

Native Title Report

2005



Aboriginal & Torres Strait Islander Social Justice Commissioner Native Title Report 2005



Aboriginal & Torres Strait Islander Social Justice Commissioner

The position of Aboriginal and Torres Strait Islander Social Justice Commissioner was established within the Human Rights and Equal Opportunity Commission in 1993 to carry out the following functions:

- (1) Report annually on the enjoyment and exercise of human rights by Aboriginal peoples and Torres Strait Islanders, and recommend where necessary on the action that should be taken to ensure these rights are observed.
- (2) Promote awareness and discussion of human rights in relation to Aboriginal peoples and Torres Strait Islanders.
- (3) Undertake research and educational programs for the purposes of promoting respect for, and enjoyment and exercise of, human rights by Aboriginal peoples and Torres Strait Islanders.
- (4) Examine and report on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal peoples and Torres Strait Islanders.

The Commissioner is also required, under Section 209 of the *Native Title Act 1993*, to report annually on the operation of the *Native Title Act* and its effect on the exercise and enjoyment of human rights by Aboriginal peoples and Torres Strait Islanders.

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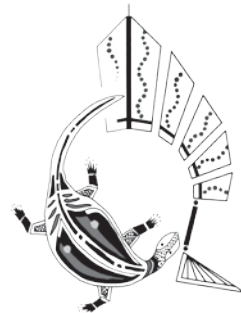
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***Human Rights and
Equal Opportunity Commission***



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2005

*Aboriginal & Torres Strait Islander
Social Justice Commissioner*



*Report of the Aboriginal & Torres Strait Islander Social Justice Commissioner
to the Attorney-General as required by section 209 Native Title Act 1993.*

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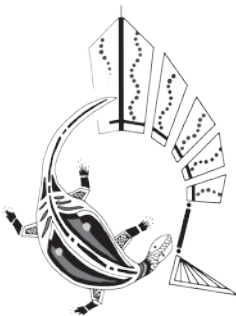
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Artist Acknowledgement

Cover photographs by Wayne Quilliam. The ocean image is taken near Broome, Western Australia. In the foreground is a midden (a sandbank covered with shells discarded by the local people after the contents were eaten). Below the midden are the mangroves where all types of seafood is hunted and collected and finally, the beautiful warm waters.

The fire image was taken in the Kimberlys in Western Australia, as with many Aboriginal groups throughout Australia fire is used to regenerate the land, the natural process has been used for tens of thousands of years to sustain the earth.



About the Social Justice Commission logo

The right section of the design is a contemporary view of traditional Dari or head-dress, a symbol of the Torres Strait Island people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commission. The dots placed in the Dari represent a brighter outlook for the future provided by the Commission's visions, black representing people, green representing islands and blue representing the seas surrounding the islands. The Goanna is a general symbol of the Aboriginal people.

The combination of these two symbols represents the coming together of two distinct cultures through the Aboriginal and Torres Strait Islander Commission and the support, strength and unity which it can provide through the pursuit of Social Justice and Human Rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander Social Justice expressing the hope and expectation that one day we will be treated with full respect and understanding.

© Leigh Harris

Human Rights and Equal Opportunity Commission



16 December 2005

The Hon Philip Ruddock MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I am pleased to present to you the *Native Title Report 2005*.

The report is provided in accordance with section 209 of the *Native Title Act 1993*. In light of recent developments in land rights during the reporting period, I have also examined the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islander persons in accordance with section 46(1)(a) of the *Human Rights and Equal Opportunity Commission Act 1986*.

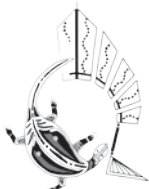
The report examines some of the issues that have arisen during the debate around the National Indigenous Council Land Tenure Principles (NIC Principles) and proposed changes to the communal nature of land interests to promote individual home ownership. The report assesses the proposal to lease Indigenous communally owned land against human rights standards, existing land rights regimes and economic factors that will influence the effectiveness of the NIC Principles.

The report makes a number of recommendations aimed at improving economic development on Indigenous land that respect and uphold Australia's human rights obligations, including further development and implementation of the principles for economic and social development as set out in the *Native Title Report 2004*.

I look forward to discussing the report with you.

Yours sincerely

Tom Calma
Aboriginal and Torres Strait Islander
Social Justice Commissioner



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Introduction



This report is my second as the Aboriginal and Torres Strait Islander Social Justice Commissioner and marks a transition from a calendar year reporting period to a financial year to comply with s.46(1)(a) of the *Human Rights and Equal Opportunity Commission Act (1986)* (Cth). As the *Native Title Report 2004* reported on the period January to December 2004, this report covers the period January to June 2005.

The reporting period has been marked by an active debate around the use of Indigenous communally owned lands for home ownership and business enterprises. Indigenous leaders, the Minister for Immigration and Multicultural and Indigenous Affairs (Minister Vanstone), as well as the Prime Minister have expressed concern that the Indigenous land base has not been effectively used to improve economic and social outcomes in communities. In the words of Minister Vanstone, Indigenous communities are land rich, yet dirt poor.¹ This report will focus on the debate and discuss subsequent proposals for leasing Indigenous communally owned land.

Consistent with the view of some Indigenous leaders, the Commonwealth Government's appointed Indigenous advisory body, the National Indigenous Council (NIC), released Principles for Land Tenure (NIC Principles) in June 2005. The NIC Principles are reproduced in full for this report at **Annexure 2**. These Principles set out a regime of long term leasing on inalienable Indigenous owned lands, for the purpose of supporting home ownership and business enterprise on these lands. The Principles have not attracted widespread support from Indigenous leaders or communities, in particular those likely to be affected by the proposal. Despite this, the Principles were presented to the Commonwealth Government for consideration.

The purpose of this report is to examine, from a non partisan and unbiased perspective, some of the issues that have arisen during the debate and assess the proposal to lease Indigenous land against human rights standards, existing land rights regimes and economic factors which will determine the effectiveness of the proposal by the NIC. This analysis will inform the debate and assist in clarifying misunderstandings about Indigenous land under existing Commonwealth, State and Territory based land rights and the national native title system that have arisen during the debate. It will also highlight important practical and human rights issues in relation to the leasing of inalienable land. I hope that this report will be a useful resource in the ongoing debate to lease communally owned Indigenous lands.

1 Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon. Amanda Vanstone, Address to National Press Club, 23 February 2005, <www.atsia.gov.au/media/speeches/23_02_2005_pressclub.htm>, accessed 31 August 2005.



In October 2005, Minister Vanstone announced changes to the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* ALRA (NT) that will enable long term leasing in communities on ALRA (NT) land. These changes are intended to promote home ownership and business enterprises in communities. While the proposed amendments fall outside the reporting period and are not addressed in this report, the recommendations and comments in relation to the NIC Principles discussed herein, also apply to the proposed new amendments to the ALRA (NT). Further changes to the ALRA (NT) and native title system addressing broader issues have been announced since June 2005 and will be addressed in my next Native Title Report.

CERD – Concluding Observations on Australians 13th and 14th Reports

In addition to the leasing debate and the ongoing implementation of the New Arrangements in Indigenous Affairs which is discussed in the *Social Justice Report 2005*, the Committee on the Elimination of Racial Discrimination (CERD) provided Concluding Observations on Australia's 13th and 14th periodic reports. The Committee handed down its comments in March 2005 noting a number of positive aspects including the significant progress made by Indigenous peoples in the enjoyment of their economic, social and cultural rights and the commitment shown by all Australian Governments to improving outcomes through the Council of Australian Governments (COAG) process.² The Committee also noted the positive steps made through the implementation of diversionary and preventative programs in juvenile justice and the abrogation of mandatory sentencing in the Northern Territory.³

However, the Committee commented on the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) and the transfer of ATSIC programs to mainstream government departments, as well as the establishment of the Government appointed NIC. The Committee expressed concern that these changes 'will reduce the participation of Indigenous people in decision-making and thus alter the State party's capacity to address the full range of issues relating to indigenous peoples.'⁴ In response to these concerns the Committee reiterated:

... that the State party take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in General Recommendation 23 (1997).

2 Committee on the Elimination of Racial Discrimination, *Consideration of Reports submitted by State Parties under Article 9 of the Convention, Concluding observations of the Committee on Australia*, Sixty-sixth Session 21 February – 11 March 2005, UN Doc CERD/C/AUS/CO/14. Available online at: <www.humanrights.gov.au/cerd/report.html> para 4.

3 *ibid.*, para 5 and 6.

4 *ibid.*, para 11.



The Committee recommended that Australia:

... reconsider the withdrawal of existing guarantees for the effective for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision and policy-making relating to their rights and interests.⁵

The Committee has expressed clear concerns about the capacity of the Australian Government to properly address Indigenous issues and ensure the informed consent of Indigenous peoples in the conduct of public affairs and policy making relating to their rights and interests. The Committee's comments demonstrate concern that the abolition of ATSIC, the implementation of the new arrangements and the establishment of the NIC are not able to ensure the effective representation of Indigenous peoples in Australia.

These observations are important in the context of the leasing debate and the NIC Principles. The Principles were developed by the NIC in its advisory role and were not developed in consultation with affected groups. Because of the nature of this process, should the Government rely on the NIC Principles to affect changes to Indigenous peoples' rights and interests in land, this will not be consistent with the human rights standards of effective participation and free, prior and informed consent. To ensure any change is made consistent with Australia's international obligations a further process of engagement with Indigenous peoples affected by proposed changes is necessary. As set out in the Committee's observations, this engagement needs to be focused on securing the effective participation and free, prior and informed consent of communities affected by proposed changes to their rights and interests. **Annexure 3** of this report provides an explanation of free, prior and informed consent and sets out the international law basis for this right.

The Committee also expressed concern in relation to the ongoing differences between Indigenous peoples in Australia and the State over the compatibility of the 1998 amendments to the *Native Title Act 1993* (NTA), and Australia's human rights obligations. The Committee recommended that Australia 'reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.'⁶ However, the Committee also reiterated its past observations in relation to the 1998 amendments. Noting that while the Mabo decision and the original NTA provided for the recognition of indigenous peoples' rights, the 1998 amendments wind back some of these rights in favour of legal certainty for government and third parties. Analysis of previous observations by CERD in relation to the 1998 amendments, are set out in the *Native Title Report 1999 and 2000*. In addition to the concluding observations on Australia by the CERD committee, a number of determinations and agreements were finalised during the reporting period. They are summarised in **Annexure 4: Chronology of events in native title 1 July 2004 – 30 June 2005**.

5 *op.cit.*

6 *ibid.*, para 16.



Native Title Report 2005 – Overview

This report provides an analysis of the different issues arising from the debate to lease Indigenous communally owned lands. Much of the debate has talked about 'Indigenous land' with little regard for whether or not the land in question is native title land, land rights land, purchased land or simply whether the land in question is reserved for the benefit of Indigenous people. *The allegation is that while Indigenous peoples enjoy ownership and access to land, it is not being utilised so as to alleviate poverty, provide home ownership or to promote economic development.* The report seeks to challenge this assertion by considering the purpose of land rights regimes which, in most cases, was to simply provide justice for peoples who had been dispossessed of their lands. Also, the NIC Principles have not fully explored what can already be achieved under existing land rights legislation but instead recommends changes to land rights laws without a full understanding of their existing potential. The objective of the NIC Principles to promote home ownership and business enterprise on Indigenous lands is considered against a range of economic factors that will determine the sustainability of these projects on Indigenous lands.

Proposals and decisions that seek to alter the Indigenous land base are of particular significance in my role as Social Justice Commissioner given Australia's obligations under national and international instruments with respect to Indigenous people's rights to non-discriminatory treatment and ownership and control of land.

In short, *this report discusses the purpose of land rights and native title legislation; the existing provisions for leasing Indigenous communally owned lands under current legislation; economic factors affecting home ownership and business enterprise; and a human rights analysis of the NIC Principles.* It does not advocate a position suffice to note that the full and meaningful participation of Indigenous peoples affected by any policy shift, is critical if sustainable outcomes are to be realised.

Chapter 1 is aimed at debunking myths and preconceptions regarding the original purpose of land rights and native title legislation. In most instances, the focus of the original legislative action around land rights was centred on simply providing justice to peoples who had been dispossessed of their land rather than facilitating economic development. Indigenous peoples have fought for many years simply to have their rights and interests in land recognised. Many continue to fight today for recognition through the native title system. Policy around native title, in particular, has remained outside of the broader policy approach of Indigenous affairs. The legal and policy limitations of the native title system are also analysed to establish how barriers to economic development can be overcome.

Chapter 2 clarifies what is meant by the term 'Indigenous land' and identifies the various forms that Indigenous interests in land can take. The current debate is hindered by misunderstandings about the precise nature of interest Indigenous peoples have in land. Understanding what interests Indigenous peoples have in land is vital in order to assess whether the NIC Principles will provide sustainable outcomes for Indigenous peoples. The report discusses the NIC Principles in light of race discrimination also, given that, if wholly adopted by government, the Principles impact and interfere only with Indigenous peoples' rights to land.

As the legal landscape highlights, there are a multitude of options in existing land rights legislation that provide for individual leasehold interests over communally



owned land. As 99 year leases are proposed, it is worth noting the arrangements that exist in the ACT and Norfolk Island with respect to long term leases. In addition, should Australia go down this path for Indigenous communally owned lands, the experience of the United States and New Zealand are outlined to provide some guidance as to what pitfalls and opportunities policy makers can expect from the NIC Principles. To assist in understanding some of the legal terminology included in this Chapter a glossary of terms is at **Annexure 1**.

Chapter 3 discusses one of the outcomes sought by the NIC Principles; individual home ownership; and the factors affecting this outcome. As the report highlights, there are many factors that influence home ownership, such as access to financial institutions, income levels, and the cost of building in remote areas. Indigenous peoples, particularly in remote areas, have lower levels of income than other Australians. Contemporary business commentary and research by the Australian Bureau of Statistics identifies that income levels and wealth are major determining factors affecting an individual's ability to service a loan for the purchase of real estate. This aspect of the NIC Principles is analysed in the report. The report also provides background on development theories relevant to the NIC Principles, including an overview of the World Bank's land titling policies. The World Bank formerly endorsed the notion of individual land titling over communal title but through experience and practical application found that the most appropriate title systems are those that are based on customary land titling and are responsive to economic factors such as the increasing value of land due to demand. As the report highlights, there are many other options apart from land tenure reform that ought to be considered in order to promote economic development on communally owned land and the report provides a number of alternative models to consider.

Chapter 4 provides a human rights appraisal of the NIC Principles based on the United Nations Declaration on the Right to Development and other international human rights standards. Human rights' set minimum standards for the protection of rights and provides a useful framework for economic and social development. This framework is used to appraise the NIC Principles in terms of the protection of rights and as a basis for economic and social development through home ownership and business enterprise. The Chapter discusses the importance of effective participation and the prior, informed consent of Indigenous groups affected by changes to their rights and interests. Chapter 4 also sets out recommendations for the Commonwealth and State and Territory governments that seek to amend land rights or native title legislation, to give affect to the NIC Principles.



Background – the origin of land rights and barriers to economic development through native title

The Australian Government has signalled that economic development is a central focus for the Indigenous Affairs portfolio this term. The Ministerial Taskforce on Indigenous Affairs, created in May 2004 to drive and coordinate the federal Government's Indigenous policies,¹ identified as one of three key areas² for priority action:

Building Indigenous wealth, employment and entrepreneurial culture, as these are integral to boosting economic development and reducing poverty and dependence on passive welfare.³

The role that land rights and native title land might play in achieving this objective became the focus of public and political debate in the reporting period. The Prime Minister announced that the Government is interested in supporting Indigenous Australians turn their land into wealth, while protecting the rights of communal ownership and preserving Indigenous land for future generations. The role that land could play in supporting home and business ownership for Indigenous families and individuals has been given consideration by the Attorney-General and Minister for Immigration and Multicultural and Indigenous Affairs.⁴

This Chapter provides a historical context for the debate that arose during the reporting period by reviewing the objectives of land rights and native title legislation. It is useful to review this history because a strong suggestion in the debate has been that land rights and native title have failed in their objectives and require reform. It is not possible to evaluate legislation or policy without

1 Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon. Amanda Vanstone, *Ministerial Taskforce on Indigenous Affairs*, Media Release, 28 May 2004. Available online at: <www.atsia.gov.au/media/media04/v04026.htm>, accessed 31 August 2005.

2 The other two priorities are: early childhood intervention (a key focus of which will be improved mental and physical health, and in particular primary health, and early educational outcomes) and safer communities (which includes issues of authority, law and order, but necessarily also focuses on dealing with issues of governance to ensure that communities are functional and effective).

3 Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon. Amanda Vanstone, *Ministerial Taskforce on Indigenous Affairs*. Available online at: <www.atsia.gov.au/taskforce/index.htm>, accessed 31 August 2005.

4 Prime Minister, the Hon. John Howard MP, *Address at the National Reconciliation Planning Workshop 30 May 2005*, Old Parliament House, Canberra. Available online at: <www.pm.gov.au/news/speeches/speech1406.html>, accessed 19 August 2005.



knowing its objectives, and the consequent legislative framework. The debate around Indigenous land tenure and economic development has been conducted with little discussion or analysis of these things.

The first section of this Chapter highlights the issues raised by the public debate in this reporting period. The second section reviews the original rationales for land rights legislation. The final section considers the origin of native title and obstacles to economic development that lie in native title law and policy.

Overview of the communal lands debate

A public and political debate about whether the communal and inalienable nature of land rights and native title land is perpetuating poverty within Indigenous communities unfolded during the reporting period. Public discussion began in late 2004⁵ when the CEO of New South Wales Native Title Services and member of the government-appointed Indigenous advisory body, the National Indigenous Council (NIC),⁶ Mr Warren Mundine, issued a press release calling for changes to the tenure of Indigenous land to facilitate increased home ownership and business development.⁷ In February 2005, the federal Minister for Immigration and Multicultural and Indigenous Affairs indicated that the Australian Government would contemplate changes to tenure in reforming the federal land rights legislation operating in the Northern Territory, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)⁸

Most Indigenous leaders, however, criticised the debate's focus on the communal and inalienable tenure of Indigenous land for obscuring the real factors in Indigenous poverty in remote areas – such as illiteracy, poor health, inadequate housing and basic infrastructure like sewerage, roads and communications – as well for elevating the economic value of the land at the expense of its spiritual and political importance to Indigenous people. There was also concern expressed that the Government's interest in the debate was to 'free up' Aboriginal land for non-Indigenous investors and the resources industry rather than encourage *Indigenous* economic development.

The debate was conducted mainly through the media, without great depth and without reference to the different land tenure arrangements across Australia. The key developments as a result of this debate during the reporting period were:

- announcements by the Prime Minister that the Commonwealth Government wants 'to make native title and communal land work better' by adding 'opportunities for families and

5 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2004*, p6. Available online at: <www.humanrights.gov.au/social_justice/ntreport04/index.html>, accessed 28 November 2005.

6 The National Indigenous Council terms of reference and further information are at: <www.oipc.gov.au/NIC/Terms_Reference/default.asp>, accessed 31 August 2005. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004*, p186.

7 W. Mundine, *Aboriginal Governance and Economic Development*, Address to the Native Title Conference 2005, Coffs Harbour, 2 June 2005. Available online at: <www.aiatsis.gov.au/rsrch/ntru/conf2005/papers/MundineW.pdf>, accessed 31 August 2005.

8 Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon. Amanda Vanstone, *Address to National Press Club*, 23 February 2005. Available online at: <www.atsia.gov.au/media/speeches/23_02_2005_pressclub.htm>, accessed 31 August 2005.



communities to build economic independence and wealth through use of their communal land assets'

- the release of 'Indigenous Land Tenure Principles' by the federal government-appointed National Indigenous Council.

At the National Reconciliation Planning Workshop on 30 May 2005, the Prime Minister indicated that land rights and native title need to be changed:

[A]s somebody who believes devoutly and passionately in individual aspiration as a driving force for progress and a driving force for progress in all sections in the Australian community, I want to see greater progress in relation to land. We support very strongly the notion of indigenous (sic) Australians desiring to turn their land into wealth for the benefit of their families. We recognise the cultural importance of communal ownership of land, and we are committed to protecting the rights of communal ownership and to ensure that indigenous land is preserved for future generations. And when I talk about land in this context let me make it clear that the Government does not seek to wind back or undermine native title or land rights. Rather we want to add opportunities for families and communities to build economic independence and wealth through use of their communal land assets. We want to find ways to help indigenous Australians secure, maximise and sustain economic benefits. We want to make native title and communal land work better.⁹

His view was echoed by the Minister for Immigration and Multicultural and Indigenous Affairs at the National Reconciliation Planning Workshop on 31 May 2005:

Most Australians achieve economic independence through having a regular job and hopefully owning their own home...It is more problematic in remote areas. There are opportunities for business development in these places, not as many and not as obvious. We need to remove impediments to business development and ensure that Aboriginal owned land can generate economic returns should the community chose (sic) to do so.¹⁰

Shortly after, the first communiqué was released by the National Indigenous Council (NIC), presenting a draft set of 'Indigenous Land Tenure Principles' (NIC Principles) for discussion at the annual Native Title Conference on 3 June 2005.¹¹

The NIC Principles aim to secure 'improved social and economic outcomes from [the Indigenous] land base now and into the future, but in a way that maintains Indigenous communal ownership'.¹² They are:

1. The principle of underlying communal interests in land is fundamental to Indigenous culture.

9 Prime Minister, the Hon. John Howard MP, *Address at the National Reconciliation Planning Workshop 30 May 2005*, Old Parliament House, Canberra. Available online at: <www.pm.gov.au/news/speeches/speech1406.html>, accessed 19 August 2005.

10 Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon. Amanda Vanstone, *Address to the Reconciliation Australia Conference*, Old Parliament House, Canberra, 31 May 2005, <www.atsia.gov.au/media/speeches/31_05_2005_reconciliation.htm>, accessed 19 August 2005.

11 National Indigenous Council, 3 June 2005 Communiqué, *Indigenous Land Tenure Principles*, <www.oipc.gov.au/NIC/communique/PDFs/LandTenure.pdf>, accessed 19 August 2005.

12 National Indigenous Council, 15-16 June 2005 Communiqué. *Third Meeting of the National Indigenous Council*, <www.oipc.gov.au/NIC/communique/PDFs/ThirdMeetingNIC.pdf>, accessed 16 August 2005.



2. Traditional lands should also be preserved in ultimately inalienable form for the use and enjoyment of future generations.
3. These two principles should be enshrined in legislation, however, in such a form as to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.
 - An effective way of reconciling traditional and contemporary Indigenous interests in land – as well as the interests of both the group and the individual – is a mixed system of freehold and leasehold interests.
 - The underlying freehold interest in traditional land should be held in perpetuity according to traditional custom, and the individual should be entitled to a transferable leasehold interest consistent with individual home ownership and entrepreneurship.
4. Effective implementation of these principles requires that:
 - the consent of the traditional owners should not be unreasonably withheld for requests for individual leasehold interests for contemporary purposes;
 - involuntary measures should not be used except as a last resort and, in the event of any compulsory acquisition, strictly on the existing basis of just terms compensation and, preferably, of subsequent return of the affected land to the original owners on a leaseback system basis, as with many national parks.
5. Governments should review and, as necessary, redesign their existing Aboriginal land rights policies and legislation to give effect to these principles.¹³

The NIC Principles were formalised without change and presented to the Ministerial Taskforce on Indigenous Affairs for consideration at the NIC meeting on 15-16 June 2005.¹⁴

Issues raised by the debate

The debate revealed a number of issues, often relating to different outcomes, entangled by ideological and political argument. These are:

What form of ownership best supports economic development – communal or individual?

A view appearing in the debate was that communal ownership must be limited, reduced or removed because it hinders economic development, while individual ownership facilitates entrepreneurship. Various propositions were offered in support of this position:

- that financial institutions find it too difficult to lend against property with multiple owners, since it is not clear who is responsible for the debt

13 National Indigenous Council, 15-16 June 2005 Communiqué. *Third Meeting of the National Indigenous Council*, <www.oipc.gov.au/NIC/communique/PDFs/ThirdMeetingNIC.pdf>, accessed 16 August 2005.

14 *ibid.*



- that communal property does not support individual effort because there is supposedly no individual reward, so it does not foster the mentality necessary for entrepreneurialism, and
- where partisanship, nepotism or corruption occurs in entities set up to represent communal interests, this fails to spread the benefits of land ownership throughout the community – classes of ‘haves’ and ‘have nots’ are created.

Counter to this view is the fact that communal Indigenous land ownership reflects ancient traditional forms of property in Aboriginal societies, giving expression to Indigenous living cultures. The right to culture and property (including property with distinctive characteristics) are human rights protected at international law (see Chapter 2). The North American experience demonstrates that financial institutions are willing to enter into loan arrangements with indigenous groups, by using creative approaches (see Chapter 3).

As noted in the *Native Title Report 2004*, the Harvard Project for American Indian Economic Development found that governance and capacity building are central to economic and social development.¹⁵ If corruption is exhibited in a community entity, this is likely to be replayed in the allocation of individual portions of communal land. Changes to titling will not address governance issues. Capacity building takes on even greater importance in relation to proposals to mortgage or lease Indigenous land. It is necessary to ensure Indigenous communities, families and individuals have capacity to take on the legal and financial obligations involved, and to manage any capital raised to ensure ongoing gains, where leasing or mortgaging is desired by them (see Chapter 4).

Value and use of the land

The NIC and liberal commentators in the debate suggest that the Indigenous land base should be used to lift Indigenous communities out of poverty. Views expressed in the debate are:

- land rights and native title have not improved the wellbeing of Indigenous Australians, so need reform, and
- inalienable title ‘locks up’ land – land should be sold for profit, leased on a long-term basis for rent, or used as security against loans for homes and businesses; that is, Indigenous land should be entered into the real property market.

No land rights or native title rights legislation aims to improve economic outcomes alone. Therefore, it is misconceived to base reforms on an economic evaluation of land rights or native title. This is explored later in this Chapter.

Inalienability (or prohibition on sale) is a feature of native title that flows from the traditional laws and customs of the native title group; it is not imposed by government. In relation to land rights, inalienability is imposed through legislation in all jurisdictions except New South Wales. This feature is intended to prevent loss of land through sale to non-Indigenous people, in recognition of

¹⁵ See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2004*, pp29-30. Available online at: <www.humanrights.gov.au/social_justice/ntreport04/index.html>, accessed 28 November 2005 and *Native Title Report 2003*, pp37-39. Available online at: <www.humanrights.gov.au/social_justice/ntreport03/index.htm>, accessed 28 November 2005.



the political and cultural importance of the land to Indigenous peoples (see case studies in Chapter 2).

Most importantly, any compulsion of traditional owners to sell or lease their land against their wishes contravenes the principle of free, prior and informed consent and risks breaching the principles of the *Racial Discrimination Act 1975* (Cth). This is explored further in Chapter 2.

Existing processes for the grant of leases

Indigenous leaders working in land councils and Native Title Representative Bodies (NTRBs), as well as land rights and native title experts, were quick to point out that existing land rights legislation and the *Native Title Act 1993* (Cth) (NTA) already enable Indigenous land to be leased. A contrary view was that while existing legislation allows for leasing, the process is cumbersome, requiring negotiations with the relevant land council, NTRB or Prescribed Bodies Corporate (PBCs) (the Indigenous entities that hold or manage native title after a positive determination). Also, Ministerial consent is often required. It was argued that these processes act as a disincentive for Indigenous and non-Indigenous people to lease land, whether for private home ownership, commercial development or investment.¹⁶

In response, the point was made that there needs to be checks and balances to ensure the sale or long-term lease of communal land is not done without the free, prior and informed consent of the community. Entities like land councils, NTRBs and PBCs play a significant role in ensuring traditional owners are accurately informed about matters concerning their land in a timely fashion, to comply with this standard (see Chapter 2).

Housing need

The debate has highlighted the inadequate supply of housing for Indigenous communities in remote areas, and the low levels of Indigenous home ownership. A strong view is that home ownership is a key factor in building wealth and individual identity. Issues raised were:

- whether increasing home ownership amongst Indigenous Australians will improve other social factors such as health and education, or other economic factors such as employment and wealth
- the relationship between the legal ability to a home (such as by individualising land tenure) and financial ability (income, wealth and credit rating), and
- the extent to which the market may be used to address housing shortages in Indigenous communities.

¹⁶ See for example N. Pearson & L. Kostakidis-Lianos, 'Building Indigenous Capital: removing obstacles to participation in the real economy' *Australian Prospect*, Easter 2004.



While there is a positive link between home ownership and other socioeconomic factors such as reduced contact with the criminal justice system, improved education and health outcomes,¹⁷ and employment,¹⁸ it is unlikely that providing the tenure arrangements to increase home ownership without attention also on generating employment opportunities and improving healthcare and education will trigger such results. *Changing land tenure to create the legal ability to own homes individually will not give Indigenous Australians the financial ability to do so.* Some level of economic development has to take place to create jobs and provide income *before* sustainable home ownership opportunities may be taken advantage of (see Chapter 3).

There is a critical housing shortage for Indigenous peoples in Australia.¹⁹ The right to housing is a fundamental human right recognised in numerous international treaties. It ensures that individuals who are homeless, without adequate housing or the resources necessary to provide for their own housing needs, are entitled to adequate housing for security and wellbeing. The government must not shift the cost of meeting the needs of individuals who do not have the resources to provide for their own housing requirements, to Aboriginal communities (see Chapter 4).

How to kick-start economic development in remote communities

Finally, the debate has drawn out discussion on the causes of poverty and how economic development is best encouraged in remote Indigenous communities on communal land. Different views have been put that:

- Creating individual leases will enable financial institutions to lend to Indigenous Australians on communal land, which will encourage home and business ownership, kick-start an entrepreneurial culture, generate private investment and build a wealth base.²⁰
- The causes of poverty in remote Indigenous communities are complex. They include: the low commercial value and aridity of the land, high transaction costs due to remoteness, small

17 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Chapter 2.

18 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005*, Productivity Commission, Canberra, 2005, p3.47. Available online at: <www.pc.gov.au/gsp/reports/indigenous/keyindicators2005/index.html>, accessed 28 November 2005. Housing is also integrally linked to other human rights, including women and children's rights and the right to health and is recognised as a fundamental necessity to ensure health, wellbeing and security, consistent with other human rights. Office of the High Commissioner for Human Rights, *The right to adequate housing* (Art.11(1)), CESCR General Comment 4, Sixth Session, 1991, para 7. Available online at: <[www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument)>, accessed on 30 September 2005.

19 According to the Australian Bureau of Statistics (ABS), \$2.1 billion is required to address Indigenous housing needs. There are an estimated 21,287 dwellings managed by Indigenous housing organisations, 8% requiring replacement and 19% requiring major repairs. Approximately 70% of the dwellings are located in remote and very remote locations, where around 106,000 Indigenous people live. See S. Etherington and L. Smith, ABS and Aboriginal and Torres Strait Islander Services (ATSIS) contribution, *The design and construction of Indigenous housing: the challenge ahead 2004*, 2004. Available online at: <www.abs.gov.au>, accessed 26 August 2005.

20 H. Hughes and J. Warin, *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities*, Centre for Independent Studies, March 2005. Available online at: <<http://www.cis.org.au/>>, accessed 10 November 2005.



populations, lack of a skilled workforce due to low levels of education, and the lack of infrastructure needed to conduct business.²¹ These won't all be addressed by enabling the mortgage or lease of land.

- Government spending patterns are responsible for under-development in remote Indigenous communities. One study in a remote Aboriginal community in the Northern Territory revealed that governments execute lower than average expenditure on positive aspects of public policy designed to build capacity such as education and employment creation, and higher than average spending on negative areas such as criminal justice and unemployment benefits.²²
- Remote communities are not economically sustainable.²³
- There is a need for *diverse* economic options – for economic plurality. Economic development can be aligned with Indigenous cultural imperatives, for example, through land management, art, and cultural tourism industries. These are profitable industries that flourish through the maintenance of traditional lifestyles, which is encouraged by inalienable land title.²⁴
- The beneficiaries and targets of economic development need to be clearly defined in any policy proposal for economic development. History has demonstrated that facilitating economic development for regional areas will not 'trickle down' to its Indigenous inhabitants. Rights are crucial to ensure Indigenous participation in the bounty of regional, state or national development.²⁵

These ideas are explored further in Chapter 3.

The purpose of land rights

The Steering Committee for the Review of Government Service Provision's biannual report card on government services for Indigenous Australians, *Overcoming Indigenous Disadvantage: Key Indicators 2005*,²⁶ found that access to

21 Central Land Council Policy Paper, *Communal Title and Economic Development*, March 2005, p6.

22 J. Taylor and O. Stanley, 'The Opportunity Costs of the Status Quo in the Thamarrurr Region', *CAEPR Working Paper 28/2005*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2005. Available online at: <www.anu.edu.au/caepr/Publications/WP/CAEPRWP28.pdf>, accessed 24 October 2005.

23 A. Bolt, 'Come to cities and share', *Herald Sun* 15 July 2005, p21.

24 J.C. Altman, 'Generating finance for Indigenous development: Economic realities and innovative options' *CAEPR Working Paper No.15/2002*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2002. Available online at: <www.anu.edu.au/caepr/Publications/WP/CAEPRWP15.pdf>, accessed 12 August 2005.

25 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Challenges and Opportunities in Times of Change*, Address to the Native Title Conference 2005, Coffs Harbour, 2 June 2005. Available online at: <www.humanrights.gov.au/speeches/social_justice/NTRBConference2005.html>, accessed 21 October 2005.

26 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005*, Productivity Commission, Canberra, 2005. Available online at: <www.pc.gov.au/gsp/reports/indigenous/keyindicators2005/index.html>, accessed 28 November 2005.



traditional lands,²⁷ and ownership and control of land,²⁸ were two positive socio economic indicators. In contrast, the Report found that Indigenous Australians ranked below non-Indigenous Australians on socioeconomic indicators including labour force participation,²⁹ home ownership,³⁰ and household and individual income.³¹

A central argument in the current debate is that the positive progress on returning land to Indigenous Australians (now estimated to total between 16-20% of Australia's land mass)³² should have made more of an impact on Indigenous economic disadvantage. However, this presumes that economic benefit was a key objective of land rights and native title that was supported by the relevant legislative framework. In this section this presumption is tested by looking at the various goals of land rights legislation. The barriers to using native title rights for economic benefit that have emerged from native title law and policy are considered in the following section.

The land rights statutes in South Australia, Victoria, Tasmania and the Jervis Bay Territory provide for the transfer or grant of specific areas of land nominated by the relevant statute. The legislation in Queensland, the Northern Territory and New South Wales establish state-wide regimes where land deemed available for claim (generally unallocated State land) may be claimed across the jurisdiction. In Western Australia, former Aboriginal reserve land was provided to traditional owners through 99 year leases held by the Western Australian Aboriginal Lands Trust; this is in the process of being transferred from the Trust to Aboriginal communities. The tenures in these different systems include freehold title, inalienable freehold title, lease-in-perpetuity and land held in trust.³³ Further detail on the land rights statutes in each jurisdiction is provided in Chapter

27 In 2002, 21.9% of Indigenous people in Australia aged 15 years and over lived on their homelands /traditional country – this varied from 43.2% in very remote areas to 8.1% in major cities. A further 46.2% did not live on their homelands/traditional country but were allowed to visit. Those who lived on their homelands/traditional country or were allowed to visit comprised nearly all of the 69.6% of the Indigenous people who recognised an area as their homelands or traditional country. *ibid.*, p9.24

28 Indigenous owned or controlled land is either held by Indigenous communities or held by governments on behalf of Indigenous people. In 2005, Indigenous owned or controlled land comprised 15.9% of the area of Australia. Nearly all (98.6%) Indigenous owned or controlled land is in very remote areas of Australia. *ibid.*, p11.26.

29 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005*, Productivity Commission, Canberra, 2005, p3.32. Available online at: <www.pc.gov.au/gsp/reports/indigenous/keyindicators2005/index.html>, accessed 28 November 2005.

30 *ibid.*, p3.47.

31 *ibid.*, pp3.39, 3.43.

32 *ibid.*, p11.26. See also J.C. Altman, C. Linkhorn and J. Clarke, 'Land rights and development reform in remote Australia', *CAEPR Discussion Paper No.276/2005*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2005, p1. Available online at: <www.anu.edu.au/caepr/Publications/DP/2005_DP276.pdf>, accessed 12 August 2005. See also D.P. Pollack, 2001, *Indigenous land in Australia: a quantitative assessment of Indigenous land holdings in 2000*, Centre for Aboriginal Economic Policy Research, Discussion Paper No.221/2001, Australian National University, Canberra, 2001. Available online at: <www.anu.edu.au/caepr/Publications/DP/2001_DP221.pdf>, accessed 31 September 2005.

33 D.P. Pollack, 2001, *Indigenous land in Australia: a quantitative assessment of Indigenous land holdings in 2000*, Centre for Aboriginal Economic Policy Research, Discussion Paper No. 221/2001, Australian National University, Canberra, 2001. Available online at: <www.anu.edu.au/caepr/Publications/DP/2001_DP221.pdf>, accessed 31 September 2005.



2, including an overview of the extent to which individual leasing, selling or mortgaging of communal land is currently permitted.

There are four broad rationales that can be identified in land rights legislation around Australia:

1. Compensation for dispossession
2. Recognition of Indigenous law, the spiritual importance of land, and the continuing connection of Indigenous peoples to country
3. Social and economic development, and
4. Indigenous self-determination.

Each of these will be considered in turn. Before looking at these rationales from the perspective of what governments intended, it must be remembered that it was the persistent fighting for justice by Aboriginal and Torres Strait Islander peoples that led to these statutes in the first place.³⁴

Today's communal lands resulted not from the benevolence of Australian governments, but the unwavering demands of generations of Indigenous activists...As Indigenous people our relationships with land sustain us, provide the foundations for our social order and define our identity. It follows that land is the enduring anchor of the black political movement. The history of the land rights struggle has been conspicuously absent from recent discussions, implying that communal lands were gifts from the colonial state, arising independently of black agency. In reality however, each community's title deed carries the indelible blood stains of our ancestors.³⁵

As the Royal Commission into Aboriginal Deaths in Custody observed, the importance of re-telling history is not because it will add to what is known 'but because what is known is known to historians and Aboriginal people; it is little known to non-Aboriginal people and...it must become more known.'³⁶

1. Compensation

Compensation for failing to make treaties, for the historical taking of land from Aboriginal and Torres Strait Islander peoples without agreement or payment – that is, for dispossession – is one of the most important reasons for modern land rights legislation. The rationale of compensation reflects international law norms and human rights principles, and is both a symbolic and practical act of reconciliation. The notion of land rights for compensation recognises the prior ownership of Australia by Indigenous Australians, and the injustice of how prior ownership was ignored and stripped away through the legal processes of colonisation.

34 For example, see the Northern Land Council's chronology of the modern land rights movement at: <www.nlc.org.au/html/land_hist.html>, accessed 31 August 2005.

35 N. Watson, 'Review of Aboriginal Land Titles', Briefing Paper No. 8, *Ngija Institute for Indigenous Law, Policy and Practice*, 2005, pp1-2. Available online at: <www.jumbunna.uts.edu.au/ngija/pdf/review_alt.pdf>, accessed 24 November 2005.

36 Royal Commission into Aboriginal Deaths in Custody, *National Report Volume 1*, 1991, para 1.4.1. Available online at: <www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadlc/>, accessed 2 November 2005.



Unlike the settlement of other British colonies, and contrary to the international legal norms of the day, the colonisation of Australia was not carried out through treaties with the indigenous inhabitants.

People who took up land on... Australian frontiers had to worry about the Lands Department, but not about Aborigines as 'owners'. They did not, as in most colonies, have to go through a form of purchase or get 'natives' to make marks on documents. No relationship was legally established between Aboriginal groups and the land they had occupied.³⁷

This was despite British instructions to the colonial officers to make treaties with the original inhabitants. For example, the Letters Patent Under the Great Seal of the United Kingdom erecting and establishing the province of South Australia in 1836 contained the proviso:

Provided always that nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any aboriginal natives of the said province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such natives.

In practice, in South Australia as elsewhere in Australia, treaties or bargains were not made; and only small areas of land were set aside for Indigenous people, as reserves.

The South Australian *Aboriginal Lands Trust Act 1966* (SA) – marking the beginning of land rights type legislation in Australia – aimed to address this historical injustice by ensuring title to reserve land, and to extra land where possible, was held on trust for the benefit of Aboriginal people. The Second Reading Speech for the Bill makes clear that the return of land was to comprise compensation for the failure to carry out the original proposal of the English commissioners who instructed on the settlement of South Australia.³⁸

The importance of compensation was also reflected in the federal *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), where the implementation of land rights was expected to do 'simple justice to a people who have been deprived of their land without their consent and without compensation'.³⁹ It also underlay the New South Wales *Aboriginal Land Rights Act 1983* (NSW), the Tasmanian *Aboriginal Lands Act 1995* (Tas) which seeks to promote reconciliation through grants of land of historic and cultural significance, and the Queensland *Aboriginal Land Act 1991* (Qld) and *Torres Strait Islander Land Act 1991* (Qld).

The rationale of compensation accords with the human rights standards at international law. The United Nations Committee on the Elimination of Racial Discrimination (CERD), the body which monitors the implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination*,⁴⁰ calls upon state parties to the Convention to eliminate racial discrimination in relation to property rights through the return of, or compensation for, land taken from indigenous peoples. It recommends that States:

37 C.D. Rowley, *The Destruction of Aboriginal Society*, Pelican, Sydney, 1970, p54.

38 Minister of Aboriginal Affairs, the Hon. D.A. Dunstan MHA, Second Reading Speech, Aboriginal Lands Trust Bill, 13 July 1966, South Australia House of Assembly, Hansard, pp473-479.

39 A.E. Woodward, Aboriginal Land Rights Commission, *Second Report*, AGPS, Canberra, 1974, p2.

40 United Nations General Assembly, *Resolution 2106 (XX)*, Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 UNTS 195.



Recognise and protect the rights of indigenous peoples to own, develop, control and use their communal land, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should *as far as possible take the form of lands and territories* (emphasis added).⁴¹

2. Recognition of Indigenous law, spiritual importance of land and the continuing connection of Indigenous peoples to country

Anthropologist Professor W.E.H. Stanner explained the Indigenous relationship to land in Western concepts as follows:

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home', as warm and suggestive though it be, does not match the Aboriginal word that may mean 'camp', 'heart', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre' and much else in one. Our word land is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets...The Aboriginal would speak of earth and use it in a rich symbolic way to mean his 'shoulder' or his 'side'. I have seen an Aboriginal embrace the earth he walked on...a different tradition leaves us tongueless and earless towards this other world of meaning and significance.⁴²

Before native title was recognised in *Mabo (No. 2)*,⁴³ it was thought that Aboriginal and Torres Strait Islander peoples' interests in land under their own laws and customs could not be given effect in Australian law.⁴⁴ Until the *Mabo* decision, land rights legislation provided the only means of recognising Indigenous rights in land within the Australian legal system. This formed another rationale for land rights: to give effect to the ownership of and connection to land by Indigenous peoples under their traditional laws and customs.

For example, the federal government stated at the introduction of the Aboriginal Land Rights (Northern Territory) Bill 1976 that:

The coalition Parties' policy on Aboriginal affairs clearly acknowledges that affinity with the land is fundamental to Aborigines' sense of identity...The Government believes that this bill will allow and encourage Aborigines in the Northern Territory to give full expression to the affinity with land

41 Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) concerning Indigenous Peoples (para.5) adopted on 18 August 1997, CERD/C/51/Misc.13/Rev.4.

42 W.E.H. Stanner, 1953, 'The Dreaming', in W.E.H. Stanner, *White Man Got No Dreaming, Essays 1938-1973*, ANU Press, Canberra, p230.

43 *Mabo and others v Queensland (No. 2)* [1992] 175 CLR 1.

44 The first case brought by Indigenous Australians asserting their territorial rights under common law was unsuccessful. In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (the Gove Land Rights case), Justice Blackburn acknowledged that Indigenous law was 'a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence' (at 267) but held that the doctrine of communal native title did not form part of the law of Australia.



that characterised their traditional society and gave a unique quality to their life.⁴⁵

The Second Reading Speech for the Bill makes clear that it was intended to vest rights that were the equivalent of traditional Aboriginal rights in traditional owners, introducing Aboriginal customary law into Australian law.⁴⁶

This basis for land rights legislation recognises that Indigenous societies in Australia are governed by their own systems of law, including customary land tenure systems, and strives to create space for these within the Australian legal system. It also acknowledges the spiritual importance of land to Indigenous culture and the continuing connection of Indigenous Australians to country, through customary law, association to place and Indigenous religions. This is done not by giving legal protection to the interests under traditional laws – as native title does now – but instead by the grant of property titles familiar to the legal system based on traditional ownership or historical association. Land rights statutes in the Northern Territory and South Australia base the grant, and subsequent management, of land on notions of ‘traditional ownership’.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) makes traditional ownership the sole criteria for land claims despite the Woodward Royal Commission, which precipitated the Act, recommending the twin bases of traditional ownership and need.⁴⁷ It defines ‘traditional Aboriginal owners’ in relation to land as a local descent group of Aboriginals who:

- a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- b) are entitled by Aboriginal tradition to forage as of right over that land.⁴⁸

The South Australian *Pitjantjatjara Land Rights Act 1981* (SA) and *Maralinga Tjarutja Land Rights Act 1984* (SA) vest ownership of lands in corporate bodies which comprises all the traditional owners in the area.⁴⁹

Some land rights statutes enable management of the land to be conducted through traditional decision-making processes and customary law. For example, in Queensland, the Ministerial appointment of trustees to hold land on behalf of Aboriginal people, and trustee decisions to grant leases or other interests in land, must as far as possible be made in accordance with Aboriginal tradition or an agreed decision-making process.⁵⁰ In the Northern Territory, a lease cannot be granted unless the relevant Land Council is satisfied that the traditional owners understand the nature and purpose of the proposed grant and, as a group,

45 Minister for Social Security, Senator the Hon. Guilfoyle, Second Reading Speech, *Aboriginal Land Rights (Northern Territory) Bill 1976*, Commonwealth Senate, 6 December 1976, Hansard, p2613.

46 G. Nettheim, G.D. Meyers, D. Craig (eds), *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p241.

47 *Aboriginal Land Rights Act (Northern Territory) Act 1976* (Cth), s.50.

48 *ibid.*, ss.3(1).

49 *Pitjantjatjara Land Rights Act 1981* (SA), s.15.

50 *Aboriginal Land Act 1991* (Qld), ss.28(4) and 65(3); and *Aboriginal Land Regulation 1991* (Qld), r.45(1), (2).



consent to it.⁵¹ This consent must be given in accordance with either an agreed or a traditional decision-making process.⁵²

In the older settled states and territories, land rights legislation takes account of the more extensive dispossession within these jurisdictions by basing the grant of land on grounds besides traditional ownership alone. In New South Wales, the only criteria for claims is membership of the Local Aboriginal Land Council, which can claim land within or outside its area if 'claimable land' (effectively, unoccupied Crown land that is not needed for a public purpose).⁵³ The Act expressly acknowledges the spiritual, social, cultural and economic importance of land to Aboriginal people in the long title, but also recognises the devastation effected upon traditional laws and customs and connection to land by colonialism through this broad basis for claims.

In Queensland, any group of Indigenous people may claim 'claimable' land on the basis of traditional affiliation⁵⁴ or historical association,⁵⁵ as well as economic or cultural viability.⁵⁶ This acknowledges the greater impact of colonisation within these states, which saw substantial numbers of Indigenous people removed from their traditional lands to other regions under government powers to remove and confine Aboriginal people to any Aboriginal reserve.⁵⁷ It also recognises that this removal did not sever the continuing connection of Indigenous peoples to the land, both their traditional country and reserves.

In South Australia,⁵⁸ Victoria,⁵⁹ Tasmania⁶⁰ and the Jervis Bay Territory⁶¹ the relevant land rights statutes grant specific parcels of land rather than establishing a claims process. This recognises the continuing connection Indigenous peoples have to specific areas of land post-contact, as the land granted is recognised to be culturally important and includes former reserve lands, missions, cemeteries or historic sites.

3. Economic and social development

Economic and social development for Indigenous Australians comprises a third important rationale for land rights legislation. Land rights can provide a means for social development through creating a legal and geographical space for the exercise of Indigenous law, culture and self-governance. The practice of

51 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss.19(5).

52 *ibid.*, s.77A.

53 *Aboriginal Land Rights Act 1983* (NSW), s.36.

54 *Torres Strait Islander Land Act 1991* (Qld), s.43 and s.50 and *Aboriginal Land Act 1991* (Qld), s.46 and s.53.

55 *Torres Strait Islander Land Act 1991* (Qld), s.43 and s.51 and *Aboriginal Land Act 1991* (Qld), s.46 and s.54.

56 *Torres Strait Islander Land Act 1991* (Qld), s.43 and s.52; and *Aboriginal Land Act 1991* (Qld), s.46 and s.55.

57 *Aboriginal Protection & Restriction of Sale of Opium Act 1897* (Qld). This legislation set a pattern for the other legislatures in Australia. The reserve inhabitants were subject to extensive regimes of control and management under the state 'Protector'. By 1911, all the States except Tasmania had enacted similar type legislation under the policy of 'protection'.

58 *Pitjantjatjara Land Rights Act 1981* (SA) and *Maralinga Tjarutja Land Rights Act 1983* (SA).

59 Land has been granted at Framlingham and Lake Tyers under the *Aboriginal Lands Act 1970* (Vic), at Northcote under the *Aboriginal Lands (Aborigines' Advancement League) (Watt St, Northcote) Act 1982* (Vic) and the *Aboriginal Land (Northcote Land) Act 1989* (Vic), at Lake Condah and Framlingham Forest under the *Aboriginal (Lake Condah and Framlingham Forest) Act 1987* (Cth), at Dimboola, Stratford and Healesville under the *Aboriginal Lands Act 1991* (Vic) and at Robinvale under the *Aboriginal Land (Matatunga Land) Act 1992* (Vic).

60 *Aboriginal Lands Act 1995* (Tas).

61 *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth).



Indigenous law and culture strengthens individual autonomy, social norms of responsibility and social capital. Land rights also encourages the establishment of Indigenous organisations to hold and manage land, providing governance structures, employment, and the development of knowledge, capacity and institutions for engagement with the broader economy and polity. Further, land rights can provide a means for economic development through restoring Indigenous rights to land and natural resources, including minerals, which can be exploited where desired. It may also give Indigenous owners a financially valuable seat at the negotiating table with government and third parties through statutory control over what happens on their lands.

The connection between land rights and Indigenous wellbeing and development was identified by the *Royal Commission into Aboriginal Deaths in Custody*:

It was the dispossession and removal of Aboriginal people from their land which has had the most profound impact on Aboriginal society and continues to determine the economic and cultural wellbeing of Aboriginal people to such a significant degree as to directly relate to the rate of arrest and detention of Aboriginal people...The nexus between inadequate or insufficient land provision for Aboriginal people and behaviour which leads to a high rate of arrests and detention of Aboriginal people has been repeatedly and directly observed in the reports of the deaths which were investigated.⁶²

The rationale of social and economic development and land rights underlies a number of statutes. For example, the Queensland *Aboriginal Land Act 1991* (Qld) and *Torres Strait Islander Land Act 1991* (Qld) enable land to be granted on the basis of economic or cultural viability, if the Queensland Land Tribunal is satisfied that granting the claim would assist in restoring, maintaining or enhancing the capacity for self-development, and the self-reliance and cultural integrity, of the group.⁶³ The Minister for Aboriginal and Islander Affairs observed at the introduction of the Torres Strait Islander Land Bill:

The legislation will restore responsibility to Torres Strait Islanders for the management of their lands in accordance with island custom. It is only by means such as this that the tide will be turned against continuing dependence on Government-provided welfare.⁶⁴

The legislation in Western Australia is also based on goals of limited social and economic development, although not through Indigenous self-determination or self-management.⁶⁵ The *Aboriginal Affairs Planning Authority Act 1972* (WA) does not vest rights directly in traditional owners of land or in the Indigenous community living on the land. Rather, it vests Aboriginal reserves in the statutory Aboriginal Affairs Planning Authority, and provides for the management of Aboriginal reserves and the grant of ordinary freehold and leases to be held by the government-appointed Aboriginal Land Trust *on behalf of* Aboriginal

62 Royal Commission into Aboriginal Deaths in Custody, *National Report Volume 2*, 1991, para 19.1.1 and 19.3.1. Available online at: <www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/>, accessed 2 November 2005.

63 *Torres Strait Islander Land Act 1991* (Qld), s.52 and *Aboriginal Land Act 1991* (Qld), s.55.

64 Minister for Family Services and Aboriginal and Islander Affairs, the Hon. A.M. Warner MLA, Second Reading Speech, Torres Strait Islander Land Bill, 22 May 1991, Queensland Legislative Assembly, Hansard, p7777.

65 See next subsection, below.



people. This reflects 'protection'⁶⁶ style legislation from the 19th century; its main purpose was to control and protect Indigenous peoples. The Authority may now sell, lease or otherwise dispose of land it holds to any Aboriginal person on any conditions it thinks fit.⁶⁷

The Act reflects an assimilationist⁶⁸ view of social and economic development. It was enacted to assist the 'integration of Aboriginal peoples...into the Australian way of life.'⁶⁹ The Authority has a statutory duty to promote the wellbeing of Aboriginal persons in Western Australia and take their views into account.⁷⁰ Its functions include:

- Fostering the involvement of persons of Aboriginal descent in their own enterprises in all aspects of commerce, industry and production, including agriculture
- Making available such services as may be necessary to promote the effective control and management of land held in trust for persons of Aboriginal descent, and
- Taking, instigating or supporting such action as is necessary to promote the economic, social and cultural advancement of persons of Aboriginal descent in Western Australia.⁷¹

The goal of achieving economic benefits for Indigenous Australians through land rights has focused on leveraging off the desired uses of the land by the mainstream economy. This has centred on: mining, national parks, commercial development. Such leveraging can not only deliver economic benefits to traditional owners, it can also build relationships between Indigenous and non-Indigenous Australians. As Nicholas Peterson argues:

Only by creating rights which draw whites into negotiation with Aborigines on equal terms, which provide Aborigines with levels of funding that allow them to pursue self-defined goals and which establish structures in relation to land that are capable of independent action, is any effective and non-assimilatory resolution of the problems Aborigines and whites pose for each other likely to be reached. Needless to say, land rights is not a universal panacea but there are very few other options open to government seeking to establish a meaningful articulation between Aborigines and Australian society in the outback...people have to have something meaningful to make decisions about: in the outback that is land and the uses to which it is put.⁷²

Some land rights legislation has also made provision for financial resources to the Indigenous landowners.

