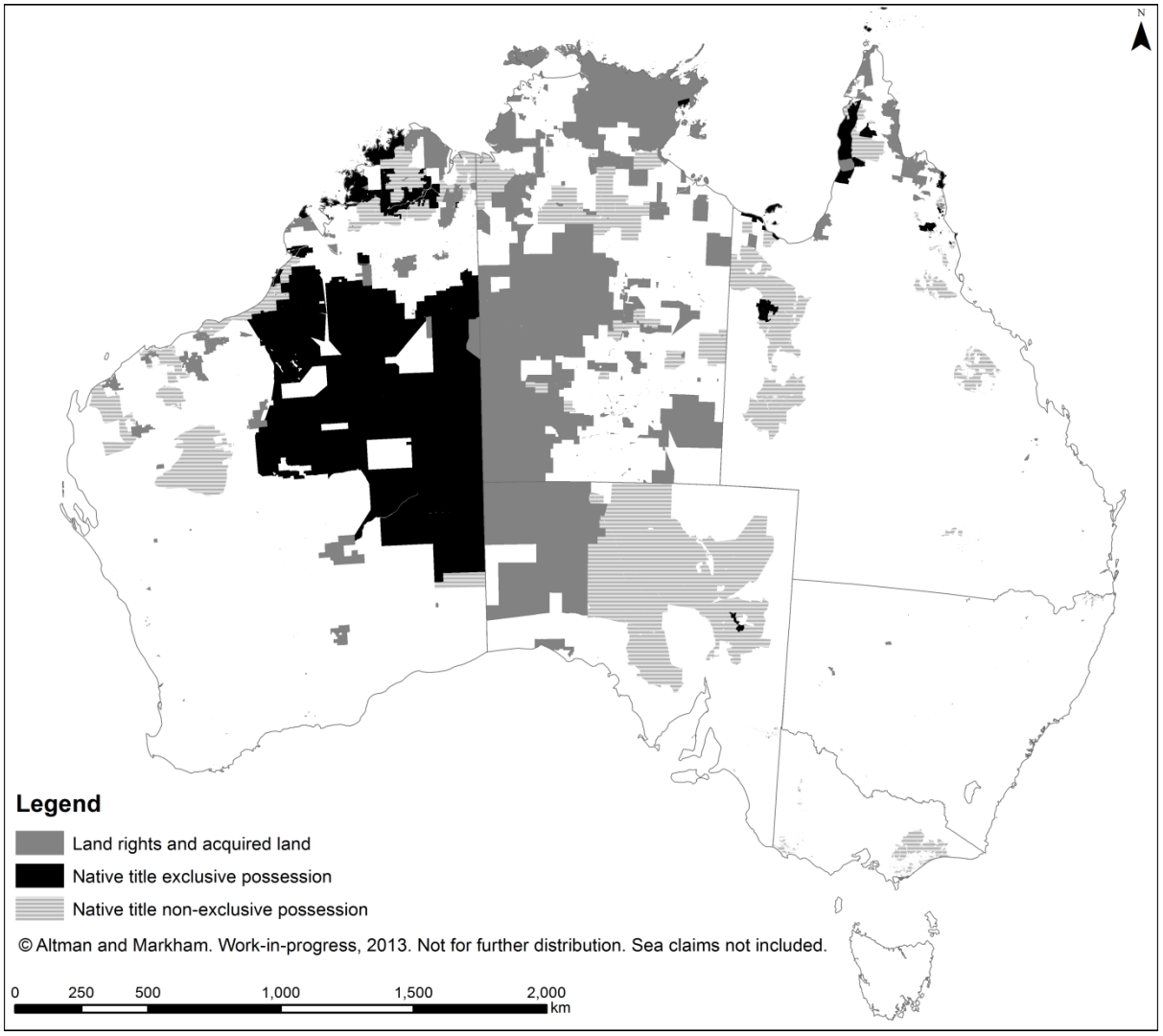
Maps and spatial information

In Map 1 we show Indigenous land holdings as we are best able to currently determine. In this map we distinguish three forms of land tenure: land claimed or scheduled under a series of Commonwealth and state land rights laws or acquired with Commonwealth funding; native title lands where there have been determinations of exclusive possession as at October 2012; and native title lands where there has been determination of non-exclusive possession. To summarise this map briefly, our current best estimate is that land rights laws and acquisitions have delivered over 938,000 km^2 to Indigenous traditional owners[4]; 79 determinations of exclusive possession total over 715,000 km^2 and 126 determinations of non-exclusive possession that provide highly variable rights (shared with other interests, often commercial pastoralism) over 717,000 km^2. While there is some overlap between these categories, these have been removed for accounting purposes in the estimated land areas presented here, giving a total area of land either acquired through land rights or any form of native title of 2,371,000 km^2, or 31% of Australia's landmass.

[2] This issue has been recently discussed in a book chapter by Jon Altman 'Land rights and development in Australia: caring for, benefiting from, governing the indigenous estate' in Lisa Ford and Tim Rowse (eds) *Between Indigenous and Settler Governance*, Routledge, London, 2013: 121–134.)

[3] *The Hybrid Economy Topic Guide* by Susie Russell (CAEPR, Australian National University, 2011) is available at http://caepr.anu.edu.au/sites/default/files/cck_misc_documents/2011/06/Hybrid%20Economy%20Topic%20Guide_2.pdf.

[4] The compilation of lands in this category is a work-in-progress and is an under-estimate, and thus should be considered as a baseline. For example, the current data set excludes most properties acquired under the *Aboriginal Land Rights Act 1983* (NSW) and land rights legislation in Victoria, Tasmania and the ACT (Jervis Bay). Further, many properties acquired under historic and current Commonwealth schemes by bodies such as the Indigenous Land Corporation, Aboriginal and Torres Strait Islander Commission, Aboriginal Land Fund Commission, Aboriginals Benefit Account and Aboriginal Development Corporation are also excluded from this work-in-progress calculation.

