



## **Land, Rights, Laws: *Issues of Native Title***

**Editor: Craig Greene  
June 2005**

**Volume 3  
Issues Paper no. 3**

### **Abstract**

*This year, a national debate about wealth creation on communally owned Indigenous land has gathered a good deal of momentum. To date, there has perhaps been more heat than light shed on the subject of economic development on Indigenous land held under the Commonwealth Native Title Act and State Land Rights Acts.*

*Rather than thoroughly investigate the complex issue of promoting sustainable economic development on Indigenous land, this paper tracks the recent debate in order to identify a number of the questions bound up in this topic – questions which touch on issues of social organisation and identity, not just economics and politics. After examining how the current debate began, the paper looks at arguments put forward by a number of prominent, largely Indigenous, commentators. It attempts to disentangle a number of key questions that can get conflated in sometimes self-interested and ideologically driven discussion of wealth creation on Indigenous land.*

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### **White picket fence or Trojan horse? The debate over communal ownership of Indigenous land and individual wealth creation.**

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## Introduction

From at least the 1970s, it was often assumed that returning land to Aboriginal and Torres Strait Islander peoples was not only right and just, it would contribute to improved socio-economic conditions and increased economic development. In general, the direct link between land return and economic and social development hasn't been firmly established, whether through the absence of any link, or a lack of analysis and investigation. Currently a national debate is taking place in Australia around issues of economic development and Indigenous land. Former Senator Aden Ridgeway has suggested '[t]his debate about communal ownership of land... goes to the core of the importance of the *Mabo* decision and the land rights debate prior to that'<sup>1</sup>.

Today, the 'Indigenous estate' – those lands that are owned or controlled by Indigenous people – makes up approximately 20% of the Australian continent.<sup>2</sup> As native title claims slowly work their way through the system this land base is set to increase, as is the Indigenous population, particularly on remote lands.<sup>3</sup> The nature of land tenure of the Indigenous estate has been raised as one reason why land return has not clearly translated into improved socio economic statistics. Communal ownership of land, as required by native title and some State land rights acts, has specifically been put forward as a possible barrier to development, for example in attracting capital for investment and home ownership. Thus, the issue of creating private interests from communal holdings has been a focus of debate.

In investigating the way the question of communal ownership has been addressed, it is important to note that the current debate on wealth creation on Indigenous lands is taking place at a time of radical change in the Indigenous affairs landscape. Key features of that landscape include:

- Re-election of the Howard government with an increased majority, and an almost unprecedented opportunity to reshape Indigenous affairs now that it has control of both Houses of Parliament;
- The implementation of 'new arrangements' in the administration of Indigenous affairs which focus on 'mutual responsibility', particularly through direct agreement making with communities;
- Elected Indigenous representation (and advocacy) has been abolished; and

While not strictly replacing ATSIC, the Howard Government has installed a new group of advisers (the National Indigenous Council, or NIC) who have indicated a willingness to embrace and recommend policy positions which tend to align with the Australian government's 'practical' (rather than 'rights based') approach in Indigenous affairs.

In the midst of this climate, this Issues Paper sets out what some key Indigenous and government commentators have said on the issue of wealth creation on Indigenous land over the past 6 months, with a view to teasing out

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<sup>1</sup> A. Ridgeway, 2005. 'Addressing the economic exclusion of Indigenous Australians through native title'. *The Mabo Lecture, National Native Title Conference, Coffs Harbour, 3 June*. [online] Available at <http://www.aiatsis.gov.au/rsrch/ntru/conf2005/papers/papers.html> [Accessed: 7 August 2005]

<sup>2</sup> J.C. Altman, M.C. Dillon, (ed) 2004. 'A Profit-Related Investment Scheme for the Indigenous Estate, *CAEPR Discussion Paper No. 270/2004*, p1.

