



THE UNIVERSITY OF  
MELBOURNE

12 July 2006

Committee Secretary  
Senate Community Affairs Committee  
Department of the Senate  
PO Box 6100  
Canberra ACT 2600

Dear Secretary

Aboriginal Land Rights (Northern Territory) Amendment Bill 2006: Long term lease provisions

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A research workshop on trends towards individual title over communal lands was held at the Law School, University of Melbourne last week. Presentations and discussion concerning this issue in Australia and elsewhere addressed some of the matters relevant to the Committee: provisions in the Amendment Bill that will significantly impact on the rights of traditional owners and the potential consequences of the provisions of the Bill. We note that much of the scheme is to be developed by regulation and the absence of this detail makes it difficult to develop an overall view of the scheme. However, much of the discussion throws some useful light on the amendments.

The following is a brief summary of the relevant matters and material from the workshop relating to the proposal for the creation of a separate land tenure scheme through long term leases of aboriginal townships to government entities and subsequent sub-leases of particular plots of land. While we have not referred in detail to the human rights dimensions of these proposals, we endorse the approach of the Social Justice Commissioner in the 2005 Native Title Report on the importance of the human rights elements of the land tenure issue.

**1. Rationale and assumptions:**

The second reading speech and the related material indicate that the new tenure system will become a vehicle for home ownership and business opportunities. Little or no detail is given of *how* the changes will promote this. There is no reference to adequate research to support this view.

The work of Hernando de Soto has often been used to support this view. Reliance on the work of de Soto does not adequately fill this gap. De Soto's analysis is based on peri-urban environments of large cities which has little resonance with rural and remote Australia. The approach of international organisations based on similar assumptions, particularly the World Bank, has changed in recent years because the move towards

Associate Professor Maureen Tehan, Melbourne Law School, The University of Melbourne. Victoria. 3010  
Telephone +61 3 83446205; Facsimile +61 3 93472392; Email: [m.tehan@unimelb.edu.au](mailto:m.tehan@unimelb.edu.au)

Associate Professor Lee Godden, Melbourne Law School, The University of Melbourne. Victoria. 3010  
Telephone +61 3 83441109; Facsimile +61 3 93472392; Email: [lgodden@unimelb.edu.au](mailto:lgodden@unimelb.edu.au)

individual title and a market based land systems has not produced the outcome of land markets as an instrument for addressing poverty. Additionally, there is no evidence of the sustainability of a land market in rural communities but particularly remote aboriginal communities in Australia. Much of this material has been canvassed in the 2004 and 2005 Native Title Reports of the Social Justice Commissioner.

## **2. Use of existing provisions**

On the assumption that some form of fungible title is required to assist economic development, it is suggested that the provisions of the existing Aboriginal Land Rights(Northern Territory) Act with minor amendments, as incorporated in the Amendment Bill, adequately provide for this. The capacity to lease and deal with land under the various statutory land rights schemes has been well researched by some participants at the Workshop and a comprehensive outline of these provisions appears in the 2005 Native Title Report. CAEPR has also produced a paper on the provisions of the Aboriginal Land Rights (Northern Territory) Act. By permitting leases of up to 40 years without Ministerial consent (and for longer with it) and by permitting future transfers, the amendments to the existing Aboriginal Land Rights(Northern Territory) Act would enable land to be used for security if required. Additionally, innovative credit providers in other fields, such as water, have been able to develop models for securities that go beyond the use of traditional land mortgage models. Taking this course would permit the use of land for the purposes of economic development without disrupting the control and power of the Traditional owners over their land.

In our view, the long term consequences of the new land tenure arrangements suggest that the use of these alternatives, with the limited amendments in the Bill, is to be preferred.

## **3. New land tenure model**

In the event that the new land tenure scheme as currently envisaged is to proceed, the workshop identified a number of major difficulties with the Amendments that establish scheme. These difficulties relate to some of the specifics of the land tenure scheme but also draw on the experience of similar schemes elsewhere to identify possible negative consequences. In our view, the scheme is likely to have a major impact on the traditional owners and their capacity to retain meaningful management and control their land.

### **a) The head lease**

- i. The wholesale transfer of the townships for an extended period will remove any powers traditional owners have to regulate the use, management and development of their land and transfer this to a government agency. In the absence of the regulations defining ‘townships’, the size