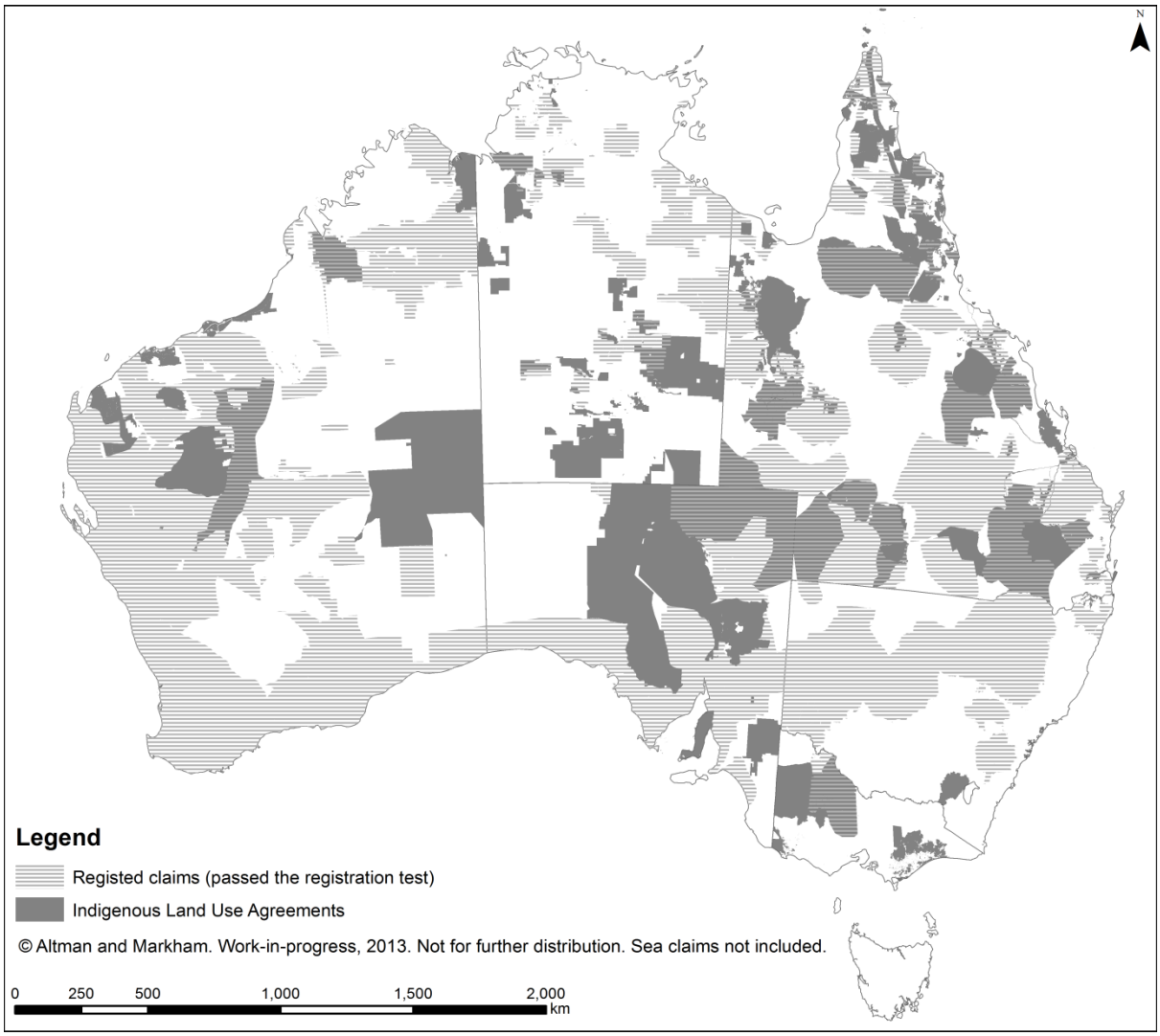


Map 1: Indigenous land holdings, 2012. The *Land rights and acquired land* category is a work-in-progress and known to be incomplete, especially in New South Wales, Western Australia, Victoria, Tasmania and Jervis Bay and thus should be considered a baseline or minimum land holding. Native title determinations data courtesy of National Native Title Tribunal. Land rights and acquired lands data courtesy of Geoscience Australia, Australian Bureau of Statistics, NT Department of Lands and Planning, and QLD Department of Natural Resources and Mines.

In Map 2 we show Indigenous land interests in 699 Indigenous Land Use Agreements (ILUAs) as at November 2012 that cover 1,599,000 km^2 and 322 registered native title claims that cover 3,171,000 km^2. We make three observations here.

First, while ILUAs can include diverse negotiated rights and interests for Indigenous groups, in general they represent a weaker form of property than land rights or native title determinations. Second, while it is impossible to speculate on how many registered claims will lead to successful determination, native title has been found to be extinguished in only 4% of the land area claimed and determined to date. This may be in part because most determinations of exclusive possession have been over unalienated Crown land or Aboriginal reserves, mostly in Western Australia. Third, significant overlap exists between ILUAs, registered claims and other forms of Indigenous land interest, meaning that merely summing the land areas involved will lead to a significant over-estimate of the size of a future Indigenous estate.

In Maps 3 to 7 we overlay a template of the strongest forms of Indigenous land tenure (land rights and exclusive possession) over a series of resource atlas maps. This experimental method was first trialed in 2007,[5] but is presented here in a more sophisticated manner that not only uses GIS techniques, but also presents the latest information available. We recognize that our focus on these two forms of tenure that we have termed 'the Indigenous estate' in other contexts is subjective, but it nevertheless reflects jurisdictions where as a general rule Indigenous people with land interests can exercise greatest leverage over what happens to their land.