<sup>3</sup> For discussion of the Northern Territory, see J. Taylor, 2003. 'Indigenous economic futures in the Northern Territory: The demographic and socioeconomic background'. *CAEPR Discussion Paper No. 246/2003*.

some key questions around communal ownership and development. Some of these key questions have yet to be addressed in any detail, with some commentators fearing the current focus on communal ownership is little more than 'a Trojan horse to attack Aboriginal rights and land councils.'<sup>4</sup>

### **The debate so far**

The current debate was largely sparked by the Chief Executive Officer of New South Wales Native Title Services and member of the National Indigenous Council, Warren Mundine, when, on 'one quiet Sunday'<sup>5</sup> he issued a media release on the issue of wealth creation on communally owned Indigenous land. He was subsequently quoted as suggesting 'We need to move away from communal land ownership and non-profit community-based businesses and take up home ownership, economic land development and profit-making businesses.'<sup>6</sup>

While John Howard hasn't been known for his consistent interest in Indigenous affairs, Mundine's comments received warm support from the Prime Minister, who suggested Mundine's view represented 'a major step forward and a break from past attitudes which I think acted as a brake on progress and solutions.'<sup>7</sup> In the months to come, Mundine would confirm his support for communal land holdings, but initially at least, his comments had the effect of bringing others out in support of communal ownership.

One of these was long time CEO of the Central Land Council, David Ross. He argued that in Central Australia, 'people aren't averse to getting involved in the economy and things of that nature, but is it really necessary to give up the title to their land?'.<sup>8</sup> For Ross, it was not the nature of tenure that was holding Aboriginal people back, but a lack of understanding, coordination, and will amongst governments in dealing with that tenure. He suggested 'Our biggest drawback is trying to get bureaucrats... to understand what really needs to be done, and getting them to loosen the purse strings.'<sup>9</sup> Here he points to the historically low level of investment in Indigenous communities by all governments. This low level of resourcing continues today.<sup>10</sup>

Also commenting on the issues raised by Warren Mundine, Professor Mick Dodson suggested losing communal ownership of land 'could be very, very dangerous for Aboriginal people.'<sup>11</sup> Professor Dodson was under no doubt about the Australian Government's agenda: he argued '[Howard's] trying to get rid of communal ownership... He doesn't like the idea of communal ownership. His religious and spiritual traditions don't allow for this form of ownership.'<sup>12</sup> Senator Aden Ridgeway recently agreed that comments by the Prime Minister were 'drawn

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<sup>4</sup> G. Yunupingu, 2005. Wilson A. 'A voice for his people falls silent' *Australian*, 11 June, 2005. p6.

<sup>5</sup> W. Mundine, 2005. 'Aboriginal Governance and economic development', *National Native Title Conference, Coffs Harbour*, 3June. Available at <http://www.aiatsis.gov.au/rsrch/ntru/conf2005/papers/papers.html> [Accessed: 8 August 2005]

<sup>6</sup> M. Metherell, 2004. 'Land system holds us back says Mundine', *Sydney Morning Herald*, 7 December 2004. p 6

<sup>7</sup> Prime Minister Howard, cited in Metherell, See note 6, p6.

<sup>8</sup> D. Ross, 2004. Interview. *PM*, ABC Radio, 6 December, 2004.

<sup>9</sup> D. Ross, see note 8.

<sup>10</sup> For example, the Central Land Council suggests that for every dollar spent on a child's education in Darwin, 26 cents gets spent on a child in the remote community of Wadeye, 'Education before mortgages for Australia's poorest', CLC Media Release, 5 April, 2005.

<sup>11</sup> M. Dodson, *The World Today*, ABC Radio, 6 December 2004.

