

# **Communal land and the amendments to the Aboriginal Land Rights Act (NT)**

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## **CONTENTS**

ABOUT THE AUTHORS	3
1. INTRODUCTION	5
2. BACKGROUND	6
3. WHAT IS COMMUNAL TITLE?	10
4. WHAT DOES COMMUNAL TITLE MEAN TO THOSE WHO HOLD IT?	15
5. THE STRUCTURES AND PROCESSES FOR DEALING WITH COMMUNAL LAND	18
6. THE REFORMS	20
CONCLUSION	25

## 1. Introduction

I'm all for a robust debate on the merits of different approaches. But at last it seems that maybe we are slowly moving away from some of the old entrenched ideological positions in Indigenous affairs and towards a more business-like appraisal of the benefits for Indigenous people.<sup>1</sup>

This paper is written as a response to the former Federal Aboriginal Affairs Minister Amanda Vanstone's call for 'robust debate' on the Howard Government's 'quiet revolution' in Aboriginal Affairs. It takes as its focus the amendments to the *Aboriginal Land Rights Act (Northern Territory) 1976* (hereafter 'the ALRA'), in particular the proposal to establish a mechanism to effectively privatise areas of Aboriginal land. We oppose this amendment as a simplistic attempt at social engineering, which proceeds on premises that are ideologically driven and without evidentiary basis. Our reasons are as follows. There has been no opportunity for the relevant traditional owners to give their free, prior and informed consent to this amendment. There is adequate provision in the existing legislation for the issuing of leases where and when this is desired by these people. There is evidence-based research which clearly demonstrates that most Indigenous households in remote communities do not have the resources to service a mortgage, such that bankruptcy rather than home-ownership is a more likely outcome of this policy. We believe that Indigenous Australians have a right to self-determination and that this right includes the right to forms of tenure that reflect cultural difference.

## 2. Background

To be properly understood, the amendments to the ALRA must be situated within the extensive program of reforms to Federal Indigenous policy, commonly glossed as 'the new arrangements'. To quote Senator Vanstone 'The Australian Government is totally reshaping the landscape of indigenous affairs.'<sup>2</sup>

On 15 April 2004, the Australian Government announced that it was introducing significant changes to the delivery of services to Indigenous communities. It announced that the Aboriginal and Torres Strait Islander Commission (ATSIC) and its service delivery arm, Aboriginal and Torres Strait Islander Services (ATSIS) would be abolished. Responsibility for the delivery of all Indigenous specific programs would be distributed across the relevant government departments. The Government also announced that all departments would be required to coordinate their service delivery to Indigenous peoples through a whole of government approach, with an emphasis on flexibility and regional service delivery. The new approach involves setting priorities at a regional level, and negotiating agreements with Indigenous families and communities at the local level. Central to this process is the concept of 'mutual obligation' or 'reciprocity' for service delivery.<sup>3</sup>

Since the abolition of ATSIC, the National Indigenous Council (NIC), a government-appointed advisory body set up to provide 'expert advice to government on improving

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<sup>1</sup> Vanstone a) 2005

<sup>2</sup> Vanstone c) 2005

<sup>3</sup> Arabena 2005:7

the socio-economic status of Indigenous Australians',<sup>4</sup> has become the only official Indigenous advisory body.<sup>5</sup> In its first major policy announcement the NIC put amendment of the ALRA on the national political agenda by calling on the Federal Government to 'review and, as necessary, redesign their existing Aboriginal land rights policies and legislation.'<sup>6</sup>

Tenure reform is one element within a package of reforms to the ALRA. Many of these are consistent with the joint submission agreed between the four Northern Territory Land Councils and the Northern Territory Government in 2002: a package negotiated after the election of the Martin Labor Government in 2001. The reforms endorsed by the joint submission and retained by the current amendment package include: stricter regulation of royalty equivalent expenditure; the transfer of certain powers from the Federal Government to the Northern Territory Government; and the simplification of mining agreements.

However, there are other components of this package that are not consistent with the joint submission, including empowering the Land Commissioner to 'strike out' applications with 'no prospect of proceeding'. The Territory Land Councils, who have hitherto been guaranteed 40% of the mining 'royalty equivalent' income paid by the Federal government into the Aboriginal Benefits Account, will now move to a 'performance based' funding model.<sup>7</sup>

The social justice implications of funding reform are twofold. First, land councils that make themselves politically unpopular may find that their funding is affected. Small government funded organisations, in particular, are notoriously sensitive to political pressure. In a 2004 survey of Non-Government Organisations Sarah Maddison of the Australia Institute found that

[t]hree quarters (74 per cent) agreed with the statement that 'NGOs are being pressured to amend their public statements to bring them in line with current government policy' while '90 per cent of respondents agreed with the statement that 'Dissenting organisations and individuals risk having their government funding cut.'<sup>8</sup>

Second, in addition to the loss of guaranteed funding for the established land councils, the Federal government will support the emergence of new land councils, paving the way for organisations that promote the interests of Indigenous people whose associations with a region are historical rather than traditional. The introduction of a majority rules policy, such that 55% of the Indigenous population of a defined geographical region can vote for the creation of a new land council, is likely to have the effect that residence and historical association, rather than traditional ownership

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<sup>4</sup> [www.oipc.gov.au](http://www.oipc.gov.au) Accessed 4/8/05

<sup>5</sup> The NIC kick-started the process of tenure reform by calling on the Government to legislate that land held by Indigenous people under communal titles be opened up to individuals and businesses and compulsorily acquired 'if necessary'. We are pleased to note that compulsory acquisition is no longer a component of the planned reforms.

<sup>6</sup> NIC Land Tenure Principles [www.oipc.gov.au](http://www.oipc.gov.au) Accessed 14 December 2005

<sup>7</sup> The Land Councils have provided long-term and effective political representation for traditional owners in the Northern Territory, a situation that contrasts with that of the Native Title Representative Bodies in other parts of the country, whose *ad hoc* and minimalist funding arrangements have meant that they struggle to meet their statutory responsibilities. We hope that CLC Director David Ross' confidence that the Land Councils will 'continue to be adequately funded to perform (their) statutory functions' is not misplaced ([www.clc.org.au](http://www.clc.org.au) Accessed 24 Nov 2005).

<sup>8</sup> Australia Institute Newsletter #39 <http://www.tai.org.au/>

will become the basis for the control of land (through 99 year leases) and for political representation through the land council system.

The diminution of the relative power of traditional owners is expressed as an explicit focus of this policy, although as explained below, properly handled it may be feasible to promote economic development in communities while recognising the interests of traditional owners:

The current arrangements actually leave many Aboriginal people without control over their lives. This is because traditional owners are but a subset of people who live on Aboriginal lands. The historical displacement of Aboriginal people has left many Aboriginal residents of communities on Aboriginal land which is not their own country and therefore they have no traditional power and no real security of tenure. They live effectively in a feudal system at the pleasure of the traditional owners, which unfortunately sometimes involves arbitrary decisions that pass out largesse to favoured family and friends.<sup>9</sup>

<sup>10</sup>The claim that Aboriginal residents in communities ‘ “live effectively in a feudal system at the pleasure of the traditional owners’ ” is both misleading and legally incorrect. Although many communities are located on Aboriginal land, traditional ownership is afforded little official recognition, whether symbolic or concrete (for example, taking advantage of development opportunities as a developer or by receiving rent for the use of their traditional land, the primary exception being rent from leases for community stores). This outcome has both legal and political drivers.

