QSNTS
Queensland South Native Title Services

Impacts of intra-Indigenous disputes on the operations of Part 11 Representative Bodies

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I commence by rehearsing an observation that has been made to judges of the Court on numerous occasions. The point is one of truth and defines the way Representative Bodies ('Rep Bodies') recognised and funded under Part 11 of the *Native Title Act* ('NTA') must undertake their statutory functions:

- Rep bodies are creatures of the *Native Title Act*. The *NTA* prescribes that which Rep Bodies must do and may do[1].
- The basis upon which representative bodies receive funding from the Department of the Prime Minister and Cabinet also places conditions on the way representative bodies provide services.

Funding allocations from the Australian Government through the Department of The Prime Minister and Cabinet to Part 11 rep bodies are made annually on the basis of Operational Plans submitted in the second quarter of a calendar year for the next financial year. Historically there has been provision to amend operational plans but it has been the case that funding to support non-budgeted contested litigation must be approved on a case by case basis.

In the recent past the basis for funding has shifted to an outcome based model with a growing emphasis being placed on establishing and operationalizing Prescribed Bodies Corporate to meet the policy aspiration that one year after incorporation, the PBC complies with ORIC, PBC Regulations and future act requirements and there is no evidence of serious internal disputes. That aspiration (which is an identified milestone within the funding arrangements) is an improvement on the originally stated aspiration that there be a functional PBC associated with each native title

[1] See s.203BB et. seq. and s.203BJ

holding group within 30 days of a determination. The aspiration that there is no evidence of serious internal disputes is, of course, something that is not within the direct influence of rep bodies.

Rep Bodies typically prioritise funding towards matters that are before the court. Like the Court and the State, rep bodies wish to see matters move to determination in the ways contemplated by sections 37M and 37N of the *Federal Court of Australia Act*. Nearly everyone in the system wishes to see an end to litigation leading to the opportunity for native title holders to manage and leverage off their native title and the development of certainty around questions of land tenure.

The imperative to progress matters before the court impacts on funding that is available to rep bodies for undertaking other functions. For a number of years QSNTS has been undertaking regional research projects pursuant to its s203BJ(b) NTA function. Those research projects focus on areas that are unclaimed but the research undertaken often impacts significantly on active claims.

Disputes affecting the progress of matters take a number of forms. No matter what form the dispute is in it will impact on the way the Rep Body can and does deliver its services and may have a concomitant impact on the progress of either the matter itself or an associated or neighbouring matter that is before the court.

Disputes take a number of forms:

- They can be between claim groups over boundaries;
- Or within claim groups over the inclusion or exclusion of persons who are or assert that they are members of the claim group;
- They may involve small groups or factions who assert that they and they alone hold native title to a discrete area within the external boundaries of the claim;
- They can be struggles within claim groups over power and a corresponding access to the benefits that can flow to the Applicant through holding that position on a registered claim;
- Or a desire desire to bolster and entrench a position of power

The structure of the *Native Title Act* is such that Rep Bodies have obligations to those who hold and to those who may hold native title within the region for which the rep body holds recognition.

Subject to operational priorities and budgetary constraints, so long as there is sufficient objective evidence to support the position being postulated by a person or group seeking assistance, there is no scope for rep bodies to pick and choose their clients. That is, rep bodies are not in a position to represent factions based on instructions that may have cogency within the cohort giving them but which will not withstand objective forensic scrutiny or that may have a purpose other than the orderly progression of the native title determination application.

The position of rep bodies bears some resemblance to the State's position as model litigant. Provisions of the Act such as 203B, 203BC(3), 203BF, 203BG, 203BI and 203BJ(b),(d) and (e) support that analogy.

Rep bodies are not in a position to take actions that favour self-interest but must take an holistic view of the evidence. Rep bodies are highly conscious of the fact that judgments in this jurisdiction are in rem and impact on succeeding generations of native title holders or potential native title holders and are not limited to the members of the immediate claim group.

