
Native Title Report 2005

CHAPTER SUMMARY:

The Indigenous land tenure debate



The *Native Title Report 2005* focuses on the issues and the potential impacts of the Australian government's proposal to encourage private ownership and leases of communal land under Indigenous title.

The four chapters outline the following:

- Background to the Indigenous land tenure debate and existing barriers that prevent economic development on native title land.
- Legal definitions of the different forms of Indigenous land title across Australia and existing options for leasing Indigenous land.
- Evidence-based research into the adverse impacts of policies that preference freehold and leasehold title over communal title.
- A human rights evaluation of the proposed changes to communal land tenure.

Chapter 1: The Indigenous land tenure debate

During 2005, the Prime Minister, the Attorney-General, and the Minister for Immigration and Multicultural and Indigenous Affairs, made statements to the effect that the Australian Government was interested in supporting Indigenous Australians to explore opportunities to lease or buy communal lands for private or personal use. The government's premise was that if Indigenous people were encouraged into private ownership of communal lands they would be able to build economic independence and wealth, and in doing so alleviate poverty.

In May 2005, the Prime Minister announced the government's intention "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".

Soon after this announcement, the government appointed National Indigenous Council (NIC), released the *Indigenous Land Tenure Principles* (Principles). The Principles were endorsed by the NIC on 16 June 2005 and presented to the Australian Government.

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

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

Chapter 1 argues that the NIC Principles are not the right solution to redress the lack of economic development on Indigenous land. In fact, the lack of economic development has less to do with communal land title, and more to do with aspects of native title law and policy that inhibit economic development. The aspects of native title that inhibit development are:

1. The rigorous test for the recognition of native title.
2. The easy test for extinguishment of native title.
3. The nature of native title: a bundle of rights with negligible or no entitlement to mineral and other assets of land and sea.
4. The rules that regulate future development affecting native title rights.
5. Inadequate funding for Indigenous bodies in the native title system.
6. The goals of governments' native title policies.

Native title is not currently designed to support Indigenous economic interests. In most cases it does little more than provide access to land. To date, governments have not developed policy or legislation to lift the barriers that prevent Indigenous Australians from deriving economic benefit from land.

Chapter 2: Defining Indigenous land and its uses

Land that is Indigenous-owned, controlled or set aside for the use of Indigenous people comprises approximately 16 percent of the area of Australia. The bulk of the land is in the Northern Territory, Western Australia and South Australia. Chapter 2 sets out the different legislation and arrangements that govern Indigenous land title across all Australian jurisdictions. Given this diversity of title, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) uses the term 'legal Indigenous land interest' to describe the range of legal relationships to land. Indigenous land title takes a number of forms including:

- the recognition of native title rights;
- federal, state and territory Indigenous land rights;
- national parks; and
- reserve systems or the purchase of land by the Indigenous Land Corporation.

Chapter 2 describes the land lease options that already exist under the various legal arrangements across Australian jurisdictions. As a consequence, it is not necessary to put the communal tenure of Indigenous land at risk as the NIC Principles propose. Given the current leasing options, the NIC Principles are in effect redundant as a means to increase private ownership of Indigenous land under communal tenure.

Furthermore, both the United States of America and New Zealand had made significant 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 have been:

- significant loss of land by the 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; and
- the constant tension between communal cultural values with the rights granted under individual titles.

The international experience demonstrates that if implemented, the NIC Principles may mirror these problems and set up a situation that needs reversal in the future.

Chapter 3: The economic logic of the National Indigenous Council (NIC) Principles and economic development on Indigenous lands

The NIC 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. The NIC Principles also assume that communal land ownership

rights *will not* lead to development, and the interests of the land will not be protected. This chapter sets out research that contradicts these assumptions.

International experience demonstrates that individual title does not lead to improved economic outcomes. The strategy of individual titling was prominent with the World Bank in the 1970's. The World Bank experienced difficulties in achieving outcomes under this approach. Research exposed 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'.

There are many factors that influence economic development on Indigenous lands besides land tenure. The current proposal by the NIC seeks to improve economic development with one strategy - access to capital - without an emphasis on sustainable outcomes. While capital is an important part of economic development, Chapter 3 sets out alternate strategies in Australia and elsewhere that promotes economic development and increase home ownership without putting existing rights to land at risk.

Chapter 4: Leasing on Indigenous land: A human rights appraisal

Chapter 4 explores the extent to which the NIC Principles comply with international human rights. The NIC Principles are evaluated in the light of 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; and
- provide sufficient regard to the right to an adequate standard of living and adequate housing.

Chapter 4 puts the case that the process for developing the NIC Principles is not consistent with Australia's obligations to ensure the civil, political, economic, social and cultural rights of its citizens. The National Indigenous Council is not a representative Indigenous body and the Council has not consulted with Indigenous communities. Human rights principles emphasise Indigenous participation in decision making, and the right to give 'free, prior and informed consent.' Chapter 4 outlines *Guidelines for engagement with Indigenous peoples* based on these principles.

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. 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 these communities, it is unlikely that many people in remote areas will be able to support the financial obligations of home ownership. Therefore state, territory and the 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.

Summary

The *Native Title Report 2005* seeks to refute the assumptions that are raised by the Indigenous land tenure debate, in particular, the assumptions of the National Indigenous Council's *Indigenous Land Tenure Principles*. This report argues:

- The National Indigenous Council is not a representative body of Indigenous Australians and it has not consulted with Indigenous Australians about the proposed Principles. Therefore, there are questions about its legitimacy and its capacity to provide approaches that aim to improve economic outcomes for Indigenous people using their communal lands.
- In its current configuration, the *Native Title Act 1993* and its accompanying policies and resource allocations are the primary impediments that prevent Indigenous people from obtaining economic benefit from communal 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.