Legally, under the ALRA, the NT government retains the right to operate those facilities which predate 1976 without paying rent (including, for example, expanding or replacing existing facilities such as housing, police stations, schools, airstrips etc). Considerable areas within existing Aboriginal communities predate 1976 and are subject to this provision, despite radical population expansion.

Politically, in relation to new facilities (which are not subject to this proviso and which require Land Trust, (i.e. traditional owner), consent, which may, or may not, be by means of a lease, it has not been politically feasible for traditional owners to insist on rent from government programs (for example, programs to provide additional housing) that are intended to assist impoverished and infrastructure starved communities. The acute need in remote communities and grudging political environment have meant that governments in the Northern Territory have not been prepared to pay, or to be seen to pay, or required by a Land Council to pay, the rent.<sup>11</sup>

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<sup>9</sup> Vanstone b): 2005

<sup>10</sup> Many thanks to an anonymous peer reviewer for the extremely helpful comments that form the basis of this and the following three paragraphs and of footnote 13.

<sup>11</sup>It is not the case (as Vanstone has claimed) that traditional owners have full control of Aboriginal land. Sections 14 & 15 of the Statute mean that the legal power to use land and provide administrative services is held by NT Government to the same extent as before the 1976 statute. In practice this covers most activities that take place in communities. The only power that is not held by the Government is the power to grant leases and subleases. That power is vested in the Land Trust. Traditional owners don't receive rent, except from stores. A different approach from the proposed one might allow traditional owners to set up one-off arrangements with NT govt (e.g. public housing development) rather than carte blanche 99 year leases.

Given these circumstances the proposal, if properly adapted, might provide an opportunity to redress traditional owners' concerns at the same time as promoting economic development to the benefit of all of a community's residents.

These changes, of themselves, have the potential to transform the purpose and intent of the original Act which, as we set out below, was designed to a) compensate traditional owners for their myriad losses under colonisation and b) support and protect traditional governance structures by privileging traditional ownership and a system of tenure designed to reflect Indigenous ways of holding and administering land.

We are also deeply concerned about the future for people currently residing in those communities described by Senator Vanstone as 'homeland settlements'. In a key address to the Australian National University's Australia and New Zealand School of Government, Senator Vanstone said:

All Australians living in remote areas of the country have less access to services and support than those in more populated areas...Perhaps we need to explicitly draw a line on the level of service that can be provided to homeland settlements.<sup>12</sup>

What will become of small Indigenous communities if the Federal and State/Territory governments decide to abandon infrastructure development in these places? Where will their residents be expected to move? What housing and which jobs will be available to these people if they move, say, from Mutitjulu to Yulara or even to Alice Springs? Will job opportunities be taken up where they exist?

(T)here are clearly acute labour market problems in major cities and regional areas (where Indigenous unemployment rates are 18 percent and 23 percent respectively, 3-4 times the non-Indigenous rate) that the Australian government has been incapable of addressing. It is likely that labour migration from remote areas will exacerbate rather than ameliorate this problem, with hypothetical migrants from outstations least likely to compete for mainstream jobs?<sup>13</sup>

Senator Vanstone in one breath speaks of 'all Australians' then singles out 'homeland settlements' only. Should not the government apply this reasoning to non-Indigenous remote settlements, for example the homesteads of pastoralists in the far north? They would avoid any accusations of racial discrimination if they did.

In this same address the Senator Vanstone said that those critical of the mainstreaming process

are the people who still feel uncomfortable with mutual obligation and fret about what is needed to tackle welfare dependency – who would rather see another generation of Aboriginal Australians marginalised than confront the debilitating effects of passive acceptance of handouts.

Fundamental as the changes outlined above might be, the most radical element of the reform package is that of tenure reform. On 5 October 2005 the Australian

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<sup>12</sup> Vanstone b): 2005

<sup>13</sup> Altman 2006: 1

government announced plans to allow a Land Trust, on behalf of the ‘traditional Aboriginal owners’ (hereafter ‘traditional owners’) to enter into a leasing arrangement with an ‘entity’ (as yet undefined) which will take a lease (the ‘head-lease’) for the whole of a town area within a community on Aboriginal land. As the holder of the head-lease this entity will enter into a series of sub-leases with individuals and organisations for land on which to conduct a business or build a home, according to the provisions of the head-lease. As consideration for the lease, traditional owners will be paid an annual rent calculated as up to 5% of the government assessed value of the land. Income from subleases will be used to fund the scheme but any shortfalls (and shortfalls seem inevitable) will be made up from the Aboriginal Benefits Account (ABA): the account set up under the ALRA to hold mining royalty equivalents generated by mining on Aboriginal land. The leaseback scheme is said to be designed to ‘help Indigenous people to get greater economic benefit from their land.’<sup>14</sup>

The Aboriginal Benefits Account (ABA) was originally established in 1952 as the Aboriginal Benefits Trust Fund in light of the manganese mine on Groote Eylandt and proposed bauxite mining at Nhulunbuy. The fund was incorporated into the ALRA and renamed as the Aboriginal Benefits Trust Account. Subsequently the account was renamed the Aboriginal Benefits Reserve, and is currently titled the Aboriginal Benefits Account. The ABA is a trust account under the *Financial Management and Accountability Act 1997* and is administered by an ABA Secretariat - contained within the Northern Territory office of the Office of Indigenous Policy Coordination in the Department of Family and Community Services, with the advice of the ABA Advisory Committee.

The Advisory Committee is made up of 14 members selected by the Land Councils and a Chairperson appointed by the Federal Minister for Aboriginal Affairs. The purpose of the ABA is to provide a mechanism for providing funds for the benefit of Aboriginal people in the Northern Territory. *Such funds are compensatory in nature and are not intended to substitute for normal government expenditure for Aboriginal development.* ABA funds reflect:

- a special right to compensation for traditional owners of land directly affected by mining operations.
- a wider entitlement to compensation for loss of land or connected rights and associated disadvantage to Aboriginal people throughout the NT
- the need to provide Land Councils and other Aboriginal bodies providing representation, advice and additional services or assistance with financial support that is insulated from political party machinations and the immediate control of governments.<sup>15</sup>

How will ‘welfare-dependency’ be alleviated by the Federal Government taking control of the ABA to fund the town lease scheme: a scheme that may well consume the whole of the ABA’s balance in the cost of surveys alone?<sup>16</sup> If the outstations are to be starved of funds and the ABA consumed by the town-lease scheme then it is

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<sup>14</sup> [www.oipc.gov.au](http://www.oipc.gov.au) Accessed 9 Oct 05

<sup>15</sup> [www.nlc.org.au](http://www.nlc.org.au) Accessed 20 December 2005. Emphasis added.

<sup>16</sup> Survey costs will be no less than \$1000 per house block (more likely \$3000 to \$3500) plus the cost of the initial township survey. The cost of consultation and the legal expenses of drawing up head-lease agreements, which are likely to exceed the survey costs, must also be taken into account.



hard to accept the Senator's claim that 'participation in this scheme is entirely voluntary'.

The benefits of changes to ALRA tenure are questionable (see Section 5 below) but there is no doubt that there are very real risks for traditional owners under this particular set of 'new arrangements': risks that households may enter into mortgages that they are unable to service, motivated by the desperate shortage of housing in remote communities; risks that community defaulters will have their leases purchased by non-community interests; risks that the ABA will be depleted, if not exhausted, by the use of its funds to administer a scheme that has been floated with precious little consultation with traditional owners, let alone the free, prior informed consent<sup>17</sup> from those people most affected; risks that traditional ties with land will be weakened over the term of 99 year subleases; risks that traditional rights in land may be divested of their political content; risks that the ALRA, an Act that was carefully designed to reflect and support Indigenous cultural difference, will be transformed from the top-down into a mechanism for assimilation.