<sup>12</sup> M. Dodson, see note 11.

purely from a Western perspective that prizes individualism', and they illustrated a 'profound cross-cultural misunderstanding.'<sup>13</sup>

This raises a number of complex questions, most of which have only been lightly touched upon in the current debate. To what extent should we view Australia as home to *different* societies with different understandings of 'ownership', and perhaps, by extension, wealth creation? Can issues of disadvantage be addressed separately to cultural issues, or is this 'a false dichotomy'?<sup>14</sup> Kimberley Land Council executive director Wayne Bergmann argued it was not possible to make a distinction between development issues and culture. He suggested '[p]eople in the north and in remote communities see and deal with land in a different way, and private home-ownership would seem inconsistent with traditional ways.'<sup>15</sup> Speaking on this issue of cultural difference, Noel Pearson felt the current debate indicates Indigenous Australians 'are at a critical juncture in the confrontation between our culture and the imperatives of the modern world.'<sup>16</sup>

As to the political question: What *is* the Australian Government's agenda in embracing the issue of economic development on Indigenous communally owned land? Given the lack of detail, this is not always easy to determine. Commonwealth representatives have been more prone to issuing pronouncements than detailed policies, with an *Age* editorial suggesting 'the Government's message suffers from a disturbing lack of clarity.'<sup>17</sup>

In a phrase on the way to being well worn, Senator Amanda Vanstone suggested in a speech to the National Press Club: Being land rich, but dirt poor isn't good enough. We have to find ways to change that. What is appropriate is to recognise what the problem is, and there is a problem. There's a huge portion of land ownership and there doesn't seem to be anywhere near enough wealth being generated.<sup>18</sup> While this is not a particularly subtle view, it may be one that resonates with a majority of the wider community.

For the Prime Minister, addressing 'what the problem is' provided an opportunity 'for reviewing the whole issue of Aboriginal land title in the sense of looking more towards private recognition'.<sup>19</sup> Recently, Mr Howard has sought to reassure Indigenous leaders of his commitment 'to protecting the rights of communal ownership'.<sup>20</sup> However, his initial interventions into the debate raised fears of a new attack on native title and land rights – fears that were fuelled by a resolution at the Liberal Party Federal Council which urged the Government to

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<sup>13</sup> A. Ridgeway, 'Addressing the economic exclusion...', p8.

<sup>14</sup> A. Ridgeway, 'Addressing the economic exclusion...' p4.

<sup>15</sup> A. Wilson, A. Hodge 2005. 'PM's new deal for blacks – private homes to be allowed on native title', *Australian*, 7 April, p1.

<sup>16</sup> N. Pearson, 2005. 'Reconciliation a building block', *Australian*, 19 April, p13.

<sup>17</sup> 'New deal for Aborigines lacks detail', *Age* editorial, 8 April, 2005 p20.

<sup>18</sup> Senator, The Hon. A. Vanstone, MP, 2005. 'Address to the National Press Club' [online], 23 February. Available from [http://www.atsia.gov.au/media/speeches/23\\_02\\_2005\\_pressclub.htm](http://www.atsia.gov.au/media/speeches/23_02_2005_pressclub.htm) [Accessed:18 April 2005]

<sup>19</sup> Lindsay Murdoch, 'Howard's land rights: own your own home', *Sydney Morning Herald*, April 7 2005, p7.

<sup>20</sup> The Hon. J. Howard, MP. 2005. *Address at the National Reconciliation Planning Workshop*, Old Parliament House, Canberra, 30 May 2005, [online] Available from <http://www.pm.gov.au/news/speeches/speech1406.html> [Accessed 18 August 2005].

amend the Native Title Act so that it was 'less open to abuse by native title claimants'.<sup>21</sup>

Howard has argued there is a need to create what he described as 'a more entrepreneurial Indigenous culture'. In a thinly veiled comment on communal ownership, he said 'having title to something is the key to your sense of individuality. It's the key to your capacity to achieve and to care for your family'.<sup>22</sup> This foray into discussion about identity broadened the debate from the specific question of wealth creation on Indigenous lands. Michelle Grattan interpreted Howard's comments as suggesting he 'is bent on taking the white picket fence to remote Aboriginal Australia'.<sup>23</sup>

This approach appears to find favour in a lot of public commentary, much of it from sources with limited experience of engaging with Indigenous issues. The attack on communal ownership – if that's what it was – found support in two recent reports for the Centre for Independent Studies (CIS).<sup>24</sup> In one, titled 'A New Deal...', the authors assert that 'Nowhere in the world has communal land ownership ever led to economic development'.<sup>25</sup> Other conservative commentators suggested native title was 'about the least practical or flexible form of land tenure known to man'.<sup>26</sup>