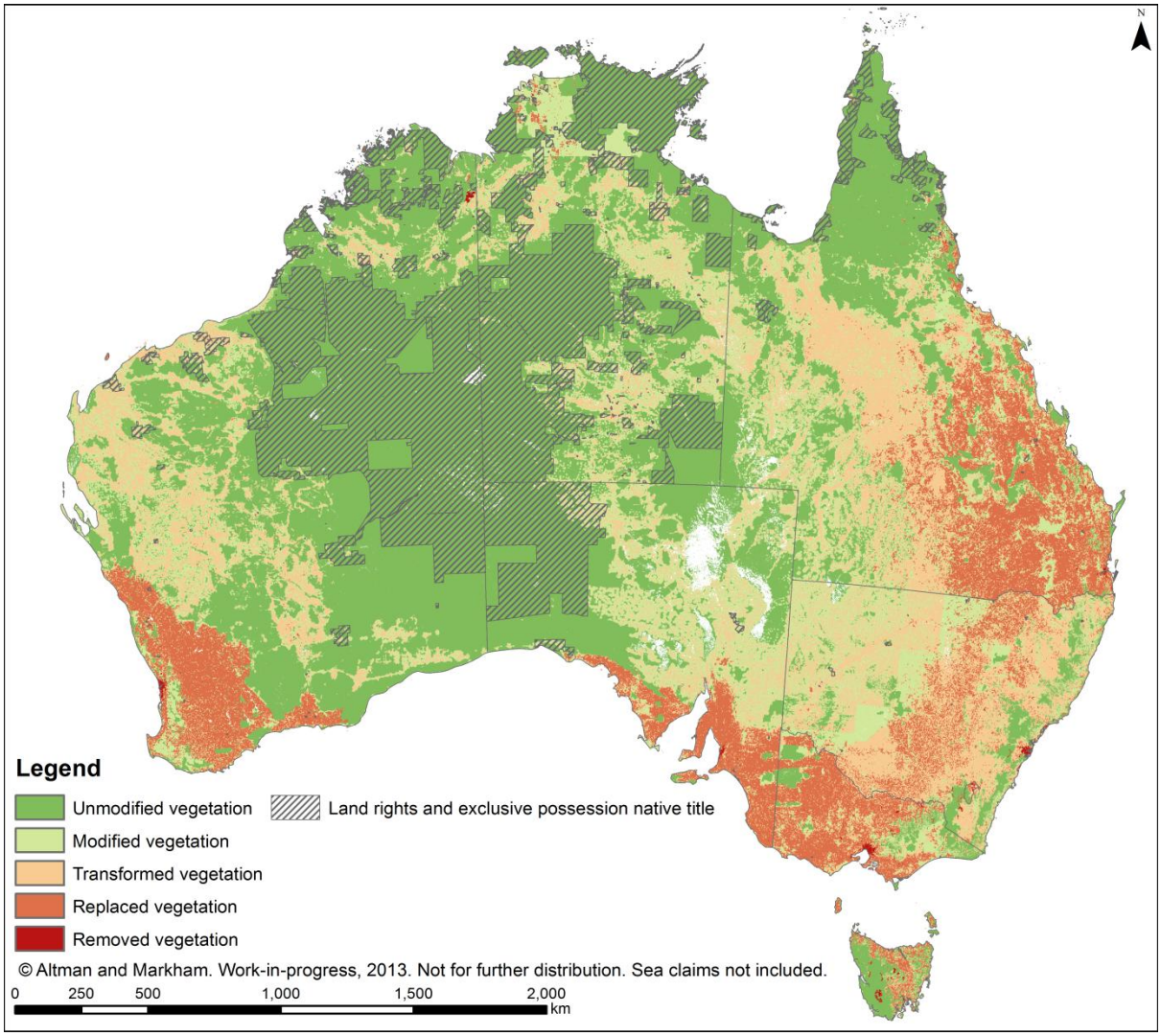


Map 2: Indigenous Land Use Agreements and Native Title claims that have passed the registration test, 2012. Data courtesy of the National Native Title Tribunal.

In Maps 3 and 4 we focus on native vegetation condition and threatened species data produced by the Commonwealth Bureau of Rural Sciences and the Department of

[5] Altman, JC, Buchanan, G and Larsen L (2007) 'The environmental significance of the Indigenous estate: Natural resource management as economic development in remote Australia', *CAEPR Discussion Paper 286/2007* available at http://caepr.anu.edu.au/sites/default/files/Publications/DP/2007_DP286.pdf viewed 11 February 2013.

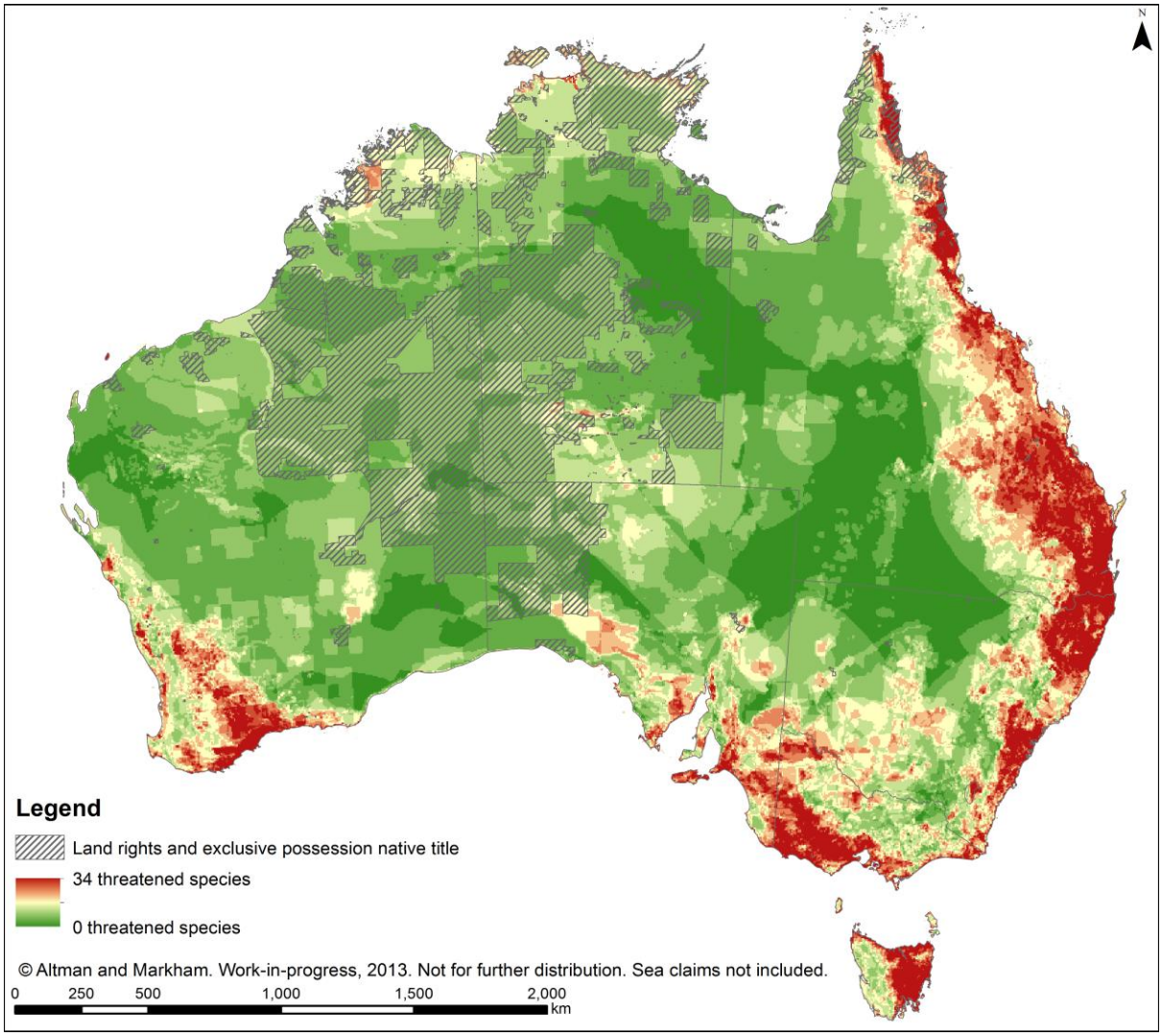
Sustainability, Environment, Water, Population and Communities respectively. One can certainly quibble about the terminology used in these resource atlas maps,[6] but the key points of these two maps is to visually demonstrate the high conservation value of Indigenous land: Map 3 shows limited modification in vegetation on Indigenous land holdings and Map 4 the relatively low threatened species count. As has been emphasized in some detail elsewhere, while Indigenous land holdings are in sound environmental condition, they are far from threat free, especially from invasive species.[7]