The remainder of this paper focuses on only one aspect of the reforms to the ALRA: the tenure changes. We are concerned that the human rights of Indigenous Australians, which include the right to culture and property (including property with distinct characteristics) have not been adequately taken into account in the formulation of this policy and believe that proceeding with these amendments without the free, prior and informed consent of traditional owners would breach Australia's obligations under international law.<sup>18</sup> We seek to challenge the claim that changes to the ALRA will 'help Indigenous people to get greater economic benefit from their land'. We argue that communal title is a form of title that most closely reflects traditional governance structures and that communal title as it stands should only be abandoned if traditional owners were to make it clear that this is what they want. We further argue that there is simply no evidence that communal title is an impediment to wealth creation on Indigenous land and that there is much evidence from Australia and abroad to suggest that privatisation would worsen rather than improve the economic position of Indigenous people living in remote Australia.

### **3. What is communal title?**

The Australian parliaments have recognised Indigenous communal title in a number of ways through legislative means. One set of legislative interventions has generally been described as 'land rights' and includes the ALRA passed by the Federal Parliament in 1976. The other category of recognition, native title, arises via the courts and the common law. This common law recognition has since been codified through the Federal Parliament's enactment of the *Native Title Act 1993*.

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<sup>17</sup> 'The principle of free, prior informed consent is acknowledged in several international human rights law instruments. The International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169) refers to the principle of free and informed consent in the context of relocation of Indigenous peoples from their land in its article 16. Article 7 recognises Indigenous peoples' 'right to decide their own priorities for the process of development' and 'to exercise control, to the extent possible, over their own economic, social and cultural development.' In articles 2, 6 and 15, the Convention requires that States fully consult with Indigenous peoples and ensure their informed participation in the context of development, national institutions and programmes, and lands and resources. As a general principle, article 6 requires that consultation must be undertaken in good faith, in a form appropriate to the circumstances and with the objective of achieving consent.' (Motoc 2005: 4).

<sup>18</sup> Calma 2006: 11

There are certain similarities between the ALRA and native title regimes. Perhaps the most obvious is that both forms of title are communally owned and inalienable and in most cases are held in trust for the community of title-holders by a corporation. Under both regimes the only land to which applicants can hope to gain a title comparable to freehold is in relation to Crown Land that is either vacant, already reserved for Indigenous people or land on which Indigenous people already hold other rights and interests. The effect is the land that may be claimed is generally land which is least economically valuable. Essentially this was the land not wanted by non-Indigenous people.<sup>19</sup>

Despite these similarities there are some fundamental historical and operational differences between the two categories of legislative recognition of communal title. Land rights have their basis in legislation and were designed as compensatory measures for the dispossession of Australia's first peoples. The various state and federal Land Rights Acts seek to provide this compensation in a way that is more or less congruent with traditional law, but they do not recognise this law as having a source or origin other than by force of statute.

Native title, on the other hand, has been recognised under the common law as a pre-existing right derived from an Indigenous system of law and tradition and is now regulated by statute. Native title:

...is not simply the incorporation of Aboriginal law into the colonial legal system, it is a common law title. The courts have limited and re-defined native title in ways that make it more familiar to the colonial legal system and take it further away from Aboriginal law... [However it] is a common law title that recognises the inherent, pre-existing and continuing rights of Indigenous people and it recognises the legitimacy and authority of these societies to determine their relationship with their land, and with each other in relation to that land.<sup>20</sup>

There are also some crucial differences within these two categories: between the forms of land rights derived titles and between the content of various native title determinations.

### **Land Rights**

Indigenous peoples have fought to protect and preserve their lands since the first white settlements emerged on the NSW coast in the late 1780s. The modern land rights movement is generally considered to have begun in the Northern Territory when in 1963 the Yolngu people of north-east Arnhem Land presented a bark petition to the Australian Parliament protesting an excision from their reserve lands at Yirrkala and seeking recognition of their land rights. In 1971, the Yolngu people sought an injunction against mining activity on their lands claiming that they enjoyed sovereign rights over this land (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, also known as

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<sup>19</sup> However times change, and land that was once considered of minimal value has in certain cases come to have real economic value. Such lands include Jervis Bay, Wujal, Yarrabah, Hopevale, Lockhart etc on the east coast, parts of the Katiti Land Trust near Ayers Rock, or the impressive and historic Macassan anchorages in north-east Arnhem Land, plus important cultural landscapes like Cape Keerweer (Wik lands) or Yalangbara in the Yolngu area. The Musgrave Ranges are stunningly beautiful and offer scenery like the Flinders Ranges but without the pastoral industry's impact. (Peter Sutton, pers. comm.)

<sup>20</sup> Strelein 2001:123

the Gove Land Rights Case).<sup>21</sup> Although this case was dismissed, the findings and recommendations of the subsequent Woodward inquiry formed the basis of the legislative regime of land rights introduced in the Northern Territory, through the ALRA. This was the first legislation in Australia to establish a land claim process by which traditional owners could claim various areas of land that were listed as 'available for claim.'<sup>22</sup>

Although all Australian states and territories recognise some form of Indigenous rights in land (see appendix 1) the ALRA has seen 400,000 square kilometres of the Territory's land returned to its traditional owners, with a further twelve National Parks in the process of being scheduled as Aboriginal land under a leaseback arrangement with the Territory Government. All in all, almost 50% of the Territory landmass is Aboriginal land (CLC 2005: 4-5) and the ALRA remains the most extensive land rights legislation in Australia.<sup>23</sup>

That the ALRA legislation was intended, fundamentally, as compensatory in nature is attested by Woodward's comment that the recognition of Aboriginal land rights would 'do simple justice to a people who have been deprived of their land without their consent and without compensation',<sup>24</sup> and by Gough Whitlam's 1973 promise to 'legislate to give Aboriginal Land Rights - because all of us as Australians are diminished while the Aborigines are denied their rightful place in this nation.'

The ALRA 'facilitates the conversion of crown land or land owned by Aborigines in the Northern Territory to "inalienable freehold" where there are traditional Aboriginal owners of that land'<sup>25</sup>. This Act defines 'traditional owners' in terms of local descent groups whose members have primary responsibility for sacred sites on a particular area of land and can hunt or gather on the land: 'Communal inalienable title under the ALRA is a form of title that attempts to accommodate customary rights of ownership and use of land within a western legal framework.'<sup>26</sup> Successful applicants 'have significant rights in relation to 'inalienable freehold' which do not apply in relation to ordinary freehold. For example, there is a veto over mineral exploration (subject to its being overridden by the Governor General in the national interest).'<sup>27</sup> Traditional owners are able to negotiate economic benefits for their communities, including revenue streams that flow from royalty equivalents. In this way too, land rights are very different from native title rights. The ALRA was designed to support and give expression to Indigenous self-determination with Aboriginal Land Commissioner Justice Woodward recommending that Aboriginal people must be consulted about all steps proposed to be taken; that Aboriginal communities should have as much autonomy as possible in the running of their own affairs; and that Aborigines should be free to follow their traditional methods of decision-making.<sup>28</sup>

## Native Title

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<sup>21</sup> [www.aiatsis.gov.au](http://www.aiatsis.gov.au) Accessed 5/8/05

<sup>22</sup> *ibid*

<sup>23</sup> Altman et al 2005:3

<sup>24</sup> Woodward 1974: 2

<sup>25</sup> Taylor 2004:1

<sup>26</sup> Altman et al 2005:5

<sup>27</sup> *ibid*

<sup>28</sup> Woodward 1974: 9-11

The recognition of native title in Australia is a relatively recent phenomenon. In 1992 a test case was brought before the Australian High Court by a group of Meriam Island people who sought recognition of their rights in land. The Mabo decision altered the foundation of land law in Australia by overturning the doctrine of *terra nullius* (land belonging to no-one) on which British claims to possession of Australia were effectively based. What is now the basis for Australian sovereignty is unclear.<sup>29</sup> The legal doctrine of native title was embedded in Australian law when the High Court recognised the traditional rights of the Meriam people to their islands in the eastern Torres Strait. The Court also held that native title existed for all Indigenous people in Australia prior to the establishment of the British Colony of New South Wales in 1788. In recognising that Indigenous people in Australia had a prior title to land taken by the Crown since Cook's declaration of possession in 1770, the Court held that this title exists today in any portion of land where it has not legally been extinguished.