66 See next subsection, below.

67 *Aboriginal Affairs Planning Authority Act 1972 (WA)*, s.41.

68 See next subsection, below.

69 Attorney-General, the Hon. T.D. Evans MLA, Second Reading Speech, Aboriginal Affairs Planning Authority Bill, 11 May 1972, Western Australia Legislative Assembly, Hansard, p1667.

70 G.Nettheim, G.D.Meyers, D.Craig (eds), *Indigenous Peoples and Governance Structures*, op.cit., p286.

71 G.Nettheim, G.D.Meyers, D.Craig (eds), *Indigenous Peoples and Governance Structures*, op.cit., pp286-7.

72 N. Peterson, in N. Peterson (ed), *Aboriginal land rights: a handbook*, Australian Institute of Aboriginal Studies, Canberra, 1981, p11.



Mining

The strongest Indigenous rights in minerals pursuant to land rights legislation are in New South Wales and Tasmania. In New South Wales, land owned by a Local Aboriginal Land Council (LALC) or the New South Wales Aboriginal Land Council (NSWALC) includes minerals other than gold, silver, coal and petroleum.⁷³ Mining cannot occur without the consent of the LALC and either the NSWALC or the New South Wales Land and Environment Court.⁷⁴ LALCs have a statutory power to explore for and exploit mineral resources or other natural resources.⁷⁵ In Tasmania, land vested in the state Aboriginal Land Council includes minerals other than oil, atomic substances, geothermal substances and helium.⁷⁶

In the Northern Territory, South Australia, Queensland, Victoria and the Jervis Bay Territory, mineral rights remain with the Crown but the Indigenous owners have some control over mining through the statutory power to withhold consent for the grant of an exploration or prospecting licence, or the power to refuse access to their lands.

A few statutes provide for compensation to be paid in recognition of the disturbance to traditional land from mining.⁷⁷ A number of regimes provide for royalties, or an amount equivalent to the royalties received by the state or federal government, to be paid to the Indigenous owners. In the Northern Territory, 'mining royalty equivalents' are paid into the Aboriginal Benefits Account (ABA) and distributed according to a formula set by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). This formula is that 40% of the monies paid into the ABA is to be divided between the Land Councils for administration: 30% is to be distributed to the Aboriginal councils or incorporated Aboriginal associations in the area affected by the mining operations; and the remaining 30% is for administration of the account, investment and payment as the Minister directs for the benefit of Aboriginals living in the Northern Territory.⁷⁸ Royalties can be negotiated by LALCs in New South Wales and are payable to the NSWALC which must deposit them in the Mining Royalties Account.⁷⁹

In South Australia, mining royalties are divided between the state government, the traditional owner corporations Anangu Pitjantjatjara and Maralinga Tjarutja, and a fund maintained by the Minister of Aboriginal Affairs to benefit South Australian Aboriginals generally.⁸⁰ There is also provision for mining royalties paid to the Crown to be transferred from general revenue to the state-wide Aboriginal Lands Trust established under the *Aboriginal Lands Trust Act 1966* (SA).⁸¹

73 See *Aboriginal Land Rights Act 1983* (NSW), s.45.

74 *ibid.*

75 *Aboriginal Land Rights Act 1983* (NSW), ss.41(b).

76 *Aboriginal Lands Act 1995* (Tas), ss.27(2).

77 *Pitjantjatjara Land Rights Act 1981* (SA), s.24 and *Maralinga Tjarutja Land Rights Act 1983* (SA), s.26; *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth), ss.32(2).

78 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s.35 and ss.63-64.

79 *Aboriginal Land Rights Act 1983* (NSW), s.46.

80 *Pitjantjatjara Land Rights Act 1983* (SA), ss.22(2); *Maralinga Tjarutja Land Rights Act 1984* (SA), ss.24(2).

81 *Aboriginal Lands Trust Act 1966* (SA), ss.16(4).



The weakest Indigenous mineral rights are in Western Australia. Mining can take place on lands reserved under the *Aboriginal Affairs Planning Authority Act 1972* (WA) with the consent of the Minister for Mines; and before granting his or her consent, the Minister must consult with the Minister for Aboriginal Affairs.⁸² There is no obligation to consult the Aboriginal Affairs Planning Authority, Aboriginal Lands Trust or Aboriginal communities. Royalties must be paid to the Crown;⁸³ however, the Authority can receive royalties for the use of its land or natural resources which has been delegated to the Aboriginal Lands Trust.⁸⁴ The Bonner Review of the Aboriginal Lands Trust recommended that the Western Australian government review the scheme for the payment of royalties to the Land Trust, and that the Trust pay all mining revenue to the communities affected by the mining.⁸⁵

Control over mining reflects a combination of economic development and cultural protection goals. *Justice Woodward recommended that mining development on Aboriginal land not occur without the consent of the Aboriginal land owners because he thought that traditional laws and customs applied to mineral rights as well as the surface of the land.*⁸⁶ *He also considered that 'Aborigines should have special rights and special compensations because they stand to lose so much more by the industrial invasion of their traditional lands and their privacy than other citizens would lose in similar circumstances.'*⁸⁷ *He concluded that '...to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights.'*⁸⁸

National Parks

The ownership or, to a lesser extent, joint management of national parks provides another measure of economic independence through land rights. For example, the leaseback of Katherine Gorge and surrounds to the government as a national park was negotiated between the Northern Territory Government and Jawoyn people as recommended by the Aboriginal Land Commissioner on the land claim.⁸⁹ The terms of the leaseback include that the Northern Territory Government pays the Northern Land Council, on behalf of the traditional owners, an annual rent of \$100,000 plus 50% of the revenue generated by the park.⁹⁰ The rent is reviewed every three years but the capital value of improvements within the park are excluded from the calculations.⁹¹ Other legislation which grants Indigenous title to the land and effects a leaseback to the government besides

82 *Mining Act 1978* (WA), ss.24(1)(f),(7)(a) and (b).

83 *Mining Act 1978* (WA), ss.108, 109; *Petroleum Act 1967* (WA) ss.137-149.

84 *Aboriginal Affairs Planning Authority Act 1972* (WA), s.24 and ss.28(a).

85 Aboriginal Lands Trust Review Team, *Report of the review of the Aboriginal Lands Trust*, Aboriginal Affairs Department, 1996, recs 9 and 10.

86 A.E.Woodward, Aboriginal Land Rights Commission, *Second Report*, AGPS, Canberra, 1974, para 708(ii).

87 A.E. Woodward, Aboriginal Land Rights Commission, *Second Report*, AGPS, Canberra, 1974, p115.

88 A.E. Woodward, Aboriginal Land Rights Commission, *Second Report*, AGPS, Canberra, 1974, p108.

89 Minister for Conservation, the Hon. Mr Manzie MP, Second Reading Speech, Nitmiluk (Katherine Gorge) National Park Bill, 23 February 1989, Northern Territory Parliament, Hansard, p5918.

90 Memorandum of Lease cl 6: *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT), Schedule 1.

91 *ibid.*, cl 7.



that in the Northern Territory⁹² is in South Australia⁹³ and New South Wales.⁹⁴ The Queensland *Aboriginal Land Act 1991* (Qld) allows Aboriginal ownership of national parks if a claim is successful.⁹⁵

Commercial development

The commercial development of land rights land can be achieved through the sale or lease of land to Indigenous or non-Indigenous developers. Every land rights statute bar one (the Victorian *Aboriginal Lands Act 1991* (Vic)) allows land to be leased. Conversely, ***land rights land can only be sold in one jurisdiction: New South Wales.***

Under the New South Wales *Aboriginal Land Rights Act 1983* (NSW), claims can be made for unused Crown land not needed for a public purpose. In addition, 7.5% of land tax received by the New South Wales Government for a period of 15 years to 1998 was invested in a capital fund to provide a basis for market purchase of land (see next subsection below). Land successfully claimed or purchased in the area of a Local Aboriginal Land Council (LALC) is generally held by that LALC as ordinary freehold.⁹⁶ Since 1990, a LALC has had power to sell, exchange, mortgage or otherwise dispose of land vested in it.⁹⁷ The power to dispose of land is subject to conditions⁹⁸ including that the state land council, the New South Wales Aboriginal Land Council (NSWALC) approves⁹⁹ and the LALC has determined that the land is 'not of cultural significance to Aborigines of the area'. The determination and the decision to dispose of the land must be made by a special majority of at least 80% of the members present and voting. Further, if the land was transferred to the LALC as a result of a successful claim, the responsible Minister and the Crown Lands Minister must have both been notified. However, the Ministers do not have power to veto a disposal.

The processes and issues involved in the sale, lease and mortgaging of land rights land are considered in depth in Chapter 2, including through case studies of the Northern Territory and New South Wales.

92 *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park 1987* (NT), *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT), *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – where Commonwealth reserves are established in the Northern Territory over Aboriginal-owned land (under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)). Also, the *Parks and Reserves (Framework for the Future) Act 2003* (NT) and *Parks and Reserves (Framework for the Future) (Revival) Act 2005* (NT) involving 27 parks and reserves. The latter two Acts provide for the requesting of the grant of freehold title under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or granting of a parks freehold and leaseback under Northern Territory law and the joint management of those lands.

93 *National Parks and Wildlife Act 1972* (SA), where NPWA reserves are established over Aboriginal land.

94 *National Parks and Wildlife Act 1974* (NSW).

95 *Aboriginal Land Act 1991* (Qld), s.24.

96 *Aboriginal Land Rights Act 1983* (NSW), s.36.

97 *ibid.*, ss.40D(1).

98 *ibid.*, ss.40D(1).

99 *ibid.*, ss.40B(2) and ss.40(1)(b).



Financial resources

Access to financial resources provides an independent means for Indigenous communities to work towards economic development under their own direction and with some autonomy from government. Two key existing institutions were established in tandem with land rights to assist Indigenous landowners accumulate financial resources: the Aboriginal Benefits Account under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the Statutory Investment Fund under the *Aboriginal Land Rights Act 1983* (NSW).

The New South Wales *Aboriginal Land Rights Act 1983* (NSW) established a statutory fund comprising 7.5% of state land tax each year for fifteen years from 1983 to 1998. Of \$547 million allocated, \$268 million was placed in a Statutory Investment Fund. This Fund had a balance of \$538 million at the end of the 2003/04 financial year.¹⁰⁰ This money is paid to the state-wide New South Wales Land Council and is intended to be compensation for loss of land through dispossession and the subsequent revocation of reserves. The earnings from this fund are allocated to the Aboriginal land council system, but the capital base remains intact.¹⁰¹

The *Aboriginals Benefit Account* (ABA) had its origins in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and receives income in the form of 'mining royalty equivalents' from mining operations on Aboriginal land in the Northern Territory. It makes payments to land councils, incorporated Aboriginal entities in areas affected by mining, and for the benefit of Aboriginal-incorporated entities in the Northern Territory generally according to the statutory formula outlined above. The net accumulated assets of the ABA are ultimately controlled by the federal Minister for Immigration and Multicultural and Indigenous Affairs.¹⁰²

Professor Jon Altman from the Centre for Aboriginal Economic Policy Research (CAEPR) argues that although substantial sums sit within these funds, the following challenges exist for the use of the money for economic development:

- there is no link between resourcing and success
- annual appropriations may be insufficient, so each [organisation] has to [manage] resources cautiously and only invest in low-risk ventures
- each organisation has considerable and highly variable objectives and jurisdictions, and options for joint action is limited
- each is subject to restrictions that are ministerially imposed and may make little commercial sense
- it is unclear if their substantial asset base can be fully utilised to back loans or guarantees or to jointly finance ventures with banks, and

100 New South Wales Aboriginal Land Council (NSWALC) and D. Gillespie, Tallegalla Consultants, SGS Economics & Planning, *NSWALC Situation Report: April 2005*, SGS Economics & Planning Pty. Ltd., Sydney, 2005, para 1.3.2.

101 J.C. Altman, 'Generating finance for Indigenous development: economic realities and innovative options' *CAEPR Working Paper No. 15/2002*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2002, p4. Available online at: <www.anu.edu.au/caepr/Publications/WP/CAEPRWP15.pdf>, accessed 28 November 2005.

102 *ibid.*



- there is some lack of appropriate transparency and communications with potential beneficiaries.¹⁰³

In addition to these policy and institutional challenges for Indigenous land financial assets, the physical characteristics of land rights land has made economic development difficult to achieve in practice. Most land rights legislation started with the transfer of ownership over former reserves to Indigenous peoples, and many now allow claims over unused Crown land. Reserves were established as areas of land to hold, control and protect Indigenous people as pastoralism and mining extended across Australia and the traditional owners were moved to make way for mining and grazing cattle and sheep. The Land and Emigration Commission, appointed in 1832 to provide government assistance to encourage British migrants to come to Australia, argued that the government must have the power to change the location of reserves when necessary¹⁰⁴. 'Europeans assumed that Aborigines felt the same about land as they did themselves, and that one tract of land was as good as another.'¹⁰⁵ Reserves and unused Crown land in practice tend to be distant from market hubs, and of low commercial value.

As the Steering Committee for the Review of Government Service Provision observes in *Overcoming Indigenous Disadvantage: Key Indicators 2005*:

The extent to which Indigenous people can potentially benefit from market based activities on their land depends very much on the location and nature of that land. Remoteness from markets and population centres adds to the costs of delivering products and services from Indigenous communities. Opportunities to profit from mining, agriculture and tourism depend, respectively, on the presence of certain minerals, rainfall and soil fertility, and places and activities that appeal to tourists... There are limited data on the extent to which Indigenous people use their land for various economic or other purposes and the benefits they obtain from it.¹⁰⁶

These practical factors must not be forgotten in assessing why land rights have not led to great improvements in Indigenous economic status.

4. Self-determination

The fourth rationale for land rights legislation is Indigenous self-determination. A number of governments sought to distinguish their approach to Indigenous affairs policy from that of preceding eras, particularly the discredited approach of assimilation, by granting land rights.

In the first half of the nineteenth century, expropriation of Indigenous land was pursued, often violently, under the policy of 'pacification'. From the early 19th century, it was government policy to 'civilise' Aboriginal people through conversion to Christianity. As immigration to the colony rapidly increased, it was predicted that Aboriginal people would soon die out. The subsequent 'protection' policy gave governments powers to remove and confine Aboriginal people to Aboriginal reserves where they were subject to extensive regimes of control and

103 *ibid.*

104 C.D. Rowley, *The Destruction of Aboriginal Society*, Pelican, Sydney, 1970, p98.

105 *ibid.*

106 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005*, Productivity Commission, Canberra, 2005, p11.20-11.21 and p11.23. Available online at: <www.pc.gov.au/gsp/reports/indigenous/keyindicators2005/index.html>, accessed 28 November 2005.



management.¹⁰⁷ This policy was practised throughout the nineteenth and into the first half of the twentieth century.¹⁰⁸

The succeeding policy of 'segregation' required 'full blood' Aboriginal people to live on reserves and 'part' or 'mixed blood' people to leave reserves to be absorbed into the white community or forcibly removed and placed in government run institutions. As soldiers returning from World War I were provided farming blocks, increasing the non-Indigenous demand for land, Aboriginal reserves were closed and residents dispersed.

In 1937, the first Commonwealth-State Native Welfare Conference was held, attended by representatives from all the states and the Northern Territory (except Tasmania). This was the first time Indigenous affairs were discussed at a national level. The Conference agreed that assimilating Indigenous people into non-Indigenous society should be the goal of government policy:

Assimilation means, in practical terms that, in the course of time, it is expected that all persons of Aboriginal birth or mixed blood in Australia will live like white Australians do.¹⁰⁹

The success of the 'assimilation' policy was measured by the extent to which traditional lifestyles were broken down. The policy of assimilation left no room for cultural diversity or self-directed autonomy for Indigenous Australians. The subsequent policy of 'integration' encouraged Aborigines and Torres Strait Islanders to become part of the majority Australian society without losing their language, identity and cultural traditions, in the same way as new migrants. The distinctive identity of Aboriginal and Torres Strait Islander peoples as 'first Australians' was disregarded in the policy of integration. The ideas associated with assimilation and integration are evident in the federal government's response to Indigenous demands for land rights in the 1960s and 1970s:

The Government believes that it is wholly wrong to encourage Aboriginals to think that because their ancestors have had a long association with a particular piece of land, Aboriginals of the present day have the right to demand ownership of it...This does not mean that Aboriginals cannot own land. They can, and do. But the Government believes they should secure land ownership under the system that applied to the Australian community and not outside it...¹¹⁰

The 'Aboriginal Embassy' was established on the lawns of Parliament House in 1972 in response to the Commonwealth Government's refusal to recognise

107 For example, in Queensland the Governor-in-Council could make regulations for residence and behaviour on reserves including the prohibition of 'aboriginal rites or customs that, in the opinion of the Minister, [were] injurious to the welfare of aboriginals living upon a reserve.' Other powers included control over Aboriginal peoples' property and the marriage of Aboriginal people to certain Aboriginal and non-Aboriginal people.

108 See Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Commonwealth of Australia, 1997, pp27-37. Available online at: <www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/>; Royal Commission into Aboriginal Deaths in Custody, *National Report Volume 1*, 1991, section 1.4. Available online at: <www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/>, accessed 2 November 2005; and M.Gumbert, *Neither Justice Nor Reason: A Legal and Anthropological Analysis of Aboriginal Land Rights*, University of Queensland Press, 1984, pp12-19.

109 M.Gumbert, *ibid.*, p19.

110 Minister for the Interior, the Hon. Mr Nixon MP, Commonwealth House of Representatives, Budget debate, Hansard, 3 September 1970.



Indigenous land rights. The policy of assimilation gave way to one of 'self-determination' with the election of the Whitlam Labor Government in 1972 on a social justice platform that included the recognition of Indigenous land rights. Self-determination in domestic policy was seen as:

...the scope for an Aboriginal group or community to make its own decisions about the directions in which it is to develop or can and does implement those decisions, not necessarily implement them only with its own hands but employ the means necessary to implement the decisions which it comes to itself.¹¹¹

The Fraser Liberal-National coalition government from 1975 retreated from the rhetoric of self-determination in Australian Indigenous policy, preferring instead the term 'self-management'. The retreat was, however, largely symbolic as it overlay a continuity of institutional development and reform of Indigenous policy and programs, most notably in the development of Indigenous community organisations and through the introduction of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).¹¹²

Since this time, the policies of self-determination or self-management have been in place for state and federal Indigenous affairs portfolios. A number of land rights statutes have been in pursuit of one or the other of these policies.

Self-determination in international law

This approach to Indigenous affairs reflected an acknowledgement of the injustices of colonisation, in international politics and law following World War II. On 14 December 1960, the United Nations General Assembly passed a resolution, the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹¹³ The Declaration includes a provision that 'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation'¹¹⁴ and 'all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'¹¹⁵ The latter clause is repeated in Article 1 of the International Covenant on Civil and Political Rights, and Article 1 of the International Covenant on Economic, Social and Cultural Rights, both of which Australia has ratified.

As outlined in the *Social Justice Report 2002*,¹¹⁶ the concept of self-determination has since evolved from this decolonisation framework. Its application to Indigenous peoples is currently being debated at the international level with

111 Select Committee of the Legislative Assembly upon Aborigines 1981, *Second Report*, Parliament of New South Wales, p5.

112 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, p9. Available online at: <www.humanrights.gov.au/social_justice/sj_reports.html#02>, accessed 28 November 2005.

113 United Nations General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, General Assembly resolution 1514 (XV) of 14 December 1960, UN Doc. A/4684 (1961).

114 *ibid.*, Article 1.

115 *ibid.*, Article 2.

116 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, *op.cit.*, pp11-30.



negotiations for the United Nations *Draft Declaration on the Rights of Indigenous Peoples*.¹¹⁷ The Draft Declaration includes a proposed article that would expressly acknowledge that Indigenous peoples have the right of self-determination. There is already jurisprudence from decisions by the United Nations Human Rights Committee and the United Nations Committee on Economic, Social and Cultural Rights which clearly identifies self-determination as a right held by indigenous peoples, including in Australia.¹¹⁸

Self-determination as a rationale for land rights

Land rights legislation can give effect to self-determination through recognising prior Aboriginal and Torres Strait Islander ownership of Australia and by creating a legal and geographical space in which Indigenous law and custom has effect and can contribute to self-directed development into the future. As Peterson notes, not only does colonisation displace, alter or eliminate Indigenous peoples' rights and interests in the land they occupied, but it also generally results in a loss of 'personal and political autonomy and group sovereignty'.¹¹⁹ The Indigenous land rights movements sought to restore both types of rights – property rights to the land, and political rights of autonomy.¹²⁰

The classic example of land rights legislation based on self-determination is the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In his second report which led to the legislation, Aboriginal Land Commissioner Woodward concluded that:

- Aboriginal people must be fully consulted about all steps proposed to be taken;
- Aboriginal communities should have as much autonomy as possible in running their own affairs; and
- Aborigines should be free to follow their traditional methods of decision-making.¹²¹

These principles are reflected in provisions of the resulting Act which established four regional land councils with an independent source of funding through the Aboriginal Benefits Account, controls access of non-traditional owners to the land, gives traditional owners the power to veto minerals exploration on their land, and ensures development proposals do not occur without the informed consent of the traditional owners. As Sean Sexton notes, the consent provisions are a key aspect of self-determination, allowing Aboriginal people to be included in negotiations, to have time to consider applications insulated from the pressure of developers or governments, and have control over how development is shaped.¹²²

117 Draft Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

118 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, *op.cit.*, p12.

119 N. Peterson, in N. Peterson (ed), *Aboriginal land rights: a handbook*, Australian Institute of Aboriginal Studies, Canberra, 1981.

120 *ibid.*, pp3-4.

121 A.E.Woodward, Aboriginal Land Rights Commission, *Second Report*, AGPS, Canberra, 1974, pp9-11.

122 S. Sexton, 'Aboriginal Land Rights, the Law, and Empowerment: The failure of economic theory as a critique of land rights', *NARU Discussion Paper No. 3/1996*, Northern Australia Research Unit, Australian National University, Canberra, 1996, p5.



The New South Wales Parliamentary Committee report which led to the *Aboriginal Land Rights Act 1983* (NSW) recommended that the New South Wales Parliament guarantee Aboriginal citizens the rights of self-determination in respect of their social, economic, political and cultural affairs. In the context of land rights, the policy of self-determination was reflected in the Committee's recommendations that:

- Full Aboriginal agreement to legislative proposals is essential.
- Aboriginal land rights organisations should be:
 - self-defining;
 - self-regulating; and
 - free from unnecessary external interference and control.
- Land returned should be held in the fullest possible title and secure from losses to government and others.
- Sufficient resources be returned and committed to Aboriginal land holding organisations.¹²³

As well as the *Aboriginal Land Rights Act 1983* (NSW), this rationale underlay the enactment of the *Pitjantjatjara Land Rights Act 1981* (SA), the *Maralinga Tjarutja Land Rights Act 1983* (SA), the Queensland *Aboriginal Land Act 1991* (Qld) and *Torres Strait Islander Land Act 1991* (Qld).

Conclusion: the purpose of land rights legislation

Land rights legislation was motivated by a number of rationales:

- compensation for dispossession
- recognition of Indigenous law, spiritual importance of land and the continuing connection of Indigenous peoples to country
- social and economic development
- Indigenous self-determination.

There are links and overlaps between these rationales. Compensation acknowledges the ongoing connection of Indigenous Australians to land as well as the wrongfulness of dispossession, through compensating in land rather than money alone (even where the area returned is not traditional country). The recognition of Indigenous law and continuing connection to land encourages the maintenance of distinct Indigenous cultures within the Australian state, in rejection of assimilation (which sought to break down traditional ways) and in support of self-determination. The goal of social and economic development is relevant to self-determination; because social wellbeing and economic prosperity will sustain independent, self-determining Indigenous communities.

Conversely, if self-determination was supported to the extent it is in the United States of America for example, Indigenous communities in Australia would be recognised as sovereign nations within the broader nation. Rights to minerals, potentially the most valuable asset of remote Aboriginal lands from the perspective of the mainstream economy, could be argued as the entitlement of Indigenous communities as well as the Crown.

These links do not mean that the different rationales are interchangeable. Each of these purposes must be respected individually when considering land rights legislation. It is too limited to evaluate land rights legislation on an economic

123 M. Wilkie, *Aboriginal Land Rights in NSW*, Alternative Publishing Co-operative Ltd., 1985, pp32-3.



development basis alone, because this was not its principle purpose or goal. Indeed, if economic development was the single or even primary aim of land rights, valuable mineral rights should have accompanied the return of all land. By and large, the particular tracts of land returned are of low commercial worth in the mainstream market – this simply does not make sense if a key objective of land rights legislation was for economic outcomes. Land rights land only becomes meaningful in light of the other three purposes: compensation, recognition of Indigenous customary law and spiritual attachment, and self-determination.

The past eighteen months has seen the emergence of a discourse asserting that the past thirty years of self-determination and self-management have failed.¹²⁴ This is illustrated by, most recently, the federal government's abolition of ATSIC. The Australian Government has indicated it does not support self-determination as the underlying principle for Indigenous policy development. Rather, it prefers concepts relating to individual empowerment and responsibility, as if such attributes were in conflict with self-determination.¹²⁵ The current debate, which is the focus of this Report, demonstrates the spread of this discourse to land rights and its communal nature, a key principle of self-determination.

The communal lands debate also expresses dissatisfaction with the economic and social outcomes produced from land rights. It criticises Indigenous self-determination on the basis that economic and social development have not resulted for Indigenous communities from land rights. This confuses the economic and social development purpose of land rights legislation with the separate purpose of self-determination.

In focusing on the economic and social development outcomes of thirty years of land rights, critical thought should be directed at the adequacy of the mechanisms set up to achieve these aims. To do otherwise misses the opportunity to improve these mechanisms, as well as the point of self-determination. Self-determination is not simply about achieving better socioeconomic outcomes; it is also about the right and power of Indigenous Australians, as a distinct peoples, to decide what development they want, how they want to achieve it, and what aspects of their laws, culture and values they will retain or give up in the process. The extent to which land rights expresses and enables this power is a crucial aspect of both Indigenous communal self-governance and individual self-esteem.

Native title and economic development

Native title differs from land rights in origin and form. Unlike land rights, native title is not a grant of an interest in land from the government or Crown. Rather, it is the recognition of rights created by Indigenous traditional laws and customs in Australian law. Unlike land rights, native title rights are not uniform across the state or territory jurisdiction they fall within. Native title varies in form between traditional owner groups, because its content is given by the particular traditional laws and customs of each group,¹²⁶ and because the history of settlement across

124 Oxfam Australia, *Land rights and development reform in remote Australia*, August 2005, p4. Available online at: <www.oxfam.org.au/campaigns/indigenous/>, accessed 13 September 2005.

125 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, *op.cit.*, p7.

126 'Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs: *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 per Brennan J at [58].



Australia (effecting extinguishment of native title rights) differs from region to region. Given there were an estimated 250 Indigenous societies and languages at the time of British settlement,¹²⁷ it is no surprise that traditional laws and customs vary between Aboriginal societies, creating an array of interests and rights in land and water. Also, the residual rights that native title holders possess depends on how many of their rights have been extinguished at law by the Crown grant of inconsistent non-Indigenous rights through settlement. These two factors mean that native title ranges from usufructuary or 'use' rights such as the right to hunt, fish, gather over an area, or conduct ceremonies on an area; to the right of exclusive possession as against the whole world.

There are a number of features of existing native title law and policy that inhibit economic development, and a few aspects that support it and need to be built on. This section considers native title in light of the debate about economic development on Indigenous land.

What is native title?

Indigenous rights and interests to lands and waters in Australia have existed from time immemorial. However, the recognition and protection of those right and interests in Australian law occurred only recently, with the High Court's 1992 decision in *Mabo (No. 2)*.¹²⁸ There the Court found that the legal doctrine of *terra nullius*, or 'land belonging to no one', that had applied from the British colonisation of Australia, was false. The *Mabo* decision led to the establishment of the native title claims process under the *Native Title Act 1993* (Cth) and of the Indigenous Land Fund, administered by the Indigenous Land Corporation.

Indigenous Land Fund

The Indigenous Land Fund was created by the Australian Government in recognition that many Indigenous people, because of dispossession, would be unable to assert native title. The Land Fund is valued at approximately \$1.4 billion. The Indigenous Land Corporation (ILC) was established on 1 June 1995 and receives over \$50 million annually from the Land Fund to purchase and manage land for Indigenous Australians, so as to provide economic, environmental, social or cultural benefits.

The Land Fund obviously presents one means to economic development from land for Indigenous Australians. From a 2002 review of its land base, the ILC found that 540 Indigenous people from the 146 properties surveyed derived economic benefits through employment; and 48% of Indigenous groups associated with the properties had income or commercial aspirations. However, most landholding groups faced barriers to achieving these aspirations including lack of capital, land capacity issues, skills and knowledge, and problems with commitment and conflict.¹²⁹ The ILC now incorporates capacity building and development into its national land strategy. The ILC provides support for successful applicants including:

127 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Encyclopedia of Aboriginal Australia*, Aboriginal Studies Press, Canberra, 1994, pp279, 601, 728, 867.

128 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

129 Indigenous Land Corporation, *Improving Outcomes from Indigenous Land Purchases*, Adelaide, 2003. Available online at: <<http://www.ilc.gov.au/webdata/resources/files/ImprovingOutcomes.pdf>>, accessed 23 September 2005.



- corporate governance
- financial management
- farm and stock management
- cropping and pasture management, and
- marketing.¹³⁰

The effectiveness of the Land Fund in building Indigenous economic development from land is not explored further in this Report.

Native Title Act 1993 (Cth)

The *Native Title Act 1993* (Cth) (NTA) was the federal government's legislative response to the High Court's decision in *Mabo (No.2)*. The Preamble of the Act recognises that Aboriginal peoples and Torres Strait Islanders were the original inhabitants of Australia and have been progressively dispossessed of their lands, largely without compensation. It aims to rectify the consequences of past injustices and ensure that Aboriginal and Torres Strait Islander peoples receive full recognition and status within the Australian nation. The objects of the Act are:

- a) to provide for the recognition and protection of native title; and
- b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- c) to establish a mechanism for determining claims to native title; and
- d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.¹³¹

In 1998 the Commonwealth Government sought to amend the Act through implementing the 'Ten Point Plan'.¹³² The amendments have been the subject of extensive criticism by Indigenous groups, the United Nations Committee on the Elimination of Racial Discrimination (CERD),¹³³ and previous Social Justice Commissioners. These criticisms are explored in the analysis below.

130 See <<http://www.ilc.gov.au/site/page.cfm?u=35>>, accessed 23 September 2005.

131 *Native Title Act 1993* (Cth), s.3.

132 The Ten Point Plan is reproduced in the Appendix of the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report July 1996 – June 1997*, p169. Available online at: <http://www.humanrights.gov.au/pdf/social_justice/native_title_report_97.pdf>, accessed 23 September 2005.

133 Acting under its early warning procedures, the Committee requested information from Australia regarding three areas of concern, including the proposed changes to the Native Title Act. The Committee subsequently found in 1999 and 2000 that the amended Native Title Act is inconsistent with Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*. This year the Committee reiterated concerns it had expressed in 1999 that the amended Native Title Act winds back some of the protections offered to Indigenous peoples in the original Act, and creates legal certainty for governments and third parties at the expense of Indigenous title. See Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia*, 18 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2 (CERD Decision 2(54)). See also Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/304/Add.101, 19/04/2000 at para 8. See also Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on Australia*, 14 April 2005, UN Doc CERD/C/AUS/CO/14, para 16 and 17. Available from the HREOC website at: <www.humanrights.gov.au/social_justice/internat_develop.html#race>.



Legal and policy limits to economic development through native title

The recognition of native title in *Mabo* established in law what Indigenous Australians have always known – that ‘their dispossession underwrote the development of the nation...The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation.’¹³⁴

This legal recognition was the first step in the continuing evolution of native title: from representing the widespread social and economic exclusion of Indigenous peoples in the development of the nation, to economic inclusion that I hope will eventually contribute to Indigenous economic independence. Economic development is often portrayed as unrelated or antithetical to the traditional relationship that Indigenous people have to their land, but as the terms of the current debate suppose, ownership of land, including traditional ownership, can be viewed as ownership of an asset from which development can take place. For example, many mining agreements struck with native title parties provide them with monetary benefits, social development programs, employment and training opportunities. These arrangements are a direct result of the legal recognition given to the traditional relationship that Indigenous people have with their land.

The brief history of native title law and policy from 1992 to the present has seen the emergence of a number of barriers to economic and social development through native title. The capacity for native title to contribute to economic development is hampered by the legal system that operates to restrict rather than maximise the protection of native title; and by government policies which fail to integrate native title into the range of policy options available.

Six specific aspects of native title law and policy can be identified as inhibitors to economic development. These are:

1. The test for the recognition of native title
2. The test for the extinguishment of native title
3. The nature of native title: a bundle of rights
4. The rules that regulate future development affecting native title rights
5. Inadequate funding for Indigenous bodies in the native title system
6. The goals of governments’ native title policies.

The first four arise from the law of native title. The final two come from governments’ administration of the native title system, through the provision of funding and policy approaches. Each is considered in turn in the following subsections.

1. The test for the recognition of native title

The legal test for the recognition of native title operates as a barrier to economic development. It sets a very difficult standard of proof that must be satisfied in order to obtain legal protection for traditional rights to land. This test establishes the

134 *Mabo (No.2)* per Deane and Gaudron JJ, at [109].



threshold for converting traditional connection to land into legally enforceable rights – rights that may then be used to leverage economic outcomes (such as through mining agreements, the release of land for townships, or industries like bio-prospecting and bush food sales).

The current debate has seen reference made to the views of economist Hernando de Soto, who argues that legal title to property is fundamental to its exploitation as an asset.¹³⁵ He suggests that poor people in ‘developing countries’ can accumulate capital – in the form of land in shanty-towns for example – but they are unable to realise its potential wealth because without legal title to such property, it cannot be used as collateral. De Soto’s theory has been used to support the argument that communal ownership of land rights and native title land prevents individual traditional owners from securing financial loans against their land. The economic logic of this argument is considered further in Chapter 3. However, it is notable that the public debate has not criticised the difficulty of securing a native title determination on the same grounds – that it prevents Indigenous people from gaining legal title to their traditional lands, on which economic development depends.

The test for the recognition of native title was determined by the High Court’s decision in *Yorta Yorta*.¹³⁶ There the Court confirmed that to prove native title, claimants must show that the traditional owners group has existed as a community continuously since the acquisition of sovereignty by the British, and that in all that time they have continued to observe the traditional laws and customs of their forebears. This test sets very difficult elements of proof for native title claimants to satisfy.

This difficulty is compounded by the fact that traditional laws and customs are transmitted orally from generation to generation, so evidence of these may be restricted or inadmissible under the hearsay rule.¹³⁷ This is an issue that has been identified by the Australian Law Reform Commission in its *Review of the Uniform Evidence Act 1995*.¹³⁸ The Commission proposes that the uniform Evidence Acts should be amended to provide an exception to the hearsay and opinion evidence rules for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs.¹³⁹ The Commission also observed that there are strong arguments that the NTA should be amended as the relevant provision does not provide sufficient guidance on or certainty on the admissibility of evidence in native title proceedings.¹⁴⁰ However, legislative amendment to the NTA falls outside the terms of reference of this review.

135 H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books, 2000.

136 *Members of the Yorta Yorta Aboriginal Community v Victoria & o’rs* [2002] HCA 58 (12 December 2002).

137 The evidence rule against hearsay means evidence of the spoken word is not admissible unless certain conditions are met. Following amendments to the NTA in 1998, the Court is bound by the rules of evidence, except to the extent that the Court otherwise orders (ss82(1)). For analysis of this issue, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p33. Available online at: <www.humanrights.gov.au/social_justice/ntreport_02/index.html>, accessed 28 November 2005.

138 See Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC Discussion Paper 69, NSWLRC Discussion Paper 47, VLRC Discussion Paper, July 2005, pp502-514. Available online at: <<http://www.austlii.edu.au/au/other/alc/publications/dp/69/>>, accessed 30 November 2005.

139 *ibid.*, Proposal 17-1, p514.

140 *ibid.*, p514.



The test for recognition means that in practice, native title is less likely to be proved in the parts of Australia where dispossession and disruption to Aboriginal culture was most effective – the South East and coastal parts of Australia. Conversely, native title is most likely to be proved in areas where dispossession was less – these areas tend to be land that European settlers did not want for housing, grazing or mining. This effect of native title law should be borne in mind when considering the proposals of the current debate, which assume there will be a commercial market for Indigenous land if only it was entered into the real property market.

2. The test for the extinguishment of native title

The recognition of native title has not established equality between Indigenous and non-Indigenous peoples. The legal test for extinguishment makes native title a fragile right. Even if native title claimants' relationship to their land withstands the 'continuous connection' test for recognition, the court will, as a matter of law, determine whether the title has been extinguished in any case by the creation of non-Indigenous interests (whether current or expired) over the same land.¹⁴¹

Extinguishment of native title can be effected under the common law or the NTA. The common law test set out by the High Court in *Western Australia v Ward*¹⁴² compares the legal nature of the non-Indigenous property right (given by the statute or executive act which created the right), with the nature of the native title rights (given by traditional laws and customs). Where there is an inconsistency between the *legal incidents* or characteristics of these two sets of rights, then native title is either completely extinguished, or partially extinguished to the extent of any inconsistency. As noted by my predecessor in the *Native Title Report 2002*, this test does not allow for co-existence, where rights are negotiated and mediated to enable a diversity of interests to be pursued over the same land.¹⁴³

One of the reasons the Court felt justified in taking this approach was because of the pre-eminence given to how native title is extinguished in the statutory framework of the NTA. Subsection 11(1) of the Act prohibits extinguishment that is contrary to the NTA, however if native title is extinguished at common law by the creation of non-Indigenous rights, then in most instances,¹⁴⁴ it will not be revived by the NTA. The NTA provides a fairly comprehensive codification of what past government actions extinguish native title.¹⁴⁵ It classifies various interests in the past, often distant past, as 'previous exclusive possession acts' which deems them to have permanently extinguished native title.¹⁴⁶ The NTA also provides that 'previous non-exclusive possession acts'¹⁴⁷ will extinguish native title to the

141 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000*, pp37-8. Available online at: <www.humanrights.gov.au/social_justice/native_title/nt2000_report.html>, accessed 28 November 2005.

142 *Western Australia v Ward* (2002) 191 ALR 1.

143 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, *op.cit.*, p7.

144 The exceptions are where the native title holders hold a pastoral lease, or where extinguishment has occurred over Aboriginal land and reserves or over vacant Crown land currently occupied by native title holders. In these cases, the Act provides for any extinguishment of native title by the grant of the lease or any other historic interest to be disregarded: *Native Title Act 1993* (Cth), ss.47, 47A and 47B.

145 *Native Title Act 1993* (Cth), Part 2, Division 2B.

146 These acts include: the construction of public works, the grant of an estate in fee simple, a specified lease, or an interest listed in Schedule 1 to the NTA ('Scheduled interests').

147 Non-exclusive agricultural and pastoral leases.



extent of any inconsistency.¹⁴⁸ The NTA also validates acts of government that took place before the High Court's decision in *Wik* which may be invalid because of the existence of native title (generally, due to the Constitutional requirement that 'just terms' be paid where property is acquired,¹⁴⁹ or the operation of the *Racial Discrimination Act 1975* (Cth)).¹⁵⁰ This aspect of the NTA has been repeatedly criticised by CERD.

Extinguishment is permanent.¹⁵¹ Extinguished native title rights cannot be revived, even once the extinguishing act ceases, and regardless of whether the traditional owner group maintains continuing connection with the land.¹⁵² There is also limited compensation for the deprivation of native title rights through extinguishment.¹⁵³ Not only is this failure to compensate for the deprivation of a property right racially discriminatory,¹⁵⁴ it also means that there is limited ability to use the NTA compensation provisions – which require governments to consider requests by Indigenous parties for non-monetary forms of compensation (such as economic benefits, restitution of land) and negotiate in good faith with regard to such requests.¹⁵⁵

My predecessors and I have advised that the extinguishment of Indigenous interests in land for the benefit of non-Indigenous interests is racially discriminatory. Not only because of the rule that native title is always wiped out by inconsistent non-Indigenous rights, but also because the process of extinguishment differs from the process applied when non-Indigenous property rights are abrogated. On an ordinary approach to statutory interpretation, the courts require very plain words to reveal a legislative intention to abrogate rights of private property. Title or ownership is not treated as extinguished, expropriated, acquired or destroyed unless that is effectively the only possib-

148 *Native Title Act 1993* (Cth), Part 2, Division 2B.

149 M. Perry and S. Lloyd, *Australian Native Title Law*, Thomson Lawbook Co., 2003, p31, para A2.30.

150 *Racial Discrimination Act 1975* (Cth) ss.10(1) states that if a particular race does not enjoy certain rights because of a particular law, the Act will override that law so that the persons of the affected race will enjoy those rights to the extent that other races enjoy them.

151 Except in limited case of s.47B NTA.

152 *Fejo v Northern Territory* (1998) 195 CLR 96.

153 Extinguishment under the confirmation provisions NTA s.23J has the effect of conferring upon native title holders an entitlement to compensation only where the statutory extinguishment exceeds the extinguishment that would have occurred either at common law or where compensation would have been available by virtue of the *Racial Discrimination Act 1975* (Cth). In any other case, there is no compensation for extinguishment of native title by the confirmation provisions. In addition, there is no compensation for the impairment of the exercise of native title rights where the 'non-extinguishment principle' applies under the confirmation provisions: NTA ss.23G(1)(b)(ii). Compensation under the validation provisions is limited to category A or B past acts (not C or D – NTA s.17). For category C and D past acts that effect impairment of native title, compensation is only paid where, in relation to ordinary title, the act could not be validly done. Where complete or partial extinguishment results from the operation of the common law and not the NTA, there is no provision for compensation under the NTA. There is also no provision for compensation for impairment of exercise of native title. In some cases, if the act is post 1975, the *Racial Discrimination Act* may extend same compensation to native title holders as to other titleholders. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p70.

154 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, *op.cit.*, p70.

155 *Native Title Act 1993* (Cth) s.79.



ility.¹⁵⁶ The High Court's decision in *Ward* departs from this principle, treating native title differently.

Extinguishment also has ramifications for the economic use of native title. The lack of recognition or the extinguishment of native title at law does not therefore mean that Indigenous Australians have lost rights to land under their traditional laws and customs. Rights and interests may continue under traditional law and custom but fail to secure legal protection under Australian law through the difficult test for recognition and the easy test for extinguishment. Legal title is considered by many in the current debate to be critical to leveraging economic outcomes from property. Like the test for recognition, the test for extinguishment (and the lack of compensation) undermines the ability for traditional owners to use their rights to economic benefit.

The economic effect of the legal test for extinguishment is to permit the expansion of non-Indigenous interests in land and erode the Indigenous land base on which the NIC Principles focus. It also works against sharing the land between Indigenous and non-Indigenous interests, because it ensures that Indigenous rights always lose out.

3. The nature of native title: a bundle of rights

Native title law involves the translation of complex Indigenous social relations, spiritual attachment to land and customary norms into legal rights which make sense to the Australian legal system. The legal principles that have evolved to guide how this is done have implications for economic development because they affect:

- what rights will be recognised
- how the recognised rights may be exercised.

The High Court determined in *Western Australia v Ward*¹⁵⁷ that native title should be characterised as a 'bundle of rights' rather than an underlying 'title to land'. The 'bundle of rights' view sees native title as a bundle of separable, distinct rights and interests that can be exercised on the land, and extinguished one by one. On this view, the legal recognition of native title gives native title holders only the right to exercise the particular rights that are proved – for example, the right to hunt, conduct ceremonies, take water and so on. By contrast, the 'title to land' view, which is the approach taken by the courts in Canada,¹⁵⁸ sees native title as a right to *the land itself*, from which a variety of rights and practices spring. On this second construction, the recognition of native title gives the titleholders the right to exclusive use and occupation of the land like a freehold titleholder – they are not restricted to using their land solely to engage in traditional practices and customs.

What rights will be recognised

The construction of native title as a 'bundle of rights' affects *what* rights will be recognised by the legal system. Since this view of native title does not accept

156 Bennion, *Statutory Interpretation*, 3rd ed, s.278; *Clissold v Perry* (1904) 1 CLR 363 at 373; *Greville v Williams* (1906) 4 CLR 64; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1970) 121 CLR 177, pp181-182.

157 *Western Australia v Ward* (2002) 191 ALR 1.

158 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (Supreme Court of Canada).



that proving native title gives Indigenous people an underlying title to land, the description of the particular rights claimed becomes very important for what the native title holders will be allowed to do post-determination. For example, in the *Croker Island* case,¹⁵⁹ the applicants' evidence that they insisted on being asked about important developments in their sea country relating to oil exploration, tourism and commercial fishing was seen as supporting a right to be *consulted* and not as a right to *control access* – even though in traditional Indigenous society asserting a right to be asked is a mode of asserting exclusive rights to country.

In turn, the description of rights claimed will determine whether or not they are extinguished by non-Indigenous interests over the same land under the test for extinguishment outlined above. It may be extinguished right by right, whenever the exercise of a particular native title right is inconsistent with the enjoyment of a particular non-Indigenous right. In contrast, if native title was constructed as an underlying title to land as in Canada, it would be extinguished only where there was a 'fundamental, total or absolute' inconsistency between rights, reflecting the intention of the Crown to remove all connection of the Aboriginal people from the land in question.¹⁶⁰ The characterisation of native title rights that best survive the extinguishment test in Australian law are ones that are expressed at a high level of specificity¹⁶¹ and are limited to the conduct of activities on the land rather than the control of activities on the land.¹⁶² Native title holders may still obtain exclusive possession of an area under the 'bundle of rights' perspective, but this will only be where there has not been any extinguishment of rights by inconsistent interests.

Together, this limits the rights that native title holders have to leverage economic benefit. Native title as a bundle of rights, instead of title to land, means there is no entitlement to participate in the management of land, control access to land, or obtain a benefit from the resources that exist on the land, even where these rights were traditionally held. Native title is reduced to a list of activities that take place on the land; and exclusive possession will rarely be recognised. As Justice Kirby observed in his dissenting judgment in the High Court's decision on the *Croker Island* case:

... [the claimants] assert a present right under their own laws and customs, now protected by the "white man's" law, to insist on effective consultation and a power of veto over other fishing, tourism, resource exploration and like activities within their sea country because it is theirs and is now protected by Australian law. If that right is upheld, it will have obvious economic consequences for them to determine – just as the rights of other Australians, in their title holdings, afford them entitlements that they may exercise and exploit or withhold as they decide. The situation of this group of indigenous [sic] Australians appears to be precisely that for which *Mabo [No.2]* was decided and the Act enacted.¹⁶³

159 *Yarmirr v Northern Territory* (1998) 82 FCR 533, per Olney J, p578. The majority of the Full Federal Court agreed with Olney J's interpretation of the evidence. The majority of the High Court found no reason to depart from Olney J's interpretation of the evidence – see *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1, per Gleeson CJ, Gaudron, Gummow, Hayne JJ, p67.

160 *Western Australia v Ward & o'rs* [2000] FCA 191 (3 March 2000), per North J at [328].

161 See eg *Western Australia & o'rs v Ward & o'rs* [2002] HCA 28 (8 August 2002), per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [29].

162 See eg *Western Australia & o'rs v Ward & o'rs* [2002] HCA 28 (8 August 2002), per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [52].

163 *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1, per Kirby J (dissenting) at p142.



How the recognised rights may be exercised

The description of native title as a bundle of rights also limits how those rights may be exercised. It encourages the law and non-Indigenous Australians to see native title as a collection of traditional practices, rather than part of a larger system of traditional law and custom which evolves over time. Having to prove each right against the test for recognition laid down in *Yorta Yorta* promotes a 'frozen rights' view of native title. Emphasis is placed on the exercise of rights, rather than the rights themselves and the system of laws which created them.

Defining native title rights by reference to their traditional exercise inhibits the economic use that might otherwise be made of them. Recognised rights are limited to those that were exercised over one hundred years ago. The right to fish under traditional laws has not translated into commercial fishing rights; the native title right to take flora and fauna is not able to be used to sell bush foods or native wildlife as of right. The traditional use of minerals has not become a native title right to exploit minerals such as through mining enterprises. Native title holders have to buy licences to exercise their native title rights commercially. Native title rights are limited in law to anachronistic, domestic, non-commercial rights.

4. The rules that regulate future development affecting native title rights

Under the NTA, proposed activities or development on land or waters that affect native title rights are classed as 'future acts'. Because claimant applications may take years in mediation or court proceedings before a final decision is reached, the NTA provides registered claimants with procedural rights in relation to future acts while native title applications are being resolved.

Before the NTA was amended in 1998, registered native title claimants had the same procedural rights in relation to future acts as freehold owners of property would have. Plus, the 'right to negotiate' applied over the grant of a mining lease or compulsory acquisition for the purpose of grants to private parties. This matched the 'underlying title' view of native title, and was consistent with the fact that traditionally Aboriginal and Torres Strait Islander peoples had sovereign power over their land which translated into a right to have a say in future developments over land today.

The 1998 amendments gradated the procedural rights that claimants could enjoy, according to what the future act was. For example, the creation of a right to mine still triggers the right to negotiate but the grant of additional rights to the lessees of non-exclusive agricultural and pastoral land gives native title parties only the opportunity to comment. The construction and operation of facilities for services to the public (such as roads, railways, bridges, wharves and pipe lines) give native title parties the same rights as other land owners; while the grant of 'minor licences and permits' do not give any procedural rights to native title parties.

The future act regime has implications for how native title parties might use their rights economically by limiting the 'right to negotiate' to certain types of activities, thereby setting up a certain relationship between developers and native title parties.

The 1998 amendments effectively removed the right to negotiate about mining and compulsory acquisition in certain circumstances, and instituted a right of



consultation, comment, objection or mere notification instead. Specifically, the amendments removed the 'right to negotiate' on non-exclusive pastoral and agricultural lease land and reserved land (including Aboriginal reserves), where the state or territory provided legislative rights of consultation and objection instead (the 'alternative state regimes'). It also removed the right in relation to any grant or other act relating to land or waters within a town or city.

Indigenous Land Use Agreements (ILUAs), which were another product of the 1998 amendments, also provide native title parties with the power to engage in negotiations about things on land. However, legislatively, developers need only enter into an ILUA where their proposed activity does not fall into any other future act category.

There is a significant difference between negotiation on the one hand; and objection or consultation on the other. The original right to negotiate did not limit what could be negotiated about, and claimants have used it to secure monetary and non-monetary compensation, including royalties, preferred employment, equity in businesses and so on. By reducing negotiation to a consultation about ways of minimising the impact of particular developments on native title rights, native title is given no role in the development of Aboriginal communities beyond permitting the practice of traditions and customs as they were practised by the ancestors of the native title party before colonisation.

However, even where the right to negotiate applies, the time-bound processes under the Act may create obstacles for economic and social development outcomes for traditional owners. The right to negotiate process is circumscribed to a period of six months under the Act. Within the six months NTRBs must be notified¹⁶⁴ and they must then: identify affected native title claimants or holders; lodge a native title application if there are no registered in the claims in the area; and negotiate with the Government and third party over the conditions of the activity. At the end of the six month period any negotiating party can apply for a determination by an arbitral body if agreement has not been reached.¹⁶⁵ This determination may address whether or not the act may be done or whether the act can be done subject to certain conditions.¹⁶⁶ However, the arbitral body cannot determine that native title parties are entitled to payments worked out in relation to the profits made from the project; income derived or anything produced.¹⁶⁷ Finally, if the Commonwealth, State or Territory Minister considers it to be in the interests of their jurisdiction, they are able to overrule the determination of the arbitral body.¹⁶⁸

Rather than a regime to facilitate the economic use of native title rights where this is desired by the native title party – such as through the commercial exploitation of rights to land and waters – the NTA future act regime is designed to support development activity by non-native title parties. As Professor Larissa Behrendt notes, government policy and legislative reform in the area of land and resource management has never developed to adequately include Indigenous people, despite the recognition of native title in 1992. Non-Indigenous development is the preferencing of the future act regime:

164 *Native Title Act 1993* (Cth), s.29.

165 *ibid.*, s.35.

166 *ibid.*, s.38.

167 *ibid.*, ss.38(2).

168 *ibid.*, s.42.



Economic development in rural and remote parts of the country is dependent on primary production and access to natural resources. The primary policy response of governments since the recognition of native title has consistently been to ensure that non-Aboriginal people's exploitation of natural resources on Indigenous land can continue.¹⁶⁹

The fact that, traditionally, Aboriginal and Torres Strait Islander people used their land as a resource for the sustenance, economics and well being of their societies is not translated into a right to participate in the modern management or economic exploitation of their land. *For the majority of development activity on land and water, the future act regime constructs the native title party as a passive rather than active agent; able to comment or object but not to actively negotiate, manage country or determine development.* Native title rights are isolated from the day to day lives of communities, and from their economic development.

5. Funding for Indigenous entities in the native title system

The institutions created and designed to represent Indigenous people in order to obtain recognition of their rights to land, and then manage their rights post-determination, are inadequately resourced and empowered to carry out this task. These entities are:

- Native Title Representative Bodies (NTRBs) – the organisations which represent native title claimants in their claim for native title and in future act processes
- Prescribed Bodies Corporate (PBCs) – which hold or manage native title on behalf of native title holders after a determination by the court that native title exists.

NTRB Funding

The degree to which Indigenous people participate in and derive benefits from the native title process is, to a significant extent, determined by the capacity of NTRBs to represent their clients' interests in the native title process. The allocation of funds by the Commonwealth Government to NTRBs has a direct impact on whether NTRBs can effectively carry out this task. The continual inadequate funding of representative bodies has had the cumulative effect of undermining the capacity of NTRBs to protect Indigenous interests in the native title process. It has diminished the extent to which Indigenous people can enjoy their land, their culture, their social and political structures, and most relevantly, the economic use of their rights.