Antipathy towards the idea of communal ownership saw a number of commentators liken it to communism, with the suggestion Aboriginal land councils are 'linger[ing] on as the last surviving Marxist enclaves in our part of the world'.<sup>27</sup> Both CIS reports described communal ownership as little more than the 'socialist experiment' of Nuggett Coombs.<sup>28</sup> Even the Australian newspaper described communal ownership as 'primitive socialism'.<sup>29</sup> Going even further, Michael Duffy argued 'breaking th[e] link with the land is the best thing that could happen to Aborigines'.<sup>30</sup>

These quotations may be indicative of the often questionable level of debate in Indigenous affairs in this country, as well as the poor standard of much media coverage of contemporary Indigenous issues. However, they add little of substance to this important debate. Even if it was possible politically or culturally to simply replace communal with individual title, no one has yet indicated how this in itself would facilitate development on Indigenous lands.

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<sup>21</sup> Policy Resolutions carried by Liberal Party Federal Council 24-26 June 2005 [online], Available from <http://www.liberal.org.au>. [Accessed 1 August 2005]

<sup>22</sup> 'The black picket fence'. *Sydney Morning Herald* editorial, 8 April 2005, p10.

<sup>23</sup> Michelle Grattan, 'Individual approach to land rights only half the answer', *Sun Herald*, 10 April 2005. p31.

<sup>24</sup> H. Hughes, J. Warin, 2005. 'A New Deal for Aborigines and Torres Strait Islanders in Remote Communities', [online] Available from: <http://www.cis.org.au> [Accessed: 1 August 2005]

John Cleary, 'Lessons from the Tiwi Islands: The need for radical improvement in remote Aboriginal communities', [online] 24 May 2005. Available from: <http://www.cis.org.au> [Accessed: 22 July 2005]

<sup>25</sup> Hughes, Warin, See note 24, p1.

<sup>26</sup> Christopher Pearson, 'Case to put lands right', *Weekend Australian*, 11 December 2004, p18.

<sup>27</sup> C. Pearson, see note 26, p18.

<sup>28</sup> Hughes, Warin (ed) see note, 29 p 1. and Cleary, J. see note 29, p 5.

<sup>29</sup> *The Australian* editorialised: 'At present, much Aboriginal land is held in common by communities, with individuals barred from owning, or purchasing property. This conforms to the old ideology of the land rights movement, that indigenous communities are happiest practising primitive socialism and are culturally comfortable with collective control of homes and land.' 'Land rights should apply to individuals', *Australian* editorial, 19 February 2005, p18.

<sup>30</sup> M. Duffy, 'A giant wakes to shake the world', *The Daily Telegraph*, 18 December 2004, p26.

Not only has public debate had limited success in addressing these complex issues, Noel Pearson recently suggested the debate had become confused by conflating different issues: He made a distinction between the legitimate agenda of 'land reform', and unacceptable attacks on land rights. Pearson argued: land reform – which enables community members to own their homes, facilitates the development of private enterprises and encourages external investment on Aboriginal lands to enable indigenous development – is a legitimate agenda. But re-contesting land rights is not. The Indigenous community fears that any re-contesting of land rights will be aimed at diminishing indigenous rights.<sup>31</sup>

This distinction helps clarify things. There appears to be overwhelming support among Indigenous spokespeople that this fact of communalism being part of identity should not – indeed cannot – be abandoned in pursuit of wealth creation. This of course, recognises the fundamental fact that issues of land have a profoundly cultural dimension that cannot be ignored. In Noel Pearson's words, communalism is 'the very basis of Aboriginal culture'.<sup>32</sup>

Apparently agreeing with this fundamental recognition, Aden Ridgeway suggested debate should focus on 'retaining the basic nature of title as it's currently held by many communities, but extending its capacities so that you can lease it, you can sell it, you can do commercial activity...'.<sup>33</sup> He argued the starting point for any discussion of how native title and other communal land can be used to achieve economic outcomes should be 'that the underlying communal title must not be disturbed.'<sup>34</sup>

