# Chapter 1

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

The Australian Government has signalled that economic development is a central focus for the Indigenous Affairs portfolio this term. The Ministerial Taskforce on Indigenous Affairs, created in May 2004 to drive and coordinate the federal Government's Indigenous policies,[1] identified as one of three key areas[2] for priority action:

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

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

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

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

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

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

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

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

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

## Overview of the communal lands debate

A public and political debate about whether the communal and inalienable nature of land rights and native title land is perpetuating poverty within Indigenous communities unfolded during the reporting period. Public discussion began in late 2004[5] when the CEO of New South Wales Native Title Services and member of the government-appointed Indigenous advisory body, the National Indigenous Council (NIC),[6] Mr Warren Mundine, issued a press release calling for changes to the tenure of Indigenous land to facilitate increased home ownership and business development.[7] In February 2005, the federal Minister for Immigration and Multicultural and Indigenous Affairs indicated that the Australian Government would contemplate changes to tenure in reforming the federal land rights legislation operating in the Northern Territory, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)[8]

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

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

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

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

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

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

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

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

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

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

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

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

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

Shortly after, the first communiqué was released by the National Indigenous Council (NIC), presenting a draft set of 'Indigenous Land Tenure Principles' (NIC Principles) for discussion at the annual Native Title Conference on 3 June 2005.[11]

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

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

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

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

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

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

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

The NIC Principles were formalised without change and presented to the Ministerial Taskforce on Indigenous Affairs for consideration at the NIC meeting on 15-16 June 2005.[14]

## Issues raised by the debate

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

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

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

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

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

14 *ibid.*

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

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

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

### *Value and use of the land*

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

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

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

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

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

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

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

### *Existing processes for the grant of leases*

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

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

### *Housing need*

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

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

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

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

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

### *How to kick-start economic development in remote communities*

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

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

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

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

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

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

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

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

These ideas are explored further in Chapter 3.

## The purpose of land rights

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

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

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

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

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

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

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

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

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

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

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

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

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

30 *ibid.*, p3.47.

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

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

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

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

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

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

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

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

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

## 1. Compensation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In Queensland, any group of Indigenous people may claim 'claimable' land on the basis of traditional affiliation[54] or historical association,[55] as well as economic or cultural viability.[56] This acknowledges the greater impact of colonisation within these states, which saw substantial numbers of Indigenous people removed from their traditional lands to other regions under government powers to remove and confine Aboriginal people to any Aboriginal reserve.[57] It also recognises that this removal did not sever the continuing connection of Indigenous peoples to the land, both their traditional country and reserves.

In South Australia,[58] Victoria,[59] Tasmania[60] and the Jervis Bay Territory[61] the relevant land rights statutes grant specific parcels of land rather than establishing a claims process. This recognises the continuing connection Indigenous peoples have to specific areas of land post-contact, as the land granted is recognised to be culturally important and includes former reserve lands, missions, cemeteries or historic sites.

## 3. Economic and social development

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

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

52 *ibid.*, s.77A.

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

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

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

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

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

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

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

60 *Aboriginal Lands Act 1995* (Tas).

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

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

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

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

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

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

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

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

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

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

65 See next subsection, below.

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

The Act reflects an assimilationist[68] view of social and economic development. It was enacted to assist the 'integration of Aboriginal peoples…into the Australian way of life'.[69] The Authority has a statutory duty to promote the wellbeing of Aboriginal persons in Western Australia and take their views into account.[70] Its functions include:

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

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

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

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

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66 See next subsection, below.

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

68 See next subsection, below.

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

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

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

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

## Mining

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

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

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

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

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

74 *ibid.*

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

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

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

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

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

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

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

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

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

## National Parks

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

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

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

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

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

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

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

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

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

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

91 *ibid.*, cl 7.

that in the Northern Territory[92] is in South Australia[93] and New South Wales.[94] The Queensland *Aboriginal Land Act 1991* (Qld) allows Aboriginal ownership of national parks if a claim is successful.[95]

## Commercial development

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

Under the New South Wales *Aboriginal Land Rights Act 1983* (NSW), claims can be made for unused Crown land not needed for a public purpose. In addition, 7.5% of land tax received by the New South Wales Government for a period of 15 years to 1998 was invested in a capital fund to provide a basis for market purchase of land (see next subsection below). Land successfully claimed or purchased in the area of a Local Aboriginal Land Council (LALC) is generally held by that LALC as ordinary freehold.[96] Since 1990, a LALC has had power to sell, exchange, mortgage or otherwise dispose of land vested in it.[97] The power to dispose of land is subject to conditions[98] including that the state land council, the New South Wales Aboriginal Land Council (NSWALC) approves[99] and the LALC has determined that the land is 'not of cultural significance to Aborigines of the area'. The determination and the decision to dispose of the land must be made by a special majority of at least 80% of the members present and voting. Further, if the land was transferred to the LALC as a result of a successful claim, the responsible Minister and the Crown Lands Minister must have both been notified. However, the Ministers do not have power to veto a disposal.