Since the late 1990s, the division of funding within the native title system has changed. Proportionally, NTRBs are receiving less, and the percentage of funding used by other institutions has increased. A wide range of stakeholders in the native title system agree that NTRBs are inadequately funded. Increased NTRB funding has been recommended in the reports and reviews of Commonwealth

169 L. Behrendt, *Speech to the Indigenous Labor Network*, 13 July 2005, pp17-18. Available online at: <www.jumbunna.uts.edu.au/research/alpiln_13_07_05.pdf>, accessed 24 November 2005.



agencies,¹⁷⁰ Commonwealth Parliamentary committees,¹⁷¹ State Governments¹⁷² and industry.¹⁷³ Most submissions to the current inquiry of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account into NTRBs, also recommend increasing funding to NTRBs.¹⁷⁴ The issue of NTRB under-funding was comprehensively covered in the *Native Title Report 2001*¹⁷⁵ and *Native Title Report 2003*,¹⁷⁶ as well as in the submission of my predecessor to the current Parliamentary NTRB inquiry.¹⁷⁷

Despite the overwhelming evidence that NTRBs are under-funded to carry out their statutory duties the Australian Government has chosen to make no real funding increase. Funding to NTRBs continues to be inadequate for the functions they are statutorily required to perform. The slight increase in the allocation of funds for NTRBs in the 2005-06 Budget (up from \$55.021m in 2004-05 to \$59.055m for funding across 17 NTRBs) is still not sufficient. Moreover, the way that funding is provided – on an annual basis – makes it difficult for long-term and strategic planning by NTRBs. This is also inconsistent with the statutory requirement that NTRBs have a (minimum) three year strategic plan in place.¹⁷⁸

170 G Parker & o'rs, *Review of Native Title Representative Bodies*, ATSIAC, Canberra, 1995; Senatore Brennan Rashid & Corrs Chambers Westgarth, *Review of Native Title Representative Bodies*, ATSIAC, March 1999.

171 See the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Report on the Effectiveness of the National Native Title Tribunal*, December 2003, paras 4.19-4.44 and recommendation 6. See also the House of Representatives Standing Committee on Industry and Resources report, *Inquiry into resources exploration impediments*, August 2003, paras 7.42-7.51 and recommendation 19; and Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Report on Indigenous Land Use Agreements*, September 2001, para 6.83 and recommendation 4. The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund is currently conducting an inquiry into NTRBs, looking at: (1) the structure and role of the Native Title Representative Bodies; (2) resources available to Native Title Representative Bodies, including funding and staffing; and (3) the inter-relationships with other organisations, including the strategic planning and setting priorities, claimant applications pursued outside the Native Title Representative Body structure and non-claimant applications. The Committee is due to report in 2006.

172 For example, *Ministerial Inquiry into Greenfields Exploration in Western Australia*, Western Australian Government report November 2002, recommendations 8-12; and *Technical Taskforce on Mineral Tenements and Land Title Applications*, Government of Western Australia, November 2001, pp103-106.

173 ABARE report commissioned by the WA Chamber of Minerals and Energy, the Minerals Council of Australia, and the WA Government, *Mineral Exploration in Australia: Trends, economic impacts & policy issues*, p76; Strategic Leaders Group, *Mineral Exploration in Australia: Recommendations for the Mineral Exploration Action Agenda*, Commonwealth of Australia, July 2003, p12.

174 For example, see the submissions of the: Western Australia Local Government Association, Garrak – Jarru Regional Council, Native Title Services Victoria Ltd., Association of Mining and Exploration Companies Inc., Mr John Basten QC, the Minerals Council of Australia, the Western Australia Government, and the New South Wales Farmers' Association.

175 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001* Chapter 2. Available online at: <www.humanrights.gov.au/social_justice/ntreport_01/index.html>, accessed 28 November 2005.

176 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, pp 90-97 and 155-165. Available online at: <www.humanrights.gov.au/social_justice/ntreport03/index.htm>, accessed 28 November 2005.

177 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission of Aboriginal and Torres Strait Islander Social Justice Commissioner to the Inquiry into the Capacity of Native Title Representative Bodies*, 28 July 2004. Available online at: <www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub15.pdf>, accessed 12 August 2005.

178 *Native Title Act 1993* (Cth) ss.203D(1).



In addition, the distribution of funds to other institutions and individuals within the native title system also affects the way in which NTRBs must allocate the limited resources they do receive. Of particular concern is the way in which the Australian Government's allocation of funds to third party respondents to native title claims necessarily funnels NTRB resources towards litigation over agreement-making and the broader needs of the claimant group.

Insufficient levels of funding also inhibits NTRBs carrying out activities that could assist native title groups to use their rights to better economic advantage or engage with the mainstream economy. NTRBs are the principal means through which non-Indigenous parties engage with a traditional owner group before a determination of native title, and they have specific statutory functions that assist non-Indigenous parties to do this.¹⁷⁹ As I suggested in my *Native Title Report 2004*, an untapped opportunity exists to harness the expertise, established community links and relationships with developers, cultural understandings and familiarity with remote areas within NTRBs, to build Indigenous capacity and develop creative businesses based on rights to country. This could be done, for example, by employing business development advisers to identify and build on commercial opportunities with traditional owners, or community development officers to assist traditional owners to work towards their social development goals. Such processes and activities should be put in place early in the negotiation / development process to ensure that sustainable capacity building and informed decision-making takes place.

PBC Funding

Funding is also inadequate to the other Indigenous entities in the native title system: Prescribed Bodies Corporate (PBC). Depending on the form of PBC adopted by the native title holders – 'agent' or 'trust' PBCs – the PBC will be the manager or title holder for native title rights. Clearly, this entity will become increasingly important as economic development from Indigenous lands becomes a policy goal of state and federal governments.

To date, there has been no direct federal funding for PBCs. The Australian Government's current position is that PBCs should be funded by the state and territory governments because land management is a state/territory jurisdictional responsibility under the Constitution. Conversely, the state and territory governments maintain that PBCs should be funded by the Australian Government as they are an entity that is required by the NTA, which is a federal statute.

While the buck continues to be passed between levels of government, PBCs remain without any funding at all and most struggle to discharge their statutory duties. This limits their ability to proactively engage with governments and third parties about development on their land and to strategise ways of using their native title rights for the economic benefit of the native title group or larger community, where desired.

179 These functions include: assisting in the government notification of future act proposals; providing assurance on which the Federal Court and other parties can rely through certifying claims and ILUAs (NTA s.203BE); facilitating communications between Indigenous and non-Indigenous parties and by resolving disputes between native title applicants or those that may hold native title (NTA s.203BF). NTRBs identify the native title holders for an area (NTA s.203BJ) and enable governments and industry to conduct business with them.



6. The goal of governments' native title policies

As the *Native Title Report 2003* detailed, a common theme of state and federal native title policies as they currently exist is a preference for negotiation over litigation.¹⁸⁰ This agreement-focus provides an invaluable opportunity for governments and traditional owner groups to ensure that native title agreements respond as far as possible to the economic and social development needs of the native title claimant group rather than just the demands of the legal system. Native title agreements encouraged by the NTA are:

- agreements to the content of a native title determination which is ratified by the Federal Court once all parties consent ('consent determinations')
- agreements produced out of negotiations under the 'right to negotiate' ('section 31 agreements')
- Indigenous Land Use Agreements.

There are also many other agreements, such as contracts and Memoranda of Understanding, related to native title but made outside the formal framework of the NTA. These agreements offer an opportunity for economic benefits to flow to traditional owners. They provide a 'hook' through which traditional owners can engage with the mainstream economy. One simple way to work towards economic development for native title claimants and holders would be to align governments' policy approaches in broader Indigenous affairs portfolios with the processes of and outcomes from these agreements.

However, unclear in most native title policies are the objectives of the negotiation process. This means that native title negotiations have no consistent goals but change depending on the circumstances of the case. It also means that there has been little policy development around defining the elements of a native title agreement that would best contribute to the sustainable development of the traditional owner group. Little or no use is made of policy frameworks that have already been developed outside of the native title area to address economic development in Indigenous communities. Despite this assessment made by my predecessor two years ago, this continues to be the case in most jurisdictions.

In addition, as detailed in my *Native Title Report 2004*, the new arrangements for the administration of Indigenous affairs, implemented by the Australian Government after it abolished ATSIC, do not include native title in its 'whole-of-government' approach. Native title continues to be positioned outside broader policy frameworks. Not only does this isolate the native title process from broader policy objectives, it limits the capacity of those broader policies to filter development through the cultural values and structures of the group which is the subject of the policy.

180 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003, op.cit.*, Chapters 2 and 3.



Conclusion: the economic use of native title

After twelve years of evolution, native title law and policy demonstrate that the economic exclusion of Indigenous Australians which 'underwrote the development of the nation',¹⁸¹ continues. The native title system is clearly designed to support the ongoing exploitation of land and natural resources by non-Indigenous Australians, and neglects Indigenous economic development. Governments have had the opportunity to legislatively override the narrow and difficult test for recognition, and the conversely expansive test for extinguishment; as well as to improve funding to Indigenous entities to assist traditional owners use their native title rights for economic benefit, and direct native title policies to broader goals. They have not done so. This makes the recent call for Indigenous Australians to employ their rights to land for economic betterment not just ill-considered, but disingenuous.

Since the first decision of the United Nations Committee on the Elimination of Racial Discrimination (CERD) in 1999 that the amended Native Title Act is inconsistent with Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*,¹⁸² Social Justice Commissioners have repeatedly recommended legislative reform to make the NTA consistent with the *Racial Discrimination Act 1975* (Cth) and other human rights of Indigenous Australians. Some of these recommended amendments are also relevant to addressing the barriers to economic development identified above, including to:

- amend section 82 to provide that the Federal Court must take account of the cultural and customary concerns of Aboriginal and Torres Strait Islander peoples, and is not bound by technicalities, legal forms or rules of evidence, as in the original NTA.¹⁸³
- replace extinguishment with the 'non-extinguishment principle', which provides that:
 - native title is not extinguished
 - instead, where other interests are inconsistent with the continued existence and enjoyment of native title rights and interests, the native title rights and interests have no effect in relation to the other interests
 - when the other interest or its effects cease to operate, native title rights and interests have full effect.¹⁸⁴

181 *Mabo (No.2)*, *op.cit.*, per Deane and Gaudron JJ, at [109].

182 See Committee on the Elimination of Racial Discrimination, Decision (2)54 on Australia, 18 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2 (CERD Decision 2(54)). See also Committee on the Elimination of Racial Discrimination, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, UN Doc CERD/C/304/Add.101, 19/04/2000, para 8. See also Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on Australia, 14 April 2005, UN Doc CERD/C/AUS/CO/14, para 16 and 17. Available from the HREOC website at: <www.humanrights.gov.au/social_justice/internat_devel_op.html#race>.

183 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p135-136. Available online at: <www.humanrights.gov.au/social_justice/ntreport_02/index.html>, accessed 2 December 2005.

184 *Native Title Act 1993* (Cth), s.238. The non-extinguishment principle already applies to future acts. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, *op.cit.*, pp132-135.



- identify non-Indigenous rights and native title rights that can be exercised together in practice, and ensure their co-exercise (that is, do not allow the non-extinguishment principle to render the native title interest of no effect in such situations).¹⁸⁵
- allow compensation wherever native title rights are extinguished or impaired, consistent with the protection against arbitrary deprivation given to non-Indigenous property rights.¹⁸⁶

In my *Native Title Report 2004*, I suggested ways to improve social and economic outcomes for traditional owners from native title. Some of these means would also require legislative change to the NTA, such as:

- strengthening the right to negotiate and extending its scope to apply to other forms of development on native title land
- permitting and facilitating the commercial exercise of native title rights
- broadening the statutory functions of NTRBs to include supporting traditional owners to use their native title rights in ways that pursue social and economic development.

There has not been a legislative response to these recommendations by the Australian Government to date and the federal Attorney-General has made it clear that the Government does not intend to enact such amendments in the future.¹⁸⁷ Accordingly, since taking office I have concentrated on policy changes that are necessary to see native title to improve the economic and social conditions of Indigenous Australians' lives. Continuing this focus, I make the following recommendation:

Recommendation 1: Native title policy reform

That State, Territory and Commonwealth governments alter their native title policies to:

- increase funding to NTRBs and PBCs
- adopt and adhere to the National Principles on economic development for Indigenous lands set out in the *Native Title Report 2004*. These principles are that native title agreements and the broader native title system should:
 1. Respond to the traditional owner group's goals for economic and social development

185 *ibid.*, p134.

186 *ibid.*, p135.

187 For example, the Attorney-General stated at the Native Title Conference 2004 that '[The Government] believe[s] the overall structure of the Native Title Act is well established.' See Attorney-General, the Hon. Philip Ruddock MP, 'The Government's approach to native title' *Speech to the Native Title Conference 2004*, 4 June 2004. Available online at: <www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_04_June_2004_-_Speech_-_Native_Title_Representative_Bodies_Conference_2004>, accessed 2 December 2005.



2. Provide for the development of the group's capacity to set, implement and achieve their development goals
3. Utilise to the fullest extent possible the existing assets and capacities of the group
4. Build relationships between stakeholders, including a whole of government approach to addressing economic and social development on Indigenous lands
5. Integrate activities at various levels to achieve the development goals of the group.

Without these policy shifts, native title will continue to provide native title holders with only hollow rights to land with little scope for realising the social and economic development goals of traditional owners – development opportunities that non-Indigenous title holders take for granted.

Chapter summary

This Chapter has reviewed the reasons for land rights and the barriers to economic development from native title, to place the communal lands debate that occurred this reporting period, in a historical context. Land rights title and native title have so far been evaluated against economic criteria in the current debate. While improvements in Indigenous statistics against socioeconomic indicators are urgently needed, it is misconceived to conclude that land rights and native title rights are failed policy because ownership of Indigenous land has not improved Indigenous Australians' ranking on economic criteria.¹⁸⁸ This is so for three reasons.

First, such an analysis misreads the objectives and frameworks of the relevant legislation. In some jurisdictions, the return of land was intended to provide an economic base for the traditional owners, but in no jurisdiction was this, the sole objective. Land rights legislation around the country was implemented in compensation for the dispossession of Indigenous peoples from their traditional country in the colonisation and development of Australia. It also reflected an appreciation of the spiritual and cultural attachment to land that is central to Indigenous identity, which is still maintained today. It was also an expression of the policy and principle of Indigenous self-determination or self-management. The framework of each land rights statute reflects these multiple objectives; it does not facilitate economic development alone, or even primarily. Were it to do so, valuable mineral rights should have accompanied the return of all land.

Second, this evaluation confuses land rights and native title rights in viewing each as the product of government policy and legislation. Land rights are the product of legislation motivated by multiple objectives as just summarised. But native title rights are not the product of legislation or executive action. The *Native Title Act 1993* (Cth) was the government's legislative response to the High Court's decision in *Mabo (No. 2)* that held Australian law recognises a form of Indigenous title to the land given by the traditional laws and customs of the original inhabitants, Australia's Indigenous peoples. But the Act does not *grant*

188 Oxfam Australia, *Land rights and development reform in remote Australia*, August 2005, p7. Available online at: < www.oxfam.org.au/campaigns/indigenous/>, accessed 13 September 2005.



that title. Native title comprises *pre-existing* rights given by Indigenous traditional laws and custom, not grants made by the Crown.

Third, such an evaluation fails to take account of the multiple barriers to the economic use of native title rights that exist in law and policy. The legal tests for the recognition and extinguishment of native title deny Indigenous people's traditional connection to land any legal protection. These tests undermine the ability of traditional owners to use their rights to economic benefit, and permit the expansion of non-Indigenous interests in land, eroding the Indigenous land base on which the NIC Principles focus. They work against sharing the land between Indigenous and non-Indigenous interests, ensuring that Indigenous rights always lose out. The construction of native title as specific and limited rights to do things on the land, rather than an underlying title to the land, 'deliver[s] customary use rights, but not exclusive property rights in commercially valuable resources.'¹⁸⁹ The preferencing of non-Indigenous uses of the land by the future act regime constructs the native title party as a passive rather than an active agent – able to comment or object but not to actively negotiate, manage country or determine development. Native title rights are isolated from the day to day lives of communities, and from traditional owners' economic development. The under-funding of Native Title Representative Bodies and Prescribed Bodies Corporate hampers the ability of these entities to assist traditional owners to build the necessary skills and knowledge to employ their rights to commercial benefit. Government native title policies of negotiating over litigating without clear objectives for negotiations miss the opportunity to link to broader Indigenous affairs policy goals and use native title agreements for more meaningful outcomes.

This is not to say that there is no room for a critical examination of the role land rights and native title rights might play in improving the socioeconomic status of Indigenous Australians, including discussion of reform. The current debate presents us with an opportunity to discuss innovative ways in which Indigenous land might support economic development desired by the traditional owners, and to *build on* existing rights.

From a human rights perspective, two factors must direct any reform of the native title and land rights systems. All decisions affecting Indigenous land must be taken with the free, prior and informed consent of Indigenous land holders. This requires the establishment of a process for the effective participation of Indigenous people as part of the broader reform process. Negotiation with Indigenous people must occur at all levels. Where the capacity of Indigenous people to participate is hampered, either through limited resources, limited skills or limited decision-making structures, provision must be made to address these deficiencies to enable genuine negotiation to take place. And benchmarks for reform must be the human rights of Indigenous people. A non-discriminatory approach to protecting Indigenous people's inherent right to land must be adopted. This measures the extent to which the law permits Indigenous property rights to be enjoyed against the extent to which the law permits the enjoyment of other property rights by all Australians.

189 J. Altman, 'Generating finance for Indigenous development: economic realities and innovative options', *CAEPR Working Paper No.15/2002*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2002, p2. Available online at: <www.anu.edu.au/caepr/Publications/WP/CAEPRWP15.pdf>, accessed 28 November 2005.



Existing legal framework and leasing options

Introduction

Defining Indigenous land

The ownership, particularly communal ownership of land by Indigenous people began in 1976 with the introduction of land rights legislation in the Northern Territory (the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA (NT))). The forms that ownership takes in Australia include the recognition of native title rights (pre-existing rights to land that pre date British settlement), federal, state and territory Indigenous land rights legislation (which provide for grants of land from the government), national parks legislation, reserve systems or the purchase of land by the Indigenous Land Corporation and Land Councils. In the context of the debate about land titles held by Indigenous people, it is important to understand the different types of land titles held by and available to Indigenous Australians. In some parts of Australia, land that is set aside for Indigenous purposes and often described in general terms as 'Indigenous land' is not in fact a land title held and controlled by Indigenous people. This exposes a serious problem with the current debate as the focus has only been upon land held communally and under a form of inalienable title: statutory land rights or native title.

It is apparent that poverty and lack of economic development commonly exist with respect to many Indigenous communities regardless of the form of land title upon which they live in Australia. For example, many Indigenous communities are located upon Crown reserves or within pastoral leases that are 'owned' by the Aboriginal community in Western Australia but controlled by the State Government. The pastoral leases are fully transferable titles with no unusual restrictions on them in terms of their use as security to raise finance. Some of the pastoral leases have been bought with funds from the Indigenous Land Corporation and so have specific access to commercial development funding. However, the same statistics concerning disadvantage apply to those communities as in the Northern



Territory in relation to communities that live on land held as inalienable freehold title under the ALRA (NT).¹

It is with this in mind that it is important to define and understand the Indigenous land title that is being discussed in a particular instance and the related terminology. For example, the term 'Aboriginal Land Trust (ALT)' has different meanings across the jurisdictions. Under the ALRA (NT) an ALT is the local or regional land holding body of an 'inalienable' freehold title for the benefit of the traditional owners of that land.² In Western Australia however, the ALT is a state-wide body of government appointed Aboriginal people that holds Crown Reserves for the benefit of Aboriginal inhabitants of that reserve.³ In South Australia, the ALT is also a state-wide body of government-appointed Aboriginal individuals that holds former reserve and other land.⁴

What land, and where?

Land that is Indigenous-owned, -controlled or set aside for the use of Indigenous people (such as through reserves owned by the government) comprises approximately 16% of the area of Australia. The bulk of the land is in the Northern Territory, Western Australia and South Australia. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) usefully uses the term 'Legal Indigenous land interest' to describe this land.⁵ The following table from *Overcoming Indigenous Disadvantage Key Indicators 2005* shows the details of Indigenous land interests (not including native title) on a State and Territory basis:

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- 1 See for example the Commonwealth Grants Commission Report on Indigenous Funding 2001 Consultants' Report and in particular the work done by the Australian Bureau of Statistics which shows relative levels of Socioeconomic disadvantage. Table 6 page 69. The ATSIC Regional Council areas shown as being the most disadvantaged areas such as Warburton, Derby and Kununurra in WA are all areas where there are large Aboriginal reserves and pastoral lease holdings. Whilst the ATSIC areas in the NT at the same level of socioeconomic disadvantage such as Apatula and Nhulunbuy have large areas of Aboriginal held freehold.
 - 2 See s.4 and s.5 of the Act.
 - 3 Section 23(c) of the *Aboriginal Affairs Planning Authority Act 1976* (WA).
 - 4 *Aboriginal Lands Trust Act 1966* (SA).
 - 5 <www.aiatsis.gov.au/rsrch/ntru/research/resourceguide/national_overview/national10.html>, accessed 9 August 2005. This material has been originally compiled from data from Geoscience Australia and the Indigenous Land Corporation.

Indigenous owned or controlled land by State/Territory, January 2005

	Unit	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Area of land by tenure type										
Freehold (inalienable)	ha	–	5,007	–	–	18,881,994	4,623	–	56,836,657	75,728,282
Freehold (alienable)	ha	357,397	4,341	2,521,198	42,010	17,316	3,083	5	1,076,509	4,021,860
Old system	ha	–	173	–	–	–	116	–	–	289
Leasehold	ha	8,012	–	2,531,809	16,164,026	1,490,934	4,670	–	2,312,265	22,511,716
Licence	ha	6,356	–	–	–	2,532	–	–	–	8,888
Aboriginal Reserve	ha	–	–	5,120	20,235,295	–	–	–	–	20,240,416
Deed of Grant in Trust (Qld)	ha	–	–	15,619	–	–	–	–	–	15,619
Tenure not stated	ha	–	–	3	–	22	4,410	–	–	4,435
Total Indigenous land	ha	371,765	9,522	5,073,750	36,441,332	20,392,797	16,902	5	60,225,431	122,531,504
Proportion of total Indigenous land	%	0.3	–	4.1	29.7	16.6	–	–	49.2	100.0
Total land area of State/Territory	ha	80,064,200	22,741,600	173,064,800	252,987,500	98,348,200	6,840,100	235,800	134,912,900	769,202,400
Indigenous land as a proportion of total land area	%	0.5	–	2.9	14.4	20.7	0.2	–	44.6	15.9
Number of land parcels*	No.	5,312	433	931	2,504	1,487	199	1	656	11,523

* Parcels are individual geographic features rather than legal entities. That is a legal parcel may be dissected into two or more parcels by for example, a road, and are represented in these data as two parcels while being only a single legal land entity.

– Nil or rounded to zero.

Source: ILC (unpublished); NNTT (unpublished).



Indigenous people currently hold land under a wide variety of titles. Many of these titles are fully transferable in the 'normal' way that titles are used and granted for the vast majority of Australians. These titles include:

- residential freehold title
- long term residential leases
- short term residential leases in the private and public housing markets
- pastoral leases
- special purpose leases
- Crown reserves
- native title, and
- inalienable freehold title under land rights legislation that applies in some parts of Australia.

In each State (except Western Australia) and the mainland Territories there exists some form of statutory land rights for Indigenous people. Native title is capable of recognition in every part of Australia. A series of tables outlining the different Indigenous specific land title regimes is provided below.

Land rights legislation and native title does not provide or recognise land title for all of the Indigenous peoples of this country. But where it does apply it has led to some large areas of land being returned to the ownership of some Indigenous traditional owners and communities.⁶

Defining land title and leases

The 'lease' as a form of land title is being widely advocated as the best means of providing for home ownership and as a means of encouraging economic development on Indigenous land where the underlying title is Indigenous communal ownership. In particular, the third NIC Principle recommends that individual leases be granted over communal Indigenous land, consistent with individual home ownership and entrepreneurship.⁷ It is relevant, then, to review what the difference is between a lease and freehold (or fee simple) title to land, as well as what rights a lessor and lessee may enjoy through a lease. A glossary of terms relating to land is at Annexure 1.

Title to land

The Australian system of landholding has been generally described as being pre-eminently a capitalist enterprise and one where title is granted requiring land development. It provides for the efficient use of land as a commodity, which is

6 *ibid.* AIATSIS 'Precise information about Indigenous held land in Australia is difficult to source as land tenure information is generally held by the relevant state or territory department of land management and the different agencies have varying forms of land tenure documentation. The Indigenous Land Corporation's Regional Indigenous Land Strategies provide estimates of Indigenous land interests (this includes land held under Indigenous titles and land held by government for Indigenous purposes, it does not include private land holdings) in Australian states and territories.'

7 For example, Principle 3 of the NIC Principles, National Indigenous Council Communiqué, Third meeting of the National Indigenous Council – 15-16 June 2003, OIPC 16 June 2005. Available online at: <www.oipc.gov.au/NIC/communiqué/PDFs/ThirdMeetingNIC.pdf>.



facilitated by the land registration system known as the Torrens system. Title to land can be readily transferred and mortgaged in this system.⁸

A freehold title (or fee simple) is generally regarded as the absolute ownership of land, subject only to the laws of the state and powers of the Crown. Land rights legislation generally grants an inalienable freehold title to traditional owners (who are identified in accordance with traditional laws and customs and are communal land holders), and/or Indigenous residents of an Indigenous community.

The limits on sale or disposal of Indigenous freehold title reflects the goals of land rights legislation reviewed in Chapter 1, particularly Indigenous cultural and religious connections to land. However, as will be demonstrated, these forms of title also allow leases to be issued for residential and commercial purposes.⁹

Land titles including leases in Australia are also generally overlaid and regulated by land use planning and environmental laws which often require Ministerial or agency consents for certain individual developments and classes or types of development.¹⁰

Importantly, a lease like other land titles is also affected by the legislation under which it is granted in terms of the purposes for which it can be granted and the terms and conditions of the lease. The purpose or type of the lease will also affect the conditions of the lease, as it will be regulated by purpose driven legislation. For example, a retail lease for commercial purposes will be subject to different requirements than a residential lease.

Leases

In relation to a lease, the owner of the freehold title is generally called the lessor, the person who grants or issues the lease. The lessee is the person who receives or holds the lease.¹¹ In the Indigenous context of land rights legislation, the owner is either a group of traditional owners of the land and/or the resident Indigenous community.

When granting a lease, the owner of the land is in effect separating the rights that make up the entire ownership of the land and handing over the right to possess and use the land to a third party. Depending upon the conditions contained in the lease, it is a form of practical alienation (or disposal) of the land even when the owner has the underlying title to the land. However, this will depend upon the purpose and terms and conditions of the lease and it is problematic to generalise. For example, at one end of the spectrum a 99-year private residential lease in the ACT is effectively a permanent alienation of the land from the owner. But a grazing lease for cattle on Indigenous freehold land may allow regular use by and access to the land under the lease by the Indigenous owners as it is still quite consistent with the purpose of the lease.

8 A. Bradbook, S. MacCallum and A. Moore, (eds), *Australian Real Property Law*, Law Book Co, 1991, p15.

9 For example see s.19 of the *Aboriginal Land Rights (Northern Territory) Act, 1976* allows subject to certain consent processes leases to be granted to any person for any purpose.

10 A. Bradbook, S. MacCallum, A. Moore, *op.cit.*, p7.

11 A. Bradbook, S. MacCallum, A. Moore, *op.cit.*, p35.



A lease is the grant of a right to possess and use another's land for a set period of time (the term of the lease). In return, the lessee pays rent to the owner of the land. The rent may be:

- a commercial amount determined by supply and demand and market forces
- a set nominal amount where the value is in the commercial value of the lease and property as a transferable commodity in the marketplace (as with the 99 year residential leasing system in the ACT)
- a set regulated amount for public welfare housing
- a nominal amount ('a peppercorn rental') if it is for social, government or community purposes.

The rent, terms and conditions of any lease are set by the owner, but this is limited by the laws that regulate the lease; the demand or market for such leases and the respective negotiating strengths and positions of the parties. Ordinarily, the lessor can set or determine the conditions of the lease including:

- the length of time or term of the lease
- the use of the land
- the amount to be paid in rent
- whether the lease can be transferred to another person and what conditions may attach to that consent to transfer the lease
- whether the lease can be mortgaged
- in what situations the lease can be cancelled
- what access rights the owner of the land or other persons may have to the land
- whether part or all of the land owned by the lessor is leased
- whether it is a 'head' or 'master' lease, which allows for sub-leases to be granted. The conditions in the head lease can be the rules under which subsequent sub-leases are issued, transferred and for what purposes land can be used in the sub-lease. The owner may wish to play a management role in the issuing and monitoring of the sub-leases and this can be included in the term and conditions.

Any improvements or fixtures built on the land by the lessee will become the property of the owner unless the lease says otherwise.

The lessee generally has the following rights:¹²

- to the quiet use and enjoyment of the land for the purpose for which it was granted
- the right to use the land for the full term of the lease
- the right to develop the land consistent with the purpose for which the lease was granted and general planning laws

¹² Presuming of course the lessee complies with the important conditions in the lease like paying the rent and the actual terms of the particular lease.



- the right to use the lease as security for a loan from a finance institution
- a right to access the leased land through surrounding land – in the case of some Indigenous land this is further regulated by the need for a permit to move through the surrounding Indigenous land.

As the law currently stands, in most cases, the Indigenous owners of land rights land can, as a group, decide to issue a lease of land held under their freehold title. This is considered in Part II of this Chapter, below. The lease can be of a portion of their land to either an individual or corporate entity from their own community or to someone from outside the community. A lease to someone outside the community will be further governed by the requirement to receive an entry permit to use the land in certain cases, such as in the Northern Territory and South Australia under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA NT) and *Pitjantjatjara Land Rights Act 1981* respectively.

It is with this background in mind that the implications for land ownership from the NIC Principles need to be considered.

Part I: Legal analysis of the NIC Principles

Exploring the NIC Principles

Background

As noted in Chapter 1, on 16 June 2005 the National Indigenous Council released its Indigenous Land Tenure Principles ('NIC Principles'). In releasing these Principles, the Chairperson of the NIC, Dr Sue Gordon, stated that:

Improved land tenure arrangements are necessary for Indigenous Australians to be able to gain improved social and economic outcomes from their land base now and into the future, but in a way that maintains communal ownership.¹³

Also during the reporting period, it was reported that the Northern Territory Government proposed to transfer town areas on land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA (NT)) to 99 year leases (from traditional owners) – this 'head lease' would be held by a new statutory body, with the power to issue sub-leases for homes and business premises.¹⁴

As the proposed ALRA (NT) changes indicate, the NIC Principles have the potential to provide support to radical changes to Indigenous land rights in Australia. In this context, a key question to consider is whether the NIC Principles are consistent with the norm of non-discrimination on the grounds of race.

The prohibition of racial discrimination is considered a fundamental rule of international law. It has the status of a peremptory norm, *ius cogens*, from which no derogation is permitted.¹⁵ It is, in particular, embodied in the International Convention on the Elimination of All Forms of Racial Discrimination (1965), which in turn has been legislated into Australian law by the *Racial Discrimination Act 1975* (Cth) (RDA).¹⁶

The principle of non-discrimination on the grounds of race is a bedrock principle of Australian law and practice. There is a presumption in Australia that it does not wish to violate its international obligations, jeopardise its international reputation, nor treat a section of its citizens in a discriminatory manner. It is possible at the federal level to lawfully override the prohibition of racial discrimination (because of the doctrine of parliamentary sovereignty), however its significance is such that where the principles of non-discrimination are potentially violated, the possibilities have often been identified in advance and avoided. In the present context, the concern about possible racial discrimination is highlighted by the importance of Indigenous rights in land and culture and

13 National Indigenous Council Communiqué, *Third meeting of the National Indigenous Council – 15-16 June 2003*, OIPC 16 June 2005. Available online at: <www.oipc.gov.au/NIC/communique/PDFs/ThirdMeetingNIC.pdf>.

14 *Northern Territory News*, 6 April 2005.

15 Non-discrimination on the grounds of race is contained in the UN Charter, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights 1966, and particularly in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965. See S. Blay, R. Piotrowicz and B.M. Tsamenyi (eds), *Public International Law – An Australian Perspective* (Melbourne University Press, 1999), p69.

16 S. Blay, R. Piotrowicz and B.M. Tsamenyi observe that '...the *Racial Discrimination Act 1975* (Cth), the first major piece of human rights legislation, is an almost complete enactment of CERD', p291.

also the generally disadvantaged situation of Indigenous Australians relative to the wider community.



The NIC Principles: maintaining or undermining communal interests?

The NIC Principles endorsed at the NIC's third meeting in June 2005 recognised that the communal basis of Indigenous rights in land is fundamental to Indigenous culture. It also recognised the inter-generational interests in such lands by affirming that the land should be preserved in an 'ultimately' inalienable form for the use and enjoyment of future generations. Neither of these principles is objectionable.

However, the NIC Principles also sought to maximise the opportunity for individuals and families to exercise a personal interest in those lands (and do not apparently restrict such personal interests to traditional owners, or even Indigenous persons).

The fourth of the NIC Principles allows for 'involuntary measures', as a last resort, where traditional owners 'unreasonably' withhold consent. This principle opens up the prospect of compulsion to agree to leases, and possibly expropriation of title as the principle notes the possibility of 'compulsory acquisition'. However, the current status of the NIC Principles is not entirely clear. The NIC maintain that the fourth principle does not advocate compulsory acquisition.

Accordingly, this analysis of the implications of the NIC Principles will focus primarily on the 'voluntary' principles set out in the first three NIC Principles. Nevertheless, some comments are first provided below in respect of the compulsory elements of the Principles, as set out in Principle 4, on the basis that they may still be revisited, perhaps if voluntary schemes fail to attract support from traditional owners.

Principle 4: involuntary measures, compulsory leases and acquisition

The Principles talk about 'just terms compensation' and also propose some sort of leaseback system to accompany compulsion. However, regardless of compensation or leaseback arrangements, involuntary surrender of the communal land title, for example, for at least 99 years as under the Northern Territory Government proposal, would almost certainly represent discriminatory behaviour, given that only Indigenous titles are to be singled out for such treatment. Although probably within constitutional power, there is little doubt that compulsory leases and/or acquisition would represent a significant winding back of Indigenous rights in Australia, irrespective of the beneficent objectives that may inform this course of action.

In examining the implications of compulsion for the norm of non-discrimination, it is necessary to look at NIC Principle 4 in light of the objective in Principle 3 of maximising 'the opportunity for individuals and families to acquire and exercise a personal interest in those lands' and the contention in that paragraph that 'the individual should be *entitled* to a transferable leasehold interest consistent with individual home ownership and entrepreneurship' (emphasis added). Even if the individuals who are to obtain this right to exercise a personal interest (by way of sub-lease) were to be members of the traditional owning group, there would be, nevertheless, a clear re-allocation of interests from the communal title to individual rights. In fact, the use of 'entitled' shows a preferencing of the



individual right over the collective. This radical change in the distribution of the benefits of the title will be even more pronounced if those able to exercise a personal interest in the land are Indigenous but non-traditional owners (of the land in question). It will represent an even starker re-arrangement of interests if it is non-Indigenous parties that are able to obtain such personal interests.

As well, the set of rights peculiarly associated with communal Indigenous title, such as usufructuary rights (usage rights), rights of cultural attachment and rights to maintain spiritual links and practice ceremony, would also be potentially lost for the term of the head lease (99 years). There is a distinct possibility that all the rights associated with communal title will be 'put on ice' for at least the best part of a century. Whether anything of such a title would be left to take back after such a very long period, other than the shell of proprietary ownership is a moot point.

It is evident that the proposal to use involuntary measures 'as a last resort' raises a number of issues touching on the question of racial discrimination. The addition of the words 'as a last resort' does not ameliorate the proposal – after all, compulsory acquisition usually occurs as a last resort. However, who is to judge what will constitute "unreasonable" behaviour in this context? Is it to be the Minister for Indigenous Affairs that forcibly grants the lease and decides what is unreasonable in these circumstances? It would seriously undermine the principle of self-determination and self-management of these communities and be a return to the days when an outside authority decided what was in the best interests of the Indigenous people concerned if Ministerial power was enlarged in this way. It is also unclear whether there would be any independent redress or review available to traditional owners where a decision has been made to compulsorily acquire lands because consent has been unreasonably withheld.

What is in fact being proposed in the NIC Principles at Principle 4 is the replacement of a regime of rights, established by legislation, with a regime of compensation. This may be capable of legal effect through legislation, however it will almost certainly fail both international standards of non-discrimination and the common sense understandings of just and equitable treatment.

Given the lack of detail in the NIC Principles it is not possible to analyse the involuntary or compulsion aspects of the Principles closely against the provisions of the RDA, although some of the salient points are discussed below. What is evident, however, is that *the potential exists for discrimination*. The NIC Principles open up the possibility of compulsion, not on the basis of national or public interest, which could apply to any title, but on the basis that this is an Indigenous title and that others, non-title holders, have set policy objectives for the title holders. This does not appear to be a situation that exists with other titles in Australia. Suffice to say that, even if the compulsory proposals are dropped from the NIC Principles, the fact that compulsory acquisition was an integral part of the Principles, as promulgated in June 2005, is a matter of concern.



Land rights and racial discrimination

The Racial Discrimination Act

The *Racial Discrimination Act (1975)* (RDA) is the enactment in Australian law of most of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹⁷ It prohibits racial discrimination at two levels.

At one level, any acts by a person discriminating against another person on the basis of race which has the purpose or the effect of nullifying or impairing the enjoyment of any human right or fundamental freedom in political, economic, social cultural or any other fields are unlawful (s.9). Section 10 of the RDA also requires equality before the law, that is it is unlawful for any law, or provision of a law, to discriminate against anyone on the basis of race in respect of rights enjoyed by persons of another race. This provision is cross-referenced (s.10 (2)) to ICERD Article 5 which elaborates the rights which are to be guaranteed to all, without distinction as to race. Relevant to the present consideration, ICERD Article 5 protects, among other things, the right to own property – including in association with others – and the right to inherit property. Accordingly, the RDA is directly relevant to the protection from racial discrimination of Indigenous rights to own and inherit land in association with others.

Formal and substantive equality

The protection offered by the RDA is not intended to merely operate at the level of formal equality. It must also take into consideration the particular characteristics of Indigenous customary titles and protect not just the formal title but those inherent characteristics of the title as well. It affirms and protects the *sui generis* (or 'one of a kind') nature of Indigenous land rights (see below). Thus, it is accepted that for justice to be served there must be an element of substantive equality, and that to rely on formal equality is to deny justice.¹⁸ As Professor Peter Bailey has pointed out, 'adopting the principle of substantive equality leads to difficult value judgements and distinctions, but in the interests of justice and human rights, there is no escape from this course.'¹⁹

Without acknowledgement and protection of the particular characteristics of Indigenous title there may result, in the words of the RDA, an effect of 'nullifying or impairing' the recognition, enjoyment or exercise of those Indigenous property rights on an equal footing with the enjoyment of other Australians of their property rights. The risk of a purely formal approach is that the land rights left protected may be only superficial, without the cultural and spiritual significance associated with this title.

It should also be noted that the rights protected may include rights that are not necessarily of legal effect. As Justice Toohey said in *Mabo (No 2)* in reference to s.10 of the RDA:

17 S. Blay, R. Piotrowicz and B.M. Tsamenyi (see above), observe that 'the *Racial Discrimination Act 1975* (Cth), the first major piece of human rights legislation, is an almost complete enactment of CERD', p291.

18 See the dissenting opinion of Judge Tanaka in the South West Africa cases 37 ILR (1968). See also discussion in *Western Australia v Commonwealth* (1995) 183 CLR.

19 P. Bailey, *Human Rights – Australia in an International Context*, Butterworths, 1990, pp30-31.



...s.10 relates to the enjoyment of a right...and the right referred to in s.10(1) need not be a legal right....The right to be immune from the arbitrary deprivation of property is a human right, if not necessarily a legal right, and falls within s.10(1) of the Act...²⁰

It appears that the remit of the RDA is wide, acting to protect substantive Indigenous rights to property, whether classed as legal or human rights.

Special measures and an obligation to protect

The RDA, following ICERD (Article 1(4)), allows for positive discrimination (s8(1)) ('special measures') where there are sound reasons. It is not necessary to examine these special measures provisions in the present context. Considerable time can be spent in debating whether particular pieces of legislation can be characterised as special measures or not, and whether this allows the rights or benefits to be reduced. However, such arguments become circular. The better approach is to acknowledge the inherent characteristics of Indigenous rights in land and culture. To interfere in those rights, either positively or negatively on the basis that they are special measures, again requires the consent of those whose rights are so affected. Otherwise, despite any stated beneficial intent, such interference may itself be a form of discrimination. Justice Brennan made this clear in *Gerhardy v Brown*, where he stated that:

[the] wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement;

and

The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.²¹

There would appear to be, at the very least at the moral and political level, a positive responsibility on governments to safeguard and protect Indigenous land rights against discriminatory acts or legislation as a matter of trust. Other similar jurisdictions recognise a relationship of trust between government and the Indigenous peoples supplanted by the state in question. These include Canada, the United States and New Zealand.²² Although Australian courts have not to date recognised a fiduciary obligation on Australian governments in respect of Indigenous peoples, it does not seem tenable that the Australian Government can take a neutral stance in respect of Indigenous land and cultural rights.²³ The sum result of these considerations is that the RDA, ICERD and human rights principles generally set a very high standard in terms of the recognition and protection of Indigenous land rights. It is incumbent on the government of the day to recognise, and act in accordance with, the standards and principles of non-discrimination embedded in the RDA.

20 (1992) 175 CLR, pp215-216 per Toohey J.

21 *Gerhardy v Brown* (1985) 159 CLR, p135. These comments are clearly relevant to consideration of the NIC Principles.

22 S. Dorsett and L. Godden, *A Guide to Overseas Precedents of Relevance to Native Title*, (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998, p221 and ff.

23 See G. McIntyre, 'Fiduciary Obligations towards Indigenous Minorities' in B. Keon-Cohen, (ed), *Native Title in the New Millennium*, (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2001, pp305-321. Indeed, James Anaya sees Indigenous peoples as the subjects of a special duty of care on the part of individual states and the international community. See S.J. Anaya, *Indigenous Peoples in International Law, 2nd edition*, Oxford University Press, 2004, p186.



What Indigenous property rights does international law protect?

Indigenous rights to their lands and territories have been a concern of international law from its origins in the 16th century expansion of Europe into the New World.²⁴ Today, international law provides strong support for Indigenous peoples' rights to own, control and enjoy their ancestral lands.²⁵ This recognition of the central place of land for Indigenous peoples encompasses in particular the communal nature of such title, and the central significance of spiritual connection to their country. *Indigenous land rights, absent of communal ownership and control, and of the ability to maintain spiritual connection and fulfil obligations of ceremony and kinship, becomes redundant.* As Chapter 1 highlighted, one of the rationales for introducing land rights was to give effect to traditional law and custom within the Australian legal system. Whilst this would appear to be self-evident, and widely accepted, current proposals about land rights in Australia suggest that the particular characteristics of Indigenous ownership of and attachment to land need to be re-stated.

The importance of Indigenous land and property rights in securing a non-discriminatory framework for Indigenous peoples has been articulated by the Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation XXIII, which affirms that indigenous peoples fall within the protection of CERD and explains what the norm of non-discrimination means in respect of indigenous peoples.²⁶ General Recommendation XXIII, notes that:

...in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and historical identity has been and still is jeopardised.²⁷

Such a statement is clearly pertinent to the history of Australia as it is with a number of settler societies. When it comes to setting out the requirements of non-discrimination in respect of land itself, General Recommendation XXIII is quite specific as to what is required:

The Committee calls upon States parties to recognise and protect the rights of indigenous peoples to own, control and use their communal lands, territories and resources.²⁸

The centrality of land to cultural integrity has also been recognised by the Human Rights Committee in respect of its jurisprudence concerning Article 27 of the International Covenant on Civil and Political Rights.²⁹ International Labor

24 See S.J. Anaya, *op.cit.*, pp15-48.

25 *ibid.*, pp49-61. See also J. Castellino and S. Allen, *Title to Territory in International Law – a Temporal Analysis*, Ashgate, England, 2003, pp205-214.

26 CERD General Comment XXIII, 'Indigenous Peoples' UN Doc. CERD/C/365 (1999), paragraph 1. Whilst General Recommendations may not be binding, they do provide guidance to states parties in terms of elaborating and explaining the meaning and reach of provisions of the Convention.

27 *ibid.*, paragraph 3.

28 *ibid.*, paragraph 5.

29 Article 27 of the International Covenant on Civil and Political Rights (ICCPR) protects the cultural integrity of minorities. The jurisprudence of the Human Rights Committee (HRC) shows that: (a) the Article covers the situation of Indigenous minorities; and (b) it recognises and protects the close connection of land to culture for Indigenous peoples. See also HRC General Comment No. 23(50) UN Doc CCPR/C/21/Rev.1/Add.5 (1994), paragraph 7.



Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples also sets out, in unequivocal terms, the requirement that:

...governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories... they occupy or otherwise use, and in particular the collective aspects of this relationship.³⁰

Thus, as Anaya points out:

In contemporary international law... modern notions of cultural integrity, non-discrimination, and self-determination join property precepts in the affirmation of *sui generis* indigenous land and resource rights...³¹

The implications for the NIC principles

The significance of these matters is that these rights – land, culture and control – provide the setting for the application of the right of non-discrimination enshrined in the RDA as it affects Indigenous Australians. Any proposals to interfere with, alter or diminish existing recognition of Indigenous rights in Australia must be assessed against these parameters in determining whether the proposals are non-discriminatory.

Despite the abundant recognition of the communal and spiritual nature of Indigenous land rights, it is in fact these very aspects of title, communality and spirituality, which are often under attack through one stratagem or another. It is important to consider whether these concerns apply to the NIC Principles and also to identify, briefly, if there are potential problems with the Northern Territory Government proposal in respect of the ALRA (NT). It should also be noted that the program to ‘privatise’ and ‘individualise’ Aboriginal land, reflected in the NIC Principles, is part of a world-wide trend to marketise and privatise communal lands.³² As Chapter 3 highlights, this trend has been problematic and not led to economic development as supposed.

However, as noted above, it has been stated that the NIC Principles do not mean compulsion. *The centrality of communal title to Indigenous rights means that the issue of informed consent in respect of proposals to privatise Indigenous land is absolutely critical in considering the potentially discriminatory effect of the NIC Principles.* It is uncertain that the NIC Principles reflect the principle of free, prior and informed consent. The only references to consent contained in the Principles are found at Principle 4, where references to consent are couched in the negative: ‘the consent of the traditional owners should not be unreasonably withheld’, and ‘involuntary measures should not be used except as a last resort.’ This suggests a limited view of consent. The elements of free, prior and informed consent will be considered in Chapter 4.

30 ILO Convention 169 Concerning Indigenous and Tribal Peoples 1989. Although not ratified by Australia, ILO 169 is generally regarded as an authoritative source for contemporary international norms and practice in respect of the rights of Indigenous peoples.

31 *ibid.*, 142.

32 World Bank Report *Land Policies for Growth and Poverty Reduction*, June 2003. Available online at: <http://econ.worldbank.org>. This report, it should be noted, actually suggests a cautious and nuanced approach to marketising land, based on World Bank experience with these policies. Also see Land Research Action Network, *The Good, the Bad and the Ugly: The Land Policies of the World Bank*, November 2004. Available online at: www.landaction.org/display.php?article=252.

Against these elements which set the parameters for non-discrimination in relation to Indigenous property – land, culture and control – the NIC Principles (particularly principles 3, 4 and 5) are wanting. For the reasons outlined above, the NIC Principles do not meet the requirements for a non-discriminatory approach enshrined in the RDA as it affects Indigenous Australians.





Part II: Existing options to lease and sell Indigenous land

Tables summary: land rights, native title and leasing regimes

The NIC Principles and subsequent government comments and actions imply that current land rights legislation does not enable Indigenous peoples to pursue economic development goals, such as owning their own home. However, leasing can already be done under every piece of land rights legislation except one (the Victorian *Aboriginal Lands Act 1991*).

The following tables provide an overview of state and federal land rights statutes and the NTA, and show the extent to which individual leases, the sale or mortgaging of communal land is currently permitted, including processes and conditions.

Jurisdiction – Commonwealth

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)	Granting of title for traditional Aboriginal owners in the Northern Territory only.	Aboriginal Land Trusts- consisting of Aboriginal people resident in the regional Land Council area.	Inalienable Freehold Title. Compulsory acquisition laws of Northern Territory don't apply: s.67.	Cannot sell or mortgage the freehold title (inalienable freehold). Leasing and mortgaging of the leasehold interest possible: s19. Leasing – to any person for any purpose: s.19(4A). Lease or licence to Aboriginal person or family, Aboriginal Council, Incorporated Association or their employee for residential, business or community purposes: s.19(2). Transfer of leasehold interest to another person requires consent of Land Council and sometimes of Minister if that consent was required in the original grant: s.19(8).	The regional Land Council must be satisfied that: <ul style="list-style-type: none"> • traditional owners understand nature and purpose of proposed grant and as a group consent to it, and • other affected Aboriginals have been consulted and expressed their view to the Land Council, and • that the terms and conditions are reasonable. s.19(5) Minister's consent is required except: <ul style="list-style-type: none"> • where lease is for less than 21 years for Aboriginal business or community purpose: s.19(7)(a) • where lease is for less than 10 years for any public purpose to Government or to a mission for mission purposes or to any other person for any purpose: s.19(7)(b).





Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<p><i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)</i></p>	<p>To grant land to the Wreck Bay Aboriginal community at Jervis Bay in the ACT.</p>	<p>Wreck Bay Aboriginal Community Council: s.4, 6(a).</p>	<p>All rights, title and interests in the land are vested in the Council: s.10. Compulsory lease back to government of Booderee National Park for 99 years or less. Minister's consent required for longer National Park lease back: s.9A, 38(B)(3).</p>	<p>With consent of the Minister, the Council may surrender its interests in all or part of the land: s.39. Otherwise can't sell or mortgage the land. Leasing and mortgaging of leasehold interest possible. Lease to community members for domestic purposes (max. 99 years without Minister's consent): s38(2)(a), s38(3)(a) and business and community purposes (max. 25 yrs without Ministers consent): s38(2)(b)(c), s38(3)(b)). Lease to Commonwealth Government and Minister determines the rent: s38(2)(f), s.38(5). Can grant a licence to use land: s38(4).</p>	<p>Community Council can grant leases and licences. Ministers consent required for:</p> <ul style="list-style-type: none"> • Lease to a non-community person for domestic and business purposes: s.38(2)(d)(e) • Any other lease that is longer than 15 years: s.38(3)(c) • Grant of sub-lease (except to community member, Commonwealth or an Authority) • Change of lease purpose in sub-lease s.41(3). <p>Domestic purpose lease held by a community member can be transmitted by will or laws of inheritance to a relative: s.42(1).</p>

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<p><i>Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987</i> (Cth)</p>	<p>To provide for vesting of land for certain Aboriginal communities in Victoria by the Commonwealth at the request of the Victorian Government.</p>	<p>Kerrup-Jmara Elders Aboriginal Corporation at Lake Condah. Kirrae Whurrong Aboriginal Corporation at Framlingham Forest.</p>	<p>Legal estate in the land and all rights and interests incident to that legal estate are vested in the Aboriginal Corporations: s.6,7. (Can be registered as if it were a grant of freehold title s. 10).</p>	<p>Leases and mortgages of the leasehold interest can be granted. Lease to Crown, public authority or any other person: s.13(1)(c), s.21(1)(c). If lease is to another person and over 3 years, need Minister's consent: s.13(3), s.21(3).</p>	<p>Can transfer the freehold type interest to another Aboriginal group for same purposes: s.13(1)(b). Any one member of the Committee of Elders or adult member of the Corporation can veto transfer of the whole legal estate in land to another Aboriginal group: s.13(2), s.21(2). Also potentially subject to Crown reserves restrictions.</p>
<p><i>Native Title Act 1993</i> (Cth) (NTA) and <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i></p>	<p>To recognise and protect native title, set up a process to determine claims for native title. Applies throughout Australia.</p>	<p>Indigenous association, 'Prescribed Body Corporate' (PBC) as agent or trustee for common law native title holders.</p>	<p>Exclusive possession or certain defined native title rights and interests depending on the nature of the interest under traditional laws and customs, the effect of the legal test for recognition and the extent of subsequent extinguishment.</p>	<p>Cannot sell or mortgage native title rights – and native title is protected from debt recovery processes: s.56(5). A PBC can't issue a lease. Leases can be issued by government if PBC agrees through an Indigenous Land Use Agreement (ILUA) or land is compulsorily acquired. If PBC accepted grant of freehold or leasehold interest (eg in exchange for surrender of native</p>	<p>PBC must consult with and obtain consent of native title holders (Reg 8(2)), and consult with and consider views of the Native Title Representative Body (land council) for the area concerned, and if appropriate and practical give notice of those views to the native title holders (Reg 8(3)). Native title holders can give their PBC a general authority to make certain types of decisions without consulting them decision-by-decision: Reg 9(2).</p>





Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<p><i>Native Title Act 1993</i> (Cth) (NTA) and <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> (continued)</p>				<p>title rights) authorised under an ILUA, it could use those titles as security for a mortgage.</p>	<p>The ILUA process requires a public process of notification, provision for objections and hearing of any objection. The period of objection is between 1 and 3 months. The whole process from negotiation to registration can take a number of months. An ILUA can also authorise an alternative process of approving say a number of residential leases</p> <p>See Div 3, Subdivisions B, C, D and E generally.</p> <p>In a compulsory acquisition the 'right to negotiate' provisions of NTA apply which provide for a minimum negotiation period of 6 months: s.35.</p>

There are two Commonwealth National Parks in the Northern Territory – Kakadu National Park and Uluru – Kata Tjuta National Park in which freehold title is held by Traditional Owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which are then leased back and jointly managed in accordance with the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). There are forms of leasing and mortgaging available subject to conservation purposes and the respective plans of management.

Jurisdiction – New South Wales

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Land Rights Act 1983</i> (NSW)	To acknowledge the importance of land to Aboriginals and its spiritual, social, cultural and economic significance and provide a process to return land.	Local Aboriginal Land Councils (LALC) or the New South Wales Aboriginal Land Council (NSWALC) can acquire, hold and deal with land.	Freehold title (s.36 (9)) and leasehold for Western Lands Division lands (s.36 (9A)) (subject to any native title rights and interests) – for claimable land. Freehold title for certain stock routes with lease back to Minister: s.37(3) Hold or purchase any type of title: s.38 No compulsory acquisition except by an Act of Parliament. S.42	NSWALC can sell or mortgage land: s.40C. NSWALC can lease land: s.40B. LALC can sell, mortgage land with approval of NSWALC: s.40D(1). LALC can lease land with approval of NSWALC: s.40B(2), (2A).	NSWALC or LALC can sell or mortgage if 80% of members of LALC meeting determine the land is not of cultural significance to Aboriginals of the area and should be disposed of. Any sale or lease by a LALC requires NSWALC approval: s.40B(2) and s.40(1)(b). NSWALC or LALC may not sell, lease, mortgage or deal with claimed (not purchased) land vested in it that is subject to native title rights and interests unless there is a Court order that native title exists or doesn't exist: s.40AA. This doesn't apply to lands leased under the National Parks Act: s.40AA(2).





Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<p><i>National Parks and Wildlife Act 1974 (NSW) (NPWA)</i></p>	<p>Provides for the ownership of approved areas that are national parks, nature reserves, a historic site, or state conservation area, regional park, karst conservation reserve or Aboriginal area that are of cultural significance to Aboriginal people: s.71D, 71Y.</p> <p>The particular areas are in Schedule 14 of the Act.</p>	<p>NSWALC or LALC as per Aboriginal Land Rights Act 1983 (NSW) – see above.</p>	<p>Freehold Title (s.71P) leased to the Minister for National Parks (for 30 years with renewal): s.71AD (1)(b) and reserved for conservation purposes.</p> <p>An area once granted that is leased to Minister and reserved under this Act can only be removed by an Act of Parliament: s.71BM.</p>	<p>Disposal of land that is reserved or dedicated under NPWA is restricted—NSWALC or a LALC may not sell, exchange, lease, dispose of, mortgage or otherwise deal with those lands: see s.40AB ALRA (above).</p> <p>Minister may approve leases of land and mortgages of leasehold interests: s.151, s.151A and Part 12 of Act.</p>	<p>Board of Management (majority Aboriginal owners of the land: s.71AN (3)) manages the land.</p> <p>Leases subject to Plan of Management: s.81A.</p>

Jurisdiction – Northern Territory

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Pastoral Land Act 1992</i> (NT)	To provide land title for Aboriginal communities (a living area) on pastoral lease land based on historical association and present need: s.92(1).	Aboriginal Association representing the community.	Freehold title that can't be transferred: s.46(1A) Land Acquisition Act (NT): s.110 Associations Act (NT). Abandoned community living areas may be resumed and returned to pastoral lease: s.114.	Cannot sell the title to land. Leases and mortgages of freehold, but only for health, education housing, financial services for the community: s.110(6) Associations Act (NT).	All dealings require Ministerial consent. Minister can only approve of leases for health, education, housing services and financial services for the community: s.110(6), (7), (8), (9) Associations Act (NT).

NB. The landmark Indigenous land rights legislation in Australia, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) applies to the Northern Territory but is not listed in the Northern Territory table as it is a federal statute – see the Commonwealth table at top.

In the Northern Territory there is also legislation that either recognises or provides for Aboriginal ownership and joint management of Northern Territory created National Parks. This legislation is the *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1987* (NT); the *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT) and the *Parks and Reserves (Framework for the Future) Act 2003* (NT) and *Parks and Reserves (Framework for the Future) (Revival) Act 2005* (NT) involving 27 parks and reserves. The latter two Acts provide for the requesting of the grant of freehold title under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or granting of a parks freehold and leaseback under Northern Territory law and the joint management of those lands. This legislation has not been dealt with because of the obvious restrictions that apply for conservation purposes. Leases and mortgages with respect to those leases can generally be granted that are consistent with any plan of management and have Ministerial consent.



Jurisdiction – South Australia

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Lands Trust Act 1966</i> (SA)	To grant land (previously set aside as Aboriginal reserves) directly to the control of an Aboriginal body.	State-wide Aboriginal Land Trust – Aboriginal persons appointed by government including Minister's representative.	Freehold title and any other estate or interest in land transferred to it: s.16 (1). Freehold or other titles can be sold or transferred. Sale of land requires approval of Parliament: s.16 (5).	Land title can be leased and mortgaged: s.16(5). Subsequent transfer, assignment or sublease of a lease or licence to use land requires Minister's consent: s.16 (7).	No special decision-making process: s.10, 11. Minister can only refuse consent if of 'view fails to preserve to the Aboriginal people of South Australia the benefits and value of the land in question': s.16(5)(b).
<i>Pitjantjatjara Land Rights Act 1981</i> (SA)	To provide ownership directly to the Traditional Owners (TO's).	Anangu Pitjantjatjara (AP) – a body corporate comprising all the TO's in the area	Inalienable freehold: s.15 (1). No compulsory acquisition, resumption or forfeiture: s.17 (a), (b).	No estate or interest may be alienated: s.17. Lease or licence can be granted to a Pitjantjatjara person or organisation for any period: <ul style="list-style-type: none"> to a government agency for 50 years or less to any other person or legal entity for 5 years or less: s.6 (2)(b)(i), (ii), (iii). No mortgages.	AP decision-making must have regard to interests of and consult with TO's. with a particular interest in the affected portion of the lands and shall not approve unless satisfied that those TO's understand the proposal, have had an opportunity to express their views to AP and consent: s.7.

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Maralinga Tjarutja Land Rights Act 1984</i>	To provide ownership directly to the traditional owners (TOs).	Maralinga Tjarutja (MT) – a body corporate comprising all the TOs in the area.	Inalienable freehold: s.15 (a). No compulsory acquisition, resumption or forfeiture: s.15 (b).	No estate or interest may be alienated. Lease or licence can be granted to a TO or organisation of TOs for any period: <ul style="list-style-type: none"> to a government agency for 50 years or less to any other person or legal entity for 5 years or less: s.5 (2)(i), (ii), (iii). No mortgages.	The Council of MT in making decisions shall consult with TOs and have regard to their customs: s.8.

Jurisdiction – Queensland

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Land Act 1991 (Qld)</i>	To provide for the claim of and grant of land to Aboriginal people and foster self-development, self-reliance and cultural integrity.	Trustees appointed by the Minister: ss.28, 65 and Part 3 Aboriginal Land Regulation 1991 (Qld).	Inalienable freehold title: s.30, s.60(1)(a); s.66 (a) or Perpetual or Fixed Term Lease: s.60(1)(b) s.64-66(b).	Freehold title can't be sold or mortgaged. Leasehold interest can be mortgaged. Lease or licence to Aboriginal person connected with the land, Cth or State or others: s.39(2).	Decisions to grant leases or other interest in land must as far as possible be made in accordance with Aboriginal tradition or an agreed decision-making process: Reg.45(1), (2) Aboriginal Land Regulation 1991.





Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Land Act 1991 (Qld)</i> (continued)			Compulsory acquisition requires Act of Parliament: s.41.	Perpetual or fixed term lease can be mortgaged or subleased only with Ministerial consent: s.76 (4). Lease to non-Indigenous person for longer than 10 years requires Ministers consent (does not apply where lease is to the spouse of an Indigenous person): s.39(2),(3).	Residential leases require Ministerial consent: s.131. If land a National Park also it must be leased to Qld Govt in perpetuity for conservation: s.83 (1)(a).
<i>Torres Strait Islander Land Act, 1991 (Qld)</i>	As above. Similar provisions to Aboriginal Land Act 1991 (Qld) apply.	As above. Similar provisions to Aboriginal Land Act 1991 (Qld) apply.	As above. Similar provisions to Aboriginal Land Act 1991 (Qld) apply.	As above. Similar provisions to Aboriginal Land Act 1991 (Qld) apply.	As above. Similar provisions to Aboriginal Land Act 1991 (Qld) apply.
<i>Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Qld)</i>	To provide secure title (individual leases) to Indigenous community members on communal land.	Community Councils and later trustees of Aboriginal land under Aboriginal Land Act.	Freehold title (Deed Of Grant In Trust: 'DOGITS'), reserves and transferred land under Aboriginal Land Act.	Leases in perpetuity to Indigenous persons or lesser term leases which are transferable, can be mortgaged and sublease: s18. No new leases can be granted since 1991: s.33A. Mortgagee can only be in possession if default for 12 months and must transfer to an Indigenous resident: s19.	Council must take into account 3 factors when deciding to issue lease: security of title, social and economic development of the area and use to be made of land within the community: s.6 (3). Must be Indigenous resident of the community to hold lease or receive transfer of lease: ss.4(1), 5(1), 18(4).

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Land Act 1994</i> (Qld)	Create public reserves including for Indigenous people (Schedule 1 Community Purposes).	Community Councils as trustee.	. Crown reserve or Deed of Grant in Trust (DOGIT) – freehold title: s.39(1). Act of Parliament needed to cancel DOGIT: s.43.	Trustees can't sell land but government can cancel reserve. Leases can be granted on Aboriginal reserves by Governor for less than 30 years: s32(1). Trustee can issue leases (for not more than 30 years) and mortgage or subleases with Ministerial consent: ss. 57, 58, 61. Minister can cancel trustee lease without compensation: s.65(3)	Community Council to be consulted before lease granted by Governor on reserve: s.32(5). When Trustee leases land Minister must be satisfied it is consistent with purpose of Reserve and approves all improvements under the lease: s.59. Minister can dispense with this consent: s.64.

Jurisdiction – Victoria

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Lands Act 1970</i> (Vic)	To make permanent the land grant and vest the land in the local resident community. Applies to Lake Jyers and Framlingham Aboriginal communities only.	Aboriginal Trust consisting of residents only.	Perpetual licence to occupy and use land and estate in fee simple: s.9(5), (6.)	Can lease for maximum of 21 years (s.11(4)) and mortgages can be issued s.11(1)(d).	Unanimous resolution of Trust to sell, dispose of or transfer any land to any person land: s.11(3).



Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Lands (Aborigines' Advancement League) (Watt Street), Northcote Act 1982 (Vic)</i>	Vest the Crown grant of land in the trustees of the Advancement League.	Aborigines Advancement League Inc.	Crown grant – unspecified: s.3(2).	Can lease and mortgage.	Continued use as a community centre: s.3(3).
<i>Aboriginal Land (Northcote Land) Act 1989 (Vic)</i>	Permanently vest block of land for Aboriginal community purposes.	Aborigines Advancement League Inc.	Freehold title with conditions: s.5(2).	Can lease and mortgage.	Land continue to be used for Aboriginal cultural and recreational purposes: s.5(3)(a).
<i>Aboriginal Lands Act 1991 (Vic)</i>	Grant of specific blocks of land for cultural and burial purposes.	Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc. Goolum Goolum Aboriginal Co-operative Ltd. Gippsland & East Gippsland Aboriginal Co-operative Ltd.	Freehold title with conditions: s.6.	Can't sell or dispose of freehold title or any interest in the land: s.7. No leases or mortgages: s.7.	Land must be used for Aboriginal cultural and burial purposes: s.6(5).

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Land (Manatunga Land) Act 1992 (Vic)</i>	Grant of land at Robinvale and to extinguish existing lease and other encumbrances: s.1.	Murray Valley Aboriginal Co-operative Ltd.	Freehold title with conditions: s.3.	Yes can lease or mortgage.	Land must be used for Aboriginal cultural purposes: s.3(2).

NB. An additional land rights statute applies to land in Victoria (the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)*) but is not included in this table as it is a federal statute – see the Commonwealth table at top.

Jurisdiction – Tasmania

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Lands Act 1995 (Tas)</i>	To promote reconciliation... by granting certain parcels of land of historic or cultural significance.	Aboriginal Land Council – state-wide elected Aboriginal body corporate.	Land vested in perpetuity: s.27.	Perpetual title – no mortgage or use as security: s.30. Leases and licences can be granted: s.28A. Mortgages can be granted on lease or licence.	Land Council decisions to have regard to the interests of local Aboriginal communities: s.18(3). Land Council must review decisions to grant interests in land if requested to do so by 50 or more Aboriginal persons: s.19.



Jurisdiction – Western Australia

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
<i>Aboriginal Affairs Planning Authority Act 1972</i> (WA) (AAPA Act)	For the economic, social and cultural advancement of persons of Aboriginal descent in Western Australia.	Crown through Aboriginal Land Trust (ALT) appointed by Minister or Aboriginal Affairs Planning Authority.	Aboriginal reserves created under LAA. Freehold title and leases.	ALT can lease and mortgage with Ministers consent: s.20(3)(c). ALT can lease Aboriginal reserves, which is commonly done to a resident Aboriginal community corporation. Authority can sell, lease and mortgage land to Aboriginal persons: s.41.	ALT to ensure use and management of land accords with the wishes of the Aboriginal inhabitants of the area where is practicable: s.23(c).
<i>Land Administration Act 1997</i> (WA) (LAA)	To provide Crown land for benefit of Aboriginal persons.	Aboriginal person or approved Aboriginal Corporation: s.83. Aboriginal reserves generally vested in ALT see AAPA Act above: or resident Aboriginal Corporation.	Freehold title or lease: s.83. Crown or Aboriginal reserves for use and benefit of Aboriginal inhabitants: s.41.	Can grant leases, sub-leases and mortgages of land if conditions of particular grant allow so. Can lease and mortgage Aboriginal reserve if consistent with management order and have Minister's consent: ss.18, 46(3).	Conditions set by Minister as thinks fit in best interests of Aboriginal person or persons: s83. Management order and purpose of reserve determines allowed use of land.



As these tables and this information highlight, a legislative basis already exists in all jurisdictions (with certain circumstances and conditions attached) that enable leasehold interests on Indigenous land. To ascertain whether impediments to individual leasehold interests revolve around land title or other explanations, analysis of the strengths, limitations and workability of the existing arrangements is required.

Opportunities and limitations in existing land rights legislation

As the previous tables highlight, leases can be granted over nearly all forms of Indigenous freehold title. It has been a characteristic of most land rights legislation that land can be leased to outsiders for business and public purposes, and to the Aboriginal holders and residents of the land for residential, community or business purposes. Such leases override any traditional rights and interests for the term of the lease. Land rights legislation also allows traditional owners to use the land differently if they wish to do so.

In this section, the existing powers to lease, sell and mortgage Indigenous land around Australia under existing land rights legislation and the NTA, are reviewed. The issues and tensions surrounding the exercise of these powers are explored in more detail through case studies of the situations in the Northern Territory and in New South Wales, below.

Indigenous rights to land in Australia – different types of legislation

In conceptual terms, there are three types of legislation used to recognise Indigenous interests in land in Australia:

1. General land legislation that allows governments to create reserves, freehold title, or leases for the benefit of Indigenous people.
2. Land rights legislation, which generally grants an inalienable freehold title to traditional owners (who are identified in accordance with traditional laws and customs and are communal land holders), and/or Indigenous residents of an Indigenous community.
3. The Commonwealth *Native Title Act 1993* (NTA), which provides for the recognition, as native title, of the communal group or individual rights and interests of Indigenous peoples under their traditional laws and customs in relation to land or waters.³³

The first type of legislation does not generally vest rights directly in traditional owners of land or in the Indigenous community living on the land. Rights are held by the government or by a body appointed by the government. This type of legislation dates back to the 19th century; its main purpose was to control and protect Indigenous peoples. Legislation of this type still applies in Western Australia and Queensland. Such legislation is not dealt with in this section of

33 See *Native Title Act 1993 (Commonwealth)*, s.223. Native title was recognised by the common law in Australia in the High Court decision in *Mabo and Others v Queensland (No.2)* (1992) 175 CLR 1, (*Mabo*). Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory (*Mabo*, per Brennan J., p58).



the Report, as Indigenous communities generally do not have power to lease or dispose of the land.³⁴

Some legislation does not fit neatly into these three categories; it has characteristics of both the older Aboriginal reserve type system and the more modern land rights system. For example, the South Australian *Aboriginal Lands Trust Act 1966* (SA) provides for a title in relation to former Aboriginal reserves, that cannot be sold without the consent of the Minister and authorisation of Parliament.³⁵ The title is held by a state-wide Aboriginal Land Trust appointed by a government minister.

Land rights and leasing: a national overview

The following is a general description and analysis of land rights legislation. There is a great deal of variation in the details of these laws around the country. All States and Territories except for Western Australia have some type of land rights legislation. Some land rights legislation provides a claims based process;³⁶ other legislation provides for statutory grants of specific areas of land to Indigenous people.³⁷

Western Australian arrangements

In Western Australia the *Aboriginal Affairs Planning Authority Act 1972* (WA) provides for the management of Aboriginal reserves and the grant of ordinary freehold and leases to be held by the Aboriginal Land Trust (appointed by the state government or statutory Aboriginal Affairs Planning Authority) on behalf of Aboriginal people. The Authority may make such grants to any person of Aboriginal descent on any conditions and for any purpose.³⁸ In doing so, it must ensure that the use and management of the land shall accord with the wish of the Aboriginal inhabitants of the area so far as that can be ascertained and is practicable.³⁹

The *Land Administration Act 1997* (WA) provides for the grant of conditional freehold for the benefit of Aboriginal people, leases to Aboriginal people,⁴⁰ and leases over Aboriginal reserves that are consistent with the management order over the reserve.⁴¹ These are examples of general legislation of the first type identified above.

Northern Territory Land Rights

The first land rights legislation that allowed Indigenous people to make claims for land was the *Aboriginal Land Rights (Northern Territory) Act, 1976* (Cth) (ALRA (NT)). Land available for claim is limited to unallocated Crown land and alienated Crown land in which all estates and interests not held by the Crown are held by Aboriginal people. Traditional Aboriginal owners, who can successfully claim

34 Except for DOGIT community lands in Queensland.

35 *Aboriginal Lands Trust Act 1966* (SA), s.16(5).

36 Northern Territory, New South Wales, and Queensland.

37 South Australia, Victoria, Tasmania and Jervis Bay Territory.

38 *Aboriginal Affairs Planning Authority Act 1972* (WA), s.41.

39 *ibid.*, s.20(3)(c).

40 *Land Administration Act 1997* (Western Australia), s.83.

41 *ibid.*, s.46(3).



land, must be a local descent group who have spiritual affiliations to a site on the land that place them under a primary spiritual responsibility for that site and for the land.⁴² Successfully claimed land is granted as inalienable freehold to an Aboriginal Land Trust on behalf of the group of traditional owners. Decisions about the use of Aboriginal land can be made by regional Land Councils, which direct an Aboriginal Land Trust to act in respect of the land. However, they can only do so on the basis of the informed consent of the traditional owners as a group. An Aboriginal Land Trust can only act in accordance with a direction of the Land Council.⁴³

Aboriginal freehold is characterized by restrictions not normally associated with 'ordinary' freehold. It cannot be sold, and the ability to lease the land is restricted in a number of ways.⁴⁴ Leases can be granted to any person for any purpose. However, the Commonwealth Minister's consent is required if the lease is for longer than a period specified in the Act, which varies in accordance with the identity of the lessee and the purpose for which the lease is to be granted. Generally, Ministerial consent is required for leases for a shorter term where the lessee is not an Aboriginal person or organisation. In addition, a lease can only be granted by the land trust with the informed consent of the traditional owners, and if the relevant Land Council is satisfied that the terms and conditions are reasonable. The normal laws of compulsory acquisition do not apply; land can only be taken by a Special Act of Parliament,⁴⁵ which means that it must address the need for the compulsory acquisition.

Further information is provided in the case study below.

South Australian Land Rights

In South Australia, in addition to the *Aboriginal Lands Trust Act 1966* (SA) referred to above, there are two Acts each providing that large parts of the western part of the State are held as inalienable freehold by a corporation that directly represents traditional owners.⁴⁶ A lease can be granted for any period to a traditional owner or organisation comprising traditional owners; to a government agency for up to 50 years; or to anyone else for 5 years or less.⁴⁷ The Anangu Pitjantjatjara corporation must have regard to the interests of and consult with traditional owners with a particular interest in the affected portion of the lands and shall not approve the lease unless it is satisfied that those people have given their informed consent.⁴⁸ The Maralinga Tjarutja corporation must consult with traditional owners.⁴⁹

42 *Aboriginal Land Rights (Northern Territory) Act (Commonwealth)*, s.3(1).

43 s.5(2)(a)(b) – *Aboriginal Land Rights (Northern Territory) Act 1976*.

44 *Aboriginal Land Rights (Northern Territory) Act (Commonwealth)*, s.19.

45 A Special Act of Parliament in these circumstances is one that is only concerned with achieving the compulsory acquisition; it ensures that Parliament is specifically addressing this issue.

46 *Pitjantjatjara Land Rights Act 1981* grants land to Anangu Pitjantjatjara; *Maralinga Tjarutja Land Rights Act 1984* grants land to Maralinga Tjarutja.

47 *Pitjantjatjara Land Rights Act 1981 (SA)*, s.6(2)(b). *Maralinga Tjarutja Land Rights Act 1984 (SA)*, s.5(2)(b).

48 *Pitjantjatjara Land Rights Act 1981 (SA)*, s.7.

49 *Maralinga Tjarutja Land Rights Act 1984 (SA)*, s.8.



New South Wales Land Rights

Aboriginal land acquisition in New South Wales has been by a claims based process under the *Aboriginal Land Rights Act 1983* (NSW).⁵⁰ Claims can be made for unused Crown land not needed for a public purpose. In addition, 7.5% of land tax received by the New South Wales Government for a period of 15 years to 1998 was invested in a capital fund to provide a basis for market purchase of land. The State is divided into Local Aboriginal Land Council (LALC) areas. In addition, there are regional Aboriginal Land Councils and a statewide Aboriginal Land Council (NSWALC).⁵¹ People living in, and those with an association with, a LALC area are eligible to seek membership of it.⁵² Land successfully claimed or purchased in the LALC area is generally held by that LALC as ordinary freehold.⁵³

Since 1990, a LALC has had power to lease or change the use of land vested in it;⁵⁴ and to sell, exchange, mortgage or otherwise dispose of land vested in it.⁵⁵ Power to lease land is subject to conditions including that the proposal has been approved at a meeting of the LALC specifically called for the purpose, at which a quorum was present.⁵⁶ Also, the NSWALC must have given its approval for the proposed lease. The NSWALC can only refuse to approve such a lease on the ground that its terms of conditions are inequitable to the LALC.⁵⁷ No such constraint is imposed in respect of proposed mortgages or other disposals.

In addition to these conditions, the power to dispose of land is subject to conditions⁵⁸ including that the LALC has determined that the land is 'not of cultural significance to Aborigines of the area'. The determination and the decision to dispose of the land must be made by a special majority of at least 80% of the members present and voting. Further, if the land was transferred to the LALC as a result of a successful claim, the responsible Minister and the Crown Lands Minister must have both been notified. However, the Ministers do not have power to veto a disposal. Further information is provided in the case study below.

Queensland Land Rights

The situation in Queensland is complex. Generally land is held by trustees, which may be an Indigenous-controlled council, on behalf of Indigenous people. There are still some Indigenous reserves, which can be leased by the Minister.⁵⁹ This system was partly replaced with a system of deeds of grant in trust (DOGITs) to Indigenous councils on reserves. The trustees can lease the land to Indigenous organisations or community councils, including in perpetuity.⁶⁰

50 This Act is currently under review. See p48 below.

51 J. Broun, M. Chapman, and S. Wright, *Issues Paper 1: Review of the land dealing provisions of the Aboriginal Land Rights Act 1983*, New South Wales Aboriginal Land Rights Act Review Task Force, Sydney, 2005, p20.

52 *Aboriginal Land Rights Act 1983 (NSW)*, s.53.

53 *ibid.*, s.36.

54 *ibid.*, s.40B(2)(a).

55 *ibid.*, s.40D(1).

56 A quorum for a valid meeting of a LALC of 27 or more voting members is 10 people. For a smaller LALC, a quorum is one third of the number of voting members plus one (*ibid.*, s.76.).

57 *ibid.*, s.40B(3).

58 *ibid.*, s.40D(1).

59 *Land Act 1994 (Queensland)*, s.32.

60 *Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Queensland)*, ss.6(1).



In addition, Queensland has two Indigenous Land Acts.⁶¹ In practice, they only operate in relation to existing reserves, DOGITs and other Aboriginal leased land, which can be transferred to trustees, and to other land that is declared by regulation to be claimable. Such declared land and transferred land can be claimed. Trustees hold *transferred* land for the benefit of the Aboriginal people of Queensland generally. Trustees hold claimable land that has been *granted* on the basis of traditional affiliation or historical association, for the benefit of the people who meet those criteria, as inalienable freehold title. Land that is claimed on the basis of economic or cultural viability can only be granted as a lease.⁶²

Transferred land and granted land can be surrendered to the Crown. Also, a lease can be granted to anyone, if the Aboriginal people particularly concerned with the land have generally given their informed consent. However, contravention of that requirement does not invalidate the interest or agreement concerned. Land can be sub-leased to an Aborigine particularly concerned with it, or such a person's spouse, only for up to 10 years or with the Minister's consent. An interest in transferred land can only be compulsorily acquired or sold by an Act of Parliament.⁶³

Queensland land rights legislation appears to increasingly be playing a role in the resolution of native title claims by providing an alternative means for Indigenous people to obtain a substantive title to land.⁶⁴

Victorian Land Rights

Five Victorian pieces of legislation provide for grants of freehold to various Aboriginal bodies corporate, generally for specific beneficial purposes including residential, community centre, cultural, recreation and burials.⁶⁵

Each of the community controlled organisations that hold the title can lease or mortgage the land (but only for the purpose for which the land was granted), apart from that organisation controlling land held under the *Aboriginal Lands Act 1991* (Vic). None of this legislation provides for Ministerial oversight of the grants. The *Aboriginal Lands Act* does not allow the land to be used in this way; it was granted for cultural and burial purposes. In addition, the Commonwealth Parliament passed the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) at the request of the Victorian Government. It grants inalienable freehold to Aboriginal controlled organisations, which can lease the land. However, any lease over 3 years requires Ministerial consent.⁶⁶

61 *Aboriginal Land Act 1991 (Qld)* and *Torres Strait Islander Land Act 1991 (Qld)*. These Acts are currently under review (Discussion paper – Review of the Aboriginal Land Act 1991 (Qld) March 2005 Natural Resources and Mines Queensland Government).

62 *Aboriginal Land Act 1991 (Qld)* & *Torres Strait Islander Act 1991 (Qld)*, s.60.

63 *ibid.*, s.39, s.76.

64 Discussion paper – Review of the Aboriginal Land Act 1991 (Qld) March 2005 Natural Resources and Mines Queensland Government, p6.

65 *Aboriginal Lands Act 1970*; *Aboriginal Lands (Aborigines' Advancement League) (Watt Street Northcote) Act 1982*; *Aboriginal Land (Northcote Land) Act 1989*; *Aboriginal Lands Act 1991*; *Aboriginal Land (Manatunga Land) Act 1992*.

66 *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Commonwealth), s.13(3), s.21(3).



Tasmanian Land Rights

In Tasmania particular areas of land that are of cultural and historic significance to Tasmanian Aboriginal people have been vested in perpetuity in a state-wide Aboriginal Land Council created under the legislation.⁶⁷ It can grant leases in the land.⁶⁸ Mortgages of the leases can be granted. Land Council decisions must have regard to the interests of the local Aboriginal communities,⁶⁹ and it must review its decision if requested to do so by 50 or more Aboriginal people.⁷⁰

Commonwealth Land Rights

The Commonwealth Parliament has passed land rights legislation in respect of the Northern Territory, Victoria (at the request of the Victorian Government – see above), and the Jervis Bay Territory.⁷¹ In all three pieces of legislation an inalienable freehold title or equivalent is vested in an Aboriginal-controlled body corporate. The legislation applying to the Jervis Bay Territory allows the Wreck Bay Aboriginal Community, the land holder, to surrender its interests in the land, with the consent of the Minister. It can lease land to community members for domestic purposes for up to 99 years, or for community or business purposes for up to 25 years. Longer leases of these types require the consent of the Minister. Leases can also be granted to non-community people for up to 15 years.⁷²

Native title

The situation with respect to native title is significantly different to that applying under land rights legislation. The *Native Title Act 1993* (NTA) left the common law position with respect to Indigenous peoples' use of native title largely untouched, and complex. At common law native title can only be surrendered to the Crown. Therefore, native title holders cannot grant leases. Further, in many cases, native title will only be recognised as comprising non-exclusive rights in land and waters.⁷³ It would not be possible to grant an exclusive lease of such native title.⁷⁴ Once recognised, native title is held by a Prescribed Bodies Corporate (PBC) made up of some of the native title holders, which must manage the native title and consult with the relevant native title holders when taking a decision that will affect their rights.⁷⁵

The NTA provides that native title is protected from debt recovery processes.⁷⁶ Therefore, it cannot be used as collateral for a mortgage; the mortgage would simply be unenforceable. However, the Act provides two mechanisms by which a lease for commercial or residential purposes could be granted by a PBC that could be used as security for finance. Either:

67 *Aboriginal Lands Act 1995 (Tas)*.

68 *Aboriginal Lands Act 1995 (Tas)*, s.28A.

69 *ibid.*, s.18(3).

70 *ibid.*, s.19.

71 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Commonwealth) and *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Commonwealth).

72 *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Commonwealth), s.38.

73 Because of the nature of the interest or right under traditional laws and customs, the legal test for the recognition of native title and extinguishment – see Chapter 1.

74 See the definition of a determination of native title in s.225 of the NTA.

75 *Native Title (Prescribed Body Corporate) Regulations 1999*.

76 *Native Title Act 1993* (Commonwealth), s.56(5).



- The native title holders could consent to the grant of a statutory title (freehold or leasehold, for example) through an Indigenous Land Use Agreement (ILUA)
- The government could compulsorily acquire the native title for a third party.

An ILUA can authorise government to grant freehold or a lease either to the PBC or to a third party. The agreement would effectively suspend the operation of the native title, and allow the statutory title to be used in the normal way. Unless the ILUA provides for a surrender of native title that is intended to extinguish it, native title is not extinguished.⁷⁷ If it does so, native title would continue to be the underlying title to the land. If the government issued a freehold title to the PBC pursuant to the ILUA, it could then issue leases on its own terms. The freehold or a lease could be used as security to raise finance, *given appropriate capacity in the PBC*. Such a process requires the consent of the native title group, and the active participation of the government in granting the freehold title.

The other mechanism is compulsory acquisition of the native title, and grant of a freehold title in its place. Compulsory acquisition of native title under the processes of the NTA would result in extinguishment of native title. Compensation would be payable on just terms for the loss of the native title. Part of the amount of that compensation could be met by the provision of freehold title. While the right to negotiate provisions of the NTA would apply in such a case, it is likely that such an approach would be generally unacceptable to many Indigenous people as it involves the permanent loss of their native title.

Case studies: Northern Territory and New South Wales

Several issues emerge from an analysis of land rights legislation in the context of a discussion of its alienability, the grant of other interests in the land, and its use as collateral to raise finance. These include:

- the level of and mechanisms for Indigenous control of decision-making about these matters
- the utility of the requirement for Ministerial consent for dealings in Indigenous land
- the length of leases
- the range of purposes for which leases can be granted: commercial purposes, the provision of public services, and residential purposes
- the identity of lessees: traditional owners, other Indigenous people, and non-Indigenous people
- transferability of leases; and control of planning and environmental issues arising with respect to leased areas.

These issues are explored in more detail through case studies of the situations in the Northern Territory and in New South Wales. The case study analysis focuses in particular on three issues:

⁷⁷ See s.24EB(3) of the *Native Title Act 1993*. This concept is generally referred to as the application of the non-extinguishment principle (s.238 of the NTA).



1. The tension between inalienability and pressure to alienate or lease land, or use it as collateral to raise finance.
2. The extent to which the legislation allows Indigenous decision-making processes that promote Indigenous control of their land.
3. The extent to which dealings in Indigenous held land are subject to government oversight, usually by the relevant Minister.

The approach taken to these matters depends on the purposes for which each of the Acts was enacted. Some examination is made of these matters to provide background.

Northern Territory case study

Purpose of the Act

The ALRA (NT) has its origin in the findings of the Woodward Royal Commission, which was appointed by the Whitlam Labor Government and reported in 1973 and 1974. Woodward enquired into 'the appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land and to satisfy in other ways the reasonable aspiration of the Aborigines in rights to or in relation to land.'⁷⁸ He described⁷⁹ the aim of land rights in the following terms:

1. The doing of simple justice to a people who have been deprived of their land without their consent and without compensation;
2. The promotion of social harmony and stability within the wider Australian community by removing so far as possible, the legitimate cause of complaint of an important minority group within that community;
3. The provision of land holdings as a first essential step for people who are economically depressed and who have at present no real opportunity of achieving a normal standard of living;
4. The preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs; and
5. The maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority.

As well as recommending land rights on the basis of traditional entitlement, Woodward recommended that land also be available to Aboriginal people on the basis of need. The Fraser Liberal Government did not take up this recomm-

78 N. Peterson, 'Reeves in the context of the history of land rights legislation: anthropological aspects' in Altman, J.C., F. Morphy and T. Rowse (eds) *Land Rights at Risk? Evaluation of the Reeves Report*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra 1999, p25.

79 A.E. Woodward, Aboriginal Land Rights Commission, Second Report, AGPS. Canberra 1974, p2.



endation when it enacted his recommendations after the original legislation lapsed in 1975.⁸⁰

The nature of the land title

In Aboriginal society, land cannot be alienated. Inalienability reflects Aboriginal ways of being: ancestors and humans are integrated with each other and with 'country'.⁸¹ Since land claims under the ALRA (NT) have a strong foundation in entitlement under Aboriginal law,⁸² the land base acquired under the ALRA (NT) is inalienable. In his 1998 review of the ALRA (NT), John Reeves found that inalienable title is also 'a source of deep reassurance to Aboriginal Territorians that they cannot again be dispossessed of their lands for whatever reason'.⁸³

The ALRA (NT) can be said to have been an unqualified success in achieving its primary aim of granting traditional Aboriginal land for the benefit of Aboriginal people.⁸⁴ In addition, land rights have restored some of the autonomy that was lost with colonisation, by empowering Aboriginal people whose ownership of land was now recognised in the Australian system.⁸⁵ It is important that that empowerment is not lost with changes that dilute Aboriginal control of their land.

Commercial use of Aboriginal land and the power to lease

Much Aboriginal land is of marginal economic value in Western terms.⁸⁶ Aboriginal use of economically marginal land by owning, living on and visiting it is a highly productive use of such land, even though the land has little alternative economic value.⁸⁷ Economic activity has been stimulated by land rights in ways that are not amenable to measurement by mainstream social indicators, including subsistence

80 J. Reeves, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Aboriginal and Torres Strait Islander Commission, Canberra 1998, pp31-32.

81 N.D. Munn, 'The transformation of subjects into objects in Walbiri and Pitjantjatjara myth', in R.M. Berndt (ed) *Australian Aboriginal Anthropology*, University of Western Australia Press, Nedlands, 1970, p144, 150, cited in N. Williams, 'The nature of 'permission!'' in J.C. Altman, F. Morphy and T. Rowse (eds) *Land Rights at Risk? Evaluation of the Reeves Report*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, 1999, p57.

82 I. Viner, Second Reading Speech, House of Representatives Hansard, 4 June 1976, p3082, cited in I. Viner, 'Land rights at risk' in Altman, J.C., F. Morphy and T. Rowse (eds) *Land Rights at Risk? Evaluation of the Reeves Report*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, 1999, p191.

83 J. Reeves, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Aboriginal and Torres Strait Islander Commission, Canberra, 1998, p485.

84 *ibid.*, p61. About 44% of the Northern Territory has been returned to Aboriginal people under the ALRA (NT) (J.C. Altman, C. Linkhorn and K. Napier, *Land Rights and Development Reform in Australia*, Centre for Aboriginal Economic Policy Research Discussion Paper 276/2005, Canberra, 2005, p1).

85 N. Peterson, 'Reeves in the context of the history of land rights legislation: anthropological aspects' in J.C., Altman, F. Morphy and T. Rowse (eds) *Land Rights at Risk? Evaluation of the Reeves Report*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, 1999, p27.

86 J.C. Altman, C. Linkhorn and K. Napier, *Land Rights and Development Reform in Australia*, Centre for Aboriginal Economic Policy Research Discussion Paper 276/2005, 2005, Canberra, p2; see also *Aboriginal Land Rights (Northern Territory) Act* (Commonwealth), s.50(1)(a).

87 J. Reeves, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Aboriginal and Torres Strait Islander Commission, Canberra 1998, p575.



activities, art and craft manufacture, land management and ceremonial business.⁸⁸ Further, Reeves found that the inalienability of Aboriginal land held under the ALRA (NT) does not significantly restrict the capacity of Aboriginal Territorians to raise capital for business ventures or to make commercial use of inalienable freehold land, as there are a number of other methods of raising finance and securing loans against the land other than by mortgage.⁸⁹

Indeed, Reeves was of the view that land is an economic *cul de sac*.⁹⁰ He concluded that economic development would be best assured through the investment and use of royalty monies from mining on Aboriginal land:

[F]ar more important modern sources of economic advancement than the possession of land are the possession of productively useful skills, technology and capital of the kind in demand in the mainstream Australian economy.⁹¹

However, the ALRA (NT) does provide for flexibility and change in Aboriginal aspirations and needs,⁹² through existing rights to grant leases and other interests in Aboriginal freehold land, even though improving the economic lot of Aboriginal people was not an initial purpose of the Act.⁹³ The leasing provision of the ALRA (NT) have been described as a means by which Indigenous people connected in a traditional way with the land are legally able to use their country in a non-traditional way if and when an Aboriginal consensus to do so exists. Such a lease will override traditional owner rights; it is the intention behind the Act to do so.⁹⁴ The maintenance of Aboriginal control over such activities reflects the inherent inalienability and proprietary rights of Aboriginal freehold in the Northern Territory.

The ALRA (NT) already allows for leasing for any purpose and to anyone. Traditional owners decide whether or not to issue the lease and obtain some benefit as

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- 88 J. Taylor, 'The social, cultural and economic costs and benefits of land rights: an assessment of the Reeves analysis' in Altman, J.C., F. Morphy and T. Rowse (eds) *Land Rights at Risk? Evaluation of the Reeves Report*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra 1999, p103. Holding Aboriginal land and the other rights available under the ALRA (NT) provides opportunities to engage in the mainstream economy in these and other ways.
- 89 J. Reeves, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Aboriginal and Torres Strait Islander Commission, Canberra 1998, pp479, 481. Reeves reproduced the methods of raising finance listed in the ATSIC submission, namely: specially incorporated company, unincorporated joint venture, unit trust, leasehold interests, non-recourse finance, negative pledge, subordinated debt, possessory liens, pledges, chattel mortgages, reservation of title, consignment plans, sale and leaseback arrangements, charges, floating charges, guarantee.
- 90 J. Reeves, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Aboriginal and Torres Strait Islander Commission, Canberra 1998, p544.
- 91 J. Taylor, 'The social, cultural and economic costs and benefits of land rights: an assessment of the Reeves analysis' in J.C. Altman, F. Morphy and T. Rowse (eds) *Land Rights at Risk? Evaluation of the Reeves Report*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, 1999, p571.
- 92 J.D. Finlayson, *Northern Territory land rights: purpose and effectiveness*, Centre for Aboriginal Economic Policy Research Discussion Paper 180/1999, Canberra, 1999.
- 93 J. Reeves, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Aboriginal and Torres Strait Islander Commission, Canberra 1998, p54; I. Viner, 'Land rights at risk' in Altman, J.C., F. Morphy and T. Rowse (eds) *Land Rights at Risk? Evaluation of the Reeves Report*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, 1999, p191.
- 94 Justice Brennan J in *The Queen v Toohy; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 (at 358).



landowners for doing so. In practice, these provisions are most commonly used for the lease of land for community and governmental purposes. Thus, medium term leases are granted for health clinics, hospitals, schools, and for medical staff and teacher accommodation – however, rents paid by government for such leases are usually below the commercial rate. Residential leases are rarely granted.⁹⁵ The Central Land Council suggests that this is because communities are concerned with increasing the availability of housing, rather than increasing individual home ownership in particular.⁹⁶

Decision-making for the use of Aboriginal land

Decision-making processes for Aboriginal land holders that must be followed when an Aboriginal Land Trust is considering the grant of a lease are designed to ensure that traditional owners retain control over decisions about what happens on their land. A lease cannot be granted unless the relevant Land Council is satisfied that the group of traditional owners understand the nature and purpose of the proposed grant and, as a group, consent to it.⁹⁷ This group consent need not be unanimous but must be given in accordance with either an agreed or a traditional decision-making process.⁹⁸ This requirement is a fundamental aspect of the whole scheme of the ALRA (NT): decisions cannot be made about Aboriginal land unless traditional owners have given their informed consent. The principle of free, prior and informed consent is integral to the human rights standard of effective participation of Indigenous peoples in decisions which affect them or their lands. It is considered further in Chapter 4.

This scheme provides a valuable means for Indigenous land owners to maintain control of decisions affecting their land. Land Councils have the resources and capacity to be able to support the land owners in making their decision, and to communicate and implement that decision. The requirement to consult and obtain informed consent is an important aspect of inalienability and Indigenous ownership. These processes enable land councils to articulate decisions about land use made under traditional law and custom by the land owners to the outside world in conformity with standard Australian land tenure and land use procedures, while maintaining Aboriginal control. The requirement that the Indigenous-controlled land council must also be satisfied that the lease conditions are reasonable⁹⁹ is an additional protection for the inalienability and protection of Indigenous ownership of Aboriginal land.

These pre-conditions to the grant of a lease of Aboriginal land are not just an extra hurdle that must be jumped by individual Aboriginal people, organisations or other developers, when seeking approval of a lease of Aboriginal land. Although the required legal and traditional customary processes can appear to be complex and time consuming, they are necessary so that Aboriginal land owners can articulate decisions about the use of communally held land.

95 G. Nettheim, G.D. Meyers and D. Craig, *Indigenous Peoples and Governance Structures*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, pp242-243.

96 Central Land Council, *Communal Title and Economic Development*, Central Land Council Policy Paper, Alice Springs, 2005, p3.

97 *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth), s.19(5).

98 *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth), s.77A.

99 *ibid.*



It is a basic aspect of ownership that the people with rights and responsibilities with respect to land retain the ability to make decisions about the use of their land. Lending institutions and developers will need to adapt to these necessary processes, factoring in sufficient time in their own processes to allow traditional decision-making to take place. Such institutions already necessarily allow sufficient time for development approval, planning and environmental processes to occur in urban contexts before development can take place. So too, Indigenous decision-making processes should be respected and allowed sufficient time to occur.

Ministerial consent to the grant of leases

Leases proposed to be granted for particular purposes for particular terms currently require the consent in writing of the Commonwealth Minister. For example, such consent is not currently required for a residential lease to an Aboriginal person, but it is required for a lease to a non-Aboriginal person for a business purpose for a period of longer than 10 years.¹⁰⁰ Thus, leases to Indigenous people for residential purposes are subject to less stringent requirements than leases to non-Indigenous people.

Some view this direct governmental supervision of many actual dealings in Aboriginal land as a survival from the paternalistic attitudes of an earlier age and argue it restricts the freedom of traditional owners to deal with their land.¹⁰¹ The requirement for Ministerial consent also adds another procedural step in granting a lease of Indigenous land. Further, a requirement for Ministerial consent before a lender can take possession of a lease if payments are not made under a mortgage, may be a disincentive for the lender to make the loan in the first place.¹⁰²

On the other hand, Ministerial consent is generally required under planning and environmental legislation for any major new development. Such requirements do not appear to act as a hindrance to the raising of finance once the necessary approvals have been given. In fact, it is possible to grant leases of inalienable Aboriginal land and use them to raise capital.¹⁰³ The requirement for Ministerial consent to a dealing with Aboriginal land has been described as an important part of the principle of inalienability of freehold title:

“... [A] fundamental principle [is] that ‘Aboriginal land [is] to be held under inalienable freehold title’. Any dealing that effectively alienates Aboriginal land, though not transferring title, is contrary to that principle. A lease or licence for an unduly long term may offend the principle, hence the justification for ministerial consent.”¹⁰⁴

100 *Aboriginal Land Rights (Northern Territory) Act* (Commonwealth), s.19.

101 J.C. Altman, C. Linkhorn and K. Napier, *Land Rights and Development Reform in Australia*, Centre for Aboriginal Economic Policy Research Discussion Paper 276/2005, 2005, Canberra, p7.

102 Central N.T. Government and Northern, Tiwi and Anindilyakwa Land Councils, *Detailed joint submission to the Commonwealth workability reforms of the Aboriginal Land Rights (Northern Territory) Act 1976*, no date, Darwin, p13.

103 This was used to secure funding for the Alice Springs to Darwin railway (Central NT Government and Northern, Tiwi and Anindilyakwa Land Councils, *Detailed joint submission to the Commonwealth workability reforms of the Aboriginal Land Rights (Northern Territory) Act 1976*, no date, Darwin, p13.

104 ‘Seven Years On – Report by Mr Justice Toohey to the Minister for Aboriginal Affairs on the *Aboriginal Land Rights (Northern Territory) Act 1976* and Related Matters’. AGPS Canberra 1984, p130 [821].



A Ministerial consent requirement also allows Indigenous owners final recourse to the Minister (short of Court proceedings) if something goes wrong in processes conducted by the title holding body. However, more recent commentaries on the ALRA (NT) have called for this consent requirement to be reduced in order to allow traditional owners themselves to control development on their land and to take responsibility for their actions.¹⁰⁵

The recent joint submission¹⁰⁶ by the Northern Territory Government and the Territory Land Councils to the Australian Government on workability reforms to the ALRA (NT) recommends changes to the Act directed at achieving more flexibility in dealing with Indigenous land. These include clarifying that land can be transferred subject to the conditions on which the initial lease was granted without requiring Ministerial consent.¹⁰⁷ This would meet the complaint of lenders that they cannot go into possession of leased land under a mortgage without the consent of the Minister. Another proposal in the Joint Submission is to allow Land Councils to grant three month licences of land in 'urgent circumstances' without the need for consultation and consent.

Whether Ministerial consent is removed or retained in a particular jurisdiction is a decision that must be made by traditional owners themselves in accordance with the principles of effective participation and free, prior and informed consent. These standards require that traditional owners be given sufficient information, resources and assistance, and time to consider changes to legislation that affect their rights and lands, to ensure their involvement is meaningful and not mere consultation. Further explanation of these principles is given in Chapter 4.

New South Wales case study

Purpose of the Act

The *Aboriginal Land Rights Act 1983* (New South Wales) (ALRA (NSW)) was enacted with the primary aim of returning significant parts of the State to their Aboriginal inhabitants as a form of compensation and in recognition of the great spiritual attachment that Aborigines have to land.¹⁰⁸ Another aim was based in the belief that land rights could lay the basis for improving Aboriginal self-sufficiency and economic well-being, through the purchase of economically viable properties. Other lands were to be developed as commercial ventures designed to improve living standards. Land rights were seen as having a dual purpose – cultural and economic.¹⁰⁹

The conflict inherent in this dual approach contrasts with the Northern Territory approach, which focuses on land rights as a matter of simple justice. However, in many ways, the New South Wales approach was originally similar to that in the Northern Territory, especially since land was to be inalienable and held by

105 J.C. Altman, C. Linkhorn and K. Napier, *Land Rights and Development Reform in Australia*, Centre for Aboriginal Economic Policy Research Discussion Paper 276/2005, 2005, Canberra, p28.

106 Central NT Government and Northern, Tiwi and Anindilyakwa Land Councils, *Detailed joint submission to the Commonwealth workability reforms of the Aboriginal Land Rights (Northern Territory) Act 1976*, Darwin, no date.

107 Central NT Government and Northern, Tiwi and Anindilyakwa Land Councils, *Detailed joint submission to the Commonwealth workability reforms of the Aboriginal Land Rights (Northern Territory) Act 1976*, Darwin, no date, pp13-14.

108 See F. Walker, Second Reading Speech, NSW Legislative Assembly Hansard, 24 March 1983, p5088.

109 *ibid.*, p5089.



local community groups. The ALRA (NSW) has been quite successful in returning significant parts of the State to Aboriginal people. By August 2005, approximately 4,050 properties over 616,461 hectares, valued at almost \$1 billion, were held by Local Aboriginal Land Councils (LALCs).¹¹⁰

Limited functions and funding

Land recovered under the ALRA (NSW) is expected to play an important role in relieving the poverty and social disadvantage of Aboriginal people in New South Wales. Disposal of land may well be a means of addressing the social and economic needs of Aboriginal people in New South Wales. LALCs have never been funded to perform such activities, and their functions are limited so that effectively they cannot use the proceeds of a disposal of land to deliver a direct benefit to individual members, other than by the provision of social housing.¹¹¹ Indeed, many are now responsible for unsustainable social housing programs and for managing housing stock which was often in poor condition when it was transferred to the LALCs when they inherited former reserves and missions. For these reasons there is substantial pressure on them to sell some of their assets.¹¹² It is worth noting that LALCs across New South Wales do not have equal access to land that can be sold to benefit their members. LALCs in coastal areas have benefited from greater opportunities to claim land and from the recent boom in land prices, in contrast to the experience of LALCs in other areas.¹¹³

Powers of lease, mortgage and disposal

Originally, a LALC could not sell, exchange, mortgage or dispose of land other than by the grant of a lease or an easement. This was consistent with the concept of land held inalienably under communal title as in the Northern Territory.¹¹⁴ The powers of LALCs with respect to land were extended in 1990, partly to allow development of Aboriginal land through the use of mortgages.¹¹⁵ Thus, at present, a LALC has power to lease or change the use of land vested in it,¹¹⁶ and to sell, exchange, mortgage or otherwise dispose of land vested in it,¹¹⁷ in each case subject to conditions (see above). The conditions are complex, and considerable uncertainty has arisen as to what they mean.¹¹⁸ Notwithstanding this uncertainty, any sale, exchange, lease, disposal or mortgage of most Aboriginal

110 J. Broun, M. Chapman, and S. Wright, *Issues Paper 1: Review of the land dealing provisions of the Aboriginal Land Rights Act 1983*, New South Wales Aboriginal Land Rights Act Review Task Force, Sydney, 2005, p7.

111 *Aboriginal Land Rights Act 1983 (NSW)*.

112 J. Broun, M. Chapman, and S. Wright, *Issues Paper 1: Review of the land dealing provisions of the Aboriginal Land Rights Act 1983*, New South Wales Aboriginal Land Rights Act Review Task Force, Sydney, 2005, pp10-12.

113 *ibid.*, pp7-9.

114 J. Basten, *Report on investigation into certain transactions of Kooppahtoo Local Aboriginal Land Council*, Independent Commission Against Corruption, Sydney, 2005, pp13-14.

115 *ibid.*, pp14-15. The ALRA (NSW) was amended by the inclusion of ss.40B-40D.

116 *Aboriginal Land Rights Act 1983 (NSW)*, s.40B(2)(a).

117 *ibid.*, s.40D(1).

118 J. Broun, M. Chapman, and S. Wright, *Issues Paper 1: Review of the land dealing provisions of the Aboriginal Land Rights Act 1983*, New South Wales Aboriginal Land Rights Act Review Task Force, Sydney 2005, Chapter 3; J. Basten, *Report on investigation into certain transactions of Kooppahtoo Local Aboriginal Land Council*, Independent Commission Against Corruption, Sydney 2005, Chapter 2.



land in contravention of the conditions is void.¹¹⁹ This may lead to uncertainty as to the validity of transactions involving Aboriginal land.¹²⁰ Therefore, dealing with LALCs may be perceived to be a high risk venture for developers.¹²¹

Decision-making for the lease or disposal of land

These conditions may also lead to decisions about the grant of a lease or the disposal of land being made in an inappropriate manner. There is no guidance as to how decisions are to be made, nor about who, within the membership of a LALC, is to make them. For instance, a pre-condition to a decision to dispose of land is that the LALC has determined that the land is “not of cultural significance to Aborigines of the area”.¹²² Given the context of the Act and the resources available to LALCs, it is likely that consideration of the question of cultural significance of land will occur at the same time as consideration of whether or not to sell the land. Therefore, the decisions will be made by the membership of the LALC present at a general meeting. The Act does not make it clear whether ‘Aborigines of the area’ means Aborigines with a traditional connection to, or Aborigines living in, the area. People who are not aware of the cultural significance of land may end up making decisions about that matter. Accordingly, the provision does not necessarily prevent the disposal of culturally significant land.¹²³ In addition, decisions may well be made by a very small proportion of those entitled to benefit from the proposal.¹²⁴

Further, the nature of the NSWALC’s role in approving of proposed disposals, and the extent of its discretion are unclear. The purpose of the requirement seems to be supervision of LALC decisions about land that may affect the members of the LALC. The requirement to inform the Ministers seems to have less justification; the Ministers have no power to do anything regarding the disposal once notified,¹²⁵ though the responsible Minister does have power to appoint investigators and administrators to LALCs.¹²⁶

The drafters of the 1990 amendments may not have given adequate consideration to the complexity of land dealings that might arise. There are serious flaws that lead to legal uncertainty for LALCs and leave them vulnerable to making serious errors when attempting to dispose of land. These flaws include little clarity as to what kind of land and what types of dealings are subject to the provisions; little guidance as to how land should be determined to be culturally significant; little guidance as to the content of LALC decisions; and no requirement for strategic planning.¹²⁷

119 *Aboriginal Land Rights Act 1983 (NSW)*, s.40(2).

120 J. Broun, M. Chapman, and S. Wright, *Issues Paper 1: Review of the land dealing provisions of the Aboriginal Land Rights Act 1983*, New South Wales Aboriginal Land Rights Act Review Task Force, Sydney 2005, pp24-25.

121 *ibid.*, pp38-40.

122 *Aboriginal Land Rights Act 1983 (NSW)*, paragraph 40C(1)(a).

123 J. Basten, *Report on investigation into certain transactions of Koombahtoo Local Aboriginal Land Council*, Independent Commission Against Corruption, Sydney, 2005, pp104-105.

124 J. Broun, M. Chapman, and S. Wright, *Issues Paper 1: Review of the land dealing provisions of the Aboriginal Land Rights Act 1983*, New South Wales Aboriginal Land Rights Act Review Task Force, Sydney, 2005, p32 describes a situation where just 10 members of a LALC with more than 600 members made a decision to dispose of land worth tens of millions of dollars.

125 s.40C and s.40D of the *Aboriginal Land Rights Act (NSW) 1983*.

126 Part 11, Division 1 and 2 of the *Aboriginal Land Rights Act (NSW) 1983*.

127 *ibid.*, pp14-15.