A number of Indigenous commentators have stressed the fact that wealth creation can, and does, currently take place on communally owned land. Galarrwuy Yunupingu pointed out that economic development is a prominent part of working with land rights regimes such as the Northern Territory Aboriginal Land Rights Act – as seen in the fact that 44 commercial agreements were approved at the Northern Land Council's (NLC) final meeting last year.<sup>35</sup> Similarly Yamatji Land Council lawyer David Ritter has noted that *individual* wealth creation is a direct result of these and other native title agreements being negotiated on communally owned land.<sup>36</sup>

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, has also spoken of the way native title can contribute to, rather than prevent, sustainable development. He suggested native title 'brings with it assets, governance structures, and cultural capital' that provided an 'an opportunity to build on what already belongs to Indigenous Australians - their traditional ownership of land.' For the Commissioner, it was not the nature of title that retarded sustainable development, but the failure of governments to view native title as a policy tool to help them and communities achieve their objectives.<sup>37</sup> In a recent report on land policies and poverty reduction, the World Bank has also

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<sup>31</sup> N. Pearson, see note 16, p13..

<sup>32</sup> N. Pearson, see note 16, p13.

<sup>33</sup> A. Ridgeway, on *The World Today*, ABC Radio, 6 December 2004 [online] Available at <http://www.abc.net.au/worldtoday/content/2004/s1258767.htm> [Accessed 19 August 2005].

<sup>34</sup> A. Ridgeway, see note 2, p9.

<sup>35</sup> G. Yunupingu. 'The new threat to our lands', *The Age*, April 11 2005, p17.

<sup>36</sup> D. Ritter, 'Native title agreement making in the age of the Howard government', National Native Title Conference, Coffs Harbour, 3 June 2005.

<sup>37</sup> T. Calma, 2004, *Speech to launch 2004 Social Justice report and 2004 Native Title Report* [online], Available from [http://www.hreoc.gov.au/social\\_justice/sjreport04/speech.html](http://www.hreoc.gov.au/social_justice/sjreport04/speech.html) [Accessed: 22 July 2005]



recognised the need for governments to 'integrate land reform into the broader context of economic and social policies aimed at development and poverty reduction...'.<sup>38</sup>

In terms of exploring the options currently available on Indigenous owned land, much can be done in terms of innovative policy approaches which fall short of abandoning communal ownership. Land rights land can be sold in one jurisdiction, leased in most others, and at least some of these leases can be mortgaged.<sup>39</sup> Expanding and simplifying leasing options is one option that has received a good deal of attention.

Northern Territory Chief Minister Clare Martin said she would support an ACT-style 99 year plan that would not dilute Aboriginal land-ownership, but was 'about leasing... not about the changing of ownership'.<sup>40</sup> Warren Mundine, among others, has also indicated this type of plan is worth investigating,<sup>41</sup> and in just one example of many, NLC CEO Norman Fry suggested the NLC was talking to the Wadeye community about ways of introducing leasing arrangements into that community.<sup>42</sup>

A leasing arrangement on Norfolk Island allows individuals on the territory to own houses, conduct business and pass the property on to their families but prevents them from selling the property to anyone outside Norfolk Island. If such a system were introduced on Indigenous lands it could allow Aboriginal families on traditional lands or trust properties to buy their houses or businesses, operate them independently, and allow the properties and capital gain to be inherited by their families. To avoid non-Indigenous people buying land acquired under native title, the properties could be sold only to other communal land- holders.<sup>43</sup> This type of system would have to ensure it doesn't add to inequity via the creation of land owning classes on one hand, and those that are 'land poor and dirt poor' on the other. This possibility may be one reason why a statement by Native Title Representative Bodies calls on both the NIC and the Australian Government to reject the 99 year leasing proposal.<sup>44</sup>

As always, the devil is in the detail, particularly when dealing with the vagaries of State land rights legislation, and the native title act, as well as the often unique nature of the Indigenous estate. Characteristics of that estate, which – aside from the nature of title – will inevitably influence the question of wealth creation on Indigenous land, include:

- The majority of the Indigenous estate is desert and/or unsuitable for economic activities such as grazing and agriculture (which is often why land was historically reserved for Aboriginal people, or is now available for claim via native title);
- Remote communities have to contend with high transaction costs;

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<sup>38</sup> World Bank, 2003. 'Land Policies for Growth and Poverty Reduction 2003', Oxford University Press, (World Bank Research Report, pxi.)