Because research generated in the course of a particular matter may establish objective evidence that is contrary to the established narrative for the claim or the beliefs of families or individuals within the claim group as to personal history, rep bodies themselves are a cause of disputation. If the legal officers employed by the rep bodies ignore evidence for the sake of peace and unity, they are failing in their duties to both the court and to their client.

In considering conflict in the native title context, it is impossible to overstate the importance of personal narrative to persons whose families were caught up in the depredations that were visited upon Indigenous People following the assertion of radical title and colonization.

We know the effect of the ebb and flow of historical tides is no answer to the Crown asserting and relying on a loss of connection in response to an NTDA[2]. But that is little comfort to Traditional Owners seeking to have their native title recognized.

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[2] Mabo and others v. Queensland (no. 2) (1992) 175 CLR 1 per Brennan J at [66]:
"Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. It is clearly not the position of the Meriam people. Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional

The requirement for evidence of connection to place and to persons and the maintenance of that connection through practice of traditional law and custom through generation to generation transmission from effective sovereignty is part of native title jurisprudence. As we all know, proving that in the aftermath of a system of forced removals and systemised punishment of persons who attempted to maintain traditional lifestyles or narratives presents a considerable challenge to native title claimants in much of Queensland.

Faced with the way the jurisprudence has developed it is little wonder that people cling to fragments of knowledge and history and that those fragments are wittingly or otherwise embellished through (often naïve and inexpert) research to arrive at a personal narrative.

That personal narrative may well be a conflation of traditional narrative (sometimes coming through the lens of descent from multiple mobs), a belief in the gospel according to Norman Tindale and recently acquired knowledge based on personal research. With repetition over time that personal narrative becomes absolute truth.

It is my belief that the imperative to establish and reinforce a personal narrative around identity and place is a key driver for much of the disputation we see in our space.

Another driver for disputation is money; control of it and access to it. Allied to that is what could be described as political motivation, that is, a desire to affect the conduct of a native title determination application in order to promote a personal or political agenda.

Whenever disputes arise, there are immediate impacts on the relevant rep body and the way it undertakes its statutory functions.

The nature of the dispute will dictate the impacts but, generally, they are predictable. There will be a need to assess and reallocate human and financial resources. That has an immediate impact on extant case management plans and internal allocations of resources.

customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown."

There is the possibility of a claim moving from a path where it is looking like it has prospects of a consent determination to a trial. Something that I am confident no one here would list as a preferred outcome.

A good example is to be found in a matter that will remain unidentified. It is a matter that has everything when it comes to intra-Indigenous dispute:

- There were Indigenous respondents;
- There were disaffected persons within the claim group;
- There were persons who were not in the claim group who asserted they should be; and finally,
- an overlapping claim was lodged.

In that matter the claim group is privately represented as is the group which has lodged the overlapping claim.

Before it was made aware of serious dissension within the group and of persons outside the group clamouring to get in, the rep body had already funded the connection report used by the claim group to support the claim to the extent of $100,000.

The rep body, following many representations by persons identifying as part of the claim group but who, because of the Form 1 claim group description were excluded from membership and participation in the business of the claim group, successfully sought to be joined as a respondent. At that stage the rep body's purpose was to advocate for changes to the claim group description.

That process required significant research to be undertaken. The research and associated witness interviews and proofing required the rep body to assign an internal researcher, two legal officers, a community relations officer (at times two community officers were assigned). Additionally, an external consultant anthropologist was engaged.

Because the rep body had determined to seek joinder in its own right and there was a potential for conflict between the rep body's position and the position of a group of persons seeking to be included in the claim group, separate representation of that group was arranged. That separate representation included counsel being retained.

To put that into context, the internal researcher was already working on several matters and those matters and her work had to be re-prioritised, the lawyers were re-tasked from other matters they

were involved in (one was already heavily involved assisting in a contentious matter that is listed for trial) and the community officers assumed higher workloads.