Map 3: Vegetation disturbance (2006) and Indigenous land holdings (2012). Vegetation disturbance data is courtesy of the Bureau of Rural Sciences Vegetation Assets, States and Transitions (VAST) v2. Indigenous land holdings data is a work-in-progress and known to be incomplete, especially in New South Wales, Western Australia, Victoria, Tasmania and Jervis Bay and thus should be considered a baseline or minimum land holding. Native title determinations data courtesy of National Native Title Tribunal. Land rights and acquired lands data courtesy of Geoscience Australia, Australian Bureau of Statistics, NT Department of Lands and Planning, and QLD Department of Natural Resources and Mines.

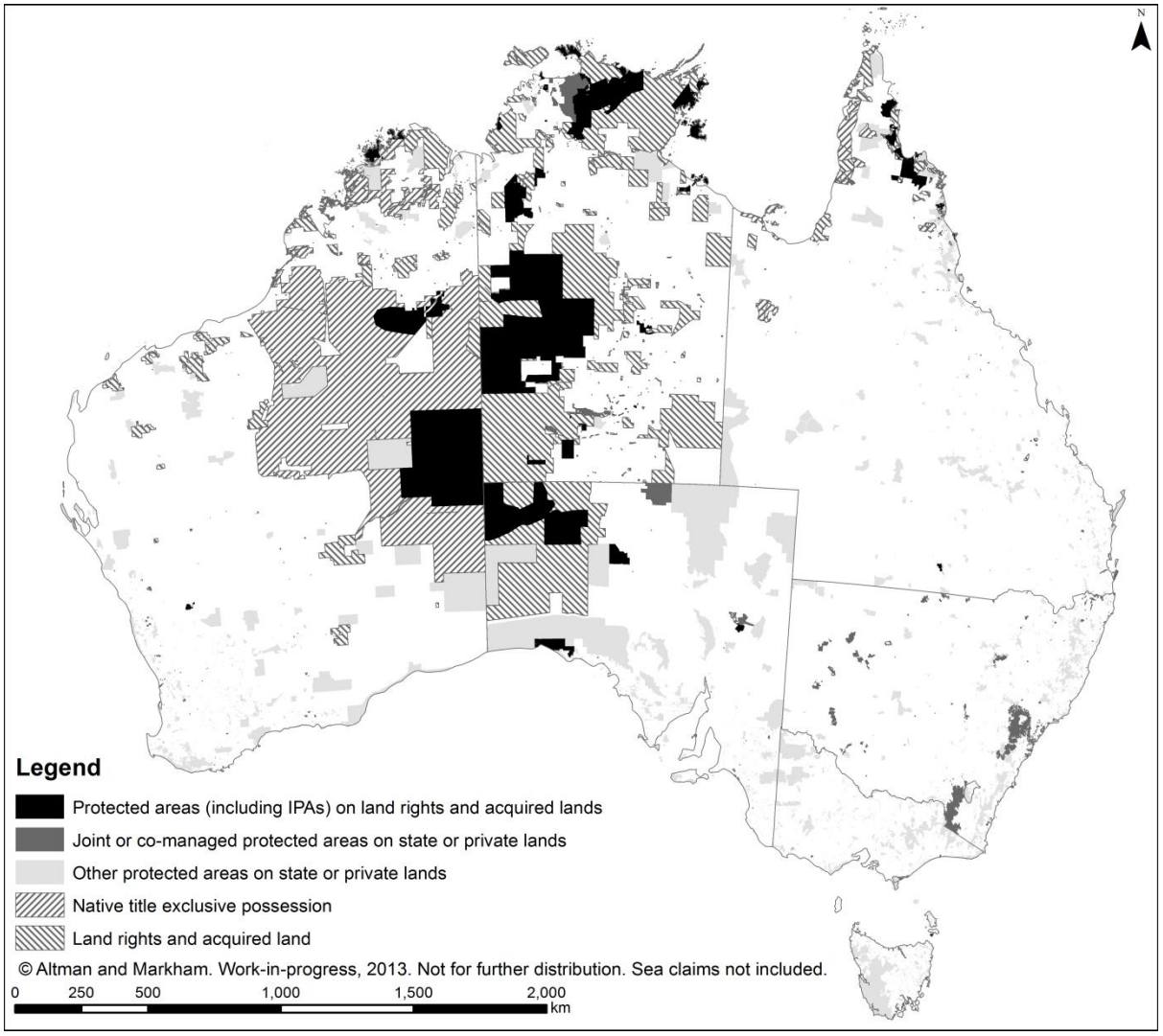
[6] In particular the term unmodified vegetation is used but clearly vegetation everywhere has been modified by altered fire regimes, invasive species, pollution and other environmental impacts.

[7] See Altman, JC and Kerins, S (eds) 2012. *People on Country, Vital Landscapes, Indigenous Futures*, Federation Press, Sydney.



Map 4: Threatened species count (2008) and Indigenous land holdings (2012). Threatened species count is courtesy of DSEWPaC and enumerates the number of species 'known' or 'likely' to be present in a grid cell. Indigenous land holdings data is a work-in-progress and known to be incomplete, especially in New South Wales, Western Australia, Victoria, Tasmania and Jervis Bay and thus should be considered a baseline or minimum land holding. Native title determinations data courtesy of National Native Title Tribunal. Land rights and acquired lands data courtesy of Geoscience Australia, Australian Bureau of Statistics, NT Department of Lands and Planning, and QLD Department of Natural Resources and Mines.

