



FEATURE

Economic development is welcome – but not at the expense of communal land title

Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner

During 2005, the Prime Minister, the Attorney-General, and the Minister for Immigration and Multicultural and Indigenous Affairs all made statements to the effect that the Australian government wanted to support Indigenous Australians to explore opportunities to lease or buy communal lands for private use. In May 2005, the Prime Minister announced that he wanted to make *'native title and communal land work better'* by adding *'opportunities for families and communities to build economic independence and wealth through use of their communal land assets.'*

It is the government's premise that if Indigenous people are encouraged into private ownership of communal lands they will be able to build economic independence and wealth, and in doing so alleviate poverty.

My *Native Title Report 2005* focuses on this land tenure debate, and in particular, on the National Indigenous Council's *Indigenous Land Tenure Principles*¹ that are the proposed

¹ The National Indigenous Council's Indigenous Land Tenure Principles

1. The principle of underlying communal interests in land is fundamental to Indigenous culture.
2. Traditional lands should also be preserved in ultimately inalienable form for the use and enjoyment of future generations.
3. These two principles should be enshrined in legislation, however, in such a form as to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.
 - An effective way of reconciling traditional and contemporary Indigenous interests in land – as well as the interests of both the group and the individual – is a mixed system of freehold and leasehold interests.
 - The underlying freehold interest in traditional land should be held in perpetuity according to traditional custom, and the individual should be entitled to a transferable leasehold

means to guide and implement the Australian government's land tenure proposal.


My report argues that while the intention to build economic independence amongst Indigenous peoples is welcomed and desirable, there are serious flaws in this approach.

The National Indigenous Council's principles are premised on the idea that private land ownership *will* lead to economic development because the land owners have an economic interest in seeing land value improved.

International experience demonstrates that individual title does not automatically, or by itself, lead to improved economic outcomes. The strategy of individual titling was prominent with the World Bank in the 1970s. The World Bank experienced difficulties in achieving outcomes under this approach. Individual titling attracted high costs and few benefits, and in Africa, where farming prospered, it appeared to do so within a framework of customary rights, kinship and social contracts.

The World Bank has since shifted its approach to economic development and formal land titling. Its current view is that the need for individual formal titling is dependant on the nature and availability of land itself. The World Bank acknowledges customary title as a means of facilitating economic development, and recently noted that *'subject to minimum conditions, [customary title] is generally more effective than premature attempts at establishing formalised structures.'*

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4. Effective implementation of these principles requires that:
 - the consent of the traditional owners should not be unreasonably withheld for requests for individual leasehold interests for contemporary purposes;
 - involuntary measures should not be used except as a last resort and, in the event of any compulsory acquisition, strictly on the existing basis of just terms compensation and, preferably, of subsequent return of the affected land to the original owners on a leaseback system basis, as with many national parks.
 5. Governments should review and, as necessary, redesign their existing Aboriginal land rights policies and legislation to give effect to these principles.



Other international experience tells us that carving Indigenous land into private land parcels creates more problems than it solves. In past decades both the United States of America and New Zealand made attempts to convert Indigenous customary land to individual freehold title and leasehold title, and recently both countries have taken steps to overturn this approach due to adverse impacts. The major adverse impacts were:

- significant loss of land by Indigenous peoples
- 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.

Any strategy for Indigenous development needs to be created with the participation of Indigenous people. As there is no national or state level representative body for Indigenous Australians at present, governments need to negotiate with Indigenous communities and traditional owners on a community by community basis. If traditional owners express interest in enterprise development or wealth creation initiatives on their land, then strategies are required to ensure that there is adequate local training and resources so that traditional owners and community members can participate in this process with informed consent. In remote communities, training and development opportunities are scarce and in many cases training is not targeted to economic development agendas.

At this stage, the government's proposal seeks to improve economic development on Indigenous land with one strategy: giving Indigenous people greater access to capital to encourage private home and land ownership. While capital is an important aspect of economic development, there are other essential factors that are required to support economic development such as adequate infrastructure on land and relevant education and training for affected parties and community members generally. These are the foundations for economic development in any community, and they should be the cornerstones of government strategy. It is only with these preconditions that traditional owners can begin to participate in discussions about the potential

uses of their land for private leasing and other enterprise development options.


I also argue in my 2005 Report that it is currently possible for Indigenous people to take out individual leases in every state and territory under existing land rights regimes. My report sets out these options in every Australian jurisdiction. As a consequence, it is not necessary to put the communal tenure of Indigenous land at risk as the NIC principles propose. Furthermore, it would appear that individual title is not something to which Indigenous land owners aspire. Despite existing land leasing opportunities, private leasing and home ownership have not flourished on Indigenous land, except in some urban environments. This raises the question as to whether the government's strategy will have impact at all, even with changes to land rights legislation in states and territories.

If governments want to facilitate home ownership schemes in non urban environments, additional policy will be required to determine ownership and to define succession rights. Indigenous Business Australia's (IBA) Home Ownership Programme (HOP) does not currently apply on communally lands. The issue that the IBA has with communally owned lands is that they have difficulties in identifying the various parties to the loan agreement. While there is no available policy or research on the extent of the obstacles, the IBA are concerned to ensure certainty around what property rights are secured following the granting of a loan and security around the extent of ownership of the property – for both the buyer and the seller.