Importantly, the external consultant was already under contract with the rep body in two other matters (it is trite to say that the cohort of credible experienced consultant anthropologists is not large) and those contracts had to be varied to facilitate the research that needed to be undertaken.

One of those pre-existing matters being researched was section 203BJ(b) 'people for country' research preliminary to the filing of a claim – that research had been ongoing for several years but on a medium priority basis. The putative claim group had been told that as a consequence of nearby and neighbouring determinations the group was in a good position and their matter would be prioritised – unfortunately the consultant had to be re-allocated and the group was not happy. Some of the more vocal members of the group complained to the funding body.

Parenthetically I observe that following the movement of the group of public servants who manage the native title system within government from the Department of Families, Housing Community Services and Indigenous Affairs to the Department of The Prime Minister and Cabinet long serving public servants who knew the system intimately and knew many of the serial complainers left the public service resulting in a loss of corporate knowledge which resulted in the 'newbies' giving a fresh ear to many old complainers and their complaints. There seemed to us to be little filtering of complaints – and a rash of 'Ministerials' followed creating an impost on time and human resources.

Indigenous informants were interviewed face to face in three states by researchers and legal officers.

Attempts were made to achieve a mediated outcome. The rep body funded the mediation which included travel and accommodation for those involved as well as the mediator's travel, accommodation and fees.

After the rep body had firmed up its research, a facilitated negotiation between the rep body and the legal advisors for the Applicant took place outside the court's processes. That negotiation resulted in an agreement to hold and participate in a conference of experts that would consider the totality of the research (including specialist genealogical research) under the guidance of a highly regarded senior anthropologist and an experienced native title barrister with the goal of developing a claim group description supported by the evidence and with which the contending parties could agree.

Happily, that conference resulted in the development of a claim group description that better corresponded with current jurisprudence but, more importantly, included all of the people that both sets of research had identified as being 'right' for the claim group.

The rep body funded all professional fees and inter-state travel and accommodation for everyone associated with that conference.

Meanwhile, the rep body became aware that an adjoining group which had been engaging the rep body for some time, but whose overtures and requests for assistance had been rejected, intended to hold an authorisation meeting to authorise the lodging of an overlapping claim.

The rep body engaged yet another consultant anthropologist under its s203BJ(b) function to look at the potential interests of those people.

That research involved a field trip funded by the rep body to very remote desert country. The field trip included 6 traditional owners, the external consultant and two rep body research officers (one male, one female).

That overlapping claim was subsequently authorised and filed without assistance from the rep body.

Concurrently with the lodging of the overlapping claim, issues around the Indigenous respondents came to a head. Those respondents had already been unsuccessful in a hearing in another matter to determine whether they ought to be members of a claim group based on their assertion of a particular identity. In the matter under consideration they asserted that same cultural identity which the court had previously found they did not possess. Their affidavit material was at odds with the report of their expert anthropologist. Dates were set for a separate hearing in relation to those respondents who were, essentially, ventilating the same argument that had been previously unsuccessful. The (self-funded) Applicant and the rep body had each briefed counsel.

Mere days before the hearing (the Applicant and the rep body both having prepared for hearing with relevant experts engaged) the respondents withdrew from the action. Surprisingly, despite the obvious costs and inconvenience to those parties who were active in that particular aspect of the matter, section 84(6) of the *Native Title Act* allowed the respondents to withdraw by the simple expedient of filing a form 106. That process allowed the respondents to withdraw without the leave of the court and minimised the possibility of costs being ordered against them.

The raw money costs of involvement in that matter to date, noting that all that the rep body has done was directed to resolving intra-Indigenous disputes relating to the matter and trying to nudge a self-funded Applicant towards a consent determination, is $953,526. That figure does not include wages and time off in lieu relating to the rep body's staff but does include $100,000 paid towards the Applicant's consultant anthropologist producing a connection report.