<sup>39</sup> J. Clarke, 2005. 'Privatising' Indigenous land no panacea' [online]. *Online Opinion*, 15 April 2005. Available from <http://onlineopinion.com.au> [Accessed: 18 August 2005]

<sup>40</sup> A. Wilson, 'Aborigines wary of PM's homes plan', *Australian*, 8 April 2005, p4.

<sup>41</sup> M. Shaw, 'Indigenous plan for wealth from land', *Australian*, 7 March 2005, p9.

<sup>42</sup> A. Wilson, 'PM's new deal for blacks', *Australian*, 7 April 2005, p1.

<sup>43</sup> D. Shanahan, 'PM considers new land rights plan', *Weekend Australian*, 11 December 2004, p4.

<sup>44</sup> 'Statement by Native Title Representative Bodies' [online], *Native Title Conference, Coffs Harbour, 1-3 June 2005*. Available from [http://www.antar.org.au/land\\_rights\\_ntrbs.html](http://www.antar.org.au/land_rights_ntrbs.html) [Accessed: 12 June 2005]

- Many Indigenous communities have relatively limited markets, and often lack a skilled workforce and basic infrastructure such as roads, as well as services such as banking and financial services; and
- Income levels of many Indigenous people in both urban and remote remote communities don't support mortgage payments regardless of tenure.<sup>45</sup>

Moving towards individual titles will not in itself have a positive economic impact if the issues listed above remain unaddressed. It is not the nature of tenure that prevents economic development, it is the particular economic circumstances of communities, the value of land, and related access landowners have to credit markets and livelihoods and the lack of opportunities for investment. As such, the World Bank has recognised that programs aimed at reducing poverty must look beyond merely individualising tenure: It noted [t]here are many land-related interventions with a clear poverty-reducing impact that are less controversial politically and less demanding in terms of institutional capacity and fiscal resources. Initiating a program of land reform without at the same time exhausting these other options will not be prudent.<sup>46</sup>

While the limited and often superficial debate on the issues of communal ownership has not engaged with the complex and interrelated features of the Indigenous estate to any great degree, it does seem to have clarified at least one thing. Stakeholders on all sides apparently recognise the significance of communal title to Indigenous people. Key Indigenous leaders are unified in their opposition to any assertion that disturbance of communal title is necessary to promote economic development. For them, weakening underlying title in exchange for opportunities to increase wealth creation is off the agenda. The Prime Minister has also stated he recognises that 'communal interest in and spiritual attachment to land is fundamental to Indigenous culture'.<sup>47</sup> This statement was also echoed by the Chair of the NIC, Sue Gordon, who declared the Council 'believe in the fundamental importance of securing that underlying title for future generations.'<sup>48</sup> Global bodies such as the World Bank have also moved on from earlier assumptions that only individualized tenure can confer certainty in land rights and facilitate wealth creation.<sup>49</sup>

### **Indigenous title: are the 'fundamentals' safe?**

In light of this apparent consensus, it would appear the focus of debate can now shift towards mechanisms for increasing sustainable economic development on Indigenous land in ways that maintain rather than undermine Indigenous ownership. At the 2005 Native Title Conference, Peter Vaughan, the Executive Coordinator of the Office of Indigenous Policy Coordination (OIPC) Land and Resources Group, delivered a paper on the place of native title in the

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<sup>45</sup> J.C. Altman, MC Dillon, (ed) 2004. 'A profit related investment scheme for the Indigenous estate', *CAEPR Discussion Paper No. 270*, 2004.