Native title was described by the Court as *sui generis*, literally meaning of its own gender/genus, or unique in its characteristics: It is inalienable, but it is subject to extinguishment by the valid exercise of legislative and executive power in circumstances where other titles to land are not. It is a communal title which has an internal dimension which allows for the allocation of rights and interests among the group or to individuals according to traditional law and custom.

The decision of the High Court in Mabo was swiftly followed by the *Native Title Act 1993*. This Act attempts to codify the implications of the decision, protect existing interests in land, and set out a legislative regime under which Australia's Indigenous peoples can seek recognition of native title rights. It also established the structures and processes for the administration of native title land and future use and development of that land. In 2002 the High Court confirmed that with the introduction of Native Title legislation it was now the Native Title Act, rather than the common law, that sets the benchmark against which native title applications are to be judged.<sup>30</sup> As noted by Strelein, in this case the High Court adhered to the line of argument which:

suggests that it is the legislation which limits the ability of native title to recognise Indigenous peoples rights to their lands, rejecting any continuing role for the common law in determining the underlying concept or framing the interpretation of the Act.<sup>31</sup>

As a legislative concept, native title is predicated on the notion that the common law can recognise the 'rights and interests' held by Indigenous Australians in land where these rights and interests are 'possessed under traditional laws acknowledged, and the traditional customs observed.'<sup>32</sup> Under the NTA, it is the 'traditional laws and customs' of Indigenous Australians that constitute the basis upon which native title

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<sup>29</sup> In Mabo 'the Court held the acquisition of sovereignty to be a non-justiciable question in a municipal court but the effect of the acquisition of sovereignty on native title to be a justiciable question. The acquisition of sovereign power and the acquisition of beneficial ownership of land were not necessarily linked. Rejecting the notion of "terra nullius", native title was held to survive the acquisition of sovereignty. Although sovereign power enabled the Crown to extinguish native title, any instrument purporting to exercise that power would be rigorously construed. No legislative or executive instrument would be taken to extinguish native title unless it revealed a clear and plain intention to do so.' (Brennan 1995:2). In native title claims the question of when beneficial ownership, rather than sovereignty, was established becomes crucial.

<sup>30</sup> *Members of the Yorta Yorta Aboriginal Community v the State of Victoria*

<sup>31</sup> Strelein 2002:5

<sup>32</sup> Native Title Act 1993, s223.1(a).

can be recognised, and which provide the content of the native title 'rights and interests' that are determined.

The outcomes for claimants from the native title process can be a bit of a hit and miss affair. In real terms, the recognition of native title in a final determination may mean anything from a non-exclusive right to visit or traverse the area, through to the recognition of a form of title that resembles freehold in its exclusivity but remains consistent with the traditional laws and customs that gave rise to it. One of the most significant native title determinations to date confirmed that:

The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them...[T]he connection which Aboriginal peoples have with 'country' is essentially spiritual...It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country. 'Speaking for' country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture.<sup>33</sup>

Native title claimants must demonstrate that they are members of an identifiable society bound by a normative system of law and custom, and that this society is the same normative society that existed at the time of colonisation: that is, the rights and interests in the land now claimed must find their source in, or be rooted in the pre-colonial societal norms. Traditional law must provide the connection to land. For some this can be a very difficult evidentiary burden. 'For the Yorta Yorta people, the result of this approach was the High Court's determination that 'the tide of history' had 'washed away' their native title.'<sup>34</sup>

The Yorta Yorta judgement also had implications for the rights that may be recognised in a native title determination. Rather than an holistic title the High Court in Yorta Yorta found that native title consists of a 'bundle of rights'. Conceptualising native title as a 'collection of distinct and severable rights...denies that there may be a unifying factor that is fundamental to the exercise of those rights and makes native title susceptible to being frozen in time.'<sup>35</sup>

Hence, the original fundamental interest in land may be extinguished, right by right, until only fragments of the original title remain. Further, as noted by the HREOC Commissioner Calma:

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

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<sup>33</sup> *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28 (8 August 2002)

<sup>34</sup> *Glaskin* 2003:2

<sup>35</sup> *Strelein* 2001: 102

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.<sup>36</sup>

#### 4. What does communal title mean to those who hold it? <sup>37</sup>

Joseph ‘Nipper’ Roe, a senior law man of the Yawuru, described the relationship between ‘country’, people and Law as follows:

The Yawuru people together own those places, as we together own all of Yawuru country. The way I look at it, the relationship between Yawuru people and country is really like a triangle made up of the people, the land, and the law. There is no such thing as a one-sided triangle or a two-sided triangle and there is no top or bottom or beginning or end of a triangle...In the same way, the people, the land, and the law are three aspects of the same thing. We have a duty to look after them all, and looking after one of them means looking after the other two as well.<sup>38</sup>

In evidence to the Federal Court another senior Kimberley law man, Paddy Neowarra described this relationship between people, land, law and the sky spirits, Wanjina:

Everybody under Wanjina. Myself, I'm under Wanjina. Animals, everybody. Everybody what in the earth. Yes, trees, everything, they all have to have names and they our families in the land. Even the river, everybody's tribe, somebody's name. My name is Neowarra. I got with my family with that black rock.<sup>39</sup>

Indigenous Australian systems of knowing, owning, inheriting and caring for land are profoundly different from those that have their roots in European forms of land-holding that range from feudalism to full commodification. To give a sense of the complexity and particularity of these systems we can look briefly at the way in which Paddy Neowarra’s Ngarinyin community map out their relationships to their traditional lands.

The land comprising the estate of a patrilineal clan is known as a *dambun*. Older people particularly think of particular *dambun* as particular relatives, so that a tract of land may be known as *abi*-brother, *ngadji*-mother, *gaja*-mother’s mother, *waya*-wife and so on. Each bloc of land becomes an embodiment of relationships with a range of people in different kin categories from surrounding *dambun*. This is not simply a metaphor for land. It serves to unify emotional stances within and between each group. All the people from one *dambun* will call another *dambun* and all the people patrilineated with it by the same kin term (even though in certain closer contexts finer differentiations might be made between generations).<sup>40</sup> Hence Neowarra might say of a tract of country, a sacred place within it or a man unrelated by blood: ‘that’s my mother’ or ‘that’s my son’.

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<sup>36</sup> Calma 2006: 40

<sup>37</sup> In the following section we have used examples drawn from native title evidence in the Kimberley WA, rather than Land claim proceedings in the Northern Territory. This is because this information is recent, readily available and within the authors’ area of expertise.