My Report also raises concerns as to whether the NIC *Indigenous Land Tenure Principles* comply with international human rights. My Report assesses the principles with consideration as to whether they:

- **pay sufficient regard to the full range of social, economic, cultural and political factors that impact on development outcomes in Indigenous communities**
- **empower Indigenous peoples by ensuring that they have the ability to participate effectively in decision-making that affects them**
- **provide sufficient regard to the right to an adequate standard of living and adequate housing.**

According to these measures, the NIC principles are not consistent with Australia's



obligations to ensure the civil, political, economic, social and cultural rights of its citizens. In the first instance, the National Indigenous Council is not a representative Indigenous body and it has not consulted with Indigenous peoples or communities. Human rights principles emphasise Indigenous participation in decision making, and the right to give 'free, prior and informed consent.'

NIC Principle 4 allows for compulsory acquisition of Indigenous land where it is deemed that traditional owners unreasonably withhold consent. The enforceable nature of this principle contravenes the right of Indigenous peoples to freely dispose of their land and wealth, and effectively withdraws their right to participate in decision-making. These rights are set out in the first Article of two important international human rights instruments: The International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

A key objective of the NIC principles is to increase Indigenous home ownership on communally owned lands. While the NIC principles may be intended to help alleviate the housing shortage in communities, it is unlikely that many people in remote areas will be able to support the financial obligations of home ownership. Therefore the state, territory and Australian governments have an ongoing commitment to provide housing and infrastructure to remote communities.

The right to adequate housing is contained in a number of international human rights instruments including: the Universal Declaration of Human Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Racial Discrimination.

While the NIC principles are directed to land rights regimes, it is important to raise the limitations of individual leasehold and home ownership schemes on **native title land**. If these economic development strategies are to be directed to native title land, then governments need to consider policy to overcome the limitations of the native title regime, which include:

- the nature of native title as a bundle of rights with negligible or no entitlement

to mineral and other assets of land and sea

- the rules that regulate future development affecting native title rights
- inadequate funding for Indigenous bodies in the native title system.

Leases for community living can be issued by government on land under native title if a Prescribed Bodies Corporate (PBC) agrees through an Indigenous Land Use Agreement (ILUA). Agreements can cover a range of matters including financial payments for resource rent. A PBC can also accept a grant of freehold or leasehold interest in land in exchange for surrender of native title rights through an ILUA with government. In these instances, the titles could be used as security for mortgages. Therefore, there are instances in which the land tenure initiative could be extended to include land under native title.

There are significant reasons to reject individual titling as a wealth creation approach. My Report argues that the *Indigenous Land Tenure Principles* do not consider the factors in Australia that impede opportunities for economic development on Indigenous land. They include:

- Australian governments have not consulted with Indigenous Australians about the proposed changes to land tenure, nor their aspirations for their land
- international research demonstrates that converting Indigenous lands under communal title to freehold or leasehold title does not lead to improved outcomes for Indigenous peoples, economic or otherwise
- the content of National Indigenous Council's *Indigenous Land Tenure Principles* and the process for their development contravene international human rights standards and obligations
- in the majority of instances, Indigenous land is marginal, arid desert or geographically isolated, and there is limited potential for economic development
- in remote regions the land lacks the most basic infrastructure to support development projects
- there are limited housing markets on Indigenous lands, and in remote locations the market potential is negligible - in these instances, private home ownership is not a wealth creation strategy

- many Indigenous people in remote communities lack access to employment and the means by which to repay mortgages or other debts to land
- to date, there has been a lack of government policy to support economic development initiatives on Indigenous land
- native title law allows very few rights to land development and land assets
- the entities with responsibility to progress native title interests to land,² have either no funding, or insecure funding
- individual land leasing options already exist in land rights regimes across Australia and these options have not been exercised by traditional owners outside of urban areas to date.

In its current configuration, the Australian government's land tenure strategy lacks specific elements that are required for any success in its implementation in a practical sense. In addition, the processes for developing this strategy and aspects of its proposed application, contravene human rights. For traditional owners, the proposed *Indigenous Land Tenure Principles* may represent a foreign and Western view of wealth creation which may be at odds with traditional views of communal ownership and communal tenure. It is essential the traditional owners are consulted in any scheme that involves their land. I am well aware of the tensions that can be created in communities with a mix of traditional owners and historical peoples on land. Attempting to formalise living arrangements in already tense living situations may exacerbate social problems that could impact on entire communities.

The *Native Title Report 2005* advocates the requirement for government and other parties to obtain the free, prior and informed consent of traditional land owners before any amendments are made to legislation or policy affecting Indigenous interests to land. My Report also provides a range of recommendations to support economic development on Indigenous land in a way which empowers and promotes the engagement of Indigenous people in the process. I argue that if Indigenous groups consent to leasing options, home ownership options may be supported through:

- extending the Home Ownership Programme administered by

Indigenous Business Australia to offer affordable home loans over Indigenous communal lands

- establishing a 'good renters programme' for tenants in community housing on communal lands to accumulate equity through regular rent payments.

These initiatives need to be developed in genuine partnership with Indigenous land holders and must take account of the socioeconomic factors particular to communities on communal lands, including: annual incomes, existing infrastructure, building and maintenance costs, low land value, skill bases, health and life expectancy levels to prevent inter-generational debt. These new initiatives must receive additional funding that is not drawn from existing Indigenous housing programs such as the Commonwealth Community Housing Infrastructure Program and Aboriginal Renting Housing Program.

Ultimately, in order to comply with human rights standards, no state, territory or Commonwealth legislation affecting the rights and interests of Aboriginal and Torres Strait Islander peoples in land should be amended without traditional Aboriginal or Torres Strait Islander owners in the relevant jurisdiction first understanding the nature and purpose of any amendments and giving their consent to legislative change.

The *Native Title Report 2005* can be accessed at http://www.hreoc.gov.au/social_justice/ntreport05/ch0.html and I welcome any feedback on this important issue.

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² Prescribed Bodies Corporate