<sup>46</sup> World Bank, see note 38, p xlvii.

<sup>47</sup> The Hon. J. Howard, MP, see note 20.

<sup>48</sup> Magistrate S. Gordon, 2005. 'Indigenous Land Tenure Principles', *Communiqué from the National Indigenous Council*, 3 June 2005. Available from <http://www.oipc.gov.au/nic>. [Accessed: 6 August 2005]

<sup>49</sup> Julian Quan, 2000. 'Land Tenure, Economic Growth and Poverty in Sub-Saharan Africa', In Toulmin, C. and Quan, J. (eds), *Evolving Land Rights, Policy and Tenure in Africa*. 2000. London. International Institute for Environment and Development, p 34



Government's new administrative arrangements for Indigenous affairs. He suggested that while the Commonwealth may make future amendments to the ALRA(NT) and the NTA, the 'fundamentals' of the Acts would be preserved.<sup>50</sup> However, recent interventions cast doubt on the security of Indigenous tenure.

A general opposition to Indigenous interests is seen in the recent Liberal Party Federal Conference resolution to make the NTA more 'user friendly for local governments, pastoralists and miners'.<sup>51</sup> Similarly, comments from Finance Minister Nick Minchin urged the NTA be revisited because the native title system was inhibiting exploration – comments which failed to gain support from even the chief executive of the Minerals Council of Australia.<sup>52</sup>

Potentially at least, the most significant recent contribution to debate may be the 'Indigenous Land Tenure Principles' released by the NIC. They begin by recognising 'the principle of underlying communal interests in land is fundamental to Indigenous culture' and that 'traditional lands' should be preserved for future generations 'in ultimately inalienable form'. These recognitions should receive legislative protection 'in such a form as to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands'. Traditional and contemporary interests in land are to be reconciled via 'a mixed system of freehold and leasehold interests.' Individuals should be entitled to a transferable leasehold interest.

The principles become more controversial when they go on to advise the Australian Government on how they should be carried out. The NIC state implementation of the principles may require 'involuntary measures' such as 'compulsory acquisition' of land. This is in the event that consent of the traditional owners is 'unreasonably withheld' from those seeking individual leases. Finally, the NIC Principles suggest: 'Governments should review and, as necessary, redesign their existing Aboriginal land rights policies and legislation to give effect to these principles.'<sup>53</sup>

There is a good deal of commonsense behind suggestions that where land legislation can be freed up to facilitate leases without weakening underlying title, this could provide opportunities for economic development. However, prominent Indigenous commentators are alarmed that the Australian government is receiving advice which apparently supports the rights of traditional owners being usurped, and gives the green light to the Government watering down Indigenous rights under the NTA and the ALRA.<sup>54</sup> The NIC's Principles apparently leave the federal Government to define what is 'unreasonable' withholding of consent, what is 'just' compensation for compulsory acquisition, and whether 'subsequent return' of land is possible. Given its track record, particularly with respect to the 1998 amendments to the NTA, Professors Larissa Behrendt and Mick Dodson have stated their doubts about the extent to which the Commonwealth can be trusted to look after Indigenous interests in this instance.<sup>55</sup>

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<sup>50</sup> P.Vaughan, 2005. 'The Australian Government's Revised Indigenous Affairs Arrangements and Native Title', *National Native Title Conference, Coffs Harbour. June 2005*

<sup>51</sup> S. Maiden, 2005. 'Libs debate Wik Rewrite', *Australian*, 21 June 2005. p4.

<sup>52</sup> J. Breusch, L. Taylor 2005. 'Minchin moves to water down claims', *Australian Financial Review*, 27 June 2005, p4.

<sup>53</sup> National Indigenous Council, 2005. 'Indigenous land Tenure Principles', see note 48, p2.

<sup>54</sup> M. Dodson, L. Behrendt, 2005. 'Howard's War on Terra', *National Indigenous Times*, 23 June 2005, p4.

<sup>55</sup> M. Dodson, L. Behrendt, see note 54, p4.