Recent controversial cases have exposed these flaws in the legislation, including an investigation by the New South Wales Independent Commission Against Corruption (“ICAC”) into various land dealings engaged in by the Kooppahtoo LALC (KLALC’),¹²⁸ in respect of land conservatively worth \$30 million.¹²⁹ The transactions investigated included joint ventures for residential development of KLALC land, KLALC approval for a sewer main across its land, and transfer of residential land to KLALC members at a price below market value. The conduct investigated included the employment of the KLALC Chairperson by one of the joint ventures, various payments to the Chairperson, and lack of disclosure of these matters to KLALC members. Among other things, the ICAC found profound ambiguities in the purposes, principles and mechanisms of the ALRA (NSW), which, together with uncertainty about the effect of the legislation are likely to cause the conditions in which corrupt conduct is more likely to occur.¹³⁰

The sheer variety of purposes facilitated by the ALRA (NSW) means that the powers of Aboriginal Land Councils would have to be exercised in a balanced way in order to address all of them. The ALRA (NSW) should ensure that Aboriginal land is not disposed of inconsistently with its purposes. Disposal of land is a means of addressing the social and economic needs of Aboriginal people in New South Wales. However, the functions of LALCs are limited so that effectively they cannot use the proceeds of a disposal of land in other ways that deliver a direct benefit to individual members, other than by the provision of social housing.¹³¹ It is argued that this tends to encourage members to try to gain benefits by illegitimate means.¹³²

Review of the ALRA (NSW)

On 26 May 2004, a review of the ALRA (NSW) was announced. It is not yet complete. The terms of reference of the review include ‘an inquiry and recommendations into an improved framework for managing, selling and developing land council assets, in particular the sale and commercial development of land council real property.’¹³³ The Task Force undertaking the review focussed first on this issue, producing an issues paper in August 2005 which addresses issues arising before the end of the *Native Title Report 2005* reporting period.

The Task Force finds that there have been some major problems in the operation of the land dealings provisions and outcomes that were not intended at the time of drafting because of a lack of clarity in the language and intent of the provisions. It sees a particular challenge in finding a way to ensure that the land acquired for the Aboriginal estate is managed and dealt with in a way that is sustainable, that preserves the value of the land, and that delivers real and ongoing benefits to Aboriginal people.¹³⁴ It does not believe that Aboriginal land must be inherently inalienable; that would not allow Aboriginal land to be used to address social

128 See generally, J. Basten, *Report on investigation into certain transactions of Kooppahtoo Local Aboriginal Land Council*, Independent Commission Against Corruption, Sydney, 2005.

129 D. Jopson and G. Ryle, *Black land, white shoes*, Sydney Morning Herald, 31 July 2004.

130 J. Basten, *Report on investigation into certain transactions of Kooppahtoo Local Aboriginal Land Council*, Independent Commission Against Corruption, Sydney, 2005, p9.

131 *Aboriginal Land Rights Act 1983 (NSW)*, s.52.

132 J. Broun, M. Chapman, and S. Wright, *Issues Paper 1: Review of the land dealing provisions of the Aboriginal Land Rights Act 1983*, New South Wales Aboriginal Land Rights Act Review Task Force, Sydney, 2005, pp77-78.

133 *ibid.*, p2.

134 *ibid.*, p6.



and economic needs, and would deny Aboriginal people the ability to make their own decisions regarding their land. The Task Force makes recommendations directed towards a new and more comprehensive land dealing regime that builds a structure for land dealings to be conducted in an orderly planned fashion, with a greater approval and supervisory role for the NSWALC.¹³⁵

Lessons learned

The problems that have arisen in the context of leasing Aboriginal land in New South Wales illustrate the need for the Indigenous people on whose behalf land is held to be able to maintain effective control of that land, and to make effective decisions about it. Effective control means that people must know about and understand proposed dealings in their land, and have the time and procedural capacity to make decisions about them. These matters should be enshrined in legislation. In addition, governance training may be necessary to assist LALCs to be able to make proper decisions about Aboriginal land. There should be greater certainty about who is to make decisions, and how they are to be made. Certainty in such procedural matters is likely to mean that lenders and developers are more willing to deal with Aboriginal land, as levels of risk will be lower.

In addition, Indigenous people considering proposals to deal with their land should have the support of independent professional advisers, and the ability to seek review of inappropriate decisions. Therefore, greater involvement of the NSWALC in the decision-making process for land dealings may be useful. In addition, there should be more protection for the cultural significance of land, and support for strategic planning for land use and development.

Overview

Land rights legislation is primarily focussed on granting traditional Indigenous land for the benefit of Indigenous people. A fundamental feature of land rights legislation in Australia has been the inalienability of land. The preservation of traditional lands in ultimately inalienable form for the use and enjoyment of future generations is still an important principle of Indigenous land tenure, as recognised by the first and second NIC Principles.¹³⁶ There has been a strong policy focus over more than thirty years on Indigenous people gaining traditional land, having the right to manage it in accordance with Indigenous tradition, and being able to make decisions about land use in accordance with traditional decision-making processes. The land gained for Indigenous people with this focus should not be lost due to ill-considered changes to land rights legislation that dilute Indigenous people's control over their land.

The current debate has called for a shift in government policy focus to ways of enabling Indigenous people to use their land in the broader economy. While I welcome the Australian Government's intention to explore ways of facilitating the economic development potential of Indigenous land where this is desired by traditional owners, this opportunity must not be used to erode Indigenous control and ownership of land. As I recommended in the *Native Title Report 2004*, economic development must be based on, not undermine, existing Indigenous

135 *ibid.*, Chapter 4.

136 National Indigenous Council Communiqué, *Third meeting of the National Indigenous Council – 15-16 June 2003*, OIPC 16 June 2005. Available online at: <www.oipc.gov.au/NIC/communiquel/PDFs/ThirdMeetingNIC.pdf>.



rights to land. Chapter 3 of this Report highlights the diversity of available options that should be explored. The likely results from options unrelated to land tenure outweigh options that concern land tenure alone.

The existing provisions generally already enable Indigenous people to engage in, or allow, commercial activity on their land using leases and mortgages. Indications that this may not have happened sufficiently to allow Indigenous people to engage more fully in the mainstream economy are not the fault of the existing provisions. There are likely to be other transactional difficulties in the way of Aboriginal people obtaining finance by way of commercial loans. The ability to raise finance is not just affected by the details of land title, but also importantly by whether there is a market for that land title; the viability of the proposed development; and other financial factors governing the grant of a loan, such as income, projected income or potential government guarantees (see Chapter 3).

The inalienability of Aboriginal land held does not necessarily significantly restrict the capacity of Indigenous people to raise capital for business ventures or to make commercial use of inalienable freehold land, as there are a number of methods of raising finance and securing loans against the land other than mortgages.¹³⁷ In addition, land use agreements, similar in concept to Indigenous Land Use Agreements (ILUAs) under the *Native Title Act 1993* (Cth), could be used to establish unique agreements within communities covering many issues.¹³⁸ Government attention is more appropriately directed to assisting Indigenous people to overcome any difficulties they have in meeting financial obstacles to such solutions than to overturning legislation that has done simple justice to a people who have been deprived of their land without their consent and without compensation.

It is also important to recognise that proper decision-making about such dealings in Indigenous land requires that Indigenous land owners have the capacity to make effective decisions. This means that as well as a statutory requirement that they give their informed consent to any such dealing with their land, they have the resources to devote to such decision-making, including mandatory independent financial and legal advice. In addition, capacity building and governance training for the Indigenous people and their organisations that are making such decisions is necessary.

The existing provisions of land rights legislation retain substantial control for traditional owners over land use decisions. The existing land rights regimes also provide substantial security for traditional owners and Indigenous communities in terms of the inalienable nature of the freehold title to land, which protects spiritual connection to and cultural use of the land. At the same time, the existing provisions generally do allow Indigenous people to engage in, or allow,

137 J. Reeves, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Aboriginal and Torres Strait Islander Commission, Canberra 1998, pp479, 481. Reeves reproduced the methods of raising finance listed in the ATSIC submission, namely: specially incorporated company, unincorporated joint venture, unit trust, leasehold interests, non-recourse finance, negative pledge, subordinated debt, possessory liens, pledges, chattel mortgages, reservation of title, consignment plans, sale and leaseback arrangements, charges, floating charges, guarantee.

138 *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Canberra, 1999, pp46-47.



commercial activity on their land using leases and mortgages, and also to take up residential leases on their land.

Accordingly, subject to changes directed towards achieving proper Indigenous decision-making with informed consent, there is no need for a complete overhaul of the processes by which Indigenous people deal with their land. Particularly unnecessary are involuntary measures to override informed refusal to grant leases and other dealings in Indigenous land.



Part III: Models and Lessons

As well as reviewing existing opportunities to lease, sell and mortgage Indigenous land, it is relevant to consider the models that have been proposed for ways to implement the NIC Principles, and assess the lessons learned from previous leasing attempts elsewhere.

This Part looks at the land leasing arrangements in the Australian Capital Territory (ACT) and Norfolk Island, and the experiences of privatising Indigenous land in New Zealand and the United States of America.

The ACT and Norfolk Island leasing systems

Both the ACT and Norfolk Island leasing systems have been mentioned in the current debate as potential precedents for changes to land rights and native title legislation.¹³⁹ They both provide for systems of leasing for residential and commercial purposes. It is useful then to consider what these systems allow the owners of land (the lessors) and the users of land under a lease (the lessees) to do.

Australian Capital Territory

The ACT has a system of private home 'ownership' based on 99-year residential leases and not freehold or fee simple titles that are used throughout the rest of Australia for ownership of private or residential homes. These leases are fully transferable, capable of being mortgaged, and guaranteed by the Government to be renewable unless required for public purposes.¹⁴⁰ The 99-year lease system was developed in the ACT to avoid land speculation and to ensure that planning and development policies are properly implemented.¹⁴¹

The ACT government generally sells the right to develop new housing estates in accordance with pre-existing development plans. The government also has an agency that undertakes public land development and sells directly to the public. The system has the following characteristics:

- All land in the ACT is owned by the Commonwealth
- The ACT Government manages the land
- Land developers enter into agreements with the ACT Government to develop land subject to relevant planning approvals and provide the roads and infrastructure, water and sewerage and so on
- The terms and conditions of a residential lease set out planning conditions and include such matters as the use of the land,

139 'PM considers new land rights plan' by Dennis Shanahan and Patricia Karvelas 11 December 2004 Weekend Australian where it was stated that: 'The main aim, however, is not to change the native title arrangements but to give economic power through property ownership to individuals and their families.' 'The options to be looked at closely include the Norfolk Island and Australian Capital Territory examples.'

140 Section 171 of the *Land Titles Act (ACT) 1925*.

141 *The Seat of Government (Administration) Act 1910* (Cth). in Section 9 states '... no Crown land in the territory shall be sold or disposed of for any estate of freehold...'; and s.29(3) of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) provides that the term of an estate in Territory Land granted after self-government (11 May 1989) 'shall not exceed 99 years or such longer period as is prescribed, but the estate may be renewed'.



where you can build, where water, drains, sewers, stormwater, electricity, gas and the telephone lines can be connected and landscaping requirements

- For new residential leases a standard clause states that construction must start within 12 months of the commencement of the lease and be completed within 24 months
- The 99 year leases are renewable and fully transferable – through mortgage, sale or inheritance (with the consent of the lessor, that is the ACT Government) except when the land is required for public purposes or the house construction or improvements to the land have not been completed in accordance with the lease conditions
- There is no effective rent charged under the lease¹⁴²
- A levy is charged when a change in the lease purpose is allowed
- A lease permits the lessee to use the land for the use or uses specified in the lease but no more.

In summary, the characteristics that distinguish this system from freehold are:

- the lease is for a specific purpose – for example, residential
- the lease is for a specified period of time, usually 99 years
- the lease includes rules and conditions with which the lessee is required to comply
- the lease is subject to the payment of land rent (be it nominal or not demanded) or a premium.

Norfolk Island

On Norfolk Island there is a type of Crown lease that can only be held or owned by a natural person whom has permission to live on the island in accordance with the *Norfolk Island Immigration Act 1980* (NI). The Island is a self-governing territory (similar to the Northern Territory) in accordance with the *Norfolk Island Act 1979* (Cth). The powers of the Assembly are greater with respect to its law making powers than the Northern Territory Assembly and in particular it has its own Immigration Act regulating entry to the Island.

The *Crown Lands Act 1996* (NI) provides that Crown leasehold land may be held only by people with resident or General Entry Permit (GEP) status under the Immigration Act. Freehold land is not subject to the same constraints on transfer as Crown leasehold land, and holdings of freehold land convey no residency status.¹⁴³ Under the Immigration Act there are three entry permit categories:

- visitors
- temporary entry permit holders
- general entry permit holders (GEP).

142 In fact a nominal amount of 5c per annum not demanded is mentioned as rent in the standard conditions – “pay to the Territory the rent of 5 cents per annum if and when demanded;...”

143 See Commonwealth Grants Commission Report on Norfolk Island 1997, p135 and *Crown Lands Act 1996* (NI) and *Immigration Act, 1980* (NI).



In addition, the Immigration Act provides for the issue of certificates of residence. These controls affect property and business ownership indirectly, because the need to obtain a long-term right to reside obviously affects whether one will buy a property or business. This leasing system has the following characteristics:¹⁴⁴

- The maximum term of the lease is for 99 years
- The leases can only be granted to a natural person (not a corporation) that has residential or GEP status or a community organisation
- The Administrator of the Island can declare the type of leases to which these restrictions apply
- The Administrator of the Island can declare criteria for determining who can hold this type of lease
- The person who holds the lease cannot transfer, sub-let or sell the lease without permission of the Administrator of the Island
- Any transfer without such permission is of no legal effect.

The ALRA (NT) also has a permit system that regulates access and provides for leasing of land but does not link the holding of a lease to the requirement to have existing permission to reside on the land and so to this extent it is more flexible.

International experience: lessons from abroad

The changes to land rights legislation recommended by the NIC Principles represent a serious departure from the current landscape. As steps to implement these principles have only just begun, one can only speculate as to its effects. However, it is possible to draw some lessons from countries where similar land title changes have already taken place. As the federal Minister for Indigenous Affairs acknowledges, while the experience and length of contact between indigenous peoples and Western society varies across former British colonies:

[W]e can learn from them and we shouldn't forget that they can learn from us. Our new conversation needs to include these other countries. We should be open to new ideas.¹⁴⁵

Considering overseas experience not only provides us with new ideas, it also alerts us to possible pitfalls of new ideas.

In a number of overseas countries the debate about the respective merits of customary or communally held titles and individual land titles has a long history. In the Pacific, Asia and Africa for many decades programs have been implemented through international aid agencies and by domestic governments to try and progressively replace customary land title systems with a land tenure system that primarily consists of individual private ownership and titling and

144 See sections 6,7,8,9 and 31 of the *Crown Lands Act 1996* (NI).

145 Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon. Amanda Vanstone, *Address to the Reconciliation Australia Conference*, 31 May 2005, Old Parliament House, Canberra. Available online at: http://www.atsia.gov.au/media/speeches/31_05_2005_reconciliation.htm.



registration programmes governed by uniform national property laws.¹⁴⁶ As Chapter 3 outlines, the success of this approach was far from overwhelming, and it became clear to the World Bank that a new approach to land tenure and poverty reduction needed to be found, as individual titling did not achieve the expected outcomes.¹⁴⁷

This change in approach has provided for the creating of 'space' within some national land law systems for local customary tenure arrangements to continue to function. Having said that there is no doubt that land title plays an important role along with other factors in facilitating economic development. It is therefore useful to reflect upon this experience when considering proposals for change in the Australian context. It is interesting to note, with these observations in mind that land rights legislation in Australia for example the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is clearly an advanced piece of legislation, because it provides for:

- recognition of communal customary title
- the registration of such title
- the registration of dealings by way of leasehold under section 19 of that Act to governments, individuals, families and corporations in accordance with a modern land tenure system.¹⁴⁸

In the United States of America and New Zealand there have been significant attempts to convert Indigenous customary land to individual freehold titles for many years. Both these countries have a long history of recognizing and dealing with customary titles and Indigenous land ownership through treaties and the recognition of native title since the beginning of the 19th Century.¹⁴⁹ Whereas in Australia, modern land rights legislation was not enacted and native title was not recognised until 1976 and 1992 respectively.

It is important to be cautious drawing conclusions for Australia regarding the outcomes in these two settings. While we share a history of colonization, the precise experience and legal background of New Zealand and the United States is differ from Australia. What is important to appreciate is that there have been large scale attempts to convert indigenous land to individual transferable freehold and leasehold titles. This has led to a significant loss of traditional lands in both countries. In recent times legislative and policy initiatives in both countries have been launched to try and overcome the adverse consequences of this approach. The major problems that have occurred historically have been:

- significant loss of land by the indigenous peoples

146 Law and Sustainable Development since Rio – Legal Trends in Agriculture and Natural Resource Management. ISSN 1014-6679 FAO LEGISLATIVE STUDY, FAO LEGAL OFFICE. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS ROME, 2002. Chapter 8, page numbers are not available. Website address is <http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/005/Y3872E/Y3872E00.HTM>, paragraph 3.2.1.

147 World Bank Land Policies for Growth and Poverty Reduction Chapter 2, World Bank Research Report, Oxford University Press, 2003, pxxvii.

148 Section 20A of the *Aboriginal Land Rights (Northern Territory) Act, 1976*.

149 For example the landmark case in the USA of *Johnson v McIntosh* was handed down in 1823 which first recognised the rights of the indigenous people to their traditional lands. In NZ the case of *R v Symonds* first recognised native title in 1847.



- complex succession problems – that is, who inherits these land titles upon the death of the owner – in relation to both freehold and leasehold interests
- creation of smaller and smaller blocks (partitioning) as the land is divided amongst each successive generation
- the constant tension between communal cultural values with the rights granted under individual titles.

New Zealand

The New Zealand *Native Lands Act* in 1865 established a Maori Land Court, which over time supervised the individualizing of communal tribal title. The Court was initially set up 'to impose the English system of individual freehold title.'¹⁵⁰ In accordance with this legal regime most Maori land eventually became deemed as a freehold title that was transferable as Maori freehold title. It was under this legislative regime that most Maori land was alienated and permanently lost to its customary owners. A Royal Commission in 1891 that investigated this change declared that:

'...The right to occupy and cultivate possessed by their fathers became in their hands an estate that could be sold. The strength that lies in union was taken from them. The authority of their leaders was destroyed.'¹⁵¹

The Waitangi Tribunal seeks to address this legacy in other ways through comprehensive land settlement processes. This historical process culminated in the adoption of new principles when the Act's name was changed to the *Te Ture Whenua Maori Act* in 1993. The Act now embodies two important principles:

- That Maori land is to be retained in the hands of its owner
- That effective management, development and occupation by Maori owners of their land is to be given the utmost encouragement.

In other words, the historical position advocating the benefits of an individual title has been reversed after this experience of loss of land over many years. This is the first time that the 'collective ownership characteristic of Maori land was officially recognized and its continuance as a permanent tenure accepted' under this new approach.¹⁵² The legacy of this earlier approach clearly remains as the following definition of Maori freehold title by the Maori Land Court shows:

'Land whose beneficial ownership the Maori Land Court has determined by freehold order (that is, the Court has created a title for the land and determined the beneficial owners to that land). Freehold titles are often divided by partition order. The land retains the status of Maori land. The status of the land will continue to be Maori land unless and until the Maori Land Court makes an order changing the status of the land.'¹⁵³

150 Maori Land Tenure-Issues and Opportunities A paper prepared for the New Zealand Institute of Surveyors Annual Conference, Auckland, October, 2004 by Dr Bill Robertson, p2.

151 The Maori Magna Carta-New Zealand Law and the Treaty of Waitangi by Paul McHugh Oxford University Press 1991, p334.

152 Maori Land Tenure-Issues and Opportunities A paper prepared for the New Zealand Institute of Surveyors Annual Conference, Auckland, October, 2004 by Dr Bill Robertson.

153 <<http://www.courts.govt.nz/maorilandcourt/glossary.htm>>, accessed 6 September 2005.



United States of America

The 'freeholding' of Native American land – or what has been called the 'Allotment' policy – was instituted in the 19th Century and continued until its repeal in 1933. The *General Allotment Act* or *Dawes Act* was passed by the United States Congress in 1887.¹⁵⁴ It codified and expanded an existing practice in treaties, special acts and 'informal' actions and has been described as 'dividing Indian lands into individual holdings to promote assimilation by deliberately destroying tribal relations.'¹⁵⁵ An allotment was a piece of land, varying typically in size from 40 to 160 acres. These allotments were originally issued on the following basis:

- to each head of a family, one-quarter of a section
- to each single person over eighteen years of age, one-eighth of a section
- to each orphan child under eighteen years of age, one-eighth of a section.

There were other criteria upon which allotments were made to individuals as well.¹⁵⁶

It was a mandatory process and any blocks of land not allotted to Indians for agricultural purposes were available for sale to the non-indigenous community. It is estimated that the Indian estate amounted to some 138 million acres in 1887 and that by 1934 it had shrunk to 52 million acres and a proportion of this was leased to non-indigenous people. This loss of land was often a consequence of fraud, mortgage foreclosures and tax sales.¹⁵⁷

This also led to what is described 'as the generational fractionation of the allotments' and 'checkerboard' land ownership. That is, on an Indian reservation 'the title to the land is held by different entities including the tribe, Indian individuals, the state, the county, the federal government and non-Indian groups or individuals.'¹⁵⁸ This is one of the consequences of land being owned by individuals and divided over time as each generation inherited a portion of the land or leased out a portion of it.

There is now a considerable body of United States federal legislation that seeks to address the consequences of the Allotment policy. In 1983 the United States Congress passed the *Indian Land Consolidation Act* and in 2004 the *American Indian Probate Reform Act*. In the United States today, Indian land consists of what is called 'restricted' and 'trust' lands, which can occur both inside and outside Indian reservations.¹⁵⁹ 'Trust land' means land the title to which is held in trust by the United States for an individual Indian or a tribe. 'Restricted land' means land

154 See generally: <<http://www.csusm.edu/nadp/asubject.htm>>, accessed 23 September 2005 and the Indian Land Tenure Foundation website and Indian Lands Working Group. Particular article by E.A. Schwartz, associate professor of history, California State University, San Marcos-from the Native Americans Document Project at that University.

155 *ibid.*, same reference by Scharwtz.

156 The Dawes Act or General Allotment Act of 1887. Source: United States Statutes at Large, 24:388-91, Chapter 119.

157 C. Wilkinson "American Indians, Time and the Law" (1987) p19-21.

158 See generally the Indian Land Tenure Foundation and its website and in particular the section on allotments. Available online at: <www.indianlandtenure.org/ILTFallotment/allotindex/index.htm>, accessed 23 September 2005.

159 See generally for this section the 'Guide to Mortgage Lending in Indian Country' by the US Treasury. Available online at: <www.occ.treas.gov/events/country.pdf>, especially p5,6,10,11,19.



the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary of the Interior.

It is interesting to note that despite this history most Indian land title maintains restrictions on transfer somewhat similar to land rights legislation in Australia, to ensure that there is no further loss of land, despite the very different historical backgrounds.

In conjunction with the land title laws, policies have been introduced to make finance available for residential housing on both individually and tribally owned lands despite these restrictions concerning transfer. These include the *Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)*, which provides that 'Indian tribes will receive a single, needs-based block grant' with respect to housing.¹⁶⁰

One of its major objectives is 'to promote the development of private capital markets in Indian country and to allow such markets to operate and grow. With the block grant funds, recipient tribes will have the flexibility to design new programs, continue existing programs, and leverage additional housing resources through public-private partnerships with private lenders.'

In addition, the *Housing and Community Development Act of 1992* provides for a Loan Guarantee Program to increase the availability of mortgage capital in Indian country from the private sector. 'The guarantee covers 100 percent of the outstanding principal and interest as well as other necessary and allowable expenses. Borrowers make a modest down payment and pay a fee of 1 percent for the guarantee. The required terms and uses of the loan are flexible so that they may be tailored to the needs of the individual borrower.'¹⁶¹ Further examples of alternative approaches to increasing home ownership apart from changing Indigenous land tenure are considered at Chapter 3.

The international experience points to the continuing need to protect and enhance the communal and cultural aspects of Indigenous title. At the same time, it shows the innovative way that policy initiatives such as private and public loan programs and guarantees can assist and promote residential and economic development on Indigenous land.

Chapter summary

Federal and state parliaments around Australia have enacted more than twenty separate pieces of legislation to provide or recognise Indigenous interests in land. However, what may be perceived as 'Indigenous land' may not necessarily be owned, controlled and managed by Indigenous people. Certainly, much of the land owned, occupied or held for the benefit of Indigenous peoples has been land that has marginal economic value or is otherwise vacant or unallocated Crown land. As this Chapter highlights, it is unhelpful to generalise about understandings of what constitutes 'Indigenous land'. Land rights and native title provide for very different notions of title. So too, it is problematic to assume that

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*



failure to achieve economic development is a result of its status as Indigenous communally owned land.

The land rights regimes around the country enable individual leasing already. There is nothing new in traditional owners or Indigenous communities leasing their land *with their consent* to any person or corporate entity. As the outline of land rights regimes highlights, the ability to enter into leases is built into nearly all land rights legislation and has existed since the first land rights legislation was introduced in 1976. However, this ability to lease has not been supported by appropriate and related government policy and resources to assist Indigenous people down the path of residential leases or economic development where this is desired. While governments' renewed interest in Indigenous land matters is a welcome one, we run the risk of 'throwing the baby out with the bath water' where policy aims to make fundamental changes to land tenure when the potential for existing leasing options has not been fully explored or realised.

As international experience in the United States and New Zealand demonstrate, the path to economic development or increased private home ownership is not necessarily realised through the individual titling of communally owned lands. These examples demonstrate to us the dangers of premature or ill advised attempts to change land tenure. In the case of the Australian context, the added dangers we face relate to adopting measures that fail to protect and respect human rights or fail to encourage the effective participation of Indigenous peoples. This is the focus of Chapter 4.



The economic logic of the NIC Principles and economic development on Indigenous lands

As my predecessor pointed out in the *Native Title Report 2003*, native title is a political process as well as a legal process. Indigenous people enter a relationship with the State on the basis of their identity as the traditional owner group of an area of land. In some cases native title has provided the first opportunity since colonisation for a relationship of this type to be formed. Where the State is sincere about transforming the economic and social conditions in which Indigenous peoples live in Australia, native title can provide an opportunity to lay the foundations for development within the framework of traditional laws and customs and consistent with international human rights principles.¹

In promoting economic development using land as the basis, policy makers should recognise that development is a journey as well as a destination. In formulating proposals for economic development on Indigenous lands, it is important that appropriate consideration is given to the desired end results. Not only this, we must ensure that the means support the ends and that realistic and sustainable measures are implemented to support economic development. While changes to land tenure may be appropriate in particular circumstances to promote economic development where this is desired by traditional owners, it should not be seen as the panacea for Indigenous communities. This Chapter explores some of the themes and assumptions underlying the National Indigenous Council's Principles for Land Tenure (NIC Principles) as outlined in Chapter 1 and suggests a number of factors and features of land that policy makers and traditional owners/claimants ought to consider in any proposal to promote and foster economic development on Indigenous lands. Finally, this Chapter explores some diverse and innovative ideas for economic development beyond the NIC Principles.

1 *Native Title Report 2003*, p1.



Theoretical views about economic development

A key aspect of current debate is that *promoting individual ownership and control of communally owned Indigenous lands is paramount to economic development and realising home ownership* for Indigenous people. The NIC views shared interests as opposed to, and counter to, individual interests in achieving economic development. Arguably, in many respects the NIC Principles represents the modernisation theory of economic development, *which was formerly the prominent mode of thinking* within the international community, particularly in Western society. While there is not capacity within this report to conduct a detailed analysis of the different theories of economic development, it is worth noting the basic features of a number of models relevant to the context of economic development and indigenous lands.

Modernisation

Modernisation theory, gained prominence as a theoretical framework in the 1950s and 1960s, and emphasises the need to progress to economic development through historical stages. It implies that to develop, societies must modernise and economies must move from being low productivity, traditional technology – mostly primary sector and subsistence basis to being a high productivity, modern, mostly industrial sector. It also sees monetary income and economic growth as key elements in measuring development progress and quality of life. Humans are seen as operating on the basis of individual self-interest and ‘rational’ economic behaviour. As a consequence, traditional culture and social structures are seen as barriers to development. For example, Adelman and Taft Morris state that one of the factors needed to initiate development is:

significant social development that helps break down traditional societies, customary behaviour patterns and the sway of traditional cultures and leads to the enlargement of the domain in which market-oriented behaviour guides economic activity.²

While modernisation theory has enjoyed a healthy following particularly within national aid agencies, there has been recognition at the United Nations (UN) level that an increased emphasis on protecting human rights in the development process is required. A rights-based approach to development has been adopted by UN agencies to ensure that trade-offs between development and rights are no longer central to economic development. It also acknowledged that in many cases, viewing development in purely economic terms is often counterproductive to development and meeting social and environmental goals. According to the United Nations Economic and Social Council report of the Working Group on the Right to Development:

the implementation of the right to development would require the judicious use of public policies and well-directed expenditures to address income and asset inequalities and to establish an effective social safety net, since economic growth alone, however robust, could never suffice to overcome poverty.³

2 I. Adelman and C. Taft Morris, *Development History and its Implications for Development Theory: An Editorial*, 1999. Available online at: <<http://are.berkeley.edu/~adelman/WORLDEV.html>>.

3 United Nations Economic and Social Council Right to Development Report of the Working Group on the Right to Development on its fifth session (Geneva, 11-20 February 2004) E/CN/2004/23.



This idea is explored later on in this Chapter in relation to the experience of the World Bank, particularly in relation to land reform.

Hybrid Economy

The Hybrid Economy model for Indigenous economic development on traditional land is based on combining ‘traditional ecological knowledge’ or Indigenous knowledge with Western biological and social sciences to produce sustainable land management and related industries.⁴

Based on a 24 year longitudinal study of an Aboriginal ‘outstation’⁵ community in Arnhem Land,⁶ Jon Altman suggests that remote Indigenous communities are sustained by ‘hybrid’ economies comprised of three elements:

1. Customary (for example hunting and gathering)
2. Market (for example arts and crafts for sale in the Australian ‘mainstream’ economy)
3. State (for example income support transfers).

He found the *customary* component to be the largest sector in the outstation economy, both in 1979 and 2003, with the imputed value of wildlife representing up to 50 per cent of total income for some individuals and groups.⁷

The Hybrid model suggests that economic development for Indigenous communities on country needs to take account of and build on all three elements of the hybrid – in particular, recognising the role of the customary sector for Indigenous livelihood as well as its important commercial potential.⁸ The requirements for realising this model include:

- state remuneration for the contribution of the customary economy to the wider society, through sustainable land use and conservation effected by the practice of ‘traditional ecological knowledge’
- private sector innovation to establish joint ventures.

4 J.C. Altman ‘Sustainable development options on Aboriginal land: the hybrid economy in the twenty-first century’ *CAEPR Discussion Paper No.226*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2001; J.C. Altman ‘People on country, health landscapes and sustainable Indigenous economic future: The Arnhem Land case’, *The Drawing Board: An Australian Review of Public Affairs*, Vol 4, No. 2, 2003, pp65-82.

5 Small settlements formed on their traditional lands after migrations from missions and government townships in the 1970s, following the shift in Indigenous policy from assimilation to self-determination.

6 Arguably, a limitation on this theory is its specificity to Arnhem Land, whose characteristics may help or hinder its application to other areas of Indigenous land. Robert Levitus (also of CAEPR) on Jon Altman’s ‘hybrid economy’ model: ‘outstation residents account for around 5-10% of the Indigenous population, and not all of these enjoy the environmental richness of north-central Arnhem Land. Some familiar with arid zone circumstances have questioned the potential of the hybrid model’, pers comm, 17 May 2005.

7 J.C. Altman and P.J. Whitehead, ‘Caring for country and sustainable Indigenous development: Opportunities, constraints and innovation’, *CAEPR Working Paper*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2003.

8 J.C. Altman, *ibid.*



This approach offers Indigenous people on land rights and native title land 'the real possibility of choice' about the way of life they wish to lead,⁹ through presenting strategies relating to each of the hybrid components and not just to the market.

Development, culture and freedom

Related to the Hybrid model, there is an emerging interest in the need to incorporate increased ethical and culture specific principles in economic development. In particular, economist Amartya Sen sees the expansion of individual freedom as both the principal means and ends of development. On this view, the spectrum of freedoms ranges from freedom from premature mortality and malnutrition to freedom to participate in economic exchange to enjoy political liberty; to basic civil rights, and to lead the kinds of lives we have reason to value.¹⁰ Sen considers that this 'development as freedom' approach requires that people engaged in the development process be able to decide freely themselves what traditions and aspects of their culture they wish to preserve and follow. Conversely, people are free to decide those aspects of culture that may be transformed or abandoned in the process.¹¹

A final theory of note in the current context is that of Hernando De Soto. His views have been utilised by Noel Pearson in the recent debates surrounding economic development on Indigenous lands. De Soto argues that legal title to property is fundamental to its exploitation as an asset.¹² He suggests that poor people in 'developing countries' can accumulate capital – in the form of land in shanty-towns for example – but they are unable to realise its potential wealth because without legal title to such property, it cannot be used as collateral. This view holds that without good title, lenders will not be willing to make loans against the land or shanty as security.¹³ Of note is that De Soto's analysis is based on shanty towns in Peru where populations are high and various levels of commercial activity are common place, despite formal title to land.

Human Right to Development

Given its obvious relevance to the current discussions regarding economic development, it is worth devoting some attention to the human right my predecessor highlighted in the Native Title Report 2003 – the right to development. The right to development was recognised in 1986 by the UN General Assembly with the adoption of the *Declaration on the Right to Development* (DRD). Article 1 provides:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political

9 T. Rowse, *Indigenous Futures: Choice and Development for Aboriginal and Islander Australia*, UNSW Press, Sydney, 2002, p7.

10 A. Sen, *Development as Freedom*, Oxford University Press, Oxford, 1999.

11 A. Sen, *ibid.*, p32.

12 H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books, 2000.

13 W.B. Conerly, *The Mystery of Capital: Why Capitalism Triumphs in the West an Fails Everywhere Else*, *Ideas on Liberty*, Jan 2002: Vol .52, No.1, 2002, p54; R. Edwards, 'Native Title: dead Capital?' *Singapore Journal of Legal Studies*, 2003, pp80-115.



development, in which all human rights and fundamental freedoms can be fully realised.

The two elements which characterise the right to development are 1) development is a human right which belongs to people, not to States, and 2) the goal of development is the realisation of all human rights and fundamental freedoms. Development defined by human rights is aimed at the full realisation of all human rights and fundamental freedoms. In relation to Indigenous Australians these rights include:

- the right to self-determination
- the right to protection of culture
- economic, social and cultural rights
- right to free, prior and informed consent
- and equality

This approach to development would aim for a broad range of outcomes, including:

- Indigenous control of development goals and agenda setting
- Development consistent with culture and cultural issues
- Better health, access to food, housing and a stable meaningful job would be just as important as increased incomes
- Indigenous people would be active participants in the process of building economic and social outcomes in their communities
- Indigenous communities would be able to say 'No', where there was discontent with government programs and development proposals
- Indigenous rights in land would be recognised as being of equal importance and as a result have equal protection
- Life chance indicators of Indigenous people would be equal to that of other Australians, reflecting a fair distribution of the benefits of national development.

Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of resulting benefits.¹⁴ It must be carried out in a way which respects and seeks to realise people's human rights. Thus *development is not only a human right in itself, but is also defined by reference to its capacity as a process to realise all other human rights.*

Better outcomes cannot be achieved in communities without strong recognition and support for the rights of these communities. In relation to economic development for Indigenous communities on Indigenous lands, I envisage development that builds on and preserves rights to land regardless of whether these rights come from land rights claims, native title legislation or traditional laws and practices. Building on rights does not involve the removal of these rights through the alienation of Indigenous land or by winding back the 'right to negotiate' to encourage resource development. Further analysis of the right to development and its relevance to the leasing debate is provided in Chapter 4.

14 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, p9.



Previous policy approaches

The idea of using land to generate economic outcomes for Indigenous Australians is not new, although it is only recently that a development focus has been brought to bear on the process. Elspeth Young identifies that the policies of assimilation and integration¹⁵ adopted a welfare approach rather than development, assuming that Aboriginal and Torres Strait Islander peoples would not be capable of taking prime initiatives for either social or economic change affecting them. Programs focused on 'encouraging and/or coercing all Aborigines to accept European workethics and join the labour force, primarily in positions at the bottom end of the occupational hierarchy.'¹⁶ For example, under the 'Protectorate' system set up in New South Wales in 1838, the functions of Protectors included working to persuade Aboriginal people in their area to settle down to a life of farming.¹⁷ Assimilation and integration did not mean equality, however. Aboriginal pastoral workers were paid below the Award wage until 1968. Frequently, wages were paid in kind rather than cash.

The policies of self-determination and self-management,¹⁸ in theory, shifted control over Indigenous development from governments to Indigenous communities, although as Young notes, assimilationist thinking was entrenched in bureaucracies and continued to exert influence even after the policy had officially been abandoned.¹⁹ The granting of land rights and the recognition of native title rights support this shift, through growing Indigenous control over land and resources.

Young argues that previous government attempts to generate Indigenous economic development from land share the following characteristics:

- An assimilationist, welfare-oriented foundation which has been challenged by the shift to the policies of Indigenous self-determination and self-management
- Conflicting definitions of development, particularly ambivalent attitudes towards the relative importance of social and economic development aims
- An emphasis on primary resource development as the economic base, which is subject to the severe and unpredictable world market fluctuations
- An inherent vulnerability which affects the availability of all government funding and puts programs at risk
- Division of responsibility between and within government departments.²⁰

To this can be added the following observations:

- Strategies have been fragmented between different levels of government.

15 For further information on the policies of assimilation and integration, see Chapter 1, p28.

16 E. Young, *Third World in the First: Development and Indigenous Peoples*, Routledge, London, 1995, p103.

17 C.D. Rowley, *The Destruction of Aboriginal Society*, Pelican, Sydney, 1970, p56.

18 For further information on the policies of self-determination and self-management, see Chapter 1, pp28-31.

19 Young, *op.cit.*, pp102-104.

20 Young, *op.cit.*, pp117-118.



The 1967 national referendum saw responsibility for the administration of Indigenous affairs shifted to the Commonwealth Government, while responsibility for land and resources remain with the state and territory governments. Local governments are responsible for zoning land and raising rates for the provision of infrastructure. And as discussed in Chapter 2,²¹ a variety of Indigenous entities including Aboriginal councils, Aboriginal Land Trusts and Prescribed Bodies Corporate (PBCs) have responsibility for Indigenous legal interests in land. These divisions make it imperative that all levels of government coordinate their activities in partnership with Indigenous entities where economic development is to be pursued through Indigenous land.

- Citizenship services gaps, such as infrastructure and social development needs, such as education and health have not been taken account of in economic development policies.

Further discussion of this issue is in Chapter 4.

Articulating the outcomes – development for whom?

History tells us that economic growth in the broader economy does not necessarily translate into greater social and economic outcomes for Indigenous people. Reflecting on the *Yorta Yorta*²² judgment demonstrates this well. As Justice Olney summarised in his decision at first instance, by the 1850s Aboriginal resistance to settlement had ceased. The Yorta Yorta population had been drastically reduced while the white population had grown dramatically – attracted by pastoral lands and gold. Government Inquiries were held into the condition of Aborigines and addressing their ‘absolute wants’. Missions and reserves were established to address these needs. Later, ‘half castes’ were dispersed from missions and stations. Families were split up or forced to move away from areas that had been their homes for years. In the twentieth century most of the reserve land had been leased to non-Indigenous farmers. While employment for Aboriginal people became harder to find as the non-Indigenous population grew and soldiers returned home. Funding for reserves was reduced and Aboriginal people living on reserves were not eligible for unemployment benefits nor were able bodied people eligible for rations.²³

As Chapter 1 observed, there is no doubt that Indigenous people throughout Australia have experienced similar events on their lands. These stories demonstrate how industry, agriculture and mining contributed to the growth of the Australian economy while at the same time, deprived Indigenous Australians of their economic resources and disrupted social, cultural and political structures. Development in Australia has not been enjoyed by the entire population. Indigenous Australians have been, and continue to be, marginalised from development outcomes on their lands.

21 Chapter 2, p82-86.

22 *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* [2002] HCA 58 (12 December 2002) (‘Yorta Yorta’).

23 *Yorta Yorta*, paras 152, 153.



Therefore, it is important to establish clear vision and direction for economic development that makes Indigenous people and their development goals central to the process. An overall policy objective needs to be formulated in relation to economic development for Indigenous lands – both land rights lands and native title lands. Unfortunately, the NIC Land Tenure Principles and government policy are wanting in this regard. Unless a more comprehensive and inclusive economic development strategy is developed, the inadequacy of historical government actions to include Indigenous Australians in the share of the bounty from national development, and of existing government programs and services to deliver better outcomes, Indigenous Australians will continue to be eclipsed by the current debate about land tenure.

Few would argue against the pursuit of economic development. However, understanding the means by which this can be achieved consistent with indigenous rights should be the focus of attention for policy makers. As this Chapter will highlight, it is evident that there are a number of options available and the views of Indigenous peoples are diverse. So far in the current debate it is unclear what outcomes policy makers seek to achieve by proposing changes to the nature of title in Indigenous lands. The following have all been referred to in the debate as issues that need to be addressed:

- Home ownership
- Address housing shortages
- Wealth creation and capital accumulation
- Capacity building and community development
- Economic growth
- Increased industry participation and investment in Indigenous land
- Perceived governance problems in community entities such as land councils
- Encouraging entrepreneurial behaviour within Indigenous communities
- Improved efficiency in existing lease granting processes and procedures
- Improved socioeconomic indicators such as education and employment.

The problem is that it is not clear which of these are the objectives of the NIC Principles and related leasing proposals. A simple demonstration of the inadequacies of the current debate is the failure of the NIC Principles to specify whether their encouragement of individual leasing would be confined to Indigenous Australian lessees or whether it would extend to non-Indigenous Australians. Existing impediments have not been clearly identified nor evidenced, outcomes are not clear and the views of traditional owners have not been sought. Until the desired outcomes are articulated and any impediments are properly identified and addressed, the prospect of using Indigenous lands to promote economic development will be as remote as the land at the centre of the debate. Unravelling these issues must be made a priority, must be conducted with effective Indigenous participation and must make Indigenous aspirations and development goals central, to be meaningful and sustainable. The extent of winners, losers and conflict must also be a consideration with any proposal on Indigenous lands so as to avoid the potential negative effects of redistribution.



Realising economic development: the assumptions, factors and challenges

While striving for economic development for Indigenous communities is a necessary and worthwhile pursuit, the current NIC Principles and in fact any economic development model, needs to consider the wider socioeconomic issues relating to Indigenous communities on Indigenous communal lands. As I noted in the 2004 Native Title Report, 'Simply creating capital may not address underlying social and economic development issues, particularly in remote areas. These communities and individuals require support and assistance to build and develop their capacity to sustain development in the long term.'²⁴ In that respect, the NIC Principles draw a number of conclusions about life on communal lands that need to be rationally examined prior to taking any decisions.

Land ownership is but one factor that influences economic development. In the remote and rural communities to which much of this proposal is aimed, there are a great many other factors that will influence economic development, such as access to markets and credit, income and existing resources and infrastructure²⁵. The challenges of economic development on Indigenous lands should not be seen as insurmountable. However, these challenges need to be fully understood in order to meet the goals of economic development and Indigenous communities.

The question of communal ownership

As this Report highlights, there has been considerable criticism of the ability of communal ownership to promote economic development for Indigenous communities. The current debate regarding whether or not Aboriginal lands and communal ownership inhibits individuals from owning their own home does not adequately focus on whether the land in question is land that has been granted by the Crown or land that is the subject of native title or both. As Chapter 2 explored, in relation to lands that are subject to native title, the rights over those lands are diverse and range from exclusive possession to rights of access to land. This factor alone has ramifications for whether or not the change from communal to individual property interests will promote economic development or provide opportunity for home ownership in parts of Australia subject to native title. Clarifying understandings and perceptions about how communal interests are and have been used is a useful way of contextualising debate in this area.

Individual ownership

The origins of the proposal to open communal title to individual leasehold interest have largely been generated by comments by the Prime Minister and Minister for Indigenous Affairs, and the NIC Principles. During a visit to the town

24 Aboriginal and Social Justice Commissioner, Native Title Report 2004, Human Rights and Equal Opportunity Commission, Sydney, p65.

25 For data refer to the Australian Bureau of Statistics: Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities 2001 Report. Selected findings include water quality was either not tested, or had failed testing in the 12 months prior to the survey, in 46% of the 213 Indigenous communities which had a population of 50 or more and were not connected to a town water supply. Further, overflows or leakages from sewerage systems in the 12 months prior to the survey occurred in 48% of Indigenous communities with a population of 50.



of Wadeye in the Northern Territory in April 2005, the Prime Minister commented that:

All Australians should be able to aspire to owning their own home and having their own business. Having title to something is the key to your sense of individuality, it's the key to your capacity to achieve and to care for your family and I don't believe that indigenous Australians should be treated differently in this respect.²⁶

The third NIC Land Tenure Principle recommends that Aboriginal land legislation be amended to maximise opportunities for individuals to acquire and exercise a personal interest on communal lands.

Individual ownership is assumed to be a prerequisite to promoting home ownership and economic development. This view reflects the 'Tragedy of the Commons' notion that was prevalent at the time of the Enclosure Acts in eighteenth century Britain, which:

- divided up the 'common land' which had traditionally been shared by the community
- redistributed plots of land in an effort to combine them into larger areas
- revoked peasant's traditional right to scavenge food left behind on his landlord's fields (gleaning rights)
- required all farmers to build a gate around their lands.²⁷

This idea holds that communal property will tend to be neglected or degraded since no single owner has a vested interest in protecting or improving the property; while individual property will be improved because the owner has an economic interest in seeing its value improved. The 'Tragedy of the Commons' gained currency again more recently with the thesis of biologist Hardin²⁸ who suggests that personal gain or self-interest will inevitably lead to the depletion of a commonly held object, particularly where there is little incentive or coercion to manage the utility of the asset. The example used by Hardin is a communally owned plot of land used for farming. While the land can only sustain a finite amount of cattle, each of the owners, if left to his own devices, will seek to maximise the benefits to himself and this will inevitably involve increasing their own number of cattle, despite the possibility that this may deplete the land. Therefore, under this view, the land would be best utilised where each farmer has ownership and responsibility for a portion of the land and the propensity to over-farm the land is removed. Another common example that has been used is the difference between the care shown by an individual to a privately owned house as compared to a rented home or public housing. However, as Chapter 4 explores, an alternative thesis about entrepreneurialism emphasises the importance of 'social capital' or reciprocity, trust and social contracts within groups for encouraging prosperity. This view sees communal entities, rather than individual operation, as necessary for economic development.

26 Prime Minister John Howard, 6 April 2005, Door stop interview Wadeye, Northern Territory. Full transcript available at: <www.pm.gov.au/news/interviews/Interview1305.html>.

27 See BBC online at: <www.bbc.co.uk/education/beyond/factsheets/makhist/makhist4_prog7d.shtml>, accessed 25 November 2005.

28 G. Hardin, 'The Tragedy of the Commons', *Science* (162:1243-1248) 1968.



Another view is that financial institutions will not lend to multiple owners, however, as described later in the Chapter, innovative ideas abound for lending on communal lands. The Central Land Council (CLC) in the Northern Territory indicates that it is not communal land tenure that explains the failure of financial institutions to expand their lending practices to lands subject to ALRA land:

The popular misconception is that this finance is unavailable because of problems with the use of Aboriginal land as collateral. The experience of the Central Land Council is that even where tenure arrangements are secure, and 99 year leases are offered, there is a difficulty in generating financial support for projects initiated in a remote Aboriginal context. The fact that tenure is not a barrier to financial lending for major commercial development on Aboriginal land is also demonstrated by the Alice Springs to Darwin railway project.²⁹

The CLC suggest that the Australian and Northern Territory Government and the Australian Bankers Association work with the CLC to develop a guide to help financial institutions understand the different processes involved in lending on Aboriginal land, as has been done successfully in Canada.

Support for the Government and NIC push for a move to individual titling of communal land tenure has been given mainly by conservative commentators³⁰ while the majority of Indigenous leaders oppose it. The views of traditional owners are conspicuously absent. As a fundamental starting point, proper evidence and analysis of any proposal, including the NIC Principles, is essential and has so far been lacking. A thorough research and consultation process, including full information about what a proposal entails (including losses or detriment as well as benefits) in a form that is understood by traditional owner groups, and the right to say no, is necessary to comply with the principle of free, prior and informed consent as well as to understand whether changes will support intended outcomes.³¹ How changing title from communal to individual ownership through leasing will address other identified impediments to economic development such as inadequate infrastructure in remote areas, under-investment in education and healthcare, high levels of welfare dependency, high levels of un-employment and limited job opportunities and limited commercial opportunities is unclear. Proponents of NIC Principles consider that changing communal title to individual leasehold will kick start economic development; but international experience demonstrates that this is not a sound assumption as the World Bank experience below highlights.

Communal Ownership: the World Bank experience

The push to change tenure arrangements from communal title to individual title is not a new idea in approaches to economic development. The former approach of the World Bank in addressing economic development is a case in point.

The World Bank is the name commonly used for the International Bank for Reconstruction and Development and the International Development Association. Its aim is to address poverty and improve the living standards of people in the developing world. The World Bank is a specialized agency of the United

29 Central Land Council Policy Paper: *Communal Title and Economic Development*, March 2005, pp9-11.

30 For example see H. Hughes, and J. Warin, 'A New Deal for Aborigines and Torres Strait Islanders in Remote Communities', *Issue Analysis No. 54*, Centre for Independent Studies, Sydney, 2005.

31 Central Land Council Policy Paper, *Communal Title and Economic Development*, 2005, p2.



Nations and is made up of 184 member countries. These countries are jointly responsible for how the institution is financed and how its money is spent. The World Bank provides loans, policy advice, technical assistance and knowledge sharing services to low and middle income countries to reduce poverty.³²

The strategy of individual titling was prominent with the World Bank in the 1970's. To illustrate, in the 1975 Land Reform Policy paper of the Land Policy Division of the World Bank it recommended the following measures for economic development:

- formal land titling as a precondition of 'modern development'
- the abandonment of communal tenure system in favour of freehold title and subdivision of the commons
- widespread promotion of land markets to bring about efficiency enhancing land transfers
- support for land redistribution on both efficiency and equity grounds.³³

The World Bank experienced difficulties in achieving outcomes under the individual titling approach to economic development. According to empirical economic research, the results exposed high costs, few benefits and in Africa, where farming prospered, it appeared to do so within a framework of customary rights, kinship and social contracts.³⁴

The World Bank has since shifted its approach to economic development and formal land titling. The World Bank's current view is that the need for individual formal titling is dependant on the nature and availability of land itself. It sees *the need for more formal property rights to exist only as populations increase and land becomes scarce*. There is little incentive to hold individual title where the rights to the land are available to all members.

Societies adopt property rights when high population density requires land-related investment or if other factors increase the value of land.³⁵

In its 2003 Report, the World Bank sought to address the twin goals of economic development and poverty reduction and found that 'dealing with efficiency will not automatically also resolve all equity issues'.³⁶ After extensive research and practical application, the World Bank has taken the view that tenure security is vital to promoting economic development; however *the nature of that security is not necessarily tied to formal individual title*:

Even though formal title will increase tenure security in many situations, experience indicates that it is not always necessary, and often is not a sufficient condition for optimum use of the land resource.³⁷

32 See www.worldbank.org for more detail.

33 J. Quan, 'Land Tenure, Economic Growth and Poverty in Sub-Saharan Africa' in C. Toulmin and J. Quan (eds), *Enduring Land Rights, Policy and Tenure in Africa* (2000) International Institute for Environment and Development, pp31-49.

34 S. Gilmour, 'Improved Wealth Creation and Economic Sustainability for Individuals, Families and Communities – an Australian approach to land tenure reform', 27 June 2005, in possession of the author, Sydney, p12.

35 World Bank Land Policies for Growth and Poverty Reduction, Chapter 2, World Bank Research Report, Oxford University Press, 2003, p9.

36 World Bank, *ibid.*, p15.

37 World Bank, *ibid.*, pxxvii.



The World Bank acknowledges customary title as a means of facilitating economic development and recently noted that 'subject to minimum conditions, [customary title] is generally more effective than premature attempts at establishing formalised structures.'³⁸ It should be noted that agricultural use of land is a key element of the value of land in the World Bank analysis, whereas this is not necessarily the case for remote land held under Indigenous communal ownership. However, it nonetheless provides important lessons for applicability here in Australia. The importance of secure land rights and access to justice to improve investment opportunities and reduce poverty was also highlighted in the Human Development Report 2005 by the United Nations Development Programme.³⁹

Reflecting on the experience of the World Bank and the lessons it provides for the Australian context, Susan Gilmour argues that the following issues are associated with market based land reform:⁴⁰

- *Unintended distributive effects*: individualised title creates winners and losers in an environment that favours those with existing access to economic and administrative power.⁴¹
- *Cost*: the cost of creating, enforcing and administering the title could be inhibitive.
- *Enforcement*: title may be ignored, particularly where the regime has been imposed or where the system in place has been satisfactory.
- *Disputes*: formal individual titles could create disputes over land as a result of competition between individuals over the ownership to communal lands.⁴²
- *Status quo*: arguably, formal individual titles over Aboriginal lands will have no impact on economic development in the absence of such things as markets and credit.⁴³
- *Reduced flexibility*: there is the possibility that titling could lead to land grabbing and reducing the flexibility with which land may be accessed for opportunities of wide benefit.⁴⁴

These difficulties must be borne in mind in governments' consideration of the NIC Principles.

Communal interests: government experience so far

There are relevant contexts where all levels of governments and third parties currently successfully engage with Indigenous peoples as a collective – that is,

38 World Bank, *ibid.*, pxxvii.

39 Human Development Report 2005, United Nations Development Programme, p53.

40 S.Gilmour, *op.cit.*

41 J.P. Platteau, 'Institutions, Social Norms and Economic Development', Overseas Publishers Association 2000, p150 cited in Gilmour *op.cit.*, p13.

42 S. Gilmour, *ibid.*, p13.

43 *ibid.*

44 E. Fortin, 'Reforming Land Rights: The World Bank and the Globalisation of Agriculture'. Available online at http://www.oxfam.org.au/what_we_do_issues/livelihoods/landrights/africa_south.htm, accessed 26 June 2005; and J. Quan, 'Land tenure, Economic Growth and Poverty in Sub-Saharan Africa' in C. Toulmin and J. Quan (eds), *Enduring Land Rights, Policy and Tenure in Africa* (2000) International Institute for Environment and Development, pp31-49.



through the negotiation of Indigenous Land Use Agreements (ILUAs) and other types of native title agreements. As outlined in the *Native Title Report 2003*⁴⁵ the native title policies of both federal and state levels of government encourage negotiations with Indigenous groups rather than litigation over areas of land subject to native title.