The location of some of the country's most biologically intact terrestrial and coastal ecosystems on the Indigenous estate, as we define it above, is reflected in the current correlation between the national reserve system (conservation estate) and Indigenous lands with the spatial extent of 51 declared Indigenous Protected Areas illustrated. In Map 5 we show the spatial coverage and distribution of IPAs that currently constitute 34% of the national reserve system with 40 more IPAs being in consultation stage. In Table 1 we illustrate quantitatively rather than cadastrally the relationship between the conservation estate, IPAs, national parks on Indigenous lands and jointly managed national parks that are not on Indigenous land as legally defined in Australian law. While IPAs are the dominant form of Indigenous conservation area, other forms of Indigenous management are also significant, while areas where Indigenous management has strong influence currently accounts for 42% of Australia's conservation lands.

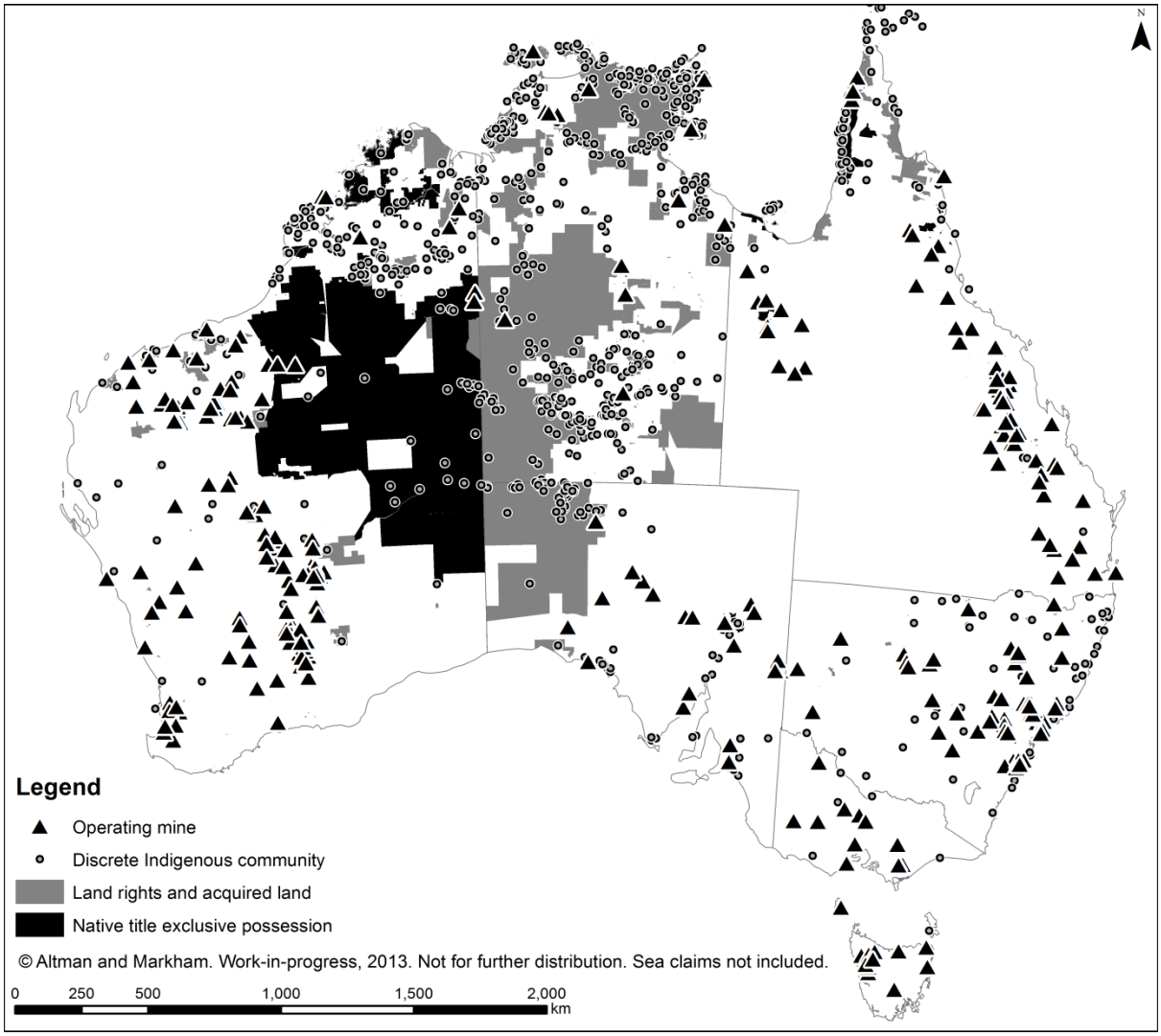


Map 5: Protected areas (2010), Indigenous Protected Areas (IPAs, 2012) and Indigenous land holdings. Protected areas and IPA data courtesy of the Commonwealth of Australia (DSEWPaC), 2012. Indigenous land holdings data is a work-in-progress and known to be incomplete, especially in New South Wales, Western Australia, Victoria, Tasmania and Jervis Bay and thus should be considered a baseline or minimum land holding. Native title determinations data courtesy of National Native Title Tribunal. Land rights and acquired lands data courtesy of Geoscience Australia, Australian Bureau of Statistics, NT Department of Lands and Planning, and QLD Department of Natural Resources and Mines.

Table 1: The Indigenous and non-Indigenous terrestrial conservation estate, by area. Protected areas (2010), Indigenous Protected Areas (IPAs, 2012) and Indigenous land holdings. Protected areas and IPA data courtesy of the Commonwealth of Australia (DSEWPaC), 2012. Joint-managed, Indigenous-owned land is known to be an underestimate.