Overlapping claims that are authorised and lodged independently of representative bodies (as distinct from claims where the group or Applicant have sacked the rep body after authorisation and registration) tend to suffer from lack of evidence and lack of rigour in the authorisation process. A number of such claims have been lodged in the Queensland South Region over the last few years, to date none have survived. Dealing with those applications requires an internal re-allocation of human and financial resources away from other matters.

Matters of that kind often involve an application to the rep body for assistance to lodge a claim or undertake research to support part of a personal narrative – in assessing such requests QSNTS has regard to the extensive research it holds in relation to its region. A refusal to provide the requested assistance often leads to a request for an internal review of the decision pursuant to section 203FE and increasingly more often a request to the funder for an external review of the decision. Of course, responding to those requests places an impost on the human resources of the rep body in marshalling the relevant material and preparing responsive submissions to the reviewer.

There has been a tendency for some family based groups to continue with efforts to assert native title rights by lodging or responding to claims despite the fact that rep bodies that have engaged with them declined to assist. My experience is that, having regard to the fact that rep bodies have an obligation to assist people who may hold native title, a refusal to assist will only occur after a consideration of the supplicant's narrative and the available external evidence.

The lamentable outcome from the trial of the competing claims by the Turrbal and Yugera Yugarapul Peoples had its genesis in what was essentially the public airing of an intra-indigenous dispute motivated at least in part by a desire for primacy in providing welcomes to country in and around the Brisbane CBD.

There is no doubt in my mind that each party had a genuine belief that it was in the right of the debate. However, neither party had the evidence to support its claims which were, as was found by the judge at first instance, ill-conceived and doomed to failure.

Before the matter went to trial QSNTS commissioned an interim report as part of its long running South East Regional Research Project. That project was another section 203BJ(b) project focusing, unsurprisingly, on the south-east corner of the State. The interim report focused on the early ethnography of the area covered by the competing claims. Copies of the interim report were provided to the Applicant for each of the claims and to the State. Unsurprisingly the Applicants did not want the report to see the light of day. As things transpired, that report might have been a partial template for his Honour's reasons.

One of the outcomes of that trial remains a source of sometimes bitter dispute between the protagonists. That dispute arises from the operation of sections 34 and 35 of the *Aboriginal Cultural Heritage Act 2003 (Qld.)*. Those sections give a failed native title claimant who was the last registered native title claimant primacy in relation to cultural heritage matters within the external boundaries of the former claim area even if native title is found to not exist. The provisions are colloquially known as the last man standing provision.

In the circumstances of the Turrbal / Yugara Yugarapul matter, the relevant person was found to not be descended from the traditional owners of the area at the time of effective sovereignty. That is, on no account was the person 'right' for either country or native title but notwithstanding that is entitled to a particular hierarchical place in relation to cultural heritage matters under the State's legislative scheme.

Despite rep bodies making submissions to the State about the inequity and actual or potential disputes arising from this clearly undesirable outcome (which has occurred in at least two determinations in the Queensland South region) there is an apparent reluctance on the part of the State to amend the legislation to enshrine a scheme that reflects the judgments of the court.

Understandably this creates high levels of angst amongst other Traditional Owners associated with the former claim area. Some of that angst is directed to QSNTS.

In the recent past QSNTS has received a lot of enquiry from disaffected Traditional Owners arising from the negotiation and authorisation of Indigenous Land Use Agreements during the heady days of gas pipeline design and construction. The enquiry comes from the implementation of the agreements that were reached and, in particular, the disbursement of money benefits received.

Recall that in dealing with the authorisation of ILUAs, s251A of the *Native Title Act* directs that the ILUA be authorised by the persons who hold or may hold native title in the relevant area. Two

ILUAs in particular are causing angst at the moment in the Queensland South Region. Both relate to areas of the Darling Downs that at the relevant time were not (and are still not) subject to a registered native title determination application.