Given intransigent Indigenous disadvantage, a national conversation about wealth creation on Indigenous owned land is important and necessary. However such debate should not be used as a Trojan horse to smuggle in a range of options which have little aim other than to weaken Indigenous rights in land. Australia would not be the first place where this has happened. The World Bank notes that ‘historical evidence suggests that transformation of property toward increased individualisation... will be affected by political and economic factors, and thus it will often coincide with major conflicts, upheavals, or power struggles.’<sup>56</sup> This is certainly a period of major upheaval in Indigenous affairs – the Minister herself has suggested there is a ‘quiet revolution’ going on.<sup>57</sup>

The issue of creating wealth on Indigenous owned land is far more complex than simply loosening communal ownership, or tightening up the NTA. Indeed, further amending the NTA in favour of non-Indigenous interests may well restrict one important source of wealth generation on Indigenous lands – land use agreements. With less bargaining power on the Indigenous side, there will be less incentive for industry representatives to enter into agreements with Indigenous parties. The agreements that *are* made may contain fewer of the benefits which assist in generating wealth for communities and individuals, including cash payments, royalties, and opportunities for employment and training.

Policies and programs that seek to alleviate Indigenous poverty shouldn’t attempt to reduce Indigenous rights as means to increase wealth. Such an approach leaves itself open to suggestions it is more about assimilation than a genuine attempt to improve the lives of Indigenous Australians.<sup>58</sup> Noel Pearson’s argument that Indigenous individuals must take responsibility for their own development is well known. Less often acknowledged is his contention that ‘non-Indigenous Australians... accept that there are two profoundly different cultures at stake here, and that complete assimilation of one into the other is not the solution.’<sup>59</sup> Acknowledging difference means looking beyond simply individualising communal tenure to address the particularities of the Indigenous experience, including historic underspends in areas of health, housing and employment, as well as ineffective programs and new policies which are to be ‘road tested’ on Indigenous people.

Initiatives which *do* seek to alter Indigenous tenures must only be undertaken with the prior free and informed consent of the traditional owners they will affect, not just the agreement of a few hand picked advisors. This is not just a matter of justice, but effectiveness. International development literature has acknowledged that processes of land reform which do not enjoy legitimacy and recognition amongst the peoples they affect have often proven to be highly ineffective.<sup>60</sup> Initiatives in Australia that are suspect in their motivation, are imposed with minimal consultation, and override the wishes of traditional owners are unlikely to be viewed as legitimate by those they are intended to assist, and are

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<sup>56</sup> World Bank, see note 38, p xxiv.

<sup>57</sup> Senator, The Hon. A. Vanstone, MP, 2005. ‘Address to the National Press Club’ [online], 23 February. Available from [http://www.atsia.gov.au/media/speeches/23\\_02\\_2005\\_pressclub.htm](http://www.atsia.gov.au/media/speeches/23_02_2005_pressclub.htm) [Accessed : 18 April 2005]

<sup>58</sup> ANTaR Fact Sheet, 2005. ‘Land rights under threat’ [online] Available from <http://www.antar.org.au> [Accessed: 18 April 2005]

<sup>59</sup> N. Pearson, see note 16, p13.

<sup>60</sup> World Bank, see note 38, pxi.

unlikely to improve Indigenous lives. As David Ross has suggested, '[s]olutions to the systematic exclusion of Aboriginal people from the social, political and economic mainstream are multi-layered and complex, but it is ludicrous and simplistic to lay the blame on land tenure.'<sup>61</sup>

The debate over communal ownership of Indigenous land and wealth creation must be driven by contributions which engage with the complex realities of the Indigenous estate, while taking account of the central importance of land to Indigenous cultures. With this in mind, all parties can seek out creative new opportunities to generate wealth as well as supporting the many Indigenous initiatives which are looking to increase sustainable economic development on Indigenous owned lands.

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<sup>61</sup> Central Land Council, Media Release, see note 10.

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ISSN 1326 - 0316

ISBN 0 85575 476 1

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