	Area (km^2)	% conservation estate
Indigenous protected area (2012)	364,427	34%
Joint managed, Indigenous owned (2010)	40,303	4%
Co-managed, state-owned (2010)	43,444	4%
State managed, state owned (2010)	630,313	58%
Total terrestrial conservation estate	1,078,486	100%

In Map 6 we show currently operating mines in Australia according to Geoscience Australia and overlay our template of Indigenous lands. While there is a perception that there is considerable mining on Indigenous lands in fact most occurs elsewhere although mines are often located adjacent to discrete Indigenous communities (as quantified in 2006 Census) also plotted on Map 6. We do not have an overall estimate of the value of the mineral resources extracted from Indigenous lands or of the compensation payments and other benefits that might accrue to Indigenous land interests; obviously in some contexts the former number in billions of dollars, the latter in millions.[8]

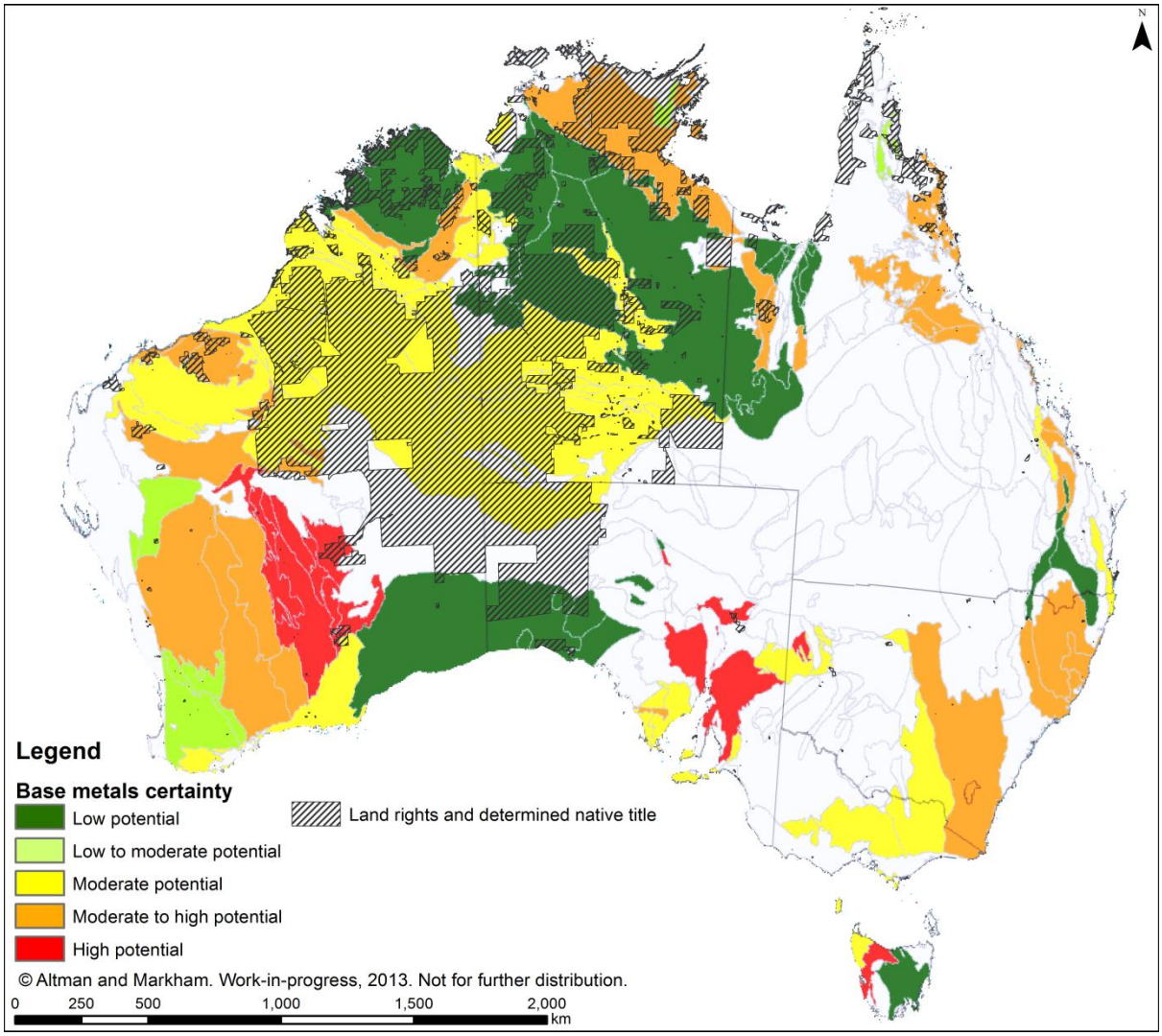


Map 6: Operating mines (2013), discrete Aboriginal communities (2006) and Indigenous land holdings (2012). Operating mines data courtesy Geoscience Australia. Discrete Aboriginal communities data courtesy of the Australian Bureau of Statistics. Indigenous land holdings data is a work-in-progress and known to be incomplete, especially in New South Wales, Western Australia, Victoria, Tasmania and Jervis Bay and thus should be considered a baseline or minimum land holding. Native title determinations data courtesy of National Native Title Tribunal. Land rights and acquired lands data courtesy of Geoscience Australia, Australian Bureau of Statistics, NT Department of Lands and Planning, and QLD Department of Natural Resources and Mines.

Given the extent of Indigenous land holdings it is highly likely that in future more mining will occur on Indigenous lands, given that on native title lands even with exclusive possession

[8] See the Agreements, Treaties and Negotiated Settlements database available at http://www.atns.net.au/ for detailed information on some agreements.