Native title agreements under the *Native Title Act 1993* (Cth) (NTA) include:

- agreements to the content of a native title determination which is ratified by the Federal Court once all parties consent ('consent determinations')
- agreements produced out of negotiations under the 'right to negotiate' ('section 31 agreements')
- ILUAs.

There are also many other agreements, such as contracts and Memoranda of Understanding, related to native title but made outside the formal framework of the NTA. Proponents of development on land and governments have successfully negotiated thousands of agreements with Indigenous groups, demonstrating that communal ownership has not hindered engagement with third parties in practice.⁴⁶ The concept of multiple owners of a single entity should be a familiar one – it forms the very basis of the legal form of the corporation.

Native title, although often conceptualised as an 'Indigenous right', is also a property right with parallels to many other property rights. In fact, in many ways, native title is no different to already recognised, and uncontroversial, property rights such as easements. Its communal nature is also analogous to other property holdings such as property held by corporations.⁴⁷

The NTA requires native title groups to form a corporate entity, a 'Prescribed Bodies Corporate' (PBC), when they achieve a successful native title determination. The PBC provides a single point of contact for the group for third parties, and the relevant Regulations⁴⁸ enable the PBC to make its decisions about the native title rights it manages by traditional law and custom or an otherwise agreed decision making process. Likewise, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) decisions about the land involving non-Aboriginal use are conveyed to third parties by the relevant Land Council following the traditional owner group making a decision in accordance with either an agreed or a traditional decision making process.⁴⁹ A variety of other Indigenous entities exist under other land rights statutes. These bodies enable communal decision making to take place according to traditional means or contemporary agreed processes, and be communicated to outsiders through a conduit, in the same way that the shareholders of corporations can take decisions as a group at general meetings and convey this through resolutions and company decisions.

45 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, Chapter 2.

46 See the Agreements, Treaties and Negotiated Settlements Project database at: <www.atns.net.au/index.php>, accessed 2 November 2005.

47 L. Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future*, The Federation Press, Sydney, 2003.

48 *Native Title (Prescribed Bodies Corporate) Regulations 1999*

49 *Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth)*, s.77A.



Individual financial capacity and access to finance

Among other things, the current debate around economic development has centred on Indigenous land as a basis for increasing levels of Indigenous home ownership and consequently, individual's economic status. There are a number of factors besides land tenure that act as inhibitors to home ownership and business development; that is the focus of this section.

Income

Examining income levels of Indigenous people and communities is a critical component of any successful proposal regarding improvements in home ownership. According to a research discussion paper produced by the Reserve Bank of Australia (RBA) in May 2005,⁵⁰ two of the major factors influencing home ownership in Australia are income levels and wealth – the ability to make financial commitments towards the property. Income and wealth are distinguished where wealth reflects an accumulation of other sources of income besides that which is derived from property and employment (particularly liquid assets i.e. assets that are money or can be quickly converted to money such as shares). Among other things, the RBA paper examines who owns property in Australia and uses a cross section of 7,245 households from the 2002 Household, Income and Labour Dynamics in Australia (HILDA) Survey.

More often than not, households incur debt in order to finance the purchase of a property. While the level of income is important to enable buyers to make mortgage repayments and influences the size of the debt and the purchase, the wealth required to make the down payment appears to be more important than income levels, particularly in the transition from renting to home ownership.⁵¹ The RBA findings are consistent with other studies⁵² which have shown that the constraints associated with wealth are a real barrier to young renter households wishing to own their own home. According to the RBA, lower income households often do not own their own property.⁵³

According to the Productivity Commission Report *Overcoming Indigenous Disadvantage Key Indicators 2005*, the income levels for Indigenous Australians remains markedly lower than for the rest of the population. The report measures household income in gross weekly equivalised household income (GWEH). The report notes that nationally, in 2002, the mean GWEH income for Indigenous households was \$394 compared with \$665 for the non-Indigenous population. This numerical difference alone demonstrates the disparity in household incomes between the different groups. However, the report also highlights that the data may not be an adequate reflection of relative income given the difference in composition and circumstances of many Indigenous households compared to non-Indigenous households.⁵⁴ The report sets out a number of differences between Indigenous and non-Indigenous households, some closely related to other socioeconomic indicators, which influences the quality of the GWEH data:

50 M. Kohler and A. Rossiter, *Property Owners in Australia: A Snapshot*, Research Discussion Paper 2005-03, Economic Research Department, Reserve Bank of Australia, 2005.

51 *ibid.*, p6.

52 *ibid.*, p6.

53 *ibid.*, p6.

54 Productivity Commission, *Overcoming Indigenous Disadvantage Key Indicators 2005*, p3.42.



- Indigenous people are more likely to live in larger households with large numbers of dependents and smaller incomes.
- Indigenous households are more likely to extend over generations, than non-Indigenous households.
- High Indigenous adult mortality can impact upon household living arrangements.
- Indigenous people, especially those living outside the cities, may live in households with resource commitments to their extended families living elsewhere.
- Indigenous households tend to have a large number of visitors, which are not necessarily accounted for in a data collection that takes a snapshot on a particular day, such as a census.⁵⁵

This suggests that the lower GWEH for Indigenous households is used to support an increased (and sometimes uncertain) number of people within an Indigenous household. Arguably, this increased financial burden on Indigenous peoples will have negative effects on the ability to engage in the savings patterns and lending practices required for the purchase of large purchases such as a home. Additionally, people living on communal lands are most likely to experience the burden of higher costs of living such as food, general consumables, white goods and transport.

Debt

It is not surprising then that the RBA also found that higher income households were more likely not only to own their own property but also to hold debt against their properties, since they are better placed to service that debt. The RBA evidence suggests that the decision to hold debt is strongly influenced by the age, income and wealth of the household. The relationship with gearing (that is, borrowing to invest) is different to that with home ownership for age and wealth.

Like home ownership, households with higher income are more likely to hold debt, possibly since they are in a better position to service the debt (and therefore to obtain the mortgage in the first instance). In contrast, the likelihood of holding debt falls with wealth, a reflection of past accumulation of savings (and thus of possibility to pay off debt). Similarly, gearing ratios among households with debt tends to rise with income and fall with higher wealth.⁵⁶

These findings are particularly interesting in the current debate in relation to home ownership. When we consider home ownership and economic development, we are not merely considering the capacity of an individual servicing a loan, but the possibility of individuals saving a deposit to purchase their own home and the on-going responsibility for funding repairs and maintenance of the home that are generally provided at no cost in a rented home. We are also conceiving of a situation where individuals own all or part of their property and are using this ownership as collateral in order to borrow capital to fund a business venture and or build another home for example. Besides the threat of foreclosure (the repossession and sale of the property by the lender for failure to meet

55 Productivity Commission, *ibid.*

56 M. Kohler and A. Rossiter, *op.cit.*, p15.



mortgage repayments), there are a great many risks involved for individuals and communities in these circumstances that policy makers ought to consider to ensure that the end goals are realistic and sustainable.

While the government currently has competitive home loans available to Indigenous people through Indigenous Business Australia (IBA), these currently do not apply on communal lands. Through the IBA's Home Ownership Programme, Aboriginal and Torres Strait Islanders who meet certain criteria can be put on a waiting list for a home loan before being invited to apply formally. To be eligible, applicants must have combined gross weekly incomes of up to 150% of the IBA Income Amount (IIA).⁵⁷

For applicants earning up to 125% of the IIA:	Applicants can borrow up to 95% of the purchase price of a property less 5% deposit or \$3,000 deposit (or \$1,500 deposit for household incomes less than \$30,000 p.a.), which ever is the lesser.
For applicants earning over 125% and up to 150% of IIA:	Applicants can borrow up to 60% of the purchase price of a property.

As mentioned the Home Ownership Programme (HOP) does not currently apply on communal lands. The issue that the IBA has with communally owned lands is that they have difficulties in identifying the various parties to the loan agreement. While there is no available policy or research on the extent of the obstacles, the IBA are concerned to ensure certainty around what property rights are secured following the granting of a loan and security around the extent of ownership of the property – for both the buyer and the seller. Given the extent of individual property ownership opportunities that already exist on communally held land (outlined in Chapter 2), there may be scope to develop policy and practice and extend the home ownership programme to communal lands. The IBA has indicated that they are reviewing options for home ownership on communal lands (see also the recommendations contained at the end of this Chapter).

The former Queensland Aboriginal Co-ordinating Council, ATSIC (previously responsible for HOP) and the Queensland Department of Housing commissioned a report to examine a number of financial models for achieving home ownership on community title land that policy makers might want to consider in light of intentions to improve home ownership.⁵⁸ These will be outlined later on in this Chapter and include proposals such as 'Depreciated Lease-to-Purchase Model, Subsidised Mortgage Options, Interest Free Mortgage Schemes, Subsidised Repayment Schemes, Non-Profit and Concessional Mortgage Schemes, Government or Community Guarantor Schemes and various combinations.

Accessing finance and financial institutions

The need to satisfy lending institutions that clients have the available resources to service a loan repayment for the purchase of property is one consideration.

57 The IBA Income Amount is based on the National Average Male Weekly Earnings figures and is updated quarterly. See <www.iba.gov.au> for full detail on the Home Ownership Programme.

58 M. Moran, Home Ownership for Indigenous People Living on Community Title Land In Queensland: Scoping Study Report, produced by Queensland Aboriginal Co-ordinating Council and the Aboriginal and Torres Strait Islander Commission, 1999.



We cannot, however, assume that all peoples have equal access to such lending institutions. This applies regardless of whether the land in question is subject to native title, or whether it is land granted by the Crown to Indigenous communities (land rights land).

As Chapter 2 explained, the geography of land owned by Indigenous peoples is largely in regional and remote parts of Australia. The Parliamentary Joint Committee on Corporate and Financial Services⁵⁹ found in its inquiry into banking and financial services that there are many barriers to access these services for people in rural, regional and remote areas of Australia. These barriers will affect Indigenous peoples' opportunities to engage with lenders should they be in a position to service a loan.

The Committee's inquiry into the level of banking and financial services in rural, regional and remote areas of Australia concluded in January 2004 with the handing down of the Committee report *Money Matters in the Bush*. According to the terms of reference, the inquiry was to place particular focus on:

- options for making additional banking services available to rural and regional communities, including the potential for shared banking facilities
- options for expansion of banking facilities through non-traditional channels including new technologies
- the level of service currently available to rural and regional residents
- international experiences and policies designed to enhance and improve the quality of rural banking services.⁶⁰

The inquiry noted that Indigenous people make up a high proportion of the population in regional and remote districts with around 1,200 discrete Indigenous communities of which over 1,000 were very small and very isolated communities.⁶¹ Limited commercial opportunities and viable labour markets in these communities means that they often lack some of the most basic services, including access to banking and financial services and institutions. Reconciliation Australia stressed that:

We are not talking about the removal of banking services from these remote communities; we are talking about the fact that there are no banking and financial services.⁶²

In addition, Reconciliation Australia explains that Indigenous Australians experience further difficulty in accessing banking and financial services as a result of comparably low levels of financial and technological literacy and low levels of education and English proficiency.⁶³ The Centre for Aboriginal Economic Policy

59 Parliamentary Joint Committee on Corporations and Financial Services, *Money Matters in the Bush: An inquiry into the Level of Banking and Financial Services in Rural, Regional and Remote Areas of Australia*, January 2004, accessed via <www.aph.gov.au> on 10 August 2005.

60 Parliamentary Joint Committee on Corporations and Financial Services, *Money Matters in the Bush: An inquiry into the Level of Banking and Financial Services in Rural, Regional and Remote Areas of Australia*, January 2004, pvii, accessed via the internet on 10 August 2005.

61 *ibid.*, p231.

62 *ibid.*, p235.

63 *ibid.*, p235.

Research (CAEPR) has similar concerns regarding Indigenous peoples and access to banking services.⁶⁴



Practical considerations

The diversity of views and evidence regarding economic development demonstrates that there are many ideological and political differences over the extent to which communal ownership does, or does not, promote economic growth. Conversely, there are competing views about the extent to which individual ownership can alleviate the concerns over communal ownership. Putting both these issues aside, there are more practical considerations relevant to this debate that require investigation. Attention to real estate values and logistical concerns needs to be addressed if any proposal is to have a realistic chance of improving such things as home ownership, capital accumulation and investment.

From the sociological perspective, it is critically important that the owners of communal lands ***are provided with detailed, yet technically basic, information about what rights they are waiving, and what obligations they will have or not have, in agreeing to long term leasing of their traditional lands.*** The provision of this information should not be rushed and must be transmitted through an independent and impartial party. From a traditional owner's perspective they will always own the land and have a responsibility to care for the land, however, this latter responsibility is transferred to the lessee and the traditional owner may have no rights to intervene or renege during the lease period.

Land value

In relation to home ownership on Indigenous lands, land value relative to construction costs needs to be examined prior to any changes to communal title to ensure that any changes support the desired outcome. Data obtained by Oxfam estimates that in the Northern Territory the average cost per hectare for land acquired in the Territory by the Indigenous Land Corporation was \$13. In more remote townships, the average Unimproved Capital Values for property sold in 2004-05 ranged from \$5 per square metre in Tennant Creek to \$25 per square metre in Pine Creek and \$36 per square metre in Katherine.⁶⁵ The Oxfam report suggests that unless Indigenous people's incomes increase significantly, there will be little or no change in Indigenous private home ownership or private financing.⁶⁶ Regardless of the cost of building a home, its value will only be as much as a buyer is willing to pay for it. Clearly, individuals may have difficulty obtaining sufficient finance for the building of a home, where the cost of building exceeds the amount that would be recouped following its sale.

64 The CAEPR submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the level of banking and financial services in rural, regional and remote areas of Australia at: <www.anu.edu.au/caepr/Publications/topical/CAEPRbankingsub.pdf>.

65 Oxfam Australia, *Land rights and development reform in remote Australia*, 2005, p16.

66 *ibid.*, p16.



The housing challenge – cost, design, demand

The Oxfam report provides an indication of some of the building costs on *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA (NT)) lands. Through information sourced from the Indigenous Housing Authority of the Northern Territory, Oxfam highlights that the cost of building a house in a remote community is \$225,000 to \$350,000 depending on the style and location.⁶⁷ Oxfam also indicates that the depreciation of the housing stock is also very high in remote communities due to environmental conditions and difficulties accessing trades people.⁶⁸

Coupled with this, there is a critical housing shortage for Indigenous peoples. According to the Australian Bureau of Statistics (ABS), estimates put the figure at \$2.1 billion as being required to address Indigenous housing needs. There are an estimated 21,287 dwellings managed by Indigenous housing organisations, 8% requiring replacement and 19% requiring major repairs. Approximately 70% of the dwellings are located in remote and very remote locations, where around 106,000 Indigenous people live.⁶⁹ A recommendation is provided at the end of this chapter regarding housing funding.

According to the ABS, the design, construction and maintenance of Indigenous housing play a crucial role in housing sustainability. Housing must also be culturally appropriate in their design. In some parts of Australia, kinship structures and practices and population mobility may impact on the use of housing and the level of occupancy. Community mobility and household size is vital in planning and designing the usage loads placed on housing, particularly health facilities such as water, waste removal and power (should these facilities be available in the first instance). Should crowding result in the failure of facilities, a range of serious health problems can occur resulting in unsafe and ultimately uninhabitable housing, creating greater stress on existing facilities. Geographical location, climate and cultural lifestyle also impact on the design and construction of Indigenous housing.⁷⁰

Where housing is poorly built, or where there is no systematic approach to their repair or maintenance, minor problems can escalate over time and shorten the life expectancy of houses. Given the serious backlog of housing need in rural and remote communities, it is important that resources are well targeted and provide the maximum benefit to Indigenous Australians. While constructing a house in a remote locality can be difficult enough due to professional building skill shortages, limited availability of materials and the expense and logistics involved, providing [culturally] appropriate housing can be even more challenging.⁷¹

Appropriate planning and consultation is essential, so too is an understanding of such factors as 'geographic location, population fluctuations experienced in communities, family and kinship structures and the specific lifestyles of communities and their use of housing. The diversity of contemporary Indigenous

67 *ibid.*, p15.

68 *ibid.*, p15.

69 S. Etherington and L. Smith, (ABS and ATSI contribution), *The design and construction of Indigenous housing: the challenge ahead 2004*, 2004. Available online at: <www.abs.gov.au>, accessed 26 August 2005.

70 *ibid.*

71 *ibid.*



cultures and the locations in which they live, means that what is appropriate will vary considerably between communities.⁷²

Measuring the value of land

Understanding the value of Indigenous land is needed in order to comprehend the extent to which land can be used to promote economic development. However, there are different ways of measuring that value that deserve consideration. The value of land can be seen in terms of:

1. its location as a site for production or consumption
2. the extent to which it can be used as collateral or leverage (as a commodity)
3. in terms of its value in culture (which is of particular importance for Indigenous lands).

1. Location value

The value of Indigenous lands understood in terms of location relates to land being the physical site of production or consumption (or both). Viewpoints that fall into this category focus on the need to develop industries or markets on Indigenous land, either by attracting external developers or starting up enterprises on the land. Economic development for Indigenous communities on the land can be generated from:

1. jobs generated and flow-on wealth through compensation or royalties and local spending in the case of external developments
2. through business profits and jobs generated in the case of Indigenous businesses
3. Indigenous equity established in external businesses where the two approaches are combined (joint ventures)
4. the liquidation of real assets and business.

The distinguishing feature of viewing land in this way is its focus on using or developing the land itself for economic gain. It focuses on the *use* value of the land which hinges on the resources and characteristics peculiar to its particular location. Strategies for economic development in this perspective broadly take three forms:

- Encouraging and engaging with external developments on Indigenous land, such as mining, agriculture, and large scale development projects
- Using funds from government, resource rental or the private sector to establish Indigenous businesses on Indigenous land to service local or external markets
- Joint ventures.

72 *ibid.*



External business on Indigenous land

Options for doing business on Indigenous land are primarily: mining, pastoralism, agriculture, and tourism.⁷³ Statutory provisions in land rights and native title legislation offer a mechanism for traditional owners and native title claimants or holders to engage with some of these industries.

For example, the right of consent in the ALRA (NT) requires traditional owner consent to be secured for mining on Aboriginal land. In a more limited way, the right to negotiate in the *Native Title Act (1993)* (NTA) gives native title claimants a procedural right to negotiate for the doing of certain types of future acts that will affect native title rights. Agreements can cover a range of matters including financial payments for compensation or 'resource rent', employment and training, preferential tendering for Indigenous businesses, community development, equity in the business and so on.⁷⁴

Under the ALRA (NT), traditional owners have the right to statutory mining royalty equivalents, and can also negotiate royalties above this minimum. Under the NTA, the property rights are weaker, being limited to a 'right to negotiate' within a set timeframe (6 months). After this time, if agreement has not been reached between the parties, the National Native Title Tribunal must arbitrate. There is also no provision for any share of mining royalties paid to government to be given to native title interests.⁷⁵ Despite these limitations, the right to negotiate and ALRA (NT) consent provisions provide a mechanism to negotiate for greater benefits and practical outcomes not mandated by the legislation.

Indigenous business on Indigenous land

Issues such as access to markets, the availability of capital for investment in Indigenous businesses and the options for viable enterprises on Indigenous land, given its location, must be examined prior to establishing Indigenous enterprises on Indigenous land. While there are potential enterprise activities associated with government funded initiatives, their long term funding cannot be assured so enterprise activity and viability must consider non government funding sources and activities.

Ideas for viable Indigenous businesses tend to centre on enterprises that are familiar to the mainstream economy including: the cattle industry,⁷⁶ fishing companies,⁷⁷ construction, agricultural enterprises, small businesses to service development project staff and Indigenous consumers like the Ngaanyatjarra

73 J.C. Altman, 'Indigenous communities and business: Three perspective, 1998-2000' CAEPR Working Paper No. 9/2001, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2001.

74 C. O'Fairceallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples', *AIATSIS Land Rights, Law: Issues of Native Title* Vol. 2 No. 35, 2004.

75 J.C. Altman, *op.cit.*

76 P. McEntee, 'Strengthening Community, Land & Enterprise: Indigenous Cattle Franchises', *Australian Prospect*, 2004; D. Fuller and E. Cummings, 'Indigenous Small Enterprise in Northern Australia: A Case Study of the Warai', *Journal of Small Business Management*, Vol. 41, No.1, 2003, pp109-115.

77 W.S. Arthur, 'What's new? The 1997 parliamentary inquiry into Indigenous Business' *CAEPR Working Paper No. 177/1999*, Centre for Aboriginal Economic Policy Research, Australian National University, 1999, p4.



airline,⁷⁸ community stores, and Indigenous experiential tourism where being on country is prized by consumers. Arthur⁷⁹ found that significant proportions of Indigenous businesses are concentrated within three industry areas: agriculture, construction and the retail sector. As I noted in the *Native Title Report 2004*, innovative options for Indigenous business are particularly important in areas that are not typically resource rich like areas that are the focus of mining interests.⁸⁰ Some suggestions are provided later on in this Chapter.

Investment partnerships on Indigenous land

Joint ventures encourage external investment in developing Indigenous business.⁸¹ Joint ventures combine external capital investment, technical expertise, management and business contacts with Indigenous skills, labour, land and water.⁸² The Central Land Council (CLC) considers that access to finance is a far more significant barrier to joint-ventures operating than the communal tenure of Indigenous land:

The lack of seed funding needed to bolster Aboriginal equity in these activities creates major issues for the viability of joint-venture activities. The experience of the CLC is that even when all elements of the joint-venture are negotiated, including 99 year lease arrangements, these joint-ventures fail because the Aboriginal partners have not been able to access finance to provide for additional equity in the business. The CLC considers that access to finance is a far more significant barrier to joint-ventures operating than tenure related issues.⁸³

Altman and Dillon propose a model to encourage joint ventures in which government funds are managed and required to be invested in a number of commercial projects which include a minimum Indigenous financial equity holding of at least 30%.⁸⁴ Profits would be shared annually on an equity basis between the government fund and Indigenous stakeholders; and after a set period of time, the project could be divested to Indigenous participants. This model is explored in more depth later on in this Chapter.

Observations

The strategies for using Indigenous land for Indigenous economic development as the location for consumption or production may not be viable in all areas of Australia and can vary depending on the fertility of the land. Land rights and native title land is generally considered to have low commercial productivity for

78 L.T. Udo-Ekpo, *The Aboriginal Economy in Transition: Inspiring Visions of the Future*, CM Digital, Adelaide, 2001.

79 W.S. Arthur, *op.cit.*

80 *Native Title Report 2004*, p68.

81 W.S. Arthur, *op.cit.*

82 Central Land Council Policy Paper: *Communal Title and Economic Development*, 2005, p11.

83 Central Land Council, *ibid.*

84 J.C. Altman, and M.C. Dillon, 'A Profit-Related Investment Scheme for the Indigenous Estate' *CAEPR Discussion Paper No. 270/2004*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2004.



purposes other than mining due to geographic remoteness from major trading centres, and/or poor soils and rainfall.⁸⁵

Alternatively, Indigenous businesses may turn a profit by building an external market for their goods or service on Indigenous lands, such as by cultural, eco or other forms of experiential tourism.⁸⁶ Such businesses will be confined to areas in which infrastructure are established. One final option for Indigenous business is to use Indigenous land as the site of production, but not the site of consumption. This would entail transferring the goods or service produced on country to markets located off Indigenous land – such as by exporting Indigenous art, trucking bush foods to cities for sale, or using the internet to mesh with potential consumers in other parts of Australia or the world.⁸⁷

2. Land as leverage

Another view of the value of land is as property which can then be used as security against loans for homes and businesses, leased to others to use for a fee (rent), or sold for profit. From this perspective, Indigenous land should be made 'fungible' – or able to be represented in a form that can be exchanged, such as title deeds – and entered into the real property market.⁸⁸ This is the view of land evident in the NIC Principles and related debate.

The distinguishing feature of this perspective is that it treats land as a commodity. It objects to the *inalienable* nature of most land rights land and of native title rights on the grounds that this inhibits the freedom of the owner(s) to freely contract to dispose of their property to the purchaser willing to pay the highest price, as other property owners can.⁸⁹ It also views the *communal* nature of Indigenous land as hindering the free dealing in land required by the real property market due to the time-intensive group consultation required.

Similar to looking at location value, the focus here is on the land itself as the key to economic development; neither take account of, or see value in the Indigenous use or valuing of the land. It seeks to make land detachable from its owners in order to be tradable where this is economically rational. Land as leverage is the bases for De Soto's theory of development discussed earlier. It is application of this perspective that interests Noel Pearson, when linking economic development to Indigenous land in Australia:

the reason that Indigenous Australians are unable to build capital is that they lack the necessary proprietary legal infrastructure to leverage the assets that they do have...Indigenous communities living on Indigenous lands (though we own 'property') are locked out of the Australian property system that enables capital formation. All of our assets, in the form of

85 E.K. Fisk, *The Aboriginal Economy in Town and Country*, George Allen and Unwin, Sydney and Australian Institute of Aboriginal Studies, Canberra, 1985; O. Stanley, 'The potential use of tax incentives for Indigenous businesses on Indigenous land', *CAEPR Working paper No. 17/2002*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2002.

86 J.D. Finlayson, 'Aboriginal employment, native title and regionalism' *CAEPR Discussion Paper No. 87/1995*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1995.

87 L.T. Udo-Ekpo, *op.cit.*, p86.

88 N. Pearson and L. Kostakidis-Lianos, 'Building Indigenous Capital: removing obstacles to participation in the real economy', *Australian Prospect*, Vol. 2, No. 3, 2004.

89 R. Edwards, 'Native Title: Dead Capital?', *Singapore Journal of Legal Studies*, 2003, pp80-115.

lands, housing, infrastructure, buildings, enterprises etc are inalienable and as a result, have no capital value.⁹⁰



However, Pearson is concerned to retain the inalienable title of Aboriginal land. He proposes increasing the fungibility of Indigenous land through simplifying the existing legal procedural requirements for granting leases to individuals on communal lands. While existing legislation allows for communal land to be leased to others, Pearson argues that the process is convoluted so 'inefficient property law unique to Indigenous people reduces valuable assets into valueless capital'.⁹¹ The process for selling and leasing land in existing land rights and native title legislation was examined in Chapter 2.

Observations

Strategies that rely on improving Indigenous economic status through Indigenous land advocated in, the land as leverage perspective, rely on the real property market. It is likely that these strategies will be successful only where there is land desired for property investment – not only to entice lessees or purchasers, but also to convince financial institutions that the land is valuable collateral against loans (that is, that the land may be easily sold if the loan is defaulted). Examples might include locations where Indigenous land abuts growing cities and towns that are land-hungry or the land is coastally located. The former was the experience of the Lhere Artepe Aboriginal Corporation representing Arrernte native title holders in Alice Springs. This was the first time commercial residential development has been agreed on native title land inside a municipal area. The traditional owners were able to negotiate a significant agreement with the Northern Territory Government which includes a development lease at no cost, with the first stage of land release currently being developed by a consortium that includes the Lhere Artepe.⁹²

3. Land as cultural value

Land can also be viewed within the framework of economic development as a cultural commodity. The value of Indigenous land for economic development in this view stems from Indigenous use of that land. The Aboriginal customary economy, continuing connection to land and practice of cultural norms in relation to country are things that might support economic enterprises. For example, wildlife harvesting, natural resource management, fishing, cultural tourism and art produced for sale. This perspective encourages the retention of the distinctive nature of Aboriginal ownership and use of land for the comparative economic advantage it gives Indigenous people in the mainstream markets. In addition, it supports the right of self-determination and the right of indigenous peoples to maintain a distinct culture.

Viewing land in this way takes account of Indigenous customary economic activity. This approach supports more diverse options for economic development that build on or are consistent with cultural practices. Strategies promoted in this perspective are based on continuing customary practices and the development of 'Indigenous' industries. Broadly, they are:

90 N. Pearson and L. Kostakidis-Lianos, *op.cit.*

91 N. Pearson and L. Kostakidis-Lianos, *op.cit.*

92 Productivity Commission, *Overcoming Indigenous Disadvantage Key Indicators 2005*, 2005, p11.22.



- Building on the comparative economic advantages Indigenous people already hold in certain products and industries.
- Developing the 'hybrid' economy.

Building on Indigenous culture

Arguably, to be economically successful, Indigenous businesses in remote areas needed to obtain a comparative economic advantage to make up for the small scale of their operation and costs of being so far from the main markets.⁹³ This comparative advantage might be conferred by proximity to a scarce resource or through utilising particular Indigenous skills that are in demand in the market place. For example, this could include the crayfish industry in the Torres Strait or Aboriginal art and cultural tourism industries. Understanding land in this way requires strategies to:

- a) improve Indigenous people's connection to the markets that already exist for products and services deriving from cultural practices on country
- b) strengthen Indigenous control of supply to and profit from these industries
- c) protect and promote cultural practices.

Current estimates indicate that tourism is worth around \$70 billion per year to the Australian economy and that around 90% of overseas visitors to Australia would like to have an Indigenous tourist experience while in Australia.⁹⁴ According to Tourism Australia, over 130,000 international visitors came to Australia last year to experience Indigenous culture and spent \$426 million on Indigenous tourism. Over 410,000 visitors, or 10 per cent of all visitors to Australia, said they experienced Aboriginal art and crafts and cultural displays and around 200,000 tourists visited an Aboriginal site or community. In 2002, Australians made around 730,000 visits to Indigenous cultural activities.⁹⁵ While these figures demonstrate the significance of Indigenous culture to the Australian economy, the ability to protect, nurture and promote Indigenous art and tourism products has highlighted many shortcomings for Indigenous people.

An example that demonstrates the need for greater Indigenous control and protection of Indigenous arts is the failure of current Australian intellectual property laws to recognise and protect Indigenous communal moral rights. Indigenous culture and intellectual property means Indigenous people's rights to their cultural heritage.⁹⁶ Indigenous art and culture are intrinsically intertwined. Where communities are custodians of particular cultural messages produced in art, their protection is not only important to the artist(s) but to the community from which the meaning is derived. Moral rights have provided some protection to individual artists for rights of:

93 E.K. Fisk, *op.cit.*

94 L. Allen, 'Black Art Gold Rush', *Background Briefing*, ABC Radio National, 25 September 2005, which can be accessed via <www.abc.net.au/rn/talks/bbing>.

95 See Tourism White Paper at <www.tourism.australia.com>.

96 For detailed analyses of Indigenous intellectual property refer to *Our Culture; Our Future* by T. Janke, a publication commissioned by the Australian Institute of Aboriginal and Torres Strait Islander Studies in 1999.



- attribution (which provides an artist's right to be named as the creator of a work)
- integrity (which means that the artist's work must not be used in a way that could damage the artists reputation or honour)
- against false attribution (which means another person cannot claim or be named as the creator of another artists work).

However, there are shortcomings in relation to protecting Indigenous rights. These shortcomings include failure to protect artists for more than 70 years (when culture is ongoing), protection for individuals only, and not for communities, and failure to protect oral history, Indigenous ecological knowledge or sacred sites.

John Oster of Desart, which provides support and services to Indigenous art centres in Central Australia, has raised concern that there are questionable practices being undertaken by commercial dealers in relation to their treatment of Indigenous art and Indigenous artists. Oster raises concern over regular unconscionable conduct, entrapment, legal duress and fraud. Oster believes that there are issues with artists being induced by social benefits that are not normally available in remote locations. Anecdotal evidence suggests that in some cases artists are producing works in poor conditions such as sheds and garages in high temperatures in Alice Springs and that they are not necessarily paid in terms of the value of their art works but are paid in 'slabs of beer', clothing, transport, and looking after the artist's family.⁹⁷

Developing the hybrid economy

This view builds on the work of Altman, who, as discussed earlier in this chapter, suggests that remote Indigenous communities are sustained by 'hybrid' economies comprised of customary, market and state components.⁹⁸ He sees a convergence in continuing Indigenous aspirations to live on, manage and make a living from being on country; global concerns with sustainable development and protecting biodiversity; and public policy objectives in relation to Indigenous socioeconomic status and the environment. He suggests this convergence could be harnessed in the form of industries like:

- State-sponsored Indigenous land management
- Indigenous arts produced on country
- Exports of harvested wildlife
- Carbon trading markets
- Coastal surveillance on behalf of State border patrol services
- Services exports such as eco and cultural tourism and recreational fishing or hunting
- Local sales of bush foods and wild game.

Altman suggests such industries would fulfil dual policy objectives: to generate real jobs and real income for Indigenous people; and effect sustainable land management of Australia's most bio-diverse regions. Such a model is already exemplified in the work of the 'Caring for Country' Unit of the Northern Land

97 Comments by John Oster, Executive Officer of Desart, on ABC Radio National, Background Briefing, 'Black Art Gold Rush', 25 September 2005.

98 J.C. Altman, *op.cit.*



Council.⁹⁹ Similarly, the native title representative body, the North Queensland Land Council, last year called for it to be granted a license to export native flora and fauna harvested by traditional owners to help stop the illegal trade, create employment for Indigenous people that encourages traditional practices, and ensure conservation.¹⁰⁰

Observations

Building on Indigenous comparative economic advantage will be most effective where Indigenous communities are located close to and have access rights to scarce resources; or where customary practice is maintained and the community is comfortable with commodifying that practice. For cultural tourism, this will be land where the local Indigenous community's culture and customary practices are strong, the area is accessible, and engagement with tourism is desired by the community.

For arts and crafts products for sale, land is less of a determining factor since the market has shown interest in modern Indigenous art made off country that reclaims and reinterprets Aboriginal culture, as well as 'traditional' art made through customary practice on country. At the same time, art that is made 'on country' offers communities a source of income and link to the mainstream economy in remote areas that have little else to attract external developers or sustain local businesses.

However, as I touched on earlier, intellectual property laws are currently inadequate to protect Indigenous knowledge – for example, ecological communal knowledge and traditional law about flora and fauna that might be used to develop new pharmaceuticals through bio-prospecting. Indigenous customary practices on country are not currently recognised by the state as a national benefit that should be subsidised or funded.

The legal landscape must also be considered in efforts to build on the hybrid economy. As was noted in Chapter 1, native title laws currently fail to allow native title holders to exercise their native title rights commercially. Rights are limited to the satisfaction of domestic or ceremonial consumption needs. Similarly, the ALRA (NT) does not and was not intended to provide Aboriginal people with economic or needs-related entitlements, such as mineral rights, commercial fishing rights, or rights to commercially harvest native fauna.¹⁰¹

While lack of recognition has proven a barrier to realising the potential for economic development regarding harvesting fauna, there are other barriers that should also be acknowledged. The cost of commercial licenses to harvest and sell wildlife and water is often prohibitive for Indigenous individuals and communities. Rights to carbon credits in any trading are currently presumed to accrue to the nation state, not individuals or communities. Without a change to the laws and subsidisation by government to address these issues, the legal landscape will continue to hinder economic development more than the physical landscape.

99 Northern Land Council, *Caring for country*. Available online at: <www.nlc.org.au/html/care_menu.html>, accessed 10 April 2005.

100 ABC NEWS ONLINE. 'Aborigines seek license to export native animals', 10 January 2005. Available online at: <www.abc.net.au/news/newsitems/200501/s1279433.htm>, accessed 11 January 2005.

101 J. Reeves, *Building on Land Rights for the Next Generation – Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Commonwealth of Australia, Australian Government Publishing Services, Canberra, 1998, p54.



Similarly, protecting Indigenous artists and artefacts from cheap imitations in the tourism industry remains problematic. The flooding of the market with fake artefacts made overseas has forced some Aboriginal communities across Australia to outsource their work in order to compete.¹⁰² Conversely, Indigenous art has enormous appeal in the mainstream art industry yet the artists are not necessarily enjoying the benefits that flow. The late Warangkula is one of many examples:

One of the original 1970s Papunya painters, he is believed to have sold his painting *Water Dreaming at Kalipinypa* in 1973 for \$150. It sold at Sothebys in June 1997 for \$210,000; three years later, it fetched \$486,500. He died, poor, seven months after that, in February 2001.¹⁰³

Examples like these not only illustrate the difficulties communities face in protecting their livelihood and meeting goals for development, but Indigenous culture is at risk of being bought and sold to the highest or even in some cases, the lowest bidder.

Creating incentives – banks, loans, homes and investment

As this Chapter has explored, there are many factors that influence economic development on Indigenous lands besides land tenure. These factors extend beyond the need for capital to, for example, access to financial services and market dynamics. Importantly, these factors should not be divorced from the socioeconomic conditions and indicators that characterise life on Indigenous lands. Arguably, the NIC Principles will affect just one of these factors, that is, access to capital, without an emphasis on sustainable outcomes. While capital is an important part of economic development, there are innovative strategies in place elsewhere in the world that should be explored for applicability here. A number of alternative proposals are suggested below that could be explored to promote economic development or effect increased home ownership without putting existing rights to land at risk. Recommendations relating to these proposals are provided at the end of this Chapter.

Overseas experience

In the United States, one of the policy goals of the federal Department of Treasury is to expand the capacity of financial institutions to provide credit, capital and financial services to under-served populations and communities.¹⁰⁴ The Community Development Financial Institutions Fund was created to promote economic development and community development through investment in and assistance to community development financial institutions (CDFIs). CDFIs are responsible for providing financial services (such as credit unions). The CDFI Fund promotes access to capital, investment and community development in the following ways:

102 S. Williams, 'Should a fake didgeridoo', *Australian Financial Review*, 29 July 2005, p3.

103 D. Jopson, 'Whitefella dreaming', *Sydney Morning Herald*, 15 November 2003.

104 CDFI Fund Vision and Mission statement. Available online at: <www.cdfifund.gov/overview/index.asp>, accessed 24 August 2005.



- by directly investing in and supporting and training CDFIs that provide loans, investments, financial services and technical assistance to under-served populations and communities
- through its New Markets Tax Credit Program by providing an allocation of tax credits to community development entities (CDEs) that enables them to attract investment from the private-sector and reinvest these amounts in low-income communities
- through its Bank Enterprise Award Program by providing an incentive to banks to invest in their communities and in other CDFIs
- through its Native [American] Initiatives, by taking action to provide financial assistance, technical assistance, and training to Native CDFIs and other Native entities proposing to become or create Native CDFIs.

Tax incentives

The New Markets Tax Credit Program may be of particular interest to Australian policy makers. It allows taxpayers to receive a credit against federal income taxes for making qualified investments in community development entities (CDEs) which are domestic corporations or partnerships that act as vehicles for providing loans, investments or financial counselling in low-income communities. The CDEs are required to demonstrate that they have a primary mission of serving, or providing investment capital for low-income communities or persons, and are accountable to the residents of the community that they serve.

Potential investors compete for the allocated tax credits worth over \$3.5 billion and the credits are staggered over 7 years. The credit investors receive tax credits of 39% of the investment (where the investor receives 5% p.a. in the first three years and 6% p.a. in the remaining four years).¹⁰⁵ Since its inception, the CDFI Fund has made \$729 million in awards to community development organisations and financial institutions. It is estimated that the New Markets Tax Credit program has attracted private-sector investments of around \$8 billion. This is an avenue worth exploring for Australian Indigenous communities on communal land. Indeed, the National Party of Australia has flagged it is interested in zonal taxation rates for people in depressed regional communities.¹⁰⁶ There is no reason why a tax credit incentive program could not also be extended to Indigenous low-income communities.

Shared equity

As this report and many others have highlighted, Indigenous Australians do not enjoy the income levels of non-Indigenous Australians. Therefore, besides the increased costs of building and maintaining a home in regional and remote locations, the ability of Indigenous peoples to meet these costs and/or service a loan is more difficult (should this type of service be available).

¹⁰⁵ New Markets Tax Credit program. Available online at: <www.cdfifund.gov/program/nmtc>.

¹⁰⁶ National Party politician Barnaby Joyce was quoted in news.com.au 'Joyce proposes cap on bush rates' on 29 August 2005 seeking zonal taxation rates for people in depressed regional communities to help stimulate economic growth, accessed online 29 August 2005.



The ACT Government is currently investigating the possibility of assisting low-income earners to own their own home through a shared equity scheme. This scheme would enable low income earners to buy a 60% share in their property with the bank owning the remaining equity. The ACT Government envisages that families with a combined income of \$70,000 or less could access the scheme and buy a percentage stake in the property. Households would be able to reassess their payments on a periodic basis and perhaps purchase a greater share in the future.

The ACT government hopes that this will be embraced by the community and that it will generate some competition between financial institutions to take part in the scheme. An arrangement such as this with governments and financial services (with appropriate incentives) could be considered in the current context, notwithstanding any variations between building costs and incomes between Indigenous and non-Indigenous people around the country.

Model for a profit-related investment scheme for Indigenous lands

The Centre for Aboriginal Economic Policy Research (CAEPR) has constructed a model to provide incentives for investment in Indigenous land, that they term the 'Indigenous estate'. According to CAEPR, the emergence of Indigenous interests and rights in land has not been accompanied by a co-ordinated government focus on policy and investment in Indigenous communities. Rather, an issues-based approach has been adopted coupled with under-investment in the management of Crown lands transferred to Indigenous ownership. According to CAEPR, this has exacerbated the situation that Indigenous landowners now face.¹⁰⁷

CAEPR see any investment scheme on Indigenous lands needing to satisfy the following characteristics:

- *Flexible and adaptable scheme*: given the diversity of views, histories and resources bases, the scheme should be able to take into consideration a multitude of Indigenous views.
- *Flexible and versatile administration*: Indigenous land rights and interests are still in a state of flux and the scheme would have to deal with a potential wide range of titles and interests.
- *Strategy must build on existing cultural capacity and develop corporate and financial management skills*: Indigenous owners may wish to maintain distinct customary rights. At the same time, understandings about western norms of good governance are needed.
- *Appropriate Incentive structures*: incentives of any scheme need to be in place for individuals and corporations to ensure that the risk is shared and to ensure that there are increased incentives to succeed for all involved.¹⁰⁸

107 J. Altman and M. Dillon, *op.cit.*, p1.

108 *ibid.*, p5.



CAEPR sees the need for alternative funding models based on outsourcing on a competitive basis. The Indigenous Profit Related Investment Program (IPRIP) is modelled on the Innovation Investment Fund (IIF) program operated by the federal Department of Industry, Tourism and Resources. The IIF was introduced to support commercialisation of innovation by small start up firms. The federal government has invested over \$220 million in nine funds and has attracted \$138 million in private sector investment since it began in 1998.

In comparing the two, CAEPR notes that the degree of risk and return are very different. CAEPR envisage that the monetary outlay and return on investment in Indigenous lands would be low, compared to the IIF projects, which are characterised by high risk and potentially extremely high returns. CAEPR note that very few start-up firms in IIF successfully survive beyond infancy. Out of nine funds in the program, only two have returned any cash to the government and that only 4 of the 65 companies that secured funding have returned any money.¹⁰⁹ The IPRIP proposal is that the federal government establish a series of funds for investment in partnership with Indigenous corporations in commercial development projects on Indigenous land. The role of the government would be twofold – as an investor, and as a regulator. The government would set up five funds, which, following a rigorous selection process, would be managed by a funds manager responsible for raising or contributing capital. Each fund would be required to participate in a number of commercial projects which include a minimum Indigenous financial equity holding of 30%. Profits would be shared annually on an equity basis between the government fund and Indigenous stakeholders, and after a set period of time, the project could be divested to Indigenous participants.

Financial modelling proposals for home ownership

As canvassed earlier, there is a significant financial burden associated with home ownership regardless of land tenure. Home ownership on communal, rural and remote lands carries with it extra characteristics that need to be acknowledged. Under commission from the Queensland Aboriginal Co-ordinating Council the Aboriginal and Torres Strait Islander Commission and the Queensland Department of Housing, Mark Moran has devised a number of financial models that take into consideration the unique circumstances of communities based on community owned lands.¹¹⁰ While comprehensive analysis of their suitability for communal lands would be required prior to adopting any of these models, they are outlined briefly below.

1. *Depreciated lease-to-purchase model*

In this model, it is estimated that the life cycle of a house in a remote community is 30 years. Therefore, it is argued that it should be possible to depreciate the initial construction value (say \$150,000) to zero over this period. With this scheme, an equity stake is gradually accumulated through payments until it meets the depreciated value of the house. In the United States, indigenous

109 *ibid.*, p6.

110 M. Moran, *Home Ownership for Indigenous People Living on Community Title Land In Queensland: Scoping Study Report*, Queensland Aboriginal Co-ordinating Council and the Aboriginal and Torres Strait Islander Commission, 1999.



housing is dominated by a lease-to-purchase program called the Mutual Help Home Ownership Opportunity Program.

2. Subsidised Mortgage Options

In this model, Moran suggests subsidised financing including interest-subsidised (or interest free) loans, up front payments, down payment subsidies and exemption from stamp duty.

3. Interest Free Mortgage Schemes

Under this model, the initial construction cost of the house is not depreciated but allowance is made for interest or inflation. An equity stake is gradually accumulated through payments until it meets the initial cost of the house.

4. Subsidised repayment schemes

Under this model, repayments required under various finance options could be subsidised through government rental assistance payments. This could be undertaken through a lease-to-purchase basis or some other modified program based on a repayment system.

5. Schemes to reduce building costs

This model recognises that there may be ways to cut down the cost of housing construction and therefore the amount that needs to be borrowed. While still adhering to national building standards, it may be appropriate to engage CDEP, family, group, and community labour (sweat equity) in the house construction. There may also be opportunities to use locally available materials, shared equity (as outlined above) or perhaps a co-operative self build program of around 10-12 people. The Canadian Rural and Native Housing Demonstration Program may be a useful model.

6. Non-Profit and Concessional Mortgage Schemes

This model suggests that government, non-profit groups and concessional lenders provide low interest rate home loans to borrowers. This model is based closely on the current Indigenous Home Ownership Programme administered by Indigenous Business Australia (and the Aboriginal and Torres Strait Islander Commission before it was dismantled).

7. Commercial lending institutions

This scheme considers the need for a guarantor, possibly through the government. In Canada, there are finance arrangements between families, community and the bank. Government makes a subsidy towards the construction costs, which is used by the community as a loan deposit. There are other programs that cap interest rates to 2%. All loans are government guaranteed.

Recognising commercial rights from Indigenous ownership

Finally, as I highlighted in the *Native Title Report 2004*, Indigenous people's participation in the mainstream economy should not be conditioned upon their ability to buy into it. Traditional owners should not be forced to purchase licenses to exercise their native title rights commercially. Another approach is required which recognises the commercial or economic rights that should flow from



Indigenous ownership of land and resources. Options that ought to be given consideration include:

- directing a proportion of catch/harvest profits or mining royalties to traditional owners as 'resource rental' (in recognising their traditional property right to the resources being exploited)
- subsidising the purchase of, or granting without a fee, commercial licenses
- providing an equity stake for traditional owners in development on Indigenous land
- granting seed funding for Indigenous enterprises
- offering contracting concessions to Indigenous businesses in development projects and other means of facilitating the exercise of commercial rights that flow from native title rights and interests.¹¹¹

Chapter summary – when one size does not fit all

In drawing analogies and commonalities between any strategies, including those outlined above, policy makers must be mindful not to pursue 'one size fits all' strategies where outcomes warrant differential approaches due to different circumstances. For example, the shared equity strategy outlined above operates from the basis that it is geared towards low income earners. As I have highlighted, many Indigenous peoples fall into this category. In that regard, it may be useful to apply to Indigenous and non-Indigenous peoples alike. In contrast, the NIC Principles are supposedly geared towards home ownership and stimulating the economy, yet the circumstances that facilitate these outcomes will vary markedly for a number of reasons, many of which are outlined in this Chapter.

Current Government language suggests that the Government seeks to 'normalise' the legal frameworks, opportunities and responsibilities of Indigenous peoples. While arguments promising Indigenous peoples equal ('normal') access to home ownership is seductive rhetoric, the ability of the NIC Principles to achieve this objective is another matter. A comprehensive strategy and policy framework to address economic development that is designed with the full participation of Indigenous peoples, and makes the goals of traditional owners central, is required. And it is important that the entire debate about land tenure must not overshadow governments responsibilities and obligations to address basic services, infrastructure and citizenship rights for Indigenous peoples living in remote communities on Indigenous land.

As this Chapter highlights, there are a multitude of theories regarding the necessary conditions for promoting economic development. These range from ideas that development goes through incremental phases to a point where traditional values and cultures are abandoned to make way for a modern society. At the other end of the spectrum there are views that modern and traditional customs and skills can be utilised simultaneously to promote economic development, in a way that enables Indigenous communities to freely decide their development future and maintain and promote traditional culture and

111 *Native Title Report 2004*, p64.



practice. It is important to keep in mind that the right to development requires that humans are at the centre of development goals and this is discussed in detail in the next Chapter.

The outcomes that the NIC and others seek to promote are diverse and include home ownership, capital accumulation, business investment and employment. In addition, there are many views about what problems communal ownership creates and what advantages individual ownership will provide.

I am of the view that there are differing levels of merit in the numerous proposals illustrated in this Chapter. However, critical to determining which proposal, or combination of proposals, are suited to Indigenous Australians and on Indigenous communally owned lands, is a human rights consideration.

Policy makers need to be clear about what outcomes they seek to achieve in any reform proposal and ensure that the goals are sustainable, realistic, consider the commercial and non-commercial value of Indigenous land and do not disenfranchise Indigenous Australian from our lands or drive us deeper into poverty. Indigenous peoples have a distinct connection to land and have fought tirelessly to have their ownership recognised in Australian law – with native title recognition occurring only 13 years ago. The value of land to Indigenous peoples is not merely monetary and its value for future generations must be assured.

Recommendation 2: Housing options

If Indigenous groups consent to leasing options, home ownership options may be supported through:

- extending the Home Ownership Programme administered by Indigenous Business Australia to offer affordable home loans over Indigenous communal lands
- establishing a ‘good renters programme’ for tenants in community housing on communal lands to accumulate equity through regular rent payments.

These initiatives need to be developed in genuine partnership with Indigenous land holders and must take account of the socioeconomic factors particular to communities on communal lands, including: annual incomes, existing infrastructure, building and maintenance costs, low land value, skill bases, health and life expectancy levels to prevent inter-generational debt.

These new initiatives must receive additional funding that is not drawn from existing Indigenous housing programs such as the Commonwealth Community Housing Infrastructure Program and Aboriginal Renting Housing Program.



Recommendation 3: Housing programs and human rights standards

That all governments ensure that Indigenous housing programmes are designed so that they are consistent with human rights obligations relating to progressive realisation and an adequate standard of housing. This requires that housing programmes are resourced and supported at a level commensurate with need and with targets and benchmarks established in collaboration with Indigenous peoples.



Leasing on Indigenous land: a human rights appraisal

Introduction

This report has focused on proposals for the leasing or alienation of Indigenous land, with a specific focus on the Indigenous Land Tenure Principles released by the National Indigenous Council (NIC). The purpose of this Chapter is to discuss these Principles from a human rights perspective, with a particular focus on the right to development.

The NIC Principles raise three important issues from a human rights and development perspective. First, is whether the NIC Principles pay sufficient regard to the full range of social, economic, cultural and political factors that impact on development outcomes in Indigenous communities. Second, is whether the principles empower Indigenous peoples by ensuring them the ability to participate effectively in decision-making that affects them. Third, is whether the policy framework that accompanies the NIC Principles gives sufficient regard to the right to an adequate standard of living and adequate housing, and accordingly contributes to a holistic response to these issues. As this Chapter sets out, the achievement of positive development outcomes in Indigenous communities and on Indigenous communal land will depend on how these issues are addressed.



Part I: The human rights context

The right to development and United Nations practice

At the international level, links between human rights and development have increasingly been acknowledged over the past twenty years.

In 1986, the United Nations (UN) General Assembly passed the Declaration on the Right to Development. This recognises development as a fundamental human right which is aimed at the full realization of all other rights.

This Declaration was a watershed in human rights law, drawing together the two separate international treaties on civil and political rights, and economic, social and cultural rights.¹ The Declaration states:

All human rights and fundamental freedoms are indivisible and inter-dependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights...²

Such an approach can provide a framework to guide economic and social development strategies within Indigenous communities. It recognises that rights relating to the protection of culture, non-discrimination and self-determination are inexorably linked and necessary to protect Indigenous peoples against development processes and outcomes that are exploitative, assimilationist or not beneficial. Similarly, the Declaration recognises that to ensure successful outcomes the process of development must give attention to the social, cultural and political context of a community. This is discussed in more detail later in this Chapter.

As with other human rights, the right to development sets out a framework of duty bearers, including States at a national level;³ and rights holders, including individual and their communities.

Within a human rights framework, duty bearers have a responsibility to respect, protect and fulfil human rights obligations⁴ with each of these obligations having a specific meaning. Respect requires that States refrain from interfering with the enjoyment of rights. The obligation to protect requires States to prevent violations of such rights by third parties. And the obligation to fulfil requires that States take appropriate legislative, administrative, judicial and budgetary steps towards the full realisation of rights.⁵

1 Dr Arun Sengupta, *The Right to Development as a Human Right*, 2000. Available online at: <www.hsph.harvard.edu/fxbcenter/FXBC_WP7--Sengupta.pdf>.

2 United Nations General Assembly, The Right to Development, 82nd plenary meeting, 12 December 1996, UN Doc A/RES/51/99, Preamble.

3 Dr Arun Sengupta, *The Right to Development – Report of the Independent Expert on the Right to Development*, Commission on Human Rights, September 2000, UN Doc E/CN.4/2000/WG.18/CRP.1. This category of duty holders relates to the emerging responsibilities of multi and trans-national corporations through their commitment to sustainable development and corporate responsibility. Please refer to the 2003 and 2004 Native Title Reports for a discussion of the principle of sustainable development.

4 Dr Arun Sengupta, *Fourth Report of the independent expert on the right to development*, Commission on Human Rights, 18-22 February 2002, UN Doc E/CN.4/2002/WG.18/2, para 34.

5 Each definition has been set out in the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997, para 6. Available online at: <www1.umn.edu/humanrts/instreet/Maastrichtguidelines_.html>, accessed on 29 September 05.



Australia, as a signatory to all of the key human rights treaties, has obligations to ensure these rights can be realised within a development context. This also requires that strategies aimed at economic and social development are not implemented without the effective participation of affected communities.