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

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

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

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

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

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

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

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

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

## Financial resources

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

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

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

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

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

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

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

102 *ibid.*

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

In addition to these policy and institutional challenges for Indigenous land financial assets, the physical characteristics of land rights land has made economic development difficult to achieve in practice. Most land rights legislation started with the transfer of ownership over former reserves to Indigenous peoples, and many now allow claims over unused Crown land. Reserves were established as areas of land to hold, control and protect Indigenous people as pastoralism and mining extended across Australia and the traditional owners were moved to make way for mining and grazing cattle and sheep. The Land and Emigration Commission, appointed in 1832 to provide government assistance to encourage British migrants to come to Australia, argued that the government must have the power to change the location of reserves when necessary[104]:'Europeans assumed that Aborigines felt the same about land as they did themselves, and that one tract of land was as good as another.'[105] Reserves and unused Crown land in practice tend to be distant from market hubs, and of low commercial value.

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

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

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

## 4. Self-determination

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

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

103 *ibid.*

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

105 *ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Self-determination in international law*

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

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

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

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

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

114 *ibid.*, Article 1.

115 *ibid.*, Article 2.

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

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

### *Self-determination as a rationale for land rights*

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

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

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

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

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

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

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

120 *ibid.*, pp3-4.

121 A.E. Woodward, Aboriginal Land Rights Commission, *Second Report*, AGPS, Canberra, 1974, pp 9-11.

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

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

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

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

## Conclusion: the purpose of land rights legislation

Land rights legislation was motivated by a number of rationales:

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

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

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

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

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

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

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

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

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

## Native title and economic development

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

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

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

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

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

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

## What is native title?

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

### *Indigenous Land Fund*

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

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

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

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

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

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

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

### *Native Title Act 1993 (Cth)*

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

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

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

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

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

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

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

## Legal and policy limits to economic development through native title

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

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

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

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

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

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

### 1. The test for the recognition of native title

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

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

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

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

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

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

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

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

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

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

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

140 *ibid.*, p514.

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

## 2. The test for the extinguishment of native title

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

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

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

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

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

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

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

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

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

147 Non-exclusive agricultural and pastoral leases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *What rights will be recognised*

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

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

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

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

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

In turn, the description of rights claimed will determine whether or not they are extinguished by non-Indigenous interests over the same land under the test for extinguishment outlined above. It may be extinguished right by right, whenever the exercise of a particular native title right is inconsistent with the enjoyment of a particular non-Indigenous right. In contrast, if native title was constructed as an underlying title to land as in Canada, it would be extinguished only where there was a 'fundamental, total or absolute' inconsistency between rights, reflecting the intention of the Crown to remove all connection of the Aboriginal people from the land in question.[160] The characterisation of native title rights that best survive the extinguishment test in Australian law are ones that are expressed at a high level of specificity[161] and are limited to the conduct of activities on the land rather than the control of activities on the land.[162] Native title holders may still obtain exclusive possession of an area under the 'bundle of rights' perspective, but this will only be where there has not been any extinguishment of rights by inconsistent interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, even where the right to negotiate applies, the time-bound processes under the Act may create obstacles for economic and social development outcomes for traditional owners. The right to negotiate process is circumscribed to a period of six months under the Act. Within the six months NTRBs must be notified[164] and they must then: identify affected native title claimants or holders; lodge a native title application if there are no registered in the claims in the area; and negotiate with the Government and third party over the conditions of the activity. At the end of the six month period any negotiating party can apply for a determination by an arbitral body if agreement has not been reached.[165] This determination may address whether or not the act may be done or whether the act can be done subject to certain conditions.[166] However, the arbitral body cannot determine that native title parties are entitled to payments worked out in relation to the profits made from the project; income derived or anything produced.[167] Finally, if the Commonwealth, State or Territory Minister considers it to be in the interests of their jurisdiction, they are able to overrule the determination of the arbitral body.[168]

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

164 *Native Title Act 1993* (Cth), s.29.
165 *ibid.*, s.35.
166 *ibid.*, s.38.
167 *ibid.*, ss.38(2).
168 *ibid.*, s.42.

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

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

## 5. Funding for Indigenous entities in the native title system

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

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

### *NTRB Funding*

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

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

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

agencies,[170] Commonwealth Parliamentary committees,[171] State Governments[172] and industry.[173] Most submissions to the current inquiry of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account into NTRBs, also recommend increasing funding to NTRBs.[174] The issue of NTRB under-funding was comprehensively covered in the *Native Title Report 2001*[175] and *Native Title Report 2003*,[176] as well as in the submission of my predecessor to the current Parliamentary NTRB inquiry.[177]

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

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

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

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

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

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

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

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

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

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

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

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

### *PBC Funding*

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

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

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

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

## 6. The goal of governments' native title policies

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

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

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

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

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

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

## Conclusion: the economic use of native title

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

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

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

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

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

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

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

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

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

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

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

## Recommendation 1: Native title policy reform

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

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

185 *ibid.*, p134.

186 *ibid.*, p135.

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

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

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

## Chapter summary

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

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

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

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

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

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

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

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

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