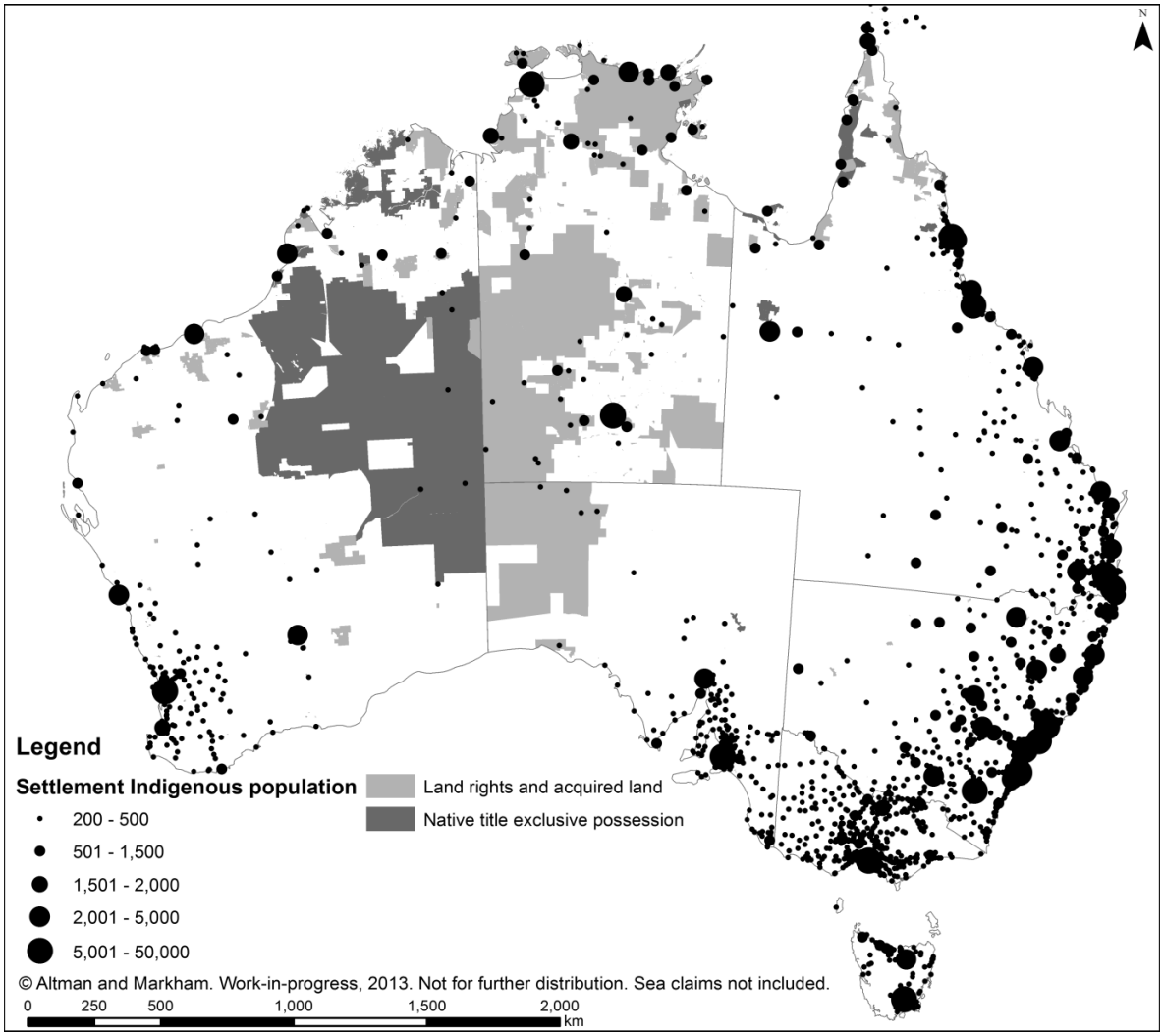
native title groups cannot veto mining and given Australia's current high economic dependence on exports of minerals. However, just how much is hard to predict. Geoscience Australia does produce maps of indicative prospectivity for a wide range of minerals. In Map 7 we overlay our template of Indigenous lands where right of consent (to exploration) or rights to negotiate provisions apply onto a map of base metal potential. Similar exercises can be undertaken with maps of gold or coal or uranium and other minerals' prospectivity. Our aim in using this speculative illustration is to suggest that some parcels of land where Indigenous parties have a right to negotiate are likely to be highly prospective and so are also likely to be subject to large-scale industrial minerals extraction. In other places where stronger 'right of consent' provisions apply it is indeterminate whether exploration and mining will occur.



Map 7: Base metals potential (2012) and Indigenous land holdings (2012). Base metals potential data courtesy Geoscience Australia. Indigenous land holdings data is a work-in-progress and known to be incomplete, especially in New South Wales, Western Australia, Victoria, Tasmania and Jervis Bay and thus should be considered a baseline or minimum land holding. Native title determinations data courtesy of National Native Title Tribunal. Land rights and acquired lands data courtesy of Geoscience Australia, Australian Bureau of Statistics, NT Department of Lands and Planning, and QLD Department of Natural Resources and Mines.

In Map 8, we use 2011 Census data to illustrate the continental distribution of the Indigenous population. Indigenous lands have a very low population density in part because

they are primarily in what is termed from the perspective of coastal south east and south west Australia as very remote. Finally, we provide one table that summarises the range of land interests documented in Maps 1 and 2 and their estimated resident population data from the 2011 Census. The key points that we wish to highlight here is that the Indigenous populations of lands held under lands rights or exclusive possession native title determination are small, 66,000 and 14,000 respectively once overlaps are discarded, representing just 10 per cent and 2 per cent of the estimated Indigenous population. Almost all this land is in very remote Australia, but in both jurisdictions the Indigenous share of the population is over 80 per cent compared to 3 per cent Australia-wide: elsewhere Altman has referred to these jurisdictions as 'territories of difference'.[9] Analysis we have undertaken indicates that at one hypothetical extreme nearly a half of the Indigenous population (in 2011) could have some land interest recognized in law over 72 per cent of Australia.



Map 8: Indigenous population of settlements of 200 or more (2011) and Indigenous land holdings (2012). Indigenous population in settlements of 200 or more maps the pro-rated count of the Indigenous population in the 2011 census. Population data is courtesy of the Australian Bureau of Statistics. Indigenous land holdings data is a work-in-progress and known to be incomplete, especially in New South Wales, Western Australia, Victoria, Tasmania and Jervis Bay and thus should be considered a baseline or minimum land holding. Native title determinations data courtesy of National Native Title Tribunal. Land rights and acquired lands data courtesy of Geoscience Australia, Australian Bureau of Statistics, NT Department of Lands and Planning, and QLD Department of Natural Resources and Mines.

[9] Jon Altman (2012) 'People on country as alternate development' in Jon Altman and Seán Kerins (eds) 2012. *People on Country, Vital Landscapes, Indigenous Futures*, Federation Press, Sydney, 1–22.

Table 2: Estimated resident populations (ERPs) by tenure (2011 Census). Estimates derived by combining state-level undercount rates with small area census counts, and downscaling to the mesh block level. Mesh block estimates are then aggregated to the land tenure types in Map 1.

Land Tenure	Indigenous ERP	Total ERP	% Australia's Indigenous population	% of residents Indigenous
Land rights and acquired lands	65,829	81,857	10.0%	80.4%
Native title exclusive possession	14,308	17,401	2.2%	82.2%
Native title non-exclusive possession	2,750	15,356	0.4%	17.9%
Registered native title claim	194,661	6,063,844	29.5%	3.2%

We would now like to briefly link this spatial information on Indigenous land holdings, population distribution and natural and mineral resources to two (of three) broad issues being considered by this Inquiry that we address.

Historical extinguishment and national parks

The information that we have presented above indicates that Indigenous lands are in relatively sound environmental condition. At a time when there is deep concern about rapid climate change, global warming and possible sea level changes the precautionary principle might suggest that expanding the conservation estate would be critical for protecting endangered species. There is evidence already that more and more Indigenous land is being incorporated into the National Reserve System through the declaration of Indigenous Protected Areas and establishment of jointly managed national parks on and off Indigenous lands.