The close relationship between rights and development is supported by other recent developments at the UN. In 1993, the Vienna Declaration and Programme of Action was adopted by the World Conference on Human Rights and declared by the UN General Assembly. This Declaration clearly states that 'democracy, *development* and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing'⁶ and that policies must be developed at a national and international level to ensure the realisation of all of these rights. The Vienna Declaration further recognises:

the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development.⁷

In 1995, the Copenhagen Declaration on Social Development reaffirmed the commitments made in the Vienna Declaration and the link between human rights and development. This declaration established a new consensus that places people at the centre of concerns for sustainable development. It commits States to the eradication of poverty, achieving full and productive employment and fostering safe, stable and just societies for all.

Recognising the importance of human rights in a development context, the UN Secretary General undertook major reforms of the UN system in 1997. These reforms included integrating human rights into the development activities of all UN agencies and adopting a human rights based approach to development.⁸ Such an approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development and results in a development model that is based on:

- express linkage to rights
- accountability
- empowerment
- participation
- non-discrimination and attention to vulnerable groups.⁹

These reforms have been further supported by the adoption in 2003 across the United Nations system of the *Human Rights Based Approach to Development Cooperation – Towards a Common Understanding Among UN Agencies*. The Common Understanding has three principles, namely that:

- all programmes, policies and technical assistance should further the realisation of all human rights

6 United Nations General Assembly, *Vienna Declaration and Programme of Action*, ('Vienna Declaration') World Conference on Human Rights, 14-25 June 2003, UN Doc A/CONF.157/23. Italics added.

7 Vienna Declaration, para 20.

8 United Nations Secretary General, *Renewing the United Nations: A Programme for Reform*, 14 July 1997 UN Doc (A/51/950). Available online at: <www.un.org/reform/refdoc.htm>.

9 United Nations Office of the High Commissioner for Human Rights, *Human Rights in Development*. Available online at: <www.unhchr.ch/development/approaches-04.html>.



- human rights standards guide development outcomes across all sectors and be included in phase of programme development and implementation
- development cooperation contributes to improving the capacity of 'duty-bearers' to meet their obligations and of 'rights-holders' to claim their rights.¹⁰

The *Common Understanding* also identifies the following elements that are 'necessary, specific, and unique to a human rights-based approach' to development.¹¹

Text Box 1: Elements of a human rights based approach to development

- Assessment and analysis identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realisation of rights.
- Programs assess the capacity of rights-holders to claim their rights and of duty-bearers to fulfill their obligations. They then develop strategies to build these capacities.
- Programs monitor and evaluate both outcomes and processes guided by human rights standards and principles.
- Programming is informed by the recommendations of international human rights bodies and mechanisms.

Other elements of good programming practices that are also essential under a human rights based approach include that:

- (i) People are recognised as key actors in their own development, rather than passive recipients of commodities and services.
- (ii) Participation is both a means and a goal.
- (iii) Strategies are empowering, not disempowering.
- (iv) Both outcomes and processes are monitored and evaluated.
- (v) Analysis includes all stakeholders.
- (vi) Programs focus on marginalised, disadvantaged, and excluded groups.
- (vii) The development process is locally owned.
- (viii) Programs aim to reduce disparity.
- (ix) Both top-down and bottom-up approaches are used in synergy.
- (x) Situation analysis is used to identify immediate, underlying, and basic causes of development problems.
- (xi) Measurable goals and targets are important in programming.
- (xii) Strategic partnerships are developed and sustained.
- (xiii) Programs support accountability to all stakeholders.

10 United Nations, *The Human Rights-Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies*, United Nations, New York 2003. Available online at: <www.unescobkk.org/fileadmin/user_upload/appeal/human_rights/UN_Common_understanding_RBA.pdf>.

11 *ibid.*, p3.



The UN's focus on development and the eradication of poverty was also augmented with the establishment of the Millennium Declaration Goals in 2000. These goals are set out in the United Nations Millennium Declaration and are aimed at overcoming extreme poverty and addressing the health and well-being of the world's poorest groups. The Millennium Declaration states:

We are committed to making the right to development a reality for everyone and to freeing the entire human race from want. We resolve therefore to create an environment at the national and global levels alike – which is conducive to development and to the elimination of poverty.¹³

The effective participation of Indigenous peoples in decision-making that affects their rights and interests

Alongside these recent developments in development and human rights practice has emerged a focus in the United Nations on the importance of ensuring the effective participation of indigenous peoples in decision-making that affects them.

This requirement has been emphasised by the human rights treaty committees, such as the Human Rights Committee in relation to the application of Articles 1 and 27 of the International Covenant on Civil and Political Rights and also by the Committee on the Elimination of Racial Discrimination (CERD) in relation to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Most recently, obligations relating to the effective participation of indigenous peoples have been synthesized into principles relating to free, prior and informed consent.

Free, prior and informed consent

A working paper prepared for the UN Working Group on Indigenous Populations identifies that free, prior and informed consent requires that:

- No coercion or manipulation is used to gain consent
- Consent must be sought well in advance of authorization by the State or third parties for activities to commence or legislation to be implemented that affects the rights of indigenous peoples
- Full and legally accurate disclosure of information relating to the proposal is provided in a form that is understandable and accessible for communities and affected peoples
- Communities and affected peoples have meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project
- Communities and affected peoples are able to secure the services of advisers, including legal counsel of their choice and have adequate time to make decisions

12 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, p52.

13 United Nations General Assembly, United Nations Millennium Declaration, 55th Session, 18 September 2000, UN Doc A/RES/55/2. Available online at: <www.un.org/millenniumgoals/background.html>, accessed on 10 October 2005.



- Consent applies to a specific set of circumstances or proposal, if there are any changes to this proposal or to the circumstances this will renew the requirement for free, prior and informed consent in relation to the new proposal or circumstances
- Consent includes the right to withhold consent and say no to a proposal.

Informed consent applies not only to administrative acts and decisions about land use, but it also applies to the legislative process itself. CERD in General Recommendation XXIII called upon states parties to:

Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.¹⁴

The CERD decision of March 1999 in respect of the 1998 amendments to the *Native Title Act 1993 (Cth)* (the Ten Point Plan)¹⁵ demonstrates the importance of effective participation in changes to legislative rights and interests. The Committee stated that:

The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with the State party's compliance with its obligations under article 5(c) of the [ICERD].¹⁶

As a consequence, they called on the government of Australia to 'recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources'¹⁷ and stressed the importance of General Recommendation XXIII as set out above. The Committee further urged:

...the State party to suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.¹⁸

The Committee reiterated this view in its Concluding Observations on Australia's 13th and 14th periodic reports in March this year. Recommending that Australia 'reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all'.¹⁹

At the domestic level, the principle of free, prior and informed consent is built into the *Aboriginal Land Rights Act (Northern Territory) 1976 (Cth)* (ALRA (NT)). This is through the requirement that in carrying out any action regarding Aboriginal land, land councils must be satisfied that the traditional owners understand the nature and purpose of the proposed action, and, as a group, consent to it (s.23(3)(a)). These rights were supported in 1999 in the bipartisan report of the House of Representatives Standing Committee on Aboriginal and Torres Strait

14 CERD, n.21 above, para 4 (d).

15 Reproduced at the Appendix of the *Native Title Report July 1996-June 1997*: p169. Also available online at: <http://www.humanrights.gov.au/pdf/social_justice/native_title_report_97.pdf>.

16 CERD, *Decision in respect of Australia of March 1999*, CERD/C/54/MISC.40/Rev.2.

17 *ibid.*

18 *ibid.*

19 *ibid.*, para 16.



Islander Affairs (HORSCATSIA) into the ALRA (NT), titled *Unlocking the Future*.²⁰ This report emphasised the importance of informed consent in relation to land use decisions made under the ALRA (NT), and in particular in respect of any decisions to amend the ALRA (NT) itself. It recommended that:

Recommendation 1:

The *Aboriginal Land Rights (Northern Territory) Act 1976* not be amended without:

- traditional Aboriginal owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group giving their consent; and
- any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views.²¹

It is clear from ICERD, other international instruments, the procedures of international organisations²² and standards in the ALRA (NT) and recommendations by HORSCATSIA; that there is a well established requirement to obtain consent in respect of major changes to land rights and native title legislation. The failure to provide for such a process will potentially breach the principle of non-discrimination.

Free, prior and informed consent is also consistent with the right of self-determination which is recognised in key international covenants.²³ This right ensures that indigenous peoples are able to freely determine their political status and their own economic, social and cultural development objectives and recognizes the right of indigenous peoples to freely dispose of their natural wealth and resources. Indigenous control over development outcomes and natural resources has been upheld by United Nations committees in relation to resource and timber extraction. For example, the Committee on Economic, Social and Cultural Rights urged State parties “to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No.169.”²⁴

The important role of self-determination in achieving economic and social development outcomes is also recognized in the Declaration on the Right to Development and is demonstrated by the experience of North American Indian groups. As discussed below, North American Indian groups have achieved sustained economic and social development outcomes through exercising their right of self-determination and being able to control development processes that occur on their lands. In this way, self-determination builds on the right of

20 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future – The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, August 1999, Canberra.

21 *ibid.*, p xvii.

22 For example, the World Bank, the International Labour Organisation, and UN development agencies. See UN Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, New York January 2005, paragraphs 23-26 incl.

23 Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

24 A-I, Motoc, Tebtebba Foundation, Legal commentary on the concept of free, prior and informed consent, Working Group on Indigenous Populations, 21 June 2005, para 15, UN Doc. E/CN.4/Sub.2/AC.4/2005/2.



free, prior and informed consent by empowering indigenous communities to set their own agenda and determine their own futures.

The active participation of Indigenous peoples in decisions that affect their communities, not only relies on free, prior and informed consent but also on effective engagement between governments and Indigenous communities and organisations.

Engaging Communities

In August 2005, the Human Rights and Equal Opportunity Commission co-hosted a workshop with the United Nations Permanent Forum on Indigenous Issues to consider the key elements which underpin the engagement of governments and civil society with Indigenous communities. The text box below sets out guidelines for engaging with Indigenous peoples and communities based on human rights principles.

Text Box 2: Guidelines for engagement with Indigenous peoples

These guidelines were developed at the *International Workshop on Engaging with Indigenous Communities* which took part at the *International Conference on Engaging Communities* in Brisbane in August 2005.²⁵

It sets out principles for governments, the private sector and civil society to engage with indigenous peoples, including in the following contexts:

- Indigenous systems of governance and law;
- Indigenous lands and territories, including sacred sites;
- Policies and legislation dealing with or affecting indigenous peoples.

The guidelines for engaging with indigenous communities specifically include:

A Human Rights-Based Approach to Development

- All policies and programs relating to indigenous peoples and communities must be based on the principles of non-discrimination and equality, which recognise the cultural distinctiveness and diversity of indigenous peoples;
- Governments should consider the introduction of constitutional and or legislative provisions recognising indigenous rights;
- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives;

25 Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with Indigenous communities*, HREOC, Sydney, and United Nations, New York, 2005. Available online at: <www.humanrights.gov.au/social_justice/>. For further information about the International Conference on Engaging Communities, Brisbane, August 2005, see: <www.engagingcommunities2005.org/home.html>.



- Such participation shall be based on the principle of free, prior and informed consent,²⁶ which includes governments and the private sector providing information that is accurate, accessible, and in a language the indigenous peoples can understand;
- Mechanisms should exist for parties to resolve disputes, including access to independent systems of arbitration and conflict resolution;

Mechanisms for representation and engagement

- Governments and the private sector should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities;
- Indigenous peoples and communities have the right to choose their representatives and the right to specify the decision-making structures through which they engage with other sectors of society;

Design, negotiation, implementation, monitoring, and evaluation

- Frameworks for engagement should allow for the full and effective participation of indigenous peoples in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes;
- Indigenous peoples and communities should be invited to participate in identifying and prioritising objectives, as well as in establishing targets and benchmarks (in the short and long term);
- There should be accurate and appropriate reporting by governments on progress in addressing agreed outcomes, with adequate data collection and disaggregation;
- In engaging with indigenous communities, governments and the private sector should adopt a long term approach to planning and funding that focuses on achieving sustainable outcomes and which is responsive to the human rights and changing needs and aspirations of indigenous communities;

Capacity-building

- There is a need for governments, the private sector, civil society and international organisations and aid agencies to support efforts to build the capacity of indigenous communities, including in the area of human rights so that they may participate equally and meaningfully in the planning, design, negotiation, implementation, monitoring and evaluation of policies, programs and projects that affect them;

26 The elements of a common understanding of free, prior and informed consent, as identified at the *International Workshop on Methodologies regarding free prior and informed consent and Indigenous peoples* (UN Doc: E/C.19/2005/3, 19 January 2005) are set out in the *UN Workshop on engaging the marginalized: Background paper prepared by the Secretariat of the UN Permanent Forum on Indigenous Issues*. The workshop report identifies the main areas where the principle of free, prior and informed consent is relevant; what constitutes consent; the timeframes for seeking such consent; who may provide it on behalf of an indigenous community; how it should be sought; and procedures and mechanisms for oversight and redress.



- Similarly, there is a need to build the capacity of government officials, the private sector and other non-governmental actors, which includes increasing their knowledge of indigenous peoples and awareness of the human rights based approach to development so that they are able to effectively engage with indigenous communities;
- This should include campaigns to recruit and then support indigenous people into government, private and non-government sector employment, as well as involve the training in capacity building and cultural awareness for civil servants; and
- There is a need for human rights education on a systemic basis and at all levels of society.

Free, prior and informed consent and the Engaging Communities guidelines provide a clear framework for ensuring effective participation of Indigenous communities in decisions affecting their rights and interests. These standards can be considered in relation to engagement with Indigenous communities generally and in relation to the implementation of the NIC Principles through changes to State and Commonwealth land rights regimes.

Progressive realisation of economic, social and cultural rights and the right to housing

Article 8 of the Declaration on the Right to Development states that the realization of the right to development would ensure 'equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income', achieved through appropriate economic and social reforms and the eradication of all social injustices.

The International Covenant on Economic, Social and Cultural Rights sets out a comprehensive framework of human rights obligations relating to such matters. This includes:

- the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions²⁷
- the right of everyone to education, directed to the full development of the human personality and sense of dignity, strengthening respect for human rights and fundamental freedoms²⁸
- the right of everyone to the enjoyment of the highest attainable standard of physical and mental health²⁹
- the right of everyone to be free from hunger³⁰
- the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and the right of everyone to the enjoyment of just and favourable conditions of work.³¹

27 International Convention on Economic, Social and Cultural Rights, Article 11(1).

28 *ibid.*, Article 13(1).

29 *ibid.*, Article 12(1).

30 *ibid.*, Article 11(2).

31 *ibid.*, Article 7.



The Australian Government has ratified this Convention and committed to its realisation in a domestic context and through international co-operation.

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for:

The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and **housing** [emphasis added] and to the continuous improvement of living conditions.

The right to housing is an element within the right to an adequate standard of living and is recognised as central to the realisation of all economic, social and cultural rights.³² The right to adequate housing is also recognized in other international human rights instruments including; the Universal Declaration of Human Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination.

In 1995, the United Nations Special Rapporteur on Housing Rights provided guidelines for the realisation of the right to housing. These guidelines indicate that while the State is not required to build housing for the entire population, those individuals or groups who are homeless, inadequately housed or generally unable to meet their own housing needs are entitled to adequate housing, provided by the State.³³

Further, the right to housing is not merely a right to shelter and 'a roof over the head'. The right to housing requires an adequate place to live in peace, dignity and security. This is because housing is integrally linked to other human rights, including women and children's rights and the right to health and is recognised as a fundamental necessity to ensure health, wellbeing and security, consistent with other human rights.³⁴

ICESCR creates a number of obligations on States for the realisation of rights set out in the Covenant.³⁵ First, the Covenant requires that States take deliberate, concrete and targeted steps towards meeting their obligations and that these steps be appropriate to promoting the realisation of rights. The Covenant requires that rights under ICESCR be progressively realised. This obligation recognises that full realization of economic, social and cultural rights may not be achievable in a short period of time. The progressive realisation of these rights allows for flexibility and ongoing improvements. However, a minimum core obligation is expected of States who are signatories to ICESCR. For example, 'a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant'.³⁶

32 Office of the High Commissioner for Human Rights, The right to adequate housing (Art.11(1)), CESCR General Comment 4, Sixth Session, 1991. Available online at: <[www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument)>, accessed 30 September 2005.

33 Sachar, R., Special Rapporteur, *The Realisation of Economic, Social and Cultural Rights: The right to adequate housing*, Commission on Human Rights, UN Doc E/CN.4/Sub.2/1995/12, 12 July 1995, para 11.

34 General Comment 4, para 7.

35 International Covenant on Economic, Social and Cultural Rights, Article 2. Available online at: <www.unhchr.ch/html/menu3/b/a_ceschr.htm>, accessed on 4 October 2004.

36 United Nations Committee on Economic, Social and Cultural Rights, The nature of States parties obligations, General Comment 3, para 10, Fifth session 1990.



Part II: Applying human rights standards to the NIC Principles

Background

The Commonwealth Government has made formal commitments to the participation of Indigenous Australians in the development of policies affecting them. This has been confirmed in the *Aboriginal and Torres Strait Islander Act 2005* (Cth)³⁷ (ATSI Act) and recent commitments by the Council of Australian Governments (COAG). The ATSI Act aims to:

- (a) ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;
- (b) promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
- (c) further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
- (d) ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

Similarly in late June 2005, all Australian governments reaffirmed their commitment to 'advance reconciliation and address the social and economic disadvantages experienced by many indigenous Australians' at the meeting of the Council of Australian Governments.³⁸ This Communiqué from COAG commits to indigenous participation at all levels; engagement with representative organisations; flexible approaches and adequate resources to support capacity at the local and regional levels.³⁹ The Communiqué also recognised the importance of a learning approach to service delivery and policy development.

The ATSI Act and COAG Communiqué commit to Indigenous participation. However, the ATSI Act falls short of recognising Indigenous self-governance or self-determination which can help to ensure full and effective participation and shared ownership of policies and outcomes. In relation to the COAG Communiqué, it is important that Indigenous participation is not restricted only to issues relating to service delivery but applied more broadly to fundamental changes to the rights enjoyed by Indigenous Australians. This approach is particularly important in relation to the development of the NIC Principles and the extent to which Indigenous communities affected by the Principles.

In early November 2004, following the abolition of ATSIC, the Minister for Immigration and Multicultural and Indigenous Affairs announced the establishment of the NIC, a government appointed Indigenous advisory body. The purpose of this body was to provide advice to the Federal Government on Indigenous issues

37 This is the name of the Act that resulted from the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005*.

38 Council of Australian Governments, Communiqué, 25 June 2005, Canberra.

39 Council of Australian Governments, Communiqué, 25 June 2005, Canberra.



and was not intended to replace ATSIC and represent Indigenous Australians.⁴⁰ Its members were appointed for their expertise and experience in particular policy areas. In recognition of the limited role of the NIC, the Chair of the Council, Dr Gordon, has stated the need for effective consultation processes to minimise misunderstandings regarding land tenure issues and to receive broad ranging feedback.⁴¹ To date, such broad ranging consultation has not been conducted by the Commonwealth Government or the NIC on the land tenure principles.

Given the acknowledgement by the NIC of the need for further consultations with affected communities and the standards of effective participation set out above, it is essential that State and Commonwealth governments engage with Indigenous communities prior to the implementation of the NIC Principles. This engagement needs to be directed towards securing the free, prior and informed consent of Indigenous groups affected by proposals to amend their legislative rights and interests.

Free, prior and informed consent applies both to changes to legislative rights and also to decisions directly affecting the exercise of rights in land. That is, if traditional owners agree to legislative changes that implement a new leasing regime then traditional owners should still be able to exercise free, prior and informed consent in decisions to lease specific areas of land. However, Principle 4 of the NIC Principles puts this approach in doubt. It states that:

Effective implementation of these principles requires that:

- the consent of traditional owners should not be unreasonably withheld for requests for individual leasehold interests for contemporary purposes;
- involuntary measures should not be used except as a last resort and, in the event of compulsory acquisition, strictly on the existing basis of just terms compensation and, preferably, of subsequent return of the affected land to the original owners on a leaseback system basis, as with many national parks.

While this recognises the need for traditional owner consent, it qualifies this consent and allows for it to be overridden through compulsory acquisition. Arguably, adopting such an approach would not be consistent with free, prior and informed consent.

To observe human rights standards, traditional owners should be able to make effective decisions about leasing their land, consistent with the elements of free, prior and informed consent set out above. These elements allow for traditional owners' full participation in all aspects of assessment, planning, implementation and monitoring of a project. This includes the right to secure the services of expert advisers. In relation to leasing land for the purpose of home ownership and economic development, experts may include financial and legal advisers and business or community development experts. However, these experts should also aim to ensure that the skills, knowledge and expertise of traditional owners are developed in the process. This type of approach is consistent with capacity development and is discussed at length in the *Native Title Report 2004*.⁴²

40 Senator Vanstone, *National Indigenous Council appointed*, media release vIPS/064/04, 6 November 2004. Available online at: <www.atsia.gov.au/media/media04/v04064.htm>.

41 National Indigenous Council, above n.1.

42 *Native Title Report 2004*, pp39-53.



Traditional owners should also have adequate time and resources to ensure that they can successfully plan the conditions of leasing that are appropriate to their community and group. For example, traditional owners will have to consider the following questions. Do they want leasing opportunities to be available to Indigenous and non-Indigenous people? Will leases be available only to individuals or can businesses or government departments apply for a lease? How long will these leases be for and how much rent should be charged? How will the permit provisions such as those that apply on ALRA land in the Northern Territory be affected by the new leasing regime? Each of these questions will impact upon the communities who may decide to lease their land. Adequate time and resources are needed to ensure that communities can respond to the full raft of issues that arise.

Adequate timeframes for decision-making should be specified and protected through legislation. The leasing of land over long periods, such as 99 years which has been suggested in aspects of the debate, should provide for a mechanism whereby the conditions for the granting of a lease is reviewed so as to monitor the impact of the changes over time. Such review processes would not effect existing and contractual lease arrangements, but may enable the long term planning necessary to achieve sustainable outcomes and ensure that the enabling legislation provisions continue to reflect and support traditional owners' interests and ever changing communities. Review and planning timeframes similar to those practiced by local government councils might be a useful guide to consider.

More broadly, legislative safeguards must be put in place to ensure that traditional owners' interests in land are protected through clear, accountable and effective decision-making processes. As discussed in Chapter 2 in relation to the disposal of land under the *Aboriginal Land Rights Act 1983* (New South Wales) (ALRA (NSW)), substantial problems have emerged. These problems have occurred through the processes of disposing of land under the ALRA (NSW). This has happened as a result of complex but inadequate provisions for the disposal of lands, lack of resources for the Local Aboriginal Land Councils to assist communities to address social and economic wellbeing, lack of safeguards, and conflict within the objectives of the Act. These types of problems not only put Indigenous rights at risk but they would discourage lenders and developers because of the high level of complexity and risk.

It is essential that Government's seeking to implement changes to land rights or native title regimes, with the consent of traditional owners, must be careful to ensure that the legislation contains provisions that provide clear and effective decision-making processes; safeguards for the protection of Indigenous rights; and adequate resources so that land councils are able to effectively engage and advise on issues relating to the complex legal, economic, cultural and social implications of leasing Indigenous lands.

If the Federal Government's objective is to address Indigenous socioeconomic disadvantage and promote economic and social development in communities, it is essential that strategies to achieve this result be developed with the full participation of those affected. Implementing a leasing proposal such as the one set out in the NIC Principles without the effective participation and free, prior and informed consent of communities is not only inconsistent with fundamental human rights, but runs the risk of failure where it is not embraced by Indigenous peoples. In the case of communally owned lands this could result in a loss of



control, use and effective ownership of Indigenous lands. To ensure positive and sustainable outcomes, the Commonwealth should use this opportunity to develop policies for Indigenous economic and social development in partnership and cooperation with Indigenous communities.

The social, cultural and political framework for development

As noted above, developments in the UN and human rights system have been directed towards achieving improved economic and social outcomes. This framework promotes respect, protection and fulfilment of all human rights within the development process; and recognises the importance of the social, cultural and political context within development strategies.

This approach to economic development is reiterated through a sustainable development approach to business and economic activity. The sustainable development 'triple bottom line' requires that businesses and corporations not only give attention to the profit margin but also focus on the social and environmental impact of their activities. This approach has been discussed in the 2003 and 2004 Native Title Reports.⁴³

The broader social, cultural and political context of Indigenous communities appears not to have been adequately considered in the development of the NIC Principles. The section below briefly addresses some key considerations relevant to the Principles, across the social, cultural and political framework of Indigenous communities.

The social framework

The private purchase of a home or creation of a business enterprise relies on individuals being empowered to access loans, understand financial and contractual obligations and have a saving regime. Leasing, disposing of land to gain capital or to use as collateral in Indigenous communities relies on Indigenous individuals, families and communities having the resources and capacity to manage these financial processes. Without these skills and capacity, leasing or mortgaging of Indigenous land will have limited long term benefits and may in fact result in substantial loss of Indigenous lands, indebtedness and entrenched poverty.

As discussed in Chapter 3, sustainable home ownership requires a stable and adequate individual income to service debt; access to financial institutions; and a strategy to address the high cost of housing against the low value of land in remote communities. Similarly, successful businesses require the capacity to identify viable business options for a particular area of land; access to finance through demonstrated business and financial management skills; and the skills to use the Indigenous community's market advantage in a way that is not exploitative.

43 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, Chapter 1 for a more detailed discussion of sustainable development. Available online at: <www.humanrights.gov.au/social_justice/ntreport03/index.htm>.

See *Native Title Report 2004*, Chapter 1, pp70-75 for a discussion of private sector obligation in relation to sustainable development agenda. Available online at: <www.humanrights.gov.au/social_justice/ntreport_04/1/Consultations.html#toc5>.



It is these skills and the infrastructure necessary to provide it, such as education, housing, health care, community infrastructure and employment, which must be established for Indigenous communities to be able to successfully achieve economic outcomes. Strategies for economic development must be holistic and not only provide a mechanism to generate capital, but also ensure the infrastructure, skills, capacity and resources necessary to manage this capital are present in Indigenous communities and organisations. Matters such as health care, housing, education and employment are not only areas of need but are fundamental human rights that remain unmet in many remote Indigenous communities.

The NIC Principles are aimed at addressing economic and social disadvantage in Indigenous communities by providing an opportunity for individual home ownership and business enterprise on communal lands. However, the NIC Principles focus only on the tenure arrangements for leasing land and provide no guidance as to how the social framework of Indigenous communities can be improved. While the NIC may consider that the Principles fit within a broader framework of Commonwealth and State policies aimed at improved social and economic outcomes, the failure to build links between the Principles and broader policy objectives, casts doubt on whether these Principles will work effectively in practice. More detailed analysis of the Principles, against other Commonwealth and State policies, must be undertaken before changes are made to legislation that are aimed at implementing the NIC Principles or some other leasing scheme.

The impact of the broader social context of communities will also effect Indigenous owned business enterprises. These enterprises cannot be established by simply creating a business enterprise. It will also be necessary to ensure the skills, knowledge and work readiness of Indigenous people in the communities is established. To adequately support successful Indigenous business enterprises, focused attention must be given to building up the social framework of a community. This could be achieved in connection with business enterprises through training and employment and improved services and infrastructure. This support must be effective, long term and designed and delivered in consultation with the community.

Consistent with the right to development and the 'triple bottom line' approach in sustainable development, it is desirable for business enterprises to seek to design business strategies that help ameliorate, the social issues affecting a community. For example, a negotiated mining agreement that includes favourable employment opportunities for traditional owners, is unlikely to deliver actual employment unless it includes a training and education scheme which allows traditional owners to become work ready.

This is not to suggest that business or economic enterprises are required to solve the social issues in a community. Instead it requires that business development strategies also include a careful analysis of the social framework of a community; identifying opportunities for the business or enterprise to address social issues that create obstacles to the economic participation of people living within the community. This approach benefits both the community and the business enterprise by enhancing the community's capacity for economic participation.

However, to fully address longstanding social issues in Indigenous communities a partnership approach between government, the community and the business enterprise is essential. Within this partnership, States retain the primary



responsibility for satisfying economic, social and cultural rights such as education, community infrastructure, health services and housing in Indigenous communities. Housing or Indigenous home ownership is a central objective of the NIC Principles and will be discussed in more detail later in this Chapter.

Further, the social framework of Indigenous communities is far more than the sum of essential services such as health, housing, education and employment. The social framework of a community is based on the networks, relationships and trust that exist among a group of people. It is these elements that also contribute to improved outcomes in communities.

Social capital recognises that social norms, networks and trust relationships such as those that exist between families and friends, school communities, ethnic, religious and community groups and even firms and government can have a beneficial impact on life indicators. Such indicators include enhanced health, better educational outcomes, improved child welfare, lower crime rates, reduced tax evasion and improved government services and responsiveness.⁴⁴

In the seminal work on social capital and its links to community development, Robert Putnam examined two communities in Italy. One community had strong civic networks and social engagement, while the other had limited civic engagement, lawlessness and ineffective governance. Putnam concluded that prosperous and stable communities:

... did not become civic simply because they were rich. The historical record strongly suggests precisely the opposite. They have become rich because they were civic. The social capital embodied in norms and networks of civic engagement seems to be a precondition for economic development, as well as for effective government.⁴⁵

Social capital has also been recognized by the World Bank as an important basis for poverty alleviation and sustainable economic and human development and is being incorporated into World Bank community development projects.⁴⁶ The importance of social capital has also been identified by the Australian Productivity Commission, through its reports into gambling, competition policy and the job network. Following up on these reports the Productivity Commission released a research paper in 2003 to assist public discussion on the important role of social capital in supporting improved economic and social conditions in communities and helping to inform public policy development.⁴⁷

Research into Indigenous social capital in Australia, identifies four characteristics of social capital unique to these communities.⁴⁸ First, the spiritual, emotional and historical connection of Indigenous groups to their land is the central feature of Indigenous social capital. Based on this connection to land, the second feature of Indigenous social capital is the sense of community and identity that is

44 Productivity Commission *Social Capital: Reviewing the concept and its Policy Implications*, Commission Research Paper, pix. Available online at: <www.pc.gov.au/research/commres/socialcapital/socialcapital.pdf>, 2003.

45 R. Putnam, (1993), *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton, NJ, Princeton University Press, p3.

46 <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTTSOCIALCAPITAL/0,,menuPK:401021~pagePK:149018~piPK:149093~theSitePK:401015,00.html>>.

47 Productivity Commission, *op.cit.*

48 J. Bennett, *Indigenous Enterprise, Social Capital and Tourism Enterprise Development: Lessons from Cape York*, PhD Thesis, School of Tourism and Hospitality, Faculty of Law and Business, La Trobe University, Melbourne, 2005.



developed amongst a group of people who belong to and share a connection with the same area of land. And within this community the norms of reciprocity, structures of relationships and interconnectedness further reinforce community and a sense of belonging.

The third characteristic is access to resources which in Indigenous communities has been traditionally determined by relationship to the land. However, the shift in resource supply from the land to missions, wages and welfare has weakened community structures. Finally, the ability to influence change or community empowerment is created by all of the other elements of Indigenous social capital and enables Indigenous communities to influence events and control their own destiny. In other words, it allows communities to be self-determining.

Within an analysis of Indigenous social capital it can be argued:

...that Indigenous empowerment or the *perceived ability to influence change*, rather than being an *element* of an individual's sense of community, is instead created by a sense of community, clarifying the connection between social capital and empowerment.⁴⁹

This demonstrates that to address Indigenous disadvantage, Indigenous communities must be empowered to participate. This requires a policy approach directed towards communities and not just focused on individuals.

The NIC Principles, which recommend that inalienable communal interests in land be maintained in such a form as 'to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands' is in contrast to the notion of development of social capital. Similarly, the Prime Minister has given preliminary support to the Principles by endorsing home ownership on communal lands and 'individual aspiration as a driving force for progress... in all sections in the Australian community'.⁵⁰ Such a perspective is inconsistent with research focusing on social capital, which argues that the erosion of community and shared networks is undermining the progress of society.

In addition to the social framework of a community, cultural and political issues can have a substantial impact on achieving improved economic and social outcomes in Indigenous communities.

The cultural framework

As discussed in Chapter 3, the Indigenous peoples' cultural characteristics and association with lands can be an important commodity. The unique nature of Indigenous connection to the land provides the basis for economic enterprises such as wildlife harvesting, natural resource management, fishing, cultural tourism and art produced for sale. This cultural framework provides Indigenous communities with an important market advantage but will only be maintained if Indigenous communities can protect their rights and interests in land in way that supports the ongoing exercise and enjoyment of culture.

Such enjoyment is upheld by international human rights standards which create obligations on government and business enterprises. Article 27 of the International Covenant on Civil and Political Rights provides:

49 J. Bennett, (2005), p140

50 Prime Minister, the Hon. John Howard MP, *Address at the National Reconciliation Planning Workshop 30 May 2005*, Old Parliament House, Canberra. Available online at: <www.pm.gov.au/news/speeches/speech1406.html>, accessed 19 August 2005.



In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or, to use their own language.

This right is upheld, to some extent, in Australian law by land rights and native title legislation. These laws provide a framework for recognising and protecting Indigenous cultural interests in land. They create mechanisms for the protection of cultural sites of significance and processes for negotiating 'outsiders' access to, and use of land. These laws recognise the communal nature of Indigenous connection to and ownership of land and the concomitant structure of communal decision-making for the use and disposal of those lands.

However, the greatest value of Indigenous culture is drawn from the connections to community, family and country. These ties give Indigenous people identity and a place and people to which they belong. Family, community and country bound together through a shared culture, are the basis for Indigenous identity and relationships. Every effort should be made to ensure that Aboriginal peoples and Torres Strait Islanders can protect and nurture their languages, traditions, families and communities. Healthy communities and vibrant cultures provide the basis for the empowerment and energy of Aboriginal and Torres Strait Islanders both now and into the future.

Also, the unique culture of Indigenous communities throughout Australia enhances the broader cultural context of the nation. This has recently been noted by Minister Vanstone:

We do need to understand the richness, diversity and strength of Indigenous culture. We need to understand that when Indigenous Australians take on aspects of our culture they are not necessarily discarding their own. They are in fact, walking in two worlds.

Sometimes it amazes me how many people expect Indigenous Australians to understand and take on our culture, when so few of us even bother to begin to understand theirs.⁵¹

This is an important acknowledgement which recognises the contribution of Indigenous cultures to the fabric of the Australian nation and also recognises the need for greater understanding of Indigenous Australians. However, this understanding should not only include an appreciation of the diversity of culture within Australia but should also translate into the adequate recognition of rights and policies designed to support and uphold cultural identity.

While the NIC Principles acknowledge the importance of culture by allowing for the underlying inalienable, communally owned title to be maintained; long term leasing provisions such as 99 year leases will in practice limit the use of land and possibly erode the Indigenous cultural framework which is embedded in land. Also, the emphasis in the Principles on preserving inalienable title, but only in such a way as to maximise benefits to individuals and families, potentially threatens communal ownership of land.

As discussed in Chapter 3 in relation to the World Bank's experience in land titling throughout the world, economic development that disregards the cultural context of a community can lead to unforeseen problems and be ultim-

51 Minister for Immigration and Multicultural and Indigenous Affairs, *Address to the National Press Club, 23 February 2005*. Available online at: <www.atsia.gov.au/media/speeches/23_02_2005_pressclub.htm>.



ately unsustainable. Similarly, studies throughout the world, including the North American Indian experience of governance and economic development (discussed below) and the growing research linking social capital to prosperous communities, demonstrate that strong culture, communities and economic prosperity are inextricably linked.

The political framework

Land rights legislation recognises that the rights of Indigenous communities are largely based on communal ownership and decision-making structures. However, this political framework is seen by members of the NIC as one of the key obstacles to economic development and home ownership within Indigenous communities. For example, Warren Mundine has commented that ‘...the idea, in the Australian context, of unlocking the economic potential of the indigenous land base by shifting some of the control away from communal entities, with their problematic governance, and in favour of forms of individual ownership’ should be pursued. He continues by noting that ‘it is more likely to be the communal rather than the inalienable aspects of the indigenous land tenure arrangements that may be the problem.’⁵²

This view is in contrast to the findings of the North American Indian Economic Development project; and the rights of Indigenous peoples recognised at the international level. These systems recognise the fundamental importance of active and effective community governance models. In the case of Indigenous societies these governance models are communal in nature to reflect and ensure consistency with the social and cultural framework of communities.

North American Indian experience

The Harvard Project on American Indian Economic Development⁵³ found that effective tribal governance structures are the key to sustainable economic development within North American Indian communities. That is, communities that have strong governance structures and are able to exercise self-determination are able to achieve significant social and economic improvements. These governance structures are largely based on existing Indigenous decision-making structures and aim to achieve a ‘cultural match’ with these processes.

The Harvard Project identifies five key areas for effective governance. They include:

- *Sovereignty*: Major decisions about governance structures, resource allocation and development are in the hands of Native American Indians.
- *Governing institutions*: Self-rule is not enough, it has to be exercised effectively through stable rules and keeping community politics out of day to day business and administration. Fair dispute resolutions mechanisms have to be maintained.
- *Cultural match*: Governing structures need to have credibility within Indian society and resonate with indigenous political

52 W. Mundine, quoted in *The Australian*, 18 February 2005, p1.

53 A comprehensive analysis on the work of the Harvard Project on American Indian Economic Development and its implications in an Australian context was undertaken for the 2004 *Native Title Report*, pp24-30.



culture. They also must be accepted by the community or group as a legitimate governing institution. Legitimacy is achieved through cultural match, effective governing institutions and outcomes.

- *Strategic thinking*: The project identified the importance of developing long term strategic thinking and planning taking account of assets/opportunities and priorities/concerns.
- *Leadership*: Finally, the project identifies the need for Indigenous leadership that can envisage a different future, recognise the need for foundational change, are willing to serve the groups interest instead of their own and can communicate the vision to the rest of the group.

The research by the Harvard Project has found that factors listed above must be underpinned by self-rule or self-determined economic development which appears to be a necessary condition for economic success on indigenous lands.⁵⁴ That is, self-determination or self-governance is the crucial feature of the North American Indian experience. The findings of the Harvard Project clearly state:

We have yet to find a case of sustained, positive reservation economic performance where someone other than the Indian nation is making the major decisions about governmental design, resource allocations, development strategy and related matters. In case after case, we have seen development begin to take hold when Indian nations move outsiders from decision-making to resource role and become primary-decision makers in their own affairs.⁵⁵

Self-governance can be understood in terms of: who is deciding how government funding for service delivery to communities is spent? Who is deciding whether to allow development on indigenous lands and what regulations will govern this activity? Who is determining the structure and purpose of indigenous governing institutions? If, Indigenous communities determine these issues a strong foundation for self-governance exists. If on the other hand, government determines these issues, self-governance declines.

However, the Harvard Project notes that these processes can be shared through a partnership mechanism which is based on equality. For example, cooperative agreements can be reached between Indigenous governing organisations and government agencies on land management or natural resources. However, these agreements must be negotiated between governments, including Indigenous governments or governing organisations, rather than agreements based on consultations with Indigenous communities.⁵⁶

It can be understood from the North American experience that self-governance or self-determination, has two important outcomes. First, it is a process of recognising the inherent rights of Indigenous communities to be self-governing. Second, this recognition produces important practical outcomes through improved social and economic development outcomes in communities. The importance of self-determination from both a rights and development perspective is also reflected

54 S. Cornell, 'The Importance and Power of Indigenous Self-Governance: Evidence from the United States', paper presented at *Indigenous Governance Conference* 3-5 April 2002, Canberra.

55 *ibid.*, p4.

56 *ibid.*



in the right of self-determination through UN human rights standards. This is discussed in more detail below.

The findings of the Harvard Project are being considered and applied in an Australian context. The Centre for Aboriginal Economic Policy Research and Reconciliation Australia have established a national Indigenous Community Governance Research Project.⁵⁷ The aim of this project is to explore Indigenous governance issues in an Australian context, providing greater understanding of the concepts of governance and support for Indigenous communities in their efforts to build their own governance structures and processes. The importance of this project and the important role of governance issues in an Indigenous context was reiterated in the most recent *Overcoming Indigenous Disadvantage*⁵⁸ report by Steering Committee for the Review of Government Service Provision.

The report notes that during consultations with Indigenous communities and academics, there was widespread understanding of the links between good governance and positive outcomes in Indigenous communities. Elaborating on this link, participants in the consultations noted that good governance includes many of the characteristics identified by the Harvard Project listed above, including the recognition and exercise of self-determination.⁵⁹

The findings in North America contradict the view that communal ownership and decision-making is inconsistent with economic and social development. Indeed, the experience of North American Indian communities reinvigorates the purpose of communal ownership and decision-making and re-recognises the importance of self-determination, particularly in those communities seeking to achieve improved economic and social development outcomes.

Self-determination

The right of self-determination is recognised in key international covenants.⁶⁰ These conventions state 'all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. This includes the right of all peoples to 'freely dispose of their natural wealth and resources.'

The right of self-determination is also an important feature of the Declaration on the Right to Development. Article 1(2) of the Declaration states that 'the human right to development also implies the full realization of the right of peoples to self-determination'.

Through the North American experience and international human rights standards, it can be seen that self-determination has a dual purpose. First, it provides a framework by which Indigenous political structures can be recognised as the basis for appropriate and legitimate governance in Indigenous communities.

The second purpose of self-determination as recognised within the right to development is the importance of community and an individual's responsibility and role within this broader context. Self-determination recognises the import-

57 More information about the Indigenous Community Governance Research Project is available at: <www.anu.edu.au/caepr/governance2.php#com>.

58 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage, Key Indicators 2005*, Commonwealth of Australia, 2005.

59 *ibid.*, p11.37.

60 Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.



ance of community and values Indigenous communities as a place of belonging and identity.

The impact of social, cultural and political issues on economic development highlights the value of a holistic approach to economic development. Linked to this approach are the right to development and the sustainable development agenda recognise that development is a fundamental human right.⁶¹ Such recognition requires that the groups or communities who wish to achieve greater social or economic outcomes or who are subject to economic development proposals must be at the centre of the process and be enabled and empowered to control the process and its objectives. They must have effective participation in the process and be able to exercise free, prior and informed consent in decisions affecting them.

Changes to legislation to enable leasing as proposed in the NIC Principles should ensure that as much as possible Indigenous people retain control over their lands even while these lands are leased.

I will now address one issue that is linked to the social, cultural and political framework – housing and home ownership. Because of its emphasis in this debate I will comment specifically on the links and relationship between home ownership and the human right to adequate housing.

Home ownership and the right to housing

Individual home ownership is a key objective of the NIC Principles. However as discussed in Chapter 3, the Principles focus only on land tenure issues and fail to address the substantive social and economic obstacles to home ownership for Indigenous communities. Given this failure it is likely that home ownership schemes in Indigenous communities will only benefit a small number of individuals who have the financial resources and capacity to manage home ownership obligations.⁶²

For the majority of Indigenous Australians, especially those living in remote areas sustainable home ownership is likely to remain out of reach. This is particularly while unemployment, poor health, low levels of education and high risk behaviours continues to feature in Indigenous communities. Compounding these key socioeconomic indicators, adequate housing is fundamental for a stable and safe community environment. However, housing does not have to be in the form of home ownership but can include rental accommodation or community owned housing. Indeed for disadvantaged groups, housing through home ownership may be unachievable and therefore must be provided through other mechanisms. The obligation on Australia (the State) to provide housing to disadvantaged groups arises from the Government's commitment to a number of international human rights treaties which are discussed above. This commitment is important within Indigenous communities in Australia and especially in remote communities where there is an acute housing shortage.

Based on a multi-measure model that examines homelessness; overcrowding; affordability; dwelling condition; and connection to services, including power,

61 Declaration on the Right to Development, Article 2(1).

62 J.C. Altman, C. Linkhorn, and J. Clarke, *Land Rights and Development Reform in Remote Australia*, Discussion Paper No.276/2005, Centre for Aboriginal Economic Policy Research.



water and sewerage – Indigenous housing needs in Australia is substantial. Indigenous and non-Indigenous comparable housing indicators show that:

Indigenous people have high rates of homelessness with a rate of 1% of the population compared to 0.25% of the non-Indigenous population...

and:

Overcrowded Indigenous houses account for some 10.2% of all Indigenous households, compared to a rate of only 1.7% for non-Indigenous households.⁶³

New South Wales and Queensland consistently record high levels in each of the measures. However, current Indigenous housing needs are most acute in the Northern Territory where 2.4% of the Indigenous population are homeless; 34.7% live in overcrowded households; 19.4% of Indigenous households are under affordability stress and 25.2% of houses require major repair or replacement. The estimated cost of meeting the existing housing need in the Northern Territory is \$806 million. Additional spending is also needed to upgrade housing-related infrastructure: costs estimates range from between \$98 to \$400 million.⁶⁴

This analysis is against current housing needs and fails to take account of a rapidly increasing Indigenous population. Research by the Centre for Aboriginal Economic Policy Research (CAEPR), focusing on just one community in the Northern Territory; estimates that the population of this area will increase by 88% in the next twenty years. Such increases will lead to a shortfall of 760 houses, with an estimated cost of \$167.2 million.⁶⁵

From the information summarised above, it is clear that Indigenous communities in Australia face a serious housing shortage across a number of indicators including homelessness and inadequate housing. Furthermore, the income of families within these communities is inadequate to address these problems. These communities clearly have a claim on the Australian Government under a range of international conventions to ensure that their housing needs are met.

Commonwealth, state, territory and local government agencies work with Indigenous communities to provide safe, healthy and sustainable housing for Indigenous people.⁶⁶ The Commonwealth provides substantial support to Indigenous housing remote areas through the Aboriginal Renting Housing Program (ARHP);⁶⁷ Community Housing and Infrastructure Program (CHIP); and the National Aboriginal Health Strategy (NAHs).⁶⁸ In addition, state and territory governments also contribute funding for Indigenous housing.

63 Northern Territory Government, *National Issues in Indigenous Housing 2004/05 and Beyond*, Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, September 2004, p12.

64 Northern Territory Government, 2004, p14.

65 Summarised in J.C. Altman, C. Linkhorn and J. Clarke, *Land Rights and Development Reform in Remote Australia*, Discussion Paper No.276/2005, Centre for Aboriginal Economic Policy Research, Australian National University.

66 Australian Government, Department of Family and Community Services, *Indigenous Housing/Accommodation*. Available online at: <www.facs.gov.au/internet/facsinternet.nsf/indigenous/programs-housing_accommodation.htm>.

67 Australian Government, Department of Family and Community Services, *Aboriginal Renting Housing Program*. Available online at: <www.facs.gov.au/internet/facsinternet.nsf/indigenous/programs-arhp.htm>.

68 Australian Government, Department of Family and Community Services, *Community Housing and Infrastructure Project*. Available online at: <www.facs.gov.au/internet/facsinternet.nsf/indigenous/programs-chip.htm>.



However, a number of reports raise concerns that the level of funding provided by Commonwealth and state/territory governments may be inadequate to meet the increasing Indigenous housing shortage. A report by the Northern Territory government notes that Commonwealth funding for ARHP and CHIP have not increased substantially since 1991. The report notes that ARHP funding has remained fixed at around \$91 million since 1991, with the exception of a \$29 million increase of funding over three years from 2002-2005.⁶⁹

Similarly, the report claims that funding for both the Community Housing and Infrastructure Project (CHIP) and the National Aboriginal Health Strategy (NAHS) has increased from a combined amount of \$138 million in 1991-92 to \$172 million in 2002-2003. Again this increase can largely be attributed to a short-term increase of an extra \$40 million in 2002-03 which was allocated for municipal services through CHIP.⁷⁰ Northern Territory government funding for Indigenous housing has not increased substantially since 1999, remaining at approximately \$4 million per annum.⁷¹

To ensure Australia complies with its obligations to provide adequate housing to Indigenous communities through progressive improvements and targeted action, attention needs to be directed towards increasing State, Commonwealth and Territory funding for Indigenous housing commensurate with identified housing need. This is necessary to ensure that progressive realisation, aimed at reducing inequality is achieved. Progressive realisation is not achieved if indicators worsen and more people are without adequate housing.

A key objective of the NIC Principles is to increase Indigenous home ownership on communally owned lands in the Northern Territory this may include remote communities on ALRA (NT) land. While this proposal may be intended to help alleviate the housing shortage in these communities, it is unlikely that many people in remote areas will be able to support the financial obligations of home ownership. Therefore, ongoing commitment by State, Territory and Commonwealth Government's for the provision of housing and infrastructure to remote communities is essential. As discussed above, funding across all sectors of Government may need to be reassessed to ensure it keeps pace with housing needs in these communities.

If the NIC Principles are acceptable to traditional owners communities, it will be important to ensure that ongoing government responsibility for the provision of housing and infrastructure is maintained at necessary levels. The funding required to support home ownership schemes should not be diverted from existing resources such as ARHP and CHIP as I am concerned that these resources are inadequate to meet existing needs and should not be depleted through new initiatives. Funding to support home ownership schemes should come from other Commonwealth government sources.

69 Northern Territory Government, *National Issues in Indigenous Housing 2004/05 and Beyond*, Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, September 2004; Commonwealth Grants Commission, (2001). *Report on Indigenous Funding 2001, Supporting Material*, Commonwealth of Australia, Canberra p122-123 shows that ARHP funding has remained at \$91 million between 1996-97 and 1999-00 and between 2000-01 and 2002-03.

70 Northern Territory Government, *National Issues in Indigenous Housing 2004/05 and Beyond*, Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, September 2004, p6.

71 Indigenous Housing Authority Northern Territory, *Annual Report 1999-2000; 2000-01; 2002-03; 2003-04*, Northern Territory Government, Darwin.



Chapter summary

The findings of Chapter 2 demonstrate that there is a discriminatory potential for the NIC Principles is real and should be implemented with caution. Also, while the NIC Principles seek to change communal ownership arrangements to increase individual leasehold interests, existing land rights and native title legislative regimes already have the capacity to provide for individual leasing arrangements. Despite this, the potential to realise economic or home ownership outcomes for Indigenous communities has not been fully explored and there has been a lack of government policy directed towards using Indigenous land to achieve these outcomes within existing frameworks.

The NIC Principles are of concern when measured against international human rights standards and strategies for economic and social development. The NIC itself is not an Indigenous representative body – it does not speak on behalf of Indigenous Australians. The NIC Principles are not endorsed nor have they been developed with effective participation and free, prior informed consent of the people affected by these principles. Such a process disempowers the communities for whom the Principles are intended to benefit. This is inconsistent with important human rights standards and inappropriate from an economic and social development perspective. This perspective, first and foremost requires that communities who are the subject of policies for economic and social development must be active participants and the central driving force behind the policies.

Secondly, the NIC Principles focus only on land tenure as a basis for economic and social development outcomes. They fail to draw links between the social, cultural and political framework of communities, even to the extent that these issues will impact on the viability of leasing arrangements in communities. That is, the NIC Principles have not considered how the social conditions in Indigenous communities will support sustainable home ownership and business enterprise. Nor have the principles addressed the cultural context of communities in terms of communal ownership of land and the economic benefits that can be gained from Indigenous communities' strong connection to their land through an ongoing and vibrant culture. Such benefits may include customary harvesting, eco-tourism and art and crafts. Instead, the Principles focus and prioritise the welfare of the individual and do not address how the wellbeing of the community can be improved. The NIC Principles situate the political context of communities in negative terms. Communal ownership and decision-making are seen to be inhibitors of economic and social development outcomes. This view fails to appreciate how the experience amongst North American Indians where governance and self-determination are recognised as fundamental to economic and social development in communities, can be applied in an Australian context. Further, there is a lack of analysis and rigour in the debate regarding the extent to which communal ownership inhibits economic development.

Finally, it is useful to note that there are other opportunities for economic and social development on Indigenous land which have been discussed in more detail in Chapter 1. *The Native Title Report 2004* explored these issues and focused on promoting economic and social development outcomes for native title holders and claimants through the native title system. It aimed at creating economic and social development through existing or enhanced rights and interests in land.



This Report set out a new framework for agreement making and proposed new objectives for the native title system.

However, the native title system also creates a number of barriers to Indigenous economic development. The test for recognition and extinguishment and the limitations these standards impose on native title rights and interests create limitations for economic development. Specifically, the failure of the native title system to recognise commercial rights in natural resources and the highly specific nature of rights, limit the benefits that can be gained through native title negotiations. In addition, the right to negotiate process creates additional barriers through limited timeframes and mediation processes. Recommendations 4 and 5 below address these concerns.

It is clear that better economic and social outcomes in Indigenous communities are goals shared by most Indigenous leaders and communities. It is also clearly a goal of commonwealth, state and territory governments. However, how to achieve this outcome is more contested. What is essential are open and informed dialogues around creating economic and social development in Indigenous communities; be they urban, rural or remotely based. Such dialogue must be based on the active participation of traditional owners, Indigenous communities and their representative organisations. It must also be driven by respect for rights, cooperation and a learning approach to policy development. A policy framework or legislative change developed from anything less is unlikely to alter the socioeconomic conditions affecting Indigenous communities.

Recommendation 4: Leasing regime consent

That no state, territory or commonwealth legislation affecting the rights and interests of Aboriginal and Torres Strait Islander peoples in land be amended without traditional Aboriginal or Torres Strait Islander owners in the relevant jurisdiction first understanding the nature and purpose of any amendments and through their representative organisations, ie land councils, PBCs and NTRBs giving their consent to legislative change.

Recommendation 5: Leasing regime conditions

If traditional owners consent to legislative changes that implement a new leasing regime, as set out in recommendation 4, changes should address each of the following and be developed with the effective participation of land councils and traditional owners:

- a) comprehensive provisions setting out the necessary elements of decision-making for leasing land
- b) providing legislative protection for the right to free, prior and informed consent to the grant of each lease
- c) establishing safeguards such as Land Council oversight of the decision to ensure Indigenous control of the decision



- d) statutory independent legal and financial advice and support for strategic planning
- e) statutory timeframes which allow for informed consent to be reached by the traditional owner group
- f) statutory review period which would allow for the renegotiation of conditions under which leases can be granted
- g) provisions that make the dealing void if it is the product of unconscionable conduct, duress, fraud or undue influence.

Recommendation 6: Leasing regime resources

Decisions to lease land must be accompanied by adequate resources. Land councils or statutory authorities participating in the process must be provided with additional resources to support the new leasing regime. These resources may be used to provide independent legal and financial advice and to engage community development or strategic planning experts to assist communities plan the impact and outcomes of leasing on their communities.