<sup>38</sup> In ‘Reasons for Judgement: Rubibi Community & Anor v The State of Western Australia & Ors’ [2001] FCA 607

<sup>39</sup> Neowarra v State of Western Australia [2003] FCA 1402

<sup>40</sup> Redmond 2001

While westerners have no trouble thinking in terms of ‘motherlands’ and ‘fatherlands’ these terms often become depleted of the emotional content of actual family relationships and come to serve as shorthands for an objectified nation state. For northern Kimberley people and many other Australian Indigenous people, the full range of human relationships is embodied in relationships to country. This includes thinking and talking of country as a child that needs love, protection and care, or as a mother or father that provides that nurturing.

The characterisation of land as kin is not unique to the Kimberley. Interpersonal exchanges and person/land relationships in the Western Desert, for example, are not characterised so much as relationships of reciprocity or production but rather as relationships of reproduction.<sup>41</sup> The Indigenous tropes that are used to describe both exchange and senior men’s relationships to country, draw upon images of the mother-child relationship and talk of ‘holding’, ‘feeding’, ‘growing up’, ‘giving’. Relationships between equals, such as brothers-in-law, are encompassed by this fundamental nurturing experience which is expanded to include a reproduction of the whole of the social and natural world.<sup>42</sup> Specific rights, responsibilities and obligations to people and places flow from these reproductive relationships.

It is this non-European way of understanding the relationship between people and land that led the ALRA to define ‘traditional owners’ as those members of the group that have the ‘primary spiritual responsibility for land.’<sup>43</sup>

In a recent address distinguished Australian anthropologist, Peter Sutton, argued against the ‘gauche’ and ‘paternalistic’ imposition of ‘an inapplicable or fading traditionalism’ on Indigenous land-holders. He also objected to a ‘popular stereotype [that suggests] that all traditional land rights were by tradition communal, and that individual entitlements and interests granted by the holders of the commons are simply a Western introduction.’<sup>44</sup>

In this paper we do not contend a simplistic communalism in Aboriginal forms of land tenure. On the contrary, a variable range of rights and interests in land can be generated by clan membership, conception place, residency, historical association, marriage, initiation and moiety membership to name but some of the bases for differentiating rights and interests in country. What is pertinent here is that these rights and interests have multiple, intersecting bases, such that it is very difficult for any one person, or any one family bloc, to speak decisively for all of the rights and interests related to any particular area of land.

To use another Ngarinyin illustration, in any *dambun* you will find that patrilineal clan members share their rights in country with those for whom this *dambun* is mother’s country, or mother’s mother’s country, or husband’s country. Certain waterholes and associated painting sites will often ‘belong’ to one or two individuals whose spirit (*rai*) emerged from these waters. Descendants of those with conception rights may sometimes activate these types of rights and interests in the name of their

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<sup>41</sup> cf Myers 1993:36, Ingold 1990:11

<sup>42</sup> Myers 1993:51

<sup>43</sup> cf Peterson, N. 1976. ‘Tribes and boundaries in Australia’. Social Anthropology Series no.10. Canberra. AIAS; Peterson, N., Keen, I., and Sansom, B. 1977. Succession to Land. Primary and Secondary Rights to Aboriginal Estates Northern Land Council, Canberra 1977

<sup>44</sup> Sutton 2005:5

forbear. Another family, sometimes from a different language group area, may have rights over a ceremony ground, a cache of exchange objects or a burial site in the same country. Others may have 'foot-walked' the area, whether working, residing on a Mission or Station, or evading State functionaries, and the intimacy of their association may give rise to particular rights to have a say in the use of the area. Some wilfully exceed their traditional rights until called to account by other traditional owners.

In short, we are arguing not that all Aboriginal land-rights were traditionally communal but rather that all traditional<sup>45</sup> *systems of regulating* rights and interests in land were communal. What is crucial is who holds which rights in what at any given time.<sup>46</sup> A range of differentiated rights and interests in land derive from bodies of communal law and custom. Hence Sutton argues for the Western Desert that:

Western Desert ideology does not locate country interests in the individual *per se*, however understood. One of the key values associated with enduring institutions such as the *Tjukurrpa* is their very transcendence of momentary and egoist will. Whether internalised as the Law of the Dreaming, or merely respected or feared externally as a matter of determination by the polity collectively and in ways that are subject to negotiated 'consensus', though often based on both, Aboriginal country interests are typically conducted on the premise that full private ownership is not really possible.<sup>47</sup>

The fit between traditional knowledge systems and Australian law is neither close nor comfortable. Australian law and legislation demand that those that wish to claim land rights or native title form themselves into groups that privilege one or another grouping (be it cultural bloc, language group, family or clan) and that membership of these groups be codified, predictive and immutable. While traditional boundaries must define the extent of a claim area, the areas where native title will persist are not defined by these traditional boundaries but are determined by the contingencies of colonial history and law. The Indigenous process by which historical events become part of an everlasting and immutable Creation are ritualistic and religious and do not sit comfortably with simplistic demands to show, for example, biological descent from the original inhabitants of a claim area. However, despite the lack of fit between these different ways of structuring knowledge about and relationships to land, it is the grossest of oversimplifications to characterise Indigenous knowledge systems or the legislation to which they gave rise as a 'socialist experiment',<sup>48</sup> or to describe Indigenous communities as 'cultural museums'.<sup>49</sup>

Rather, it is the complexity, the wide variety of Indigenous knowledge systems and their incommensurability with western understandings of land that led the anthropologist W.E.H Stanner to remark that:

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home', warm and suggestive though it may be, does not match the Aboriginal word that may mean 'camp',

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<sup>45</sup> Indeed, a regulatory system in any society is by definition collectively based.

<sup>46</sup> Peter Sutton, pers. comm. date.

<sup>47</sup> Sutton 2003: 159

<sup>48</sup> Hughes and Warin 2005:1

<sup>49</sup> Vanstone c) 2005



‘hearth’, ‘country’, ‘everlasting home’, ‘totem place’, ‘life source’, ‘spirit centre’ and much else. Our term ‘land’ is too spare and meagre. We can scarcely use it except without economic overtones unless we happen to be poets.<sup>50</sup>

The Aboriginal English word ‘country’ is not equivalent to the ordinary English use of the word ‘country’. Rather, the word ‘country’ is an abbreviation of all the values, places, resources, stories and cultural obligations associated with that area. Certainly, to talk of country is to talk of its resources: their uses and their proper distribution. In this sense, to understand ‘country’ is also to understand its crucial importance to the Indigenous economy and governance. However, the Aboriginal English word ‘country’ best describes the entirety of a people’s ancestral domains. It is place that gives meaning to creation beliefs. The stories of creation form the basis of traditional Indigenous law and explain the origins of the natural world. Thus to speak of country is to speak of a system of law and culture: of the economic uses to which country may be put, the Indigenous governance structures that regulate its use and occupation and in many cases of a spiritual relationship that links the past to the present, the dead to the living and the human and non-human worlds. We concur with Altman that:

Anthropologists know that closing the gaps, or aiming for statistical equality via mainstreaming, can be incompatible with the endurance of cultural difference. While there is no anthropologist who would deny that equitable needs-based mainstream services should be provided to Indigenous people as Australian citizens, most would add the considerable rider that this does not mean that they share mainstream values. Indeed, a combination of colonial history, Indigenous priorities and choices might mean that many or some Indigenous people will continue to remain outside the mainstream. This is the reality of heterogeneity and diversity of circumstances as much as socio-economic inequality.<sup>51</sup>

## **5. The structures and processes for dealing with communal land**

Once Indigenous people have gained title over their country, there are (often intricate) processes for determining how title will be held and how use and access by others should be determined. There is considerable variation across different regimes, however here we are concerned with the ALRA.