It seems that if historical extinguishment can be removed as a barrier to the recognition of native title interests in national parks and reserves there is are a number of potential benefits that would accrue to the nation. As native title interests could be formally recognized as stakeholders in national parks and reserves they would have added incentive to actively engage in the environmental management of these conservation areas. In particular, there would be possibility to encourage the deployment of Indigenous Knowledge alongside western science in management regimes, something that has proven very effective in managing IPAs and Indigenous owned land elsewhere in Australia. There would also be enhanced possibility to deploy Indigenous labour in environmental management in places that are often regional and remote but where Indigenous people live.

With the removal of historical extinguishment as a statutory barrier, claims could be registered and determinations made. Such determinations would likely be for non-exclusive possession as there are existing conservation interests in parks and reserves. This suggests that determinations would need to at once recognize native title customary interests but also recognize the principal conservation priorities of parks and reserves. There are important precedents here where Indigenous Protected Areas are managed to maintain

their environmental and cultural values in accord with international IUCN protected area criteria. In particular IUCN categories V and VI allow sustainable use of resources for customary purposes (a title right under s211 of the Native Title Act 1993). Clearly, as with IPAs, plans of management the potential tension between customary rights and conservation priorities will need to be managed to ensure the adequate protection of any threatened species.

Strengthening the right to negotiate

Since the passage of the *Native Title Act 1993* it has been recognized that the right to negotiate over exploration and mining is a relatively weak form of property compared to the right of consent provisions in the *Aboriginal Land Rights (Northern Territory) Act 1976*. The absence of free prior informed consent rights in the NTA's future act regime clearly contravenes the aspirational Article 32 of the UN Declaration on the Rights of Indigenous Peoples that Australia belatedly endorsed in April 2009.[10]

Land rights laws, especially in the Northern Territory, have consent provisions that can be interpreted as a de facto property right in minerals. But in reality these property rights are diluted by the fact that this provision can only be exercised at the exploration stage; and by the guarantee that traditional owners will only receive a 30% proportion of statutory mining royalties (actually equivalents minus mining withholding tax) raised from areas affected. Under the future act provisions of the NTA native title parties can negotiate to receive untaxed compensation payments, but their leverage is limited to a right to negotiate within a limited window of six months (extendable by agreement between all parties). It could be debated which of these property rights generates better commercial outcomes for Indigenous parties with interests in land from which minerals are extracted.

It is not surprising that issues of good faith negotiations are crucially significant in such circumstances because of the current time limited 'pressure cooker' six month window for commercial negotiation. The Native Title Act is designed in such a way that if agreement is not reached quickly then a proposal must go to arbitration by the National Native Title Tribunal but in arbitration the profitability of a mine cannot be used in assessment of compensation. There are real issues of moral hazard here that open up possibility of strategic behaviour by resource developers who may look to delay negotiation so as to ensure more commercially favourable arbitration. But such strategic behavior can also be exercised by native title groups, especially if they are vehemently opposed to the development. For example, delay might allow the mobilization of broad public opinion against a development proposal; or a delay might jeopardise the commercial viability of a project.

In our view while the extension of the window for negotiation from six to eight months is small it is commendable because it potentially heightens the possibility of good faith negotiation and equitable agreement making. But we are a little surprised that it is

[10] Article 32 (2) notes: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. See http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf accessed 8 February 2013.

proposed that an accusation of lack of good faith in negotiations by one party should trigger a requirement to demonstrate good faith by the other. One alternative to this 'guilty until proven innocent' approach might be to consider the possibility of engaging the services of a third party to make an assessment on good faith. The surest measure of whether negotiations are being conducted in good faith is whether they are progressing and commercial mediators could readily determine if this is the case. Indeed commercial mediators could also be given a role in mediating fair compensation as an alternative to the current requirement to make submission to an arbitral body, the National Native Title Tribunal as an alternate dispute resolution option.

Final comments and recommendations
We observe with approval the strong statement of compatibility with Human Rights prepared to ensure that the Bill complies with requirements in the *Human Rights (Parliamentary Scrutiny) Act 2011*. In particular we note and support the reference to the right to self-determination and principles outlined in a series of articles in the UNDRIP highlighted in the Bill's Explanatory Memorandum.

We also note with some disappointment that as the 'long election campaign' of 2013 gets underway vested interests have moved quickly to take hard and fast positions on the amendments proposed in the Native Title Amendment Bill 2012. As reported in the influential national daily newspaper *The Australian* on 5 February 2013 these proposed changes have come under belated 'assault' from miners, farmers and resource dependent States. And then, in *The Australian* the next day, a strongly-worded reported critique of the proposed amendments from the Federal Opposition 'Native Title laws don't need to change: Brandis'. What is surprising in this contrary position taken by the Abbott Opposition is that it directly contradicts its earlier proposal to strengthen native title rights and interests and align them to articles in the UN Declaration contained in its defeated (Abbott) Wild Rivers (Environmental Management) Bill 2010.[11] How quickly policy debate becomes pre-emptively polarized and politicized even before this Inquiry has reported.

We can see merit in both the possibility of disregarding historical extinguishment of native title in national, State and Territory parks and reserves; and in strengthening Indigenous native title property rights as proposed in relation to the requirement for good faith negotiations and extending the window where the right to negotiate can be used as a form of leverage in negotiations.

Also on 6 February the Gillard Government tabled the 5th *Closing the Gap Prime Minister's Report 2013*.[12] The outcomes reported indicate that at best the statistical gaps the Government aims to reduce are proving extremely slow to respond to policy intervention. Under such circumstances and assuming the Closing the Gap framework remains an Australian state priority, it seems to us that any measures that are likely to enhance the prospects for improved livelihood and wellbeing for Indigenous people need to be supported. This is especially the case if such measures contribute to the national interest as

[11] Jon Altman (2011) Wild Rivers and Indigenous economic development in Queensland, CAEPR Topical Issue Issue No.6/2011 available at http://caepr.anu.edu.au/sites/default/files/Publications/topical/TI2011_5_Altman_Wild%20Rivers%202.pdf
[12] http://www.fahcsia.gov.au/sites/default/files/documents/02_2013/00313-ctg-report_fa1.pdf

well as the Indigenous interest; and do not detract from the rights and interests of other Australians.

If gaps are to be reduced then Indigenous engagement in any regional and remote employment needs to be enhanced—including in national parks—and property rights need to be strengthened. It is mainly for these reasons of economic realism and social justice that we support the amendments proposed.