Recommendations

The following recommendations address concerns raised in this Report in relation to: implementing leasing proposals through changes to state, territory or commonwealth land rights legislation; Indigenous housing and home ownership schemes; and the native title system.

Recommendation 1: Native title policy reform

That State, Territory and Commonwealth governments alter their native title policies to:

- increase funding to NTRBs and PBCs
- adopt and adhere to the National Principles on economic development for Indigenous lands set out in the *Native Title Report 2004*. These principles are that native title agreements and the broader native title system should:
 1. Respond to the traditional owner group's goals for economic and social development
 2. Provide for the development of the group's capacity to set, implement and achieve their development goals
 3. Utilise to the fullest extent possible the existing assets and capacities of the group
 4. Build relationships between stakeholders, including a whole of government approach to addressing economic and social development on Indigenous lands
 5. Integrate activities at various levels to achieve the development goals of the group.

Recommendation 2: Housing options

If Indigenous groups consent to leasing options, home ownership options may be supported through:

- extending the Home Ownership Programme administered by Indigenous Business Australia to offer affordable home loans over Indigenous communal lands
- establishing a 'good renters programme' for tenants in community housing on communal lands to accumulate equity through regular rent payments.



These initiatives need to be developed in genuine partnership with Indigenous land holders and must take account of the socioeconomic factors particular to communities on communal lands, including: annual incomes, existing infrastructure, building and maintenance costs, low land value, skill bases, health and life expectancy levels to prevent inter-generational debt.

These new initiatives must receive additional funding that is not drawn from existing Indigenous housing programs such as the Commonwealth Community Housing Infrastructure Program and Aboriginal Renting Housing Program.

Recommendation 3: Housing programs and human rights standards

That all governments ensure that Indigenous housing programmes are designed so that they are consistent with human rights obligations relating to progressive realisation and an adequate standard of housing. This requires that housing programmes are resourced and supported at a level commensurate with need and with targets and benchmarks established in collaboration with Indigenous peoples.

Recommendation 4: Leasing regime consent

That no state, territory or commonwealth legislation affecting the rights and interests of Aboriginal and Torres Strait Islander peoples in land be amended without traditional Aboriginal or Torres Strait Islander owners in the relevant jurisdiction first understanding the nature and purpose of any amendments and through their representative organisations, ie land councils, PBCs and NTRBs giving their consent to legislative change.

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Annexures



Glossary of Terms

Alienate: 1. To dispose of, often used in relation to an interest in land. Alienation may be formal (such as by grant or conveyance), informal and involuntary (such as compulsory acquisition by the state). 2. To sell, lease or otherwise dispose of under the Crown lands Acts or any other Act relating to alienation of Crown land: (NSW) *Crown Lands Act 199* s.172(1). See also Acquisition; Conveyance; Crown land; Grant.

Acquisition: 1. Obtaining ownership or possession of a thing. 2. The thing acquired. 3. Territory acquired through cession, conquest, or settlement. See also Cession. 4. Transferral of land or of any interest in land to the government. Acquisition generally must be on *just terms* or compensable: for example Commonwealth Constitution s.51(xxxi).

Collateral: 1. A subsidiary, concurrent, subordinate or additional security as opposed to primary security deposited by the borrower. 2 An item of value offered as security or pledged to secure a note or bond payable, to which the lender is entitled if the borrower does not repay the debt as agreed. The collateral agreement is not subordinate to the original debt but rather, are additional or parallel to the original obligation: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 364.

Crown Grant: Grant of land title by the Crown; a deed of grant issued in the name of the then current monarch conveying to the grantee some portion of land in fee simple. A Crown grant is the first alienation of crown land and often excludes or reserves from the grant some part of the land such as minerals or roads, so that those parts remain vested in the Crown.

Crown land: 1. Broadly, land that is the property of the Commonwealth, a State or Territory 2. Any land the property of a State, a Territory or the Commonwealth, whether reserved or dedicated for any public use or not. It does not include any estate or interest granted by the government to any person.

Dealing: An act of buying or selling property, goods or commodities, or the registrable instrument that evidences such an act.

Devise: A gift or disposition of an interest in land made by a will. Real property is devised, personal property is bequeathed.



Dispose of: In general terms, to pass into the control of another person, to alienate, relinquish, part with, or get rid of. In respect of real estate, to get rid of, sell, or leave by will.

Estate: Any interest, charge, right, title, claim, demand, lien or encumbrance at law or in equity.

Fiduciary: A person who is under an obligation to act in another's interest to the exclusion of the fiduciary's own interest. A fiduciary cannot use his or her position, knowledge or opportunity to the fiduciary's own advantage, or have a personal interest in, or inconsistent engagement with a third party, unless fully informed and free consent is given.

Fee simple: The estate in land which is 'the most extensive in quantum, the most absolute in respect to the rights it confers of all estates known to law...and for all practical purposes of ownership, it differs from the absolute dominion of a chattel in nothing except the physical indestructibility of its subject': *Commonwealth v New South Wales* (1923) 33 CLR 1. Originated in feudal times as an estate capable of inheritances (a 'fee') which could descend to any heirs whatsoever of the original grantee.

Foreclosure: A mortgagee's right to take absolute title and possession of mortgaged land in full satisfaction of the mortgage debt, extinguishing the mortgagor's equity of redemption. A right to foreclose only arises after the due date for repayment of the principal has passed (unless the terms of the mortgage permit the remedy to be exercised on interest becoming overdue). In relation to Torres title, by state a mortgagee may apply for a foreclosure order to the Registrar-General if certain conditions are met.

Freehold: A type of land-holding originating in feudal times, being land held by a freeman and subject to services and incidents thought to be appropriate to the status of a freeman. At common law, there are three types of freehold estate: fee simple, fee tail and the life estate. Freeholds are of uncertain duration, unlike leasehold.

Fungible: New Latin *fungibilis*, from Latin *fungi* to perform: being something (as money or a commodity) one part or quantity of which can be substituted for another of equal value in paying a debt or settling an account. Example: oil, wheat, and lumber are **fungible** commodities.¹

Gearing: In respect of investment, the ratio of borrowed capital to equity. Investors may borrow to augment the financing of an investment such as residential property. When the interest on such a loan is greater than the income produced by the investment, the gearing is described as negative. Negative gearing presently attracts special tax concessions.

Headlease: A lease between an owner of a freehold estate in land and a tenant, where the tenant has granted a sublease to a third party.

1 Taken from legal dictionary at Find Law <<http://dictionary.lp.findlaw.com/>>.



Inalienability: Characteristic of a right of benefit that the courts will not allow the holder to transfer to another. Native title rights are inalienable except to the Crown or members of the Indigenous people to whom property may be alienated under traditional law and customs, where those people continue to observe and acknowledge such laws and customs: *Mabo v Queensland (No.2)* (1992) 175 CLR 1; 107 ALR 1.

Just terms: A qualification on the power of the Commonwealth Government to acquire land or property from private companies or individuals for purposes for which the government has the power to make laws: Constitution 1901 s.51(xxxi). In exercising this power, the government must do so on just terms. The general requirement of acquisition of property on just terms requires the terms to be actually just and not merely to be those terms which the parliament considers to be just: *P J Magennis Mtd v Commonwealth* (1949) 80 CLR 382 at 397. Just terms should provide fair, timely compensation approximating the market value of the property acquired as far as is possible, and reflecting a general notion of fairness in all the circumstances: *Peveill v Health Insurance Commission* (1991) 32 FCR 133; 104 ALR 449. The general requirement of just terms is the provision of a price which a reasonably willing vendor and purchaser would have negotiated at the date of the acquisition: *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495.

Landlord: In general, an owner of land or an estate in land (including a leasehold estate) who lets premises to another person under a tenancy arrangement.

Lease: An interest in land given by a landowner (landlord or lessor) to another person (lessee or tenant) for a fixed duration such that the lessee has the right to exclusive possession of the premises.

Leasehold: A holding of land for a term of years or for a periodic term, including under grants from the Crown.

Leverage: 1. The extent of the use by an investor of borrowed funds for investment. The greater the proportion of borrowed funds to the value of the investment, the greater the leverage. 2. The ratio of loan capital to share capital in a company.

Mortgage: A lender's interest in land, secured over the land of the borrower, including a charge on property for the purpose of securing money or money's worth: (NSW) Conveyancing Act 1919 s.7. A personal contract for a debt secured by an estate: given over personal property.

Mortgagee: A person who lends money to another where the loan is secured by taking a mortgage over the borrower's property.

Mortgagor: A borrower of money who gives a mortgage over his/her property to secure a mortgage debt in favour of the mortgagee.

Property: A word which can be used to describe every type of right (that is, a claim recognised by law), interest, or thing which is legally capable of ownership, and which has a value. Property is either real (that is, an interest or estate in land) or personal (that is, interests in things other than land including chattels and choses in action).



Real estate: Commonly used to mean land and whatever is attached to land (such as houses, trees, fences and the like).

Real property: Land and interests in land.

Sublease: A lease of a leasehold interest (known as the headlease). A sublease may be in respect of the whole or part only of the premises, and must terminate before the termination date of the headlease. The sublease must not conflict with the terms of the headlease.

Tenant: In modern times, the term is used almost exclusively to refer to a person who holds land under a tenancy from a landlord, whether for a term of years, or under a periodical tenancy, or at will, or at sufferance. During the currency of the tenancy, a tenant is entitled to exclusive possession of the premises the subject of the tenancy against all the world, including the landlord.

Tenure: To hold, possess, or occupy. The mode of holding land...All land in Australia and the United Kingdom that has been granted by the Crown, even that in fee simple, is held by tenure rather than by absolute ownership, as the Crown alone is the source of all tenure. Land held under native title is an exception, since native title rights do not derive from any Crown grant: *Mabo v Queensland (No.2)* (1992) 175 CLR 1; 107 ALR 1.

(Note: Terms provided have been sourced from Butterworths Australian Legal Dictionary 1997 and is in no way intended to be considered as legal advice).



NATIONAL INDIGENOUS COUNCIL

Friday, 3rd June 2005

Indigenous Land Tenure Principles

Statement by Magistrate Sue Gordon, Chairperson

Members of the National Indigenous Council (NIC) will meet with Land Councils/Native Title Representative Bodies (3 June 2005) to advance their discussions on the issues surrounding Indigenous land tenure.

At its February 2005 meeting the NIC commenced consideration of how the now considerable Indigenous land base might be best used to facilitate the economic development of Indigenous people, including individual home ownership and entrepreneurship. The NIC agreed that further consultation was necessary to inform its own advice to the government.

Land Councils and Native Title Representative Bodies are a primary source for advice and the Native Title conference provided the opportunity to consult with all parties at one time. The NIC is grateful to the organizers for allowing this to happen. The meeting today will be used as one means of informing the NIC's views in this area, including on the issue of land tenure.

The Council recognised the cultural significance of land to Aboriginal people. It should also be noted that tenure arrangements are only one piece of a much larger jigsaw of social and economic factors.

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“These bigger challenges remain the primary obstacles to economic independence and to wealth generation on Indigenous land,” Chairperson of the NIC, Magistrate Sue Gordon AM, said.

“The NIC has agreed that some change is necessary for Indigenous Australians to be able to gain improved outcomes from their land base into the future. It is a precondition, not a panacea,” Mrs Gordon said.

“The meeting will focus on a set of draft Indigenous land tenure principles that have been formulated by NIC members as a starting point for obtaining the views of interested stakeholders. The NIC will further consider these principles with the feedback we receive today at our next meeting, before formalising our advice to government,” Mrs Gordon said.

“While we have differing views within our community on how to improve the variety of special Indigenous land tenures across Australia, we recognise that collective ownership is inherent in Aboriginal custom and we believe in the fundamental importance of securing that underlying land title for future generations.”

“We welcomed the Prime Minister’s acknowledgement earlier this week that communal interest in and spiritual attachment to land is fundamental to Indigenous culture – and that, rather than winding back or undermining native title or land rights, what everyone is interested in is how to make the land work better for families and communities wishing to build economic independence and wealth. It is clear that retaining the land base should not disadvantage individuals by frustrating their aspirations for individual home ownership and wealth creation,” Mrs Gordon said.

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[Note: The NIC Possible Indigenous Land Tenure Principles are attached.]

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DRAFT WORKING DOCUMENT
NATIONAL INDIGENOUS COUNCIL

POSSIBLE INDIGENOUS LAND TENURE PRINCIPLES

1. The principle of underlying communal interests in land is fundamental to Indigenous culture.
2. Traditional lands should also be preserved in ultimately inalienable form for the use and enjoyment of future generations.
3. These two principles should be enshrined in legislation, however, in such a form as to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.
 - An effective way of reconciling traditional and contemporary Indigenous interests in land – as well as the interests of both the group and the individual – is a mixed system of freehold and leasehold interests.
 - The underlying freehold interest in traditional land should be held in perpetuity according to traditional custom, and the individual should be entitled to a transferable leasehold interest consistent with individual home ownership and entrepreneurship.
4. Effective implementation of these principles requires that:
 - the consent of the traditional owners should not be unreasonably withheld for requests for individual leasehold interests for contemporary purposes;
 - involuntary measures should not be used except as a last resort and, in the event of any compulsory acquisition, strictly on the existing basis of just terms compensation and, preferably, of subsequent return of the affected land to the original owners on a leaseback system basis, as with many national parks.
5. Governments should review and, as necessary, redesign their existing Aboriginal land rights policies and legislation to give effect to these principles.



Summary of free, prior and informed consent

Obligations to ensure effective participation exist in nearly all the main human rights treaties. These obligations have been synthesised into the principle of free, prior and informed consent of indigenous peoples.

The international law basis for the principle of free, prior and informed consent is set out in a legal commentary prepared for the Working Group on Indigenous Populations. This commentary is available at: http://www.un.org/esa/socdev/unpfi/documents/FPIC_2005_Com%20on%20Human%20Rights.pdf

The key elements of free, prior and informed consent are summarised below and have been set out in a report from the UN Permanent Forum on Indigenous Issues in May 2005. This report is available at: http://www.un.org/esa/socdev/unpfi/4session/4doc_secr.htm

Key elements of free, prior and informed consent¹

1. What?

Free – should imply no coercion, intimidation or manipulation;

Prior – should imply consent has been sought sufficiently in advance of any authorisation or commencement of activities and respect time requirements of indigenous consultation/consensus processes;

Informed – should imply that information is provided that covers (at least) the following aspects:

- a. The nature, size, pace, reversibility and scope of any proposed project or activity;
- b. The reason(s) or purpose of the project and/or activity;
- c. The duration of the above;
- d. The locality of areas that will be affected;
- e. A preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
- f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
- g. Procedures that the project may entail.

¹ Permanent Forum on Indigenous Issues (PFII), *Key elements of the principle of free, prior and informed consent*, PFII, New York, 2005.



Consent

Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

2. When?

Free, prior and informed consent (FPIC) should be sought sufficiently in advance of commencement or authorization of activities, taking into account Indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

3. Who?

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, indigenous peoples, UN Agencies and governments should ensure a gender balance and take into account the views of children and youth as relevant.

4. How?

Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.

5. Procedures/Mechanisms

- Mechanisms and procedures should be established to verify FPIC as described above, including mechanisms of oversight and redress, such as the creation of national mechanisms.
- As a core principle of FPIC, all sides of a FPIC process must have equal opportunity to debate any proposed agreement/development/project. "Equal opportunity" should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in indigenous language(s) as appropriate, or through any other agreed means on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples or an impact on their rights to their territories and/or natural resources.
- FPIC could be strengthened by establishing procedures to challenge and to independently review these processes.
- Determination that the elements of FPIC have not been respected may lead to the revocation of consent given.



Chronology of events in native title 1 July 2004 – 30 June 2005

This table includes summaries of every native title determination that occurred during this period, and notable or interesting agreements; it does not include every Indigenous Land Use Agreement (ILUA) registered or other native title agreements made over this period, due to the large volume. A snapshot of applications, determinations and ILUAs from this period is provided at the end of this table.

Date	Event/summary of issue
<p>27 August 2004 <i>Native title determination</i></p>	<p>Wanjina-Wunggurr Wilinggin Native Title Determination No 1 <i>Neowarra v State of Western Australia</i> [2004] FCA 1092 – Native title exists in parts of the determination area – litigated determination. Native title is held by the Wanjina-Wunggurr Community, including rights of exclusive possession in some areas and non-exclusive rights including the right to: camp, use traditional resources, manufacture traditional items and hunt and fish for the purpose of satisfying their personal, domestic or non-commercial communal needs.</p>
<p>7 September 2004 <i>Native title determination</i></p>	<p>Darug People <i>Gale on behalf of the Darug People v Minister for Lands</i> (Unreported, FCA 2 September 2004, Madgwick J) – Native title does not exist – litigated determination.</p>
<p>8 September 2004 <i>Native title determination</i></p>	<p>Karajarri (Area B) <i>Nangkiriny v State of Western Australia</i> [2004] FCA 1156 – Native title exists in parts of the determination area – Consent determination.</p>



Date	Event/summary of issue
<p>8 September 2004 <i>Native title determination (continued)</i></p>	<p>The Federal Court makes the 'consent determination' of native title in the terms agreed to by the parties.¹</p>
<p>11 October 2004 <i>Australian Agricultural Company reaches agreement over native title interests through MOU</i></p>	<p>MOU achieved over 'Headingly' property Australia's largest beef producer, Australian Agricultural Company (AACo) and the Waluwarra/Georgina River people sign an agreement settling access and traditional activities on AACo's north-western Queensland flagship property, 'Headingly'. The memorandum of understanding (MOU) acknowledges the Waluwarra/Georgina River People as the traditional owners of the area. The MOU provides for protection of the Waluwarra/Georgina River people's significant sites on the pastoral land and their access to country to pass on culture to younger generations.²</p>
<p>29 October 2004 <i>Native title agreement to allow for residential development</i></p>	<p>Rubibi agreement enables residential development near Broome A native title agreement is signed between the Western Australian Government and the Rubibi community allows for the residential development of 33 hectares of prime land near Cable Beach and allow for the creation of an aged care facility. Under the agreement, the Rubibi native title claimants are compensated for extinguishment of native title over the area by cultural, economic and social benefits.³</p>
<p>30 October 2004 <i>WA Connection Guidelines released</i></p>	<p>Western Australian 'connection guidelines' released The Western Australian Office of Native Title releases revised guidelines for 'connection reports'. Connection reports are prepared by native title claimants to present evidentiary material to the state to encourage negotiation of a consent determination. They are not statutory requirements of the NTA.⁴</p>

- 1 The NTA enables the Court to make an order in the terms agreed between the parties without holding a hearing if it is appropriate to do so (s.87). The preconditions to the exercise of the Court's discretion are:
 - the terms of the agreement must be in writing and signed by or on behalf of the parties;
 - the agreement must be filed with the court; and
 - the court must be satisfied that the order in those terms would be within its power.
 In considering whether it is 'appropriate' to make the consent determination, the court will consider factors including: the scope and purpose of the NTA; whether or not the parties had independent and competent legal advice; and whether or not there is suggestion that the agreement had not been freely entered into. For example, see *Mervyn v Western Australia* [2005] FCA 831 per Black CJ, [8]-[12].
- 2 National Native Title Tribunal: Media Release: *AACo and native title group agree on access to north QLD pastoral property*. 11 October 2004.
- 3 AIATSIS Native Title Research Unit, *Native Title Newsletter*, Mar/Apr 2005, No. 2/2005, p12.
- 4 For further information visit: <www.nativetitle.dpc.wa.gov.au/index.cfm?event=aboutKeyEvents>.



Date	Event/summary of issue
<p>6 November 2004 <i>National Indigenous Council (NIC) appointed</i></p>	<p>National Indigenous Council (NIC) appointed The federal Minister for Immigration and Multicultural and Indigenous Affairs announces the membership of the Government-appointed advisory body, the National Indigenous Council (NIC). It is composed of twelve Indigenous Advisers. Members of the Council will provide advice on policy and service delivery to the Ministerial Taskforce on Indigenous Affairs.⁵</p>
<p>12 November 2004 <i>MOU signed recognising native title rights near Kununurra</i></p>	<p>MOU signed between WA Government and Miriuwung Gajerrong traditional owners in East Kimberley The Western Australian Government and the Miriuwung Gajerrong Traditional Owners signed a Memorandum of Understanding (MOU) to deal with land issues in the Kununurra area. The MOU recognises the rights of the traditional owners, and provides mechanism to ensure they have a role in the development of the area and the land in and around Kununurra.</p>
<p>3 December 2004 <i>South Australian native title local government agreement</i></p>	<p>South Australian native title local government agreement Representatives of the Narungga Nations Aboriginal Corporation, the District Council of Yorke Peninsula, Wakefield Regional Council, District Council of Copper Coast, District Council of Barunga West, Aboriginal Legal Rights Movement (ALRM), and the State Government sign an ILUA after 20 months of negotiation. This is the first native title agreement to be negotiated by local government and an Indigenous group in South Australia. The agreement sets out an Aboriginal heritage protection protocol that requires developers to notify the Narungga Nations Aboriginal Corporation of when and where they plan to develop infrastructure so that the Narungga people can take steps to protect their cultural heritage sites. The agreement also recognises the Narungga people as the traditional owners of the Yorke Peninsula and provides a compensation package. Under the agreement a committee comprising members of all parties will be established to resolve any native title and cultural heritage issues that may arise.⁶</p>

5 Minister for Immigration and Multicultural and Indigenous Affairs. Media Release, *National Indigenous Council Appointed*. ATSIA website: <www.atsia.gov.au/media/media04/v04064.htm>, accessed 11 August 2005.

6 National Native Title Tribunal: Media Release: *South Australian groups finalise first native title local government agreement*, 3 December 2004.



Date	Event/summary of issue
<p>8-9 December 2004 <i>Inaugural National Indigenous Council meeting</i></p>	<p>The inaugural meeting of the National Indigenous Council (NIC) is held in Canberra. The Council meet with the Prime Minister, the Minister for Immigration and Multicultural and Indigenous Affairs and the Ministerial Taskforce on Indigenous Affairs.</p> <p>The Terms of Reference for the NIC are agreed. The NIC identify its three priority areas as:</p> <ul style="list-style-type: none"> • early childhood intervention and improving primary health and early education outcomes; • safer communities; and • overcoming passive welfare with improvements in employment outcomes and economic development for Indigenous Australians.⁷
<p>7-14 December 2004 <i>Native title determinations</i></p>	<p>Torres Strait Native Title Determinations</p> <p>7 December – Kulkalgal People: <i>Warria on behalf of the Kulkalgal v State of Queensland</i> [2004] FCA 1577 – Native title exists in the entire determination area – Consent determination.⁸</p> <p>13 December – Gebara Islanders #1: <i>Newie on behalf of the Gebaralgal v State of Queensland</i> [2004] FCA 1577 – Native title exists in the entire determination area – Consent determination.⁹</p>
<p>22 December 2004 <i>Fishing principles released by National Indigenous Fishing Technical Working Group</i></p>	<p>Fishing principles to guide Indigenous involvement in marine management</p> <p>The National Indigenous Fishing Technical Working Group (NIFTWG) releases principles to guide policy and strategy in relation to Indigenous fishing-related issues. The principles, which are not legally binding, encourage the recognition of traditional fishing practices and greater Indigenous involvement in commercial fisheries, charter fishing and eco-tourism activities. For the principles to have effect they must be adopted by relevant fisheries jurisdictions at the federal, state and territory level. Formal endorsement of the principles is currently being progressed through bodies responsible for fisheries and natural resources management, including governments.¹⁰</p>

7 Gordon, S., *First meeting of the National Indigenous Council: A very good beginning*, Media Statement, 9 December 2004.

8 For further information on consent determinations, see footnote 2 above.

9 *ibid.*

10 National Native Title Tribunal: Media Release: *Fishing principles to guide Indigenous involvement in marine management*, 22 December 2004; and National Native Title Tribunal, *Indigenous Fishing Bulletin*, 1st edition, January 2005.



Date	Event/summary of issue
<p>7 February 2005 <i>Native title determination</i></p>	<p>Blue Mud Bay #2 proposed native title determination</p> <p><i>Gumana v Northern Territory</i> (with Corrigendum dated 22 February 2005) [2005] FCA 50 – litigated determination.</p> <p>The decision is set out in the form of a proposed determination: that the native title claimants (members of the Yolngu people) have a native title right of exclusive possession over land in the claim area apart from the inter-tidal zone (the area of the foreshore between the low and high water mark and to the area of rivers and estuaries affected by the ebb and flow of the tides). These land and waters are already held by the Arnhem Land Aboriginal Trust under the <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth).</p> <p>Selway J also finds that this determination is bound by the High Court’s decision in <i>Croker Island</i> to hold that native title rights to exclude those exercising public rights to fish or navigate in the sea or the inter-tidal zone cannot be recognised.¹¹ Rejecting the applicants’ argument that a native title right to exclude people permanently from small areas or to exclude temporarily from areas in the sea according to Yolngu traditional laws and customs is not inconsistent with the public right to fish and navigate.¹² Parties are invited to make submissions on the proposed determination.</p>
<p>17-18 February 2005 <i>The second National Indigenous Council (NIC) meeting</i></p>	<p>Second meeting of the National Indigenous Council considered draft principles for Indigenous land tenure</p> <p>The National Indigenous Council holds its second meeting in Canberra. Feedback was provided to the Ministerial Task Force on the previously identified priority areas of early childhood intervention, primary health and early education, safer communities and land use and economic development.</p> <p>The NIC considered a paper tabled by one of their members, the paper focused on the issue of communally owned Indigenous land being used to further the economic development of Indigenous people (see Annexure 2 for details). The NIC discussed the potential consequences and possible benefits of adjustments to the forms of land tenure held under the various existing Land Rights legislation and Native Title legislation.</p>

11 National Native Title Tribunal, 'Proposed determination of native title', *Gumana v Northern Territory* [2005] FCA 50, *Native Title Hot Spots*, No.14, April 2005, p1.

12 P. Hetheron, Solicitor, Northern Land Council, *Gumana v Northern Territory* [2005] FCA 50, Selway J, 7 February 2005 (Update on Blue Mud Bay Case) in AIATSIS Native Title Research Unit, *Native Title Newsletter*, Mar/Apr 2005, No.2/2005, p6.



Date	Event/summary of issue
<p>17-18 February 2005 <i>Traditional owners in Victoria call for land justice</i></p>	<p>Traditional owners of Victoria endorse statement calling on the Victorian government to consider land justice measures</p> <p>A historic meeting of Traditional Owners of Victoria was convened with the meeting endorsing a statement calling on the State Government to consider a raft of land justice measures. The statement calls on the State Government to commit to a process of negotiation with the Traditional Owners of Victoria; consider traditional owners preferred model for cultural heritage and engage in a process of negotiation for land justice settlement in Victoria.</p> <p>The Statement, supported by delegates from 20 traditional owner groups, was presented in person to the Attorney-General, Rob Hulls, and the Minister for Aboriginal Affairs, Gavin Jennings, at the conclusion of the traditional owners meeting. At the meeting, Mr Hulls agreed to meet further with a delegation of traditional owners to take the discussion forward.</p>
<p>23 February 2005 <i>Minister for Indigenous Affairs addresses National Press Club</i></p>	<p>Minister for Indigenous Affairs addresses Press Club on future of Indigenous affairs and intended changes to Indigenous land interests</p> <p>During the Minister's address, the following comments were made in relation to Indigenous land interests: 'We do need to ask ourselves why, when Indigenous Australia theoretically controls such a large proportion of the Australian land mass, they are themselves so poor. Being land-rich, but dirt-poor, isn't good enough. We have to find ways to change that.'¹³</p>
<p>10 March 2005 <i>The CERD makes concluding observations on Australia's 13th and 14th periodic reports</i></p>	<p>United Nations Committee on Elimination of Racial Discrimination concluding observations on Australia released</p> <p>The United Nations Committee on the Elimination of Racial Discrimination (CERD) issues its Concluding Observations on Australia following consideration of Australia's 13th and 14th periodic reports.</p>

13 Senator Amanda Vanstone, Minister for Indigenous affairs, National Press Club Speech 23 February 2005. Available online at: <www.atsia.gov.au/media/speeches/23_02_2005_pressclub.htm>, accessed 5 December 2005.



Date	Event/summary of issue
<p>10 March 2005 <i>The CERD makes concluding observations on Australia's 13th and 14th periodic reports</i> (continued)</p>	<p>Among other issues (see Appendix 1, <i>Social Justice Report 2005</i>) the Committee re-iterated concerns about the 1998 amendments to the <i>Native Title Act 1993</i>. The Committee also expressed concern in relation to the high standard of connection proof required to establish native title recognition. This standard is reported to have the consequence that many Indigenous people are unable to obtain recognition of their relationship with their traditional lands.¹⁴ See the Introduction and Chapter 4 of this report for further details.</p>
<p>16 March 2005 <i>Local government ILUA in WA</i></p>	<p>Western Australian Wheatbelt ILUA</p> <p>A coalition of 16 local government councils sign an Indigenous Land Use Agreement (ILUA) with the Noongar native title claimants, covering over 40,000 sq km in Western Australia's wheatbelt region. The ILUA provides for benefits for the native title claimants including significant protection of cultural heritage sites, cross-cultural training, employment, training and contracting opportunities and consultation with the State, Councils and other land developers.¹⁵</p>
<p>24 March 2005 <i>Native title determination</i></p>	<p>Wik and Wik Way Native Title Determination No. 2 and 3</p> <p><i>Wik Peoples v State of Queensland</i> [2004] FCA 1306 – Native title exists in the entire determination area – Consent determination.¹⁶</p> <p>These consent determinations are the first native title consent determinations to be made over pastoral leases in Queensland. The determinations were reached through negotiation between the Wik and Wik Way peoples and other groups with interests in this area, including Commonwealth, State and local governments.¹⁷</p>

14 Consideration of Reports Submitted by State Parties Under Article 9 of the Convention: *Concluding observations of the Committee on Australia*. United Nations International Committee on the Elimination of All Forms of Racial Discrimination. Available online at: <www.hreoc.gov.au/CERD/REPORT.HTML>, accessed 20 September 2005.

15 AIATSIS Native Title Research Unit, *Native Title Newsletter*, Mar/Apr 2005, No. 2/2005, p12.

16 For further information on consent determinations, see footnote 2 above.

17 For further information visit the National Native Title Tribunal Website at: <www.nntt.gov.au/media/1097628223_3072.html>.



Date	Event/summary of issue
<p>6 April 2005 <i>Bilateral agreement</i></p>	<p>Bilateral agreement between Commonwealth and Northern Territory governments signed</p> <p>The Prime Minister and the Chief Minister of the Northern Territory sign the <i>Overarching Agreement on Indigenous Affairs Between the Commonwealth of Australia and the Northern Territory of Australia</i>.¹⁸ This is the first bilateral agreement to come out of the June 2004 Council of Australian Governments' (COAG) commitment to improve services to Indigenous Australians.</p> <p>The Agreement sets out five priority areas:</p> <ul style="list-style-type: none"> • improving outcomes for young Indigenous Territorians; • building safer communities; • strengthening governance and developing community capacity; • building Indigenous wealth, employment and entrepreneurial culture; and • improving service delivery and infrastructure.
<p>6-7 April 2005 <i>Private land ownership in Indigenous communities</i></p>	<p>Prime Minister opens discussion on private home ownership on Indigenous land</p> <p>The Prime Minister visits Wadeye, Northern Territory and announces there is a case for reviewing the issue of Aboriginal land title, with a focus on private recognition of land. The Prime Minister states that Aboriginal people should be able to aspire to own their own homes.¹⁹</p> <p>In Wadeye, the Northern Land Council was already discussing with the community ways of introducing leasing arrangements. Following the Prime Minister statement, Wadeye traditional owners issued a statement calling for a "public and private housing scheme" without amending the <i>Aboriginal Land Rights (Northern Territory) Act 1976</i>.²⁰</p>
<p>8 April 2005 <i>Social Justice Report 2004 and Native Title Report 2004 tabled in Parliament</i></p>	<p>The Federal Attorney-General tables the <i>Social Justice Report 2004</i> and the <i>Native Title Report 2004</i> in Parliament</p> <p>The <i>Social Justice Report 2004</i> outlines the key challenges raised by the abolition of the Aboriginal and Torres Strait Islander Commission</p>

18 Prime Minister of Australia. *Better Indigenous Service Delivery, 5 Year Bilateral Agreement with Northern Territory*. Media Release, 6 April 2000.

19 ABC News Online. *Land council casts doubt on home ownership plan*. Available online at: <www.abc.net.au/news/newsitems/200504/s1339873.htm>, accessed 23 August 2005.

20 ANTaR's national website, Issues. *Land rights under threat*. Available online at: <www.antar.org.au/land_rights_nt.html>, accessed 23 August 2005.



Date	Event/summary of issue
<p>8 April 2005 <i>Social Justice Report 2004 and Native Title Report 2004 tabled in Parliament (continued)</i></p>	<p>(ATSIC) and Aboriginal and Torres Strait Islander Services (ATSIS) and the transfer of all Indigenous specific programs to mainstream government departments and the movement to new arrangements for administering Indigenous programs. The Report also examines support programs for Indigenous women exiting prison.</p> <p>The <i>Native Title Report 2004</i> considers options for promoting economic and social development through the native title system. The report examines a set of principles for promoting economic and social development through Native Title. The principles are based on strategies for sustainable development and capacity building and have been developed in consultation with NTRB's and other native title stakeholders.</p>
<p>2 May 2005 <i>Native title determination</i></p>	<p>Ngarluma/Yindjibarndi determination</p> <p><i>Daniel v State of Western Australia</i> [2005] FCA 536 – Native title exists in part of the determination area – Consent determination.²¹</p> <p>Although a single claim was lodged on behalf of the Ngarluma and Yindjibarndi Peoples, the Court found that each group has separate but overlapping native title rights in the claim area. Both groups have non-exclusive native title rights in their respective parts of the claim area, totalling 24,247 sq km, including the right to: access; camp and build shelters; fish, forage and hunt in areas landwards of the low water mark; take ochre; take water for drinking and domestic use; cook and protect sacred sites. More limited rights of rights to access, fish and hunt for fauna apply to the intertidal zone.</p> <p>The Court found that there are no native title rights over the Burrup Peninsula, in minerals or petroleum, or subterranean waters.</p> <p>The Ngarluma and Yindjinbarndi parts of the claim area overlap in one area. Consistent with NTA, the determination provides for two separate but overlapping PBCs for the claim area.²²</p> <p>The Ngarluma Yindjibarndi, Wong-goo-tt-oo and Commonwealth Government have filed appeals in relation to certain aspects of the determination. The State of Western Australia has cross-appealed a number of points.²³</p>

21 For further information on consent determinations, see footnote 2 above.

22 Office of Native Title (Western Australia Government), *E-Newsletter*, Edition 5 June 2005, p2.

23 *ibid.*, p1.



Date	Event/summary of issue
<p>10 May 2005 <i>Handing back of reserved Crown land to Aboriginal community in Cape Barron Tasmania</i></p>	<p>Cape Barren Land Hand Back The <i>Aboriginal Lands Amendment Bill 2004</i> (Tas) provides for the cessation of the reserved status of certain Crown land in Tasmania, in order to return title to the Tasmanian Aboriginal community. These areas include the Clarke Island Nature Reserve, an area of land on Goose Island, and areas of land on Cape Barren Island. These are all located in the Bass Strait. The amending legislation approving the transfer was passed by the Tasmanian State Parliament in March 2005 by a majority of one vote.²⁴</p> <p>The hand back of title to the Tasmanian Aboriginal Community of Cape Barren and Clarke Islands was made by the Tasmanian Premier on 10 May 2005. It includes 45,000 hectares of Cape Barren and 11,000 hectares of Clarke Island. The Aboriginal community has sought communal ownership of Cape Barren Island since 1866. Aboriginal survivors of the colonial era congregated on the Island which by 1920 had a population of approximately 300 people. Subsequent Government policy, which included the forcible removal of children, however, ultimately forced people to the Tasmanian mainland.²⁵</p>
<p>17 May 2005 <i>Agreement reached over National Parks in the Northern Territory following on from Miriuwung Gajerrong native title case</i></p>	<p>Agreements over Northern Territory national parks Following the High Court's decision in <i>Miriuwung Gajerrong</i> which put in doubt the valid declaration of a number of national parks in the Northern Territory, native title and land rights issues were settled over 27 national parks and reserves in the Territory through 31 Indigenous Land Use Agreements (ILUAs). The ILUAs address cooperative planning and co-management between the Territory Government and local Indigenous people, and were made by Northern Territory Chief Minister and representatives of the Northern Land Council (NLC) and Central Land Council (CLC).²⁶</p>

24 Agreements, Treaties and Negotiated Settlements website: Agreements Database: *Aboriginal Lands Amendment Act 2004 (Tas)*. Available online at: <www.atns.net.au/biogs/A002271b.htm>, accessed 8 September 2005.

25 Agreements, Treaties and Negotiated Settlements website: Agreements Database: *Cape Barren Land Transfer (2005-)*. Available online at: <www.atns.net.au/biogs/A002272b.htm>, accessed 8 September 2005.

26 National Native Title Tribunal: Media Release: *Agreements over NT national parks an Australian first*, 17 May 2005.



Date	Event/summary of issue
<p>24 May 2005 <i>Native title determinations</i></p>	<p>Torres Strait Native Title Determinations</p> <p>Badu Islanders #1: <i>Nona on behalf of the Badulgal v State of Queensland</i> [2004] FCA 1578 – Native title exists in the entire determination area – Consent determination.²⁷</p> <p>Erubam Le (Darnley Islanders) #1: <i>Mye on behalf of the Erubam Le v State of Queensland</i> [2004] FCA 1573 – Native title exists in the entire determination area – Consent determination.²⁸</p> <p>Ugar (Stephens Islanders) #1: <i>Stephen on behalf of the Ugar People v State of Queensland</i> [2004] FCA 157 – Native title exists in the entire determination area – Consent determination.²⁹</p> <p>People of Boigu Island #2: <i>Gibuma on behalf of the Boigu People v State of Queensland</i> [2004] FCA 1575 – Native title exists in the entire determination area – Consent determination.³⁰</p> <p>Yam Islanders/Tudulaig: <i>David on behalf of the lama People and Tudulaig v State of Queensland</i> [2004] FCA 1576 – Native title exists in the entire determination area – Consent determination.³¹</p> <p>The other two native title consent determinations over the Torres Strait Islands made by the Federal Court sitting at Thursday Island from 7-14 December 2004 took effect immediately (see above).</p>
<p>25 & 26 May 2005 <i>Second Indigenous Economic Development Forum held in Darwin</i></p>	<p>The second Indigenous Economic Development Forum is held in Darwin³²</p> <p>The Chief Minister of the Northern Territory launches the Northern Territory Government's new Indigenous Economic Development Strategy at the forum.</p> <p>The Strategy covers 13 industry sectors and identifies specific opportunities for development in construction, tourism, community services, mining and production, retail and services, pastoral, horticultural, natural resources management, government, forestry and agri-business, arts, knowledge and culture, and aquaculture and fisheries.</p>

27 For further information on consent determinations, see footnote 2 above.

28 *ibid.*

29 *ibid.*

30 *ibid.*

31 *ibid.*

32 Clare Martin Chief Minister, Minister for Indigenous Affairs, *Strategy for More Jobs For Indigenous Territorians*, Media Release, 25 May 2005.



Date	Event/summary of issue
<p>30-31 May 2005 <i>National Reconciliation Planning Workshop</i></p>	<p>The National Reconciliation Planning Workshop organised by Reconciliation Australia is held in Canberra</p> <p>The Workshop goals had three main aims:</p> <ul style="list-style-type: none"> • to clarify any major areas that need to be addressed, so as to advance reconciliation; • to foster the building of relationships, understanding, commitment and the capacity to work together between the various participants of the workshop and members of the broader community; and • to establish a path forward for the reconciliation process. <p>Two hundred invited people attend the workshop, 45% of whom are Indigenous. Representation was spread across all levels of government, non-government organisations, education, business, the media and faith groups.</p>
<p>30 May 2005 <i>Prime Minister addresses Reconciliation Workshop and discusses the prospect of changes to Indigenous land interests to support home ownership</i></p>	<p>Prime Minister addresses Reconciliation Workshop and discusses the need to make changes to land rights and native title</p> <p>The Prime Minister lent his support to the view that land rights and native title need to be changed at the National Reconciliation Planning Workshop. The Prime Minister informed participants that the role that Indigenous land could play in supporting home and business ownership for Indigenous families and individuals was under consideration by the Attorney-General and the Minister for Immigration and Multicultural and Indigenous Affairs:³³</p> <p>And as somebody who believes devoutly and passionately in individual aspiration as a driving force for progress and a driving force for progress in all sections in the Australian community, I want to see greater progress in relation to land. We support very strongly the notion of indigenous Australians desiring to turn their land into wealth for the benefit of their families. We recognise the cultural importance of communal ownership of land, and we are committed to protecting the rights of communal ownership and to ensure that indigenous land is preserved for future generations.</p>

33 Transcript of the Prime Minister the Hon John Howard MP: Address at the National Reconciliation Planning Workshop 30 May 2005, Old Parliament House, Canberra. Available online at: <www.pm.gov.au/news/speeches/speech1406.html>, accessed 19 August 2005.



Date	Event/summary of issue
<p>31 May 2005 <i>Minister for Indigenous Affairs addresses Reconciliation Workshop and discusses changes to land rights and native title</i></p>	<p>Minister for Indigenous Affairs addresses Reconciliation Workshop discussing changes to land rights and native title</p> <p>The Prime Minister's view that land rights and native title changes was needed was echoed by the Minister for Indigenous Affairs at the National Reconciliation Planning Workshop:³⁴</p> <p>Most Australians achieve economic independence through having a regular job and hopefully owning their own home. In urban and regional centres, it is a matter of assisting Indigenous Australians to capture opportunities in the local economy. Many have already done so. But we can do more. It is more problematic in remote areas. There are opportunities for business development in these places, but not as many and not as obvious. We need to remove impediments to business development and ensure that Aboriginal-owned land can generate economic returns should the community chose to do so. I assure you that the nature of Indigenous land tenure is not up for grabs – inalienability and native title will remain the core.</p>
<p>1 June 2005 <i>Minerals Council of Australia forms partnership with Indigenous people through MOU</i></p>	<p>Minerals Council of Australia – Memorandum of Understanding</p> <p>A Memorandum of Agreement (MOU) between the Mineral Council of Australia (MCA) and the Commonwealth Government is launched. The purpose of the MOU is to formalise a partnership between the Commonwealth and the MCA to work together with Indigenous people to build sustainable, prosperous communities in which individuals can create and take up social, employment and business opportunities in mining regions. The partnership will operate for five years. Actions under the MOU will focus on Indigenous communities in mining regions where MCA member companies operate. They will be applied on a local and regional basis, within agreed regional frameworks. Each party to this agreement will contribute within the scope of its responsibilities and operations.³⁵</p>

34 Senator, the Hon Amanda Vanstone, Minister for Immigration, Multicultural and Indigenous Affairs, Speech to Reconciliation Australia Planning Workshop, 31 May 2005.

35 *Memorandum of Understanding between the Commonwealth of Australia and The Mineral Council of Australia*. June 2005.



Date	Event/summary of issue
<p>3 June 2005 <i>NIC release draft 'Indigenous land tenure principles'</i></p>	<p>NIC release draft 'Indigenous Land Tenure Principles'</p> <p>The first communiqué is released by the National Indigenous Council, presenting a draft set of 'Indigenous land tenure principles' for discussion at the annual Native Title Conference on 3 June 2005.³⁶ These are reproduced at Annexure 2.</p>
<p>1-3 June 2005 <i>National Native Title Conference</i></p>	<p>Annual Native Title Conference</p> <p>The annual, National Native Title Conference was held over three days in Coffs Harbour. The Conference addressed a broad range of issues including Federal Court requirements; recent determinations; economic development and native title; and native title in the context of the New Arrangements for Indigenous Affairs.</p> <p>The National Indigenous Council (NIC) also met with Chief Executive Officers from both Land Councils and Native Title Representative Bodies (NTRBs) to discuss possible Indigenous land tenure principles that the Council has developed.³⁷ The majority of NTRBs and Land Councils reject the NIC's draft principles.³⁸</p>
<p>8 June 2005 <i>Native title determination</i></p>	<p>De Rose Hill native title determination</p> <p><i>De Rose v State of South Australia (No 2)</i> [2005] FCAFC 110 – Native title exists in parts of the determination area – Litigated determination.</p> <p>This is the first finding of native title in the state of South Australia.³⁹ The full Court of the Federal Court (Wilcox, Sackville and Merkel J) find that non-exclusive native title exists over the De Rose Hill pastoral station in the far north of South Australia, except in the area of improvements built in accordance with the pastoral leases (eg houses, sheds, airstrips and constructed dams). The respondent parties were the State of South Australia and the Fullers (and their private company) as holders of the pastoral lease.</p>

36 NIC communiqué 3 June 2005. Available online at: <www.oipc.gov.au/NIC/communique/default.asp>, accessed 19 August 2005.

37 National Indigenous Council, *Indigenous Land Tenure Principles*, Media Release, 3 July 2005

38 National Indigenous Times, *Confusion reigns*, Thursday, 4 August 2005.

39 National Native Title Tribunal, *De Rose marks native title first for SA*, Media Release, 8 June 2005.



Date	Event/summary of issue
<p>8 June 2005 <i>Native title determination</i> <i>(continued)</i></p>	<p>The full Court holds that the NTA (ss.223(1))⁴⁰ does not require that every member of the native title claimant community must acknowledge and observe the relevant traditional laws and customs, nor that the claimants must necessarily establish they have <i>continuously</i> discharged their responsibilities under traditional law and custom. For example, the failure by persons holding certain religious beliefs in the wider Australian community to live up to those beliefs did not necessarily mean that those beliefs had been abandoned. The Court also notes that the requirement to demonstrate 'connection' in ss.223(1)(a) does not require the claimants to prove a continuing <i>physical</i> connection.⁴¹</p>
<p>10 June 2005 <i>Native title determination</i></p>	<p>Bardi Jawi proposed native title determination <i>Sampi v State of Western Australia</i> [2005] FCA 777 – Native title exists in part of the determination area – Litigated determination.</p> <p>The court held that native title is communal and is held by the Bardi society into which the Jawi people had been integrated. The Court recognised exclusive possession native title over approximately 1037 square kilometres of land at the northern end of the Dampier Peninsula, and non-exclusive possession native title over the inter-tidal zone. The court also found that native title rights and interests were not extinguished by the grant of expired pearl oyster farm leases.⁴²</p>
<p>15 June 2005 <i>Native title determination</i></p>	<p>Nowra Local Aboriginal Land Council <i>Nowra Aboriginal Land Council v New South Wales Native Title Services Ltd</i> (Unreported, FCA, 15 June 2005, Wilcox J) – Native title does not exist – Unopposed determination.</p>

40 *Native Title Act 1993* (Cth), ss.223(1) The expression native title or native title rights and interests 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;
- (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.

41 M. Dore, *De Rose v State of South Australia (no 2)* [2005] FCAFC 110 (case note) in Australian Institute of Aboriginal and Torres Strait Islander Studies, *Native Title Newsletter*, Jul/Aug 2005, pp3-5.

42 For further information see *Native Title Hot Spots*, National Native Title Tribunal, No 15, July 2005, p16.



Date	Event/summary of issue
<p>15-16 June 2005 <i>Third NIC meeting and second joint meeting with the Ministerial Taskforce on Indigenous Affairs</i></p>	<p>'Indigenous Land Tenure Principles' presented by NIC to Ministerial Taskforce on Indigenous affairs</p> <p>The third National Indigenous Council (NIC) meeting and second joint meeting with the Ministerial Taskforce (MTF) on Indigenous Affairs is held. The primary areas of discussion at this meeting are land tenure and economic development.⁴³</p>
<p>23 June 2005 <i>De-recognition of NTRB QSRB</i></p>	<p>De-recognition of Queensland South Representative Body</p> <p>The Minister for Immigration and Multicultural and Indigenous Affairs announces the withdrawal of Native Title Representative Body (NTRB) recognition from Queensland South Representative Body (QSRB). This means that QSRB is no longer able to exercise powers and functions under the NTA, nor receive any funding for such purposes.</p> <p>The Minister announces that recognition was based on a 'fundamental failure of corporate governance...for example, that it had drawn \$1.7m in cash cheques over four financial years and had made unauthorised withdrawals of monies from client Trust Accounts.' The Minister's decision comes after the appointment of a Funding Controller to QSRB in February 2004, due to concerns about its financial management. In November 2004, following detailed examination of the organisation's conduct, the Minister asked QSRB to show cause why it should not lose recognition. The Minister said QSRB's response did not convince her that recognition should not be withdrawn.⁴⁴</p>
<p>28 June 2005 <i>Establishment of new body to perform NTRB functions in Queensland South region</i></p>	<p>Establishment of Queensland South Native Title Service</p> <p>The Minister for Immigration and Multicultural and Indigenous Affairs announces that the Australian Government is funding a new body for six months, Queensland South Native Title Services Ltd (QSNTS), to provide native title</p>

43 Third meeting of the National Indigenous Council 15-16 June 2005 – communiqué. Available online at: <www.oipc.gov.au/NIC/communique/PDFs/ThirdMeetingNIC.pdf>, accessed 16 August 2005.

44 Minister for Immigration and Multicultural and Indigenous Affairs, 'Queensland South Representative Body'; Media Release, 23 June 2005.



Date	Event/summary of issue
<p>28 June 2005 <i>Establishment of new body to perform NTRB functions in Queensland South region</i></p>	<p>services to claimants in the South Queensland region. The decision follows the Minister's decision on 23 June 2005 to withdraw recognition of QSRB as the NTRB for the Queensland South Area (see above).</p> <p>QSNTS is a body incorporated under the <i>Corporations Act 2001</i> (Cth). The Minister announces that funding to QSNTS is subject to the conditions imposed on funding to NTRBs.⁴⁵</p>
<p>29 June 2005 <i>Native title determination</i></p>	<p>Ngaanyatjarra Lands determination <i>Stanley Mervyn, Adrian Young, and Livingston West and Ors on behalf of the Peoples of the Ngaanyatjarra Lands v The State of Western Australia and Ors</i> [2005] FCA 831 – Native title exists in parts of the determination area – Consent determination.⁴⁶</p> <p>This is determination of native title cover the largest area of land to date. In an area originally comprising six claims which was amalgamated into a single claim. Agreement was reached in principle by all the parties within 12 months of negotiations.</p> <p>The Peoples of the Ngaanyatjarra Lands hold exclusive native title rights over most of the claimed area – approximately 187,000 sq km in Western Australia, stretching from the Gibson Desert Nature Reserve to the South Australian border.⁴⁷ The Peoples of the Ngaanyatjarra Lands also hold non-exclusive rights over an unvested reserve in the claim area including rights to: enter and remain on reserved land; take flora and fauna; take water for personal, domestic or non-commercial communal purposes; take other natural resources such as ochre, stones, soils, wood and resin; and care for and protect sites of significance.</p> <p>The Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation) is to hold the native title rights on trust for the native title holders.⁴⁸</p>

45 Minister for Immigration and Multicultural and Indigenous Affairs, 'Queensland South Native Title Services Ltd', Media Release, 29 June 2005.

46 For further information on consent determinations, see footnote 2 above.

47 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Largest ever determination of native title', Media Release, 30 June 2005. Available online at: <www.humanrights.gov.au/media_releases/2005/23_05.html>.

48 National Native Title Tribunal, 'Determination of native title – Ngaanyatjarra Lands' *Native Title Hot Spots*, No. 15, July 2005, p1-2.



Native Title Statistics (as at 30 June 2005)⁴⁹

Determinations of Native Title

Total number of registered native title determinations in Australia:	66
Determinations that native title exists in the entire determination area or in parts of the area:	47 (71.2%)
Determination that native title does not exist in the determination area:	19 (28.8%)
Consent determinations:	39 (59.1%)
Litigated determinations:	15 (22.7%)
Unopposed determinations:	12 (18.2%)
Determinations registered in 2004/05 financial year:	16 (up from 6 in 2003/04)

Claimant Applications

Active claimant applications by State/Territory

Australian Capital Territory:	1 (0.2%)
New South Wales:	37 (6.3%)
Northern Territory:	192 (32.9%)
Queensland:	184 (31.5%)
South Australia:	25 (4.3%)
Victoria:	19 (3.2%)
Western Australia:	126 (21.6%)
<i>Total active claimant applications:</i>	584 (100%)
Registered claimant applications:	488 (83.6%)
Unregistered claimant applications:	96 (16.4%)
Active claimant applications where notification complete:	532 (91.1%)
Claimant applications in mediation:	346 (59.2%)
Claimant applications lodged in 2004/05 financial year:	32 (down from 35 in 2003/04)

Non-Claimant Applications

Active non-claimant applications by State/Territory

New South Wales:	25 (89.3%)
Queensland:	1 (3.6%)
Western Australia:	2 (7.1%)
<i>Total active non-claimant applications:</i>	28 (100%)
Non-claimant applications lodged in 2004/05 financial year:	18 (up from 9 in 2003/04)

⁴⁹ Courtesy of the National Native Title Tribunal.



Compensation Applications

Active compensation applications by State/Territory

New South Wales:	4 (25%)
Northern Territory:	5 (31.2%)
Queensland:	3 (18.8%)
Victoria:	1 (6.2%)
Western Australia:	3 (18.8%)
<i>Total active compensation applications:</i>	16 (100%)
Compensation applications lodged in 2004/05 financial year:	0

Indigenous Land Use Agreements (ILUAs)

Registered ILUAs by State/Territory

New South Wales:	4 (2.2%)
Northern Territory:	44 (24.2%)
Queensland:	112 (61.6%)
South Australia:	5 (2.7%)
Victoria:	14 (7.7%)
Western Australia:	3 (1.6%)
<i>Total ILUAs registered:</i>	182 (100%)

ILUAs registered by type

Area agreements:	163 (89.6%)
Body corporate agreements:	19 (10.4%)
ILUAs registered in 2004/05:	52 (up from 46 in 03/04)

Future Act Applications

Number of active future act determination applications by State/Territory

Queensland:	2 (25%)
Western Australia:	6 (75%)
<i>Total:</i>	8 (100%)

Number of active future act mediation requests by State/Territory

New South Wales:	1 (1.9%)
Northern Territory:	1 (1.9%)
Queensland:	16 (30.2%)
Victoria:	2 (3.8%)
Western Australia:	33 (62.2%)
<i>Total:</i>	53 (100%)

Number of active objections to the expedited procedure by State/Territory

Northern Territory:	4 (0.5%)
Queensland:	94 (10.5%)
Western Australia:	794 (89%)
<i>Total:</i>	892 (100%)