One is between the 'Area E' native title group and APLNG. In that ILUA a particular stretch of pipeline known as 'area E' involved about 148 lineal kilometres. Thirteen separately identifying groups were part of the authorisation process and were ultimately included as signatories to the ILUA and beneficiaries of the benefits that flow from it.

Disputes have now arisen in relation to the bona fides of persons who authorised and executed the ILUA and are beneficiaries under it. Essentially, the dispute is about who is 'right' for the area. Apparently no such questions were asked during the long authorisation process or if they were asked, they were expediently ignored. It seems that once the rush to authorise has passed and the time to distribute benefits arrives introspection occurs and answers to tough questions are demanded.

The other dispute relates to an area ILUA. That ILUA involved 5 separately self-identifying groups. A power struggle is now taking place in relation to both the native title party and the corporation that it caused to be incorporated as its nominated entity to receive, hold and disburse the monetary benefits. The corporation, which is an ASIC corporation, reportedly now holds around $2m.

There is a struggle as to the role of the native title party and the influence it may have over the nominated entity corporation and a further struggle for control of the nominated entity corporation itself. Given that the corporation is properly viewed as the trustee of a trust, one wonders at what precisely is motivating the internecine dispute that is now taking place.

The matter is taking a substantial portion of a QSNTS lawyer's time.

Of course, the proponents have got their agreements and, subject to the proponent observing its obligations under the agreement the potential for fall-out from it is potentially of academic interest only to the proponent.

There is no doubt in my mind that s203B contemplates a rep body being involved in matters of this kind.[3] However funding the litigation that could flow from this scenario; mareva injunction, declaratory relief and consequential orders, may be problematic.

Perhaps there is a place for rep bodies to be permitted by their funding arrangements to be more substantially involved in these sorts of matters. Dysfunctional corporations with significant cash washing around in them are potentially attractive to the private sector and the disputes can take a long time to resolve.

The management of significant financial resources accruing because of native title claims and the development of prudential protocols around the management of those resources is critical to the effective implementation of ILUAs and to the success of the whole native title group into the future and would, in my submission, help mitigate the level of disputation arising from the management of such resources.

The primary role of the persons comprising the Applicant in a native title determination application is to be found at s62A.[4] The Act does not contemplate the role of the Applicant as being an office of profit. The Act assigns to the Applicant the task of prosecuting the application and dealing with all matters arising under the Act in relation to the Application. Why then (I ask rhetorically) are native title determination applications plagued with coups and attempted coups that result in applications under s66B being made to the court? The answer, it seems to me, is that for some people there is a perception (which may in some circumstances be a reality) that being part of the

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[3] **NATIVE TITLE ACT 1993 - SECT 203BB**
Facilitation and assistance functions
General
(1) The ***facilitation and assistance functions*** of a representative body are:
(a) to research and prepare native title applications, and to facilitate research into, preparation of and making of native title applications; and
(b) to assist registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to the following:
(i) native title applications;
(ii) future acts;
(iii) indigenous land use agreements or other agreements in relation to native title;
(iv) rights of access conferred under this Act or otherwise;
(v) any other matters relating to native title or to the operation of this Act.

[4] **NATIVE TITLE ACT 1993 - SECT 62A**
Power of applicants where application authorised by group
In the case of:
(a) a claimant application; or
(b) a compensation application whose making was authorised by a compensation claim group;
the applicant may deal with all matters arising under this Act in relation to the application.

Applicant is, in fact, an office of profit – surely the attraction cannot be the prestige that comes with that role?

