Chapter 2

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:

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/communique/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 overlayed 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 is 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.

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.

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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.

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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
Aboriginal Land Rights (Northern Territory) Act 1976 (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: • 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: • 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
Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)	To grant land to the Wreck Bay Aboriginal community at Jervis Bay in the ACT.	Wreck Bay Aboriginal Community Council: s.4,6(a).	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).	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).	Community Council can grant leases and licences. Ministers consent required for: • 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). Domestic purpose lease held by a community member can be transmitted by will or laws of inheritance to a relative: s.42(1).

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)	To provide for vesting of land for certain Aboriginal communities in Victoria by the Commonwealth at the request of the Victorian Government.	Kerrup-Jmara Elders Aboriginal Corporation at Lake Condah. Kirrae Whurrong Aboriginal Corporation at Framlingham Forest.	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).	Leases and mortgages of the leasehold interest can be granted. Lease to Crown, public authority or any other person: s13(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).	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.
Native Title Act 1993 (Cth) (NTA) and *Native Title (Prescribed Bodies Corporate) Regulations 1999*	To recognise and protect native title, set up a process to determine claims for native title. Applies throughout Australia.	Indigenous association, 'Prescribed Body Corporate (PBC)' as agent or trustee for common law native title holders.	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.	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	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).

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
Native Title Act 1993 (Cth) (NTA) and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (continued)				title rights) authorised under an ILUA, it could use those titles as security for a mortgage.	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 See Div 3,Subdivisions B, C, D and E generally. In a compulsory acquisition the 'right to negotiate' provisions of NTA apply which provide for a minimum negotiation period of 6 months: s.35.

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
Aboriginal Land Rights Act 1983 (NSW)	To acknowledge the importance of land to Aborigines 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 leaseback 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 Aborigines 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
National Parks and Wildlife Act 1974 (NSW) (NPWA)	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. The particular areas are in Schedule 14 of the Act.	NSWALC or LALC as per Aboriginal Land Rights Act 1983 (NSW) – see above.	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. 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.	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). Minister may approve leases of land and mortgages of leasehold interests: s.151, s.151A and Part 12 of Act.	Board of Management (majority Aboriginal owners of the land: s.71AN (3)) manages the land. Leases subject to Plan of Management: s.81A.

Jurisdiction – Northern Territory

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
Pastoral Land Act 1992 (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
Aboriginal Lands Trust Act 1966 (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).
Pitjantjatjara Land Rights Act 1981 (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: • 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
Maralinga Tjarutja Land Rights Act 1984	To provide ownership directly to the traditional owners (TO's).	Maralinga Tjarutja (MT) – a body corporate comprising all the TO's 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: • 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 TO's and have regard to their customs: s.8.

Jurisdiction – Queensland

Legislation	Aim	Land Owner	Land Title	Selling, Leasing and Mortgaging	Process and Conditions
Aboriginal Land Act 1991 (Qld)	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
Aboriginal Land Act 1991 (Qld) (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).
Torres Strait Islander Land Act, 1991 (Qld)	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.
Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Qld)	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
Land Act 1994 (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
Aboriginal Lands Act 1970 (Vic)	To make permanent the land grant and vest the land in the local resident community. Applies to Lake Tyers 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
Aboriginal Lands (Aborigines' Advancement League) (Watt Street), Northcote) Act 1982 (Vic)	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).
Aboriginal Land (Northcote Land) Act 1989 (Vic)	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).
Aboriginal Lands Act 1991 (Vic)	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
Aboriginal Land (Manatunga Land) Act 1992 (Vic)	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
Aboriginal Lands Act 1995 (Tas)	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
Aboriginal Affairs Planning Authority Act 1972 (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).
Land Administration Act 1997 (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]

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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 conditions[58] 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]

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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]

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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:

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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 described[79] 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

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 Toohey; 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 heath 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 by 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 reasonable[99] 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.

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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 submission[106] 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 acitivities, 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 Koompahtoo 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 Koompahtoo 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]

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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 Koompahtoo 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 Koompahtoo 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 it 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 Koompahtoo 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 Koompahtoo 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/communique/PDFs/Third MeetingNIC. 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 lease[142]
- 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.

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.