There are two ways in which land in the Northern Territory can be made subject to the Act: it may be scheduled and annexed to the Act or a claim may be brought before the Aboriginal Land Commissioner and won. Land that is subject to the ALRA is not owned by individuals. It is granted as an inalienable freehold communal title. It can be leased but it cannot be bought, acquired or mortgaged.

For the most part, Aboriginal landowners with inalienable Aboriginal freehold have the exclusive power to control the direction and pace of development on their lands. The public, in the form of Government at various levels, has only limited rights to impose external development or conservation direction or constraints.<sup>52</sup>

Communal title is formally vested in Aboriginal Land Trusts that are comprised of Aboriginal people who hold the title for the benefit of the traditional owners and other

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<sup>50</sup> W.E.H. Stanner: 1991:44

<sup>51</sup> Altman 2004: 2

<sup>52</sup> www.clc.org.au Accessed 19/8/05

people with a traditional interest in the land. These trusts are statutory corporations and their role is essentially passive. The Trust holds the title but has no authority to undertake any dealings in relation to the land except as directed by a Land Council, as authorised by the traditional owners. Precisely because land is owned communally it is unlikely that any individual has the absolute right to approve an activity carried out on Aboriginal land, particularly if that activity will involve substantial interference and disturbance to 'country'. The Land Council's role is to ensure that Aboriginal culture, traditions and law are respected and followed on Aboriginal land; that the relevant Aboriginal people make informed decisions and that commercial and resource exploitation agreements are fair. The Land Council must be satisfied that the relevant traditional owners understand the nature and purpose of any land use agreement which is entered into on their behalf and that they have agreed to it as a group.<sup>53</sup>

Attention has been brought to bear on the communal nature of the titles as a brake on economic development and ignited debate on Indigenous land tenure. While the regime was designed to both provide certainty for proponents and to protect the intergenerational nature of the titles, it is perhaps not surprising that it is perceived by some as an onerous imposition and a hindrance to economic development, hence the changes to the ALRA which will be implemented in the following manner:

1. The Australian Government will change its own law (*Aboriginal Land Rights (Northern Territory) Act 1976*) to allow the Northern Territory Government to establish an entity to talk with the Traditional Owners and the Land Council of a particular town area about the head-lease.
2. The Northern Territory Government will pass its own law so that it can get the entity to talk to the Traditional Owners and Land Councils to agree on a head-lease for the whole town area in the community.
3. The Traditional Owners and Land Councils will set all the conditions of the 99-year head-lease including the rent up to the maximum set in the Land Rights Act.
4. Once there is agreement for a head-lease, the people who live in the town area can then ask the entity for a lease on part of the town land which they can use for their own home or business.
5. If the people who lease the part of the town land want some help with money for their own home or business, they can contact the Australian Government.<sup>54</sup>

The Office of Indigenous Policy Coordination's literature on the reforms raises as many questions as it answers. In particular we are concerned that the ABA will be beggared by the set-up costs (including the retention of legal counsel and other consultation expenses), surveying of both head-lease and sub-lease areas, rental payments and other administrative costs of this scheme. It is also unclear what will happen with the housing and infrastructure currently owned by Land Trusts. If they are to remain with the Land Trusts how will their upkeep be funded, if the ABA is to be used to fund the scheme? Does the Government hope to replace royalties with rent?

It should also be noted that the purpose of the ABA is to provide a mechanism for providing funds for the benefit of Aboriginal people in the Northern Territory. Such

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<sup>53</sup> [www.nlc.org.au](http://www.nlc.org.au) Accessed 19/8/05 and [www.clc.org.au](http://www.clc.org.au) Accessed 19/8/05

<sup>54</sup> [www.oipc.gov.au](http://www.oipc.gov.au) Accessed 9 Oct 05

funds are compensatory in nature and are not intended to substitute for normal government expenditure for Aboriginal development.

## 6. The Reforms

The push to privatise Indigenous land began late last year when the current President of the Australian Labour Party, then National Indigenous Council member and CEO of NSW Native Title Services, Warren Mundine, released a statement to the media that called for fundamental legislative changes to the Native Title and Land Rights Acts. Mr Mundine said the Aboriginal community had the key to economic advancement locked up in communal land-holdings and suggested that they could be selectively sold. In February of 2005 Mr Mundine tabled a paper called 'Privatising Indigenous Land' at a meeting of the National Indigenous Council.

Meanwhile, in early March, economist Helen Hughes and nurse Jeness Warin published their article 'A New Deal for Aborigines and Torres Strait Islanders in Remote Communities' through the mining-company funded right-wing think tank the Centre for Independent Studies. In this article they claimed that '[c]ommunal ownership of land, royalties and other resources is the principal cause of the lack of economic development in remote areas'. They liken remote communities to 'museums', designed to preserve a hunter-gatherer culture that is 'uneconomic' in modern Australia. They want Aboriginal people to catch up with post-industrial society and enjoy Australia's 'ever increasing capital and advancing technology'. They rail against bi-lingual education, 'separatism', and the recognition of customary law. Remote communities are conceived as 'a nation independent from the rest of Australia'. Although the term 'assimilation' is avoided they pathologise all manifestations of cultural difference.

On 30 May 2005 Prime Minister John Howard addressed the National Reconciliation Workshop and said that his government is 'committed to protecting the rights of communal ownership (and)...does not seek to wind back or undermine native title or land rights.'<sup>55</sup> There, one might have hoped, was an end to the matter.

However in June the NIC released a document entitled 'Indigenous Land Tenure Principles', its only public piece of policy advice to date. These principles, while referring to the importance of communal title to Indigenous people, included the recommendations that:

- the consent of the traditional owners should not be unreasonably withheld for requests for individual leasehold interests for contemporary purposes'; and that '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 and that

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<sup>55</sup> In NIT 2005: Issue 85

- Governments should review and, as necessary, redesign their existing Aboriginal land rights policies and legislation to give effect to these principles.<sup>56</sup>

These recommendations were worrying for a number of reasons. One wonders how ‘just terms’ will be calculated in those cases where the value of communally held land to its owners is spiritual and cultural, and where the market value of the land is negligible. Further, after the expiration of a 99 year lease one would question whether land returned will be recognisable either physically or culturally to the original title holders or their descendants. It is worth noting in this context that the phrase ‘unreasonable withholding of consent’ is most commonly applied to property owners who refuse to continue an existing lease. As Bradfield concluded, ‘The NIC’s Principles left the Commonwealth to define what is ‘unreasonable’ withholding of consent, what would have been ‘just’ compensation for compulsory acquisition, and whether ‘subsequent return’ of land is possible.’<sup>57</sup>

The final very troubling aspect of the NIC proposal was that the authors of the document recklessly gave total unqualified and undefined ‘licence’ to the government to make wholesale unspecified policy and legislative changes to give effect to these principles. There is nothing revealed in the NIC document that indicates it had considered the adequacy of the existing legislative arrangements for leasing on Indigenous owned land. Land returned to Indigenous communities via land rights legislation can be sold in NSW, leased in most other jurisdictions and some of these leases can be mortgaged. In the Northern Territory Aboriginal land has been leased to third parties for a range of purposes including tourism, safari hunting, fishing lodges and infrastructure.<sup>58</sup> AustralAsia Railway Corporation’s partial funding of the Alice-Darwin rail link by mortgages over leased Aboriginal land shows that commercial lenders may participate in these arrangements.<sup>59</sup> Native title holders may negotiate Indigenous Land Use Agreements that allow economic development to take place on their land. These may include profit sharing and/or employment opportunities for the community.<sup>60</sup> In our view there it is inappropriately interventionist to consider privatising Indigenous land without consultation with and consent from its owners. We conclude with Altman that the policy pendulum appears to have swung reactively to focus primarily on the elimination of socioeconomic difference, while overlooking cultural difference and plurality.<sup>61</sup>

Would legislation that enabled the alienation and subdivision of communal land produce improved economic outcomes for Indigenous Australians? Would privatising communal land address Indigenous economic inequality? It may for some, although it almost certainly will not for most. We believe that there are many reasons to think that privatising communally held land would not in itself improve economic or other outcomes for Indigenous Australians.

Let us consider the economic value of the land which is held under communal titles and the nature of that title. The ALRA and the Native Title Act both strictly limit the

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<sup>56</sup> NICa 2005

<sup>57</sup> Bradfield 2005: 8

<sup>58</sup> Altman et al 2005: 22

<sup>59</sup> Clarke 2005:1

<sup>60</sup> Edmunds & Smith 2005: 74

<sup>61</sup> Jon Altman 10 March 2006 pers comm

land available to be claimed by Indigenous people. The Native Title Act provides that claimable land must have never been subject to freehold title. Where the Crown has granted leases or licences, Indigenous rights and interests are extinguished to the extent of the rights and interests granted. In the Northern Territory, under the existing ALRA, only certain reserve crown lands and vacant crown lands can be claimed or pastoral leases that are owned by or on behalf of Aboriginal people. Hence, the land that is available for claim under these regimes is precisely that land which in most cases tends to be the least commercially valuable and viable.

It has been observed that the ‘major cause of under-development on the Indigenous estate is that land has been returned but without property rights or exclusive control of commercially valuable resources’<sup>62</sup> and further:

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 can add to the costs of delivering products and services from Indigenous communities.<sup>63</sup>

This begs the question of whether isolated and under-resourced<sup>64</sup> Indigenous communities could be transformed into viable economic marketplaces by privatising land ownership. In particular, there is much evidence to suggest that the average household income in remote Australian Indigenous communities is simply not sufficient to service a mortgage. According to a major report into land rights and development in remote Australia, prepared for Oxfam by the Centre for Aboriginal Economic Policy Research<sup>65</sup> the average household (not individual) income in remote parts of the Northern Territory is approximately \$40,000 a year. If dealing with a mainstream financial institution, this level of income would allow the household to borrow approximately \$160,000 over 30 years to pay for a house at a cost \$1110/month in mortgage repayments and total interest payments of \$235,000. Compare this to the \$192 a month that the average remote household pays in rent. Moreover, the cost of building a house in a remote community is between \$225,000 and \$350,000, at least \$100,000 more than a bank would lend a family on an average income. Furthermore, overcrowding, the associated overuse of these properties, difficulties in obtaining building supplies and the common use of cheap and poor quality materials, together with the rugged environmental conditions, mean that the rate of depreciation is very high. Finally, the value of land in remote townships of the Northern Territory is between \$4.30 and \$36 per square metre and of pastoral lease

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<sup>62</sup> Altman et al 2005:6

<sup>63</sup> Productivity Commission 2003:310

<sup>64</sup> ‘Despite popular views that there is over-expenditure on Indigenous Australians, in fact there is under-expenditure on any equitable needs-based criteria’ (Altman 2005: 6).

Hence, the 2005 study of the success of the new arrangements at Wadeye in the Northern Territory found that although: one might have expected that the remedial costs to government of servicing a growing Australian community that is relatively sick, poorly housed, illiterate, innumerate, disengaged from the education system, on low income, unemployed, and with a sub-standard communications network would be substantially higher (not lower) than the Northern Territory average. What emerges instead is something akin to Hart’s (1971) oft-cited inverse care law in relation to health care needs—‘to those most in need the least is provided’. Furthermore, there is a structural imbalance in funding at Tharrarrurr with proportionally less expenditure on positive aspects of public policy such as education and employment creation that are designed to build capacity and increase output, and proportionally more spending on negative areas such criminal justice and unemployment benefit t. This begs the very important question as to whether this situation of fiscal imbalance actually serves to perpetuate the very socioeconomic conditions observed at Tharrarrurr in the first place (Taylor & Stanley 2005: 63)

<sup>65</sup> Altman et al 2005

land, approximately \$13 per hectare<sup>66</sup> which raises the question: how much money would realistically be raised from the privatisation of these lands? As the Human Rights and Equal opportunity Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma points out:

Changing land tenure to create the legal ability to own homes individually will not give Indigenous Australians the financial ability to do so.<sup>67</sup>

The privatisation of communally held Maori lands in New Zealand had the effect of worsening economic outcomes for Maori people<sup>68</sup>, while in PNG agricultural production has expanded steadily under customary tenures and has mostly declined under registered titles.<sup>69</sup> Empirical economic research, commissioned by the International Institute for Environment and Development found that the re-titling of communal lands in sub-Saharan Africa had not worked well as 'the costs were high...the expected benefits had not materialised and, where family farming prospered, it appeared to do so anyway, on a foundation of customary rights, secured by kinship and social contracts.'<sup>70</sup>

Even if there were good reason to expect great benefits to flow to Indigenous Australians from the privatisation of their communal lands, there has been no process of consultation on this issue with those people who would be most affected<sup>71</sup>: communal title holders. Improved material conditions might well tempt traditional owners to accept a form of social re-engineering, whereby residence and/or historical association rather than traditional ownership assumes more importance in relation to land and the control of Land Councils. However, this is a hypothetical question. Without extensive consultation it is impossible to know whether or not traditional owners are interested in changing the current arrangements. The World Bank has noted 'processes of land reform which do not enjoy legitimacy and recognition amongst the peoples they affect have often proven to be highly ineffective.'<sup>72</sup> State policy frameworks may structure opportunities for Indigenous Australians but ultimately it is Indigenous agency that will underpin Indigenous responses to policy.<sup>73</sup>

There is little in the way of evidence to suggest that privatising Indigenous land would improve the economic situation of Indigenous Australians and there are many reasons to suppose that it could worsen an already desperate situation. Even if there were evidence to support the notion that privatising communal lands would be of benefit to Indigenous people it is worth recalling the findings of this Government's own inquiry into the ALRA (the 1998 Reeves Review). The Review found that communal title is the form of title that is most likely to protect the interests of Aboriginal people, including future generations, in their traditional lands. It also found that the inalienability of Aboriginal freehold title does not significantly restrict the capacity of Aboriginal Territorians to raise capital for business ventures. Perhaps most

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<sup>66</sup> Altman et al 2005: 15-16

<sup>67</sup> Calma 2006: 13

<sup>68</sup> Altman et al 2005:25-30

<sup>69</sup> Burke in Fingleton a) 2005

<sup>70</sup> Quan in Gilmour 2005: 13

<sup>71</sup> It is disingenuous, to say the least, for the Office of Indigenous Policy Coordination to co-opt the consultations that took place in the development of the joint submission, as privatisation of communal lands was not an aspect of these consultations.

<sup>72</sup> World Bank, 'Land Policies for Growth and Poverty Reduction 2003' 2003: xxiv in Bradfield 2005: 9

<sup>73</sup> Altman 2005: 7

importantly, the Reeves Review notes that the achievement of Aboriginal social and economic advancement through land rights was not an objective of the ALRA when it was introduced.<sup>74</sup>

A central plank of the argument for privatisation is that greater economic outcomes should have (and have not) resulted from the return of land under the various land rights regimes for traditional owner communities. However, we question the presupposition that land rights and native title legislation were primarily intended to produce economic outcomes. As the HREOC Native Title Report 2005 makes plain, there are four main 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.<sup>75</sup>

The Native Title Act and its amendments represent legislative attempts to limit the implications of a High Court decision that overturned the doctrine of *terra nullius* (land belonging to no-one) on which British claims to possession of Australia were based. Far from being an Act that was designed to achieve economic or social justice outcomes for Indigenous Australians it was an Act designed to protect non-Indigenous property interests in Australia.

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...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.<sup>76</sup>

It is ahistoric and beside the point to criticise the ALRA and NTA on the basis that they have not achieved something that they have not been supported to achieve: that

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<sup>74</sup> The Woodward Royal Commission which led to the enactment of the Land Rights (Northern Territory) Act 1976 set out the aims underlying the recognition of land rights in the Territory as follows:

1. The doing of simple justice to a people who have been deprived of their land without their consent and without compensation.
2. The promotion of social harmony and stability within the wider Australian community by removing, so far as possible, the legitimate cases of complaint of an important minority group within that community.
3. The provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living. See also Ridgeway 2005: 8 & 9
4. The preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs.

Australian Aboriginal Studies 1996/number 2 5

5. The maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority. (Woodward in French 1996).

<sup>75</sup> Calma 2006: 16

<sup>76</sup> Calma 2006: 42 and 47

is, produce economic advancement for Indigenous Australians. As Commissioner Calma succinctly puts it

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.<sup>77</sup>

This historical fact seems to be absent from the current reasoning as plainly seen by Senator Vanstone's suggestion that:

[W]e need to explicitly draw a line on the level of service that can be provided to homeland settlements...No more cultural museums that might make some people feel good and leave Indigenous Australians without a viable future. Continuing cultural identity does not require poverty or isolation from mainstream Australian society.<sup>78</sup>

Leaving aside the provocative characterisation of living communities as 'cultural museums' we challenge Senator Vanstone to provide any evidence that Indigenous poverty will be relieved or cultural identity maintained by denying Indigenous people the opportunity to retain, through residence, their traditional connection to country.

## 7. Conclusion

It is pertinent to ask why the Federal Government has moved so quickly to implement these changes to the ALRA. We must remember that the issue has been raised in the context of a fundamental restructure of Indigenous affairs in Australia a restructure described by the Former Minister for Indigenous Affairs Amanda Vanstone as both a 'quiet revolution' and a 'total reshaping'. Grouped under the rubric of 'the new arrangements' these changes have included the abolition of ATSIC, proposed changes to the Native Title Act to make it 'more workable' for opponents of claims and a move towards 'practical' rather than 'symbolic' reconciliation. This restructure has been administrative rather than legislative, meaning much of it has taken and will continue to take place secretly behind closed doors.

The Australian Human Rights and Equal Opportunities Commission's assessment of the new arrangements in Indigenous Affairs sets out powerfully the range of concerns that we have:

With the announcement of the new arrangements, there has been a noticeable shift in emphasis on the role of Shared Responsibility Agreements (or SRAs). The focus is now much more explicitly on the responsibilities of Indigenous people in meeting mutual obligation principles. The OIPC state that the SRA process is intended to:

*build genuine partnerships with Indigenous people at the local level based on the notion of reciprocity or mutual responsibility. An SRA is a two way street where communities identify priorities and longer term objectives for themselves, government listens and they work together to*

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<sup>77</sup> Calma 2006: 32

<sup>78</sup> Thanks to Peter Sutton for the observation that 'Separate *political* identity doesn't depend on some degree of isolation but separate *cultural* identity does. Or is 'cultural identity' now primarily a political thing in Vanstone's terms?' Peter Sutton, pers. comm.. date.



*achieve agreed objectives - nothing can progress unless the lead comes from the community.*

This presents the acceptance of mutual obligation as voluntary. However, the OIPC have also stated that 'Under the new approach, groups will need to offer commitments in return for government funding'. During consultations for this report senior bureaucrats have confirmed that the intention is that communities that do not wish to accept mutual obligation will be provided with basic services, but might not receive additional funding or support....Consultations for this report have revealed widespread concerns about the potential scope and dominance of mutual obligation requirements. There is concern that SRAs will become less of a community development and capacity building model and more of a punitive funding agreement model which seeks behavioural change. This is particularly so when, as in the Mulan agreement, there is very little connection between the outcome sought by the Government (in this example reducing the incidence of trachoma) and the input provided by the Government (a petrol bowser). There is also widespread concern that the linking of delivery of services to behavioural change through SRAs would be discriminatory.<sup>79</sup>

The Federal government's decision to legislate away the recognition of fundamental cultural difference afforded by the ALRA is in keeping with the assimilationist thrust of the 'new arrangements':

There are clear rewards for those who participate in developing capacity and who become accepted into mainstream society, either through becoming a program beneficiary or becoming a person that no longer requires discretionary monies to 'be improved' and has become a 'fit citizen' for modern Australian society. These considerations are based on ideologies of respectability and good citizenship and that our attainment of these is best managed in urban areas where a large number of Aboriginal and Torres Strait Islander people already reside. I have provided a historical policy perspective that shows these 'new arrangements' are a replication of the 'New Deal' announced in 1939 and its subsequent development in the 1940s and 1950s assimilation policies; and that there are similarities between what is desired by the Commonwealth Government both then and now.<sup>80</sup>

We conclude that the changes to the form of tenure under the ALRA, which have been proposed without mandate and with a consultation process that could be generously described as perfunctory, seem to be squarely aimed at drawing residents in remote communities away from real communal ownership of land and into individuated relationships with the broader economy.

Yet there is no evidence for the proposition that carving up the Indigenous estate will improve the day to day lives of Australia's Indigenous people, let alone their descendants. Given this lack of evidence we can only assume that this process has been ideologically driven. There are abundant statistics that speak to the desperate living conditions endured in so many remote Indigenous communities. We are convinced of the need for real, sustainable economic development, access to clean water, sewage, roads, housing, education, medical care, and all of the basic human rights that most other Australians are able to take for granted. It is salutary to

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<sup>79</sup> Calma 2004: 117

<sup>80</sup> Arabena 2005: 49

remember in this context the findings of the Royal Commission into Aboriginal Deaths in Custody which concluded that:

dispossession and removal of Aboriginal people from their land has had the most profound impact on Aboriginal society and continues to determine the economic and cultural wellbeing of Aboriginal people.<sup>81</sup>

We have argued that communal rights and responsibilities in relation to land are a key component of Indigenous Australians' various and unique cultures. That there has been no research and hence no evidence to suggest that the proposed leasing arrangement will address these issues in any meaningful way. We give WEH Stanner the final word. These words, written 40 years ago, alas still resonate today:

There are immense pressures of expediency we all understand. But they do not answer the ethical questions. The principles are clear. Is this use of power arbitrary? Is the decision just? And is it good neighbourly? Rigorously asked, and candidly answered, (the answers) will leave many people feeling uncomfortable...There are positive requirements which compel the Aborigine to give up his own choice of life in order to gain things otherwise conceded to be his of right. The ethics of the policy thus seem very dubious.<sup>82</sup>

*Postscript*

*The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* was passed in the Commonwealth Senate on 17 August 2006.

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<sup>81</sup> in Calma 2006: 21

<sup>82</sup> Stanner 1958:

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