In *Russell Doctor and Ors on behalf of the Bigambul People v State of Queensland & Ors* (Bigambul People), Queensland South, after receiving a petition from a significant number of claim group members, took a position based on its understanding of the evidence as to the claim group description. The evidence suggested that one of the old people describing the claim group was not a Bigambul person. The potential removal of that old person from the description of the claim group meant that one or more persons comprising the Applicant for the claim would not be members of the native title claim group with the consequence that they could no longer be part of the Applicant. Actions taken by QSNTS led to a series of interlocutory skirmishes around section 66B and a series of authorisation meetings many of which were apparently intended to preserve the status quo.

I note in passing that holding an authorisation meeting costs QSNTS around $45,000 depending on the advertising required. Unlike QSNTS some rep bodies also fund attendees to travel to authorisation meetings and that must add considerably to the cost of holding a meeting.

QSNTS eventually joined the matter as a respondent in order to put the research it had generated before the court. Ultimately the position that had been originally postulated by QSNTS was accepted by a conference of experts, and accepted by the claim group in an authorisation meeting and accepted by the State. The matter is now listed for consent determination with the report commissioned by QSNTS being exhibited to an affidavit filed in support of the claim group's position and relied on in the claim group's last amended Form 1.

QSNTS has, and continues to be criticised for its intervention in that matter by those who sought to maintain the status quo. In my submission, the ultimate adoption by the claim group of the course recommended by QSNTS from the beginning of its intervention and the acceptance by the State of the expert evidence generated by QSNTS which enabled the matter to be removed from trial (and all of the risk trial entails) and listed for a consent determination justifies the position taken by Queensland South despite the disputation that intervention was allowed to create. The raw money cost to QSNTS to achieve that outcome was $668,220 not including wages and salaries.

Recent matters have persuaded me that, at least in part, another motivation behind s66B applications is to build or maintain political alliances.

None of those motivations have much to do with furthering the native title determination application but seemingly do relate to personal agendas.

I have said in other places that if I could take the money out of native title I would achieve more outcomes faster.

Increasingly, as claims mature, some claim groups and native title holders have access to significant financial resources (some remain impoverished because of the vagaries of geography and geology). The system in which we all work has failed to deal with the way money is dealt with by people holding positions of power within the relevant group. In my submission, all money flowing to a person or to a group as a consequence of there being a registered native title claim, or because of the authorisation of an indigenous land use agreement, other than a bona fide reimbursement for lost wages or personal outlay, ought to be fixed with a trust, the beneficiaries of which are the determined native title holders or, failing that, members of the final iteration of the claim group. This is a controversial concept and opens me to a charge of being paternalistic. However, it is, I think, a defensible positon when one has regard to the circumstances of the majority of rep bodies constituents who more than 20 years after Mabo and the passing of the *Native Title* Act remain seriously disadvantaged.

An outspoken Indigenous activist I have had some dealings with has the habit in meetings of tipping his glass over and referring to 'the empty cup of native title' – the unfortunate reality for many of those we work with is that native title does resemble something of an empty cup. For others, the cup overflows because of but not from native title.

I began by reflecting on some of the motivations that give rise to disputation. I make no judgment on those Indigenous persons who seek to profit from what is offered because of the *Native Title Act.* I am in the happy white middle class position of never having been truly impoverished or disadvantaged or discriminated against. I cannot blame people who take what's on offer, but I do criticize the personal use of benefits intended for the wider group or community.

One of the things with litigation is that it applies contemporary standards and ideals to a set of facts that have occurred in the past and are frozen in time. That is particularly true of native title litigation which, because of the way the jurisprudence developed, requires that Indigenous Society is frozen into what we now believe it was as at 26 January 1788. We treat Indigenous Society as a fossil and not as an organic entity that lived and changed and evolved over time and left alone would have continued to do so.

It is worth considering the preamble to the *Native Title Act* it says (in part):

> The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.
>
> They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.
>
> As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.
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> …
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> Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:
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> a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
> b) proposals for the use of such land for economic purposes.
>
> It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.
>
> It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

All of us here have a role and responsibility in making those lofty aspirations happen.

I hope that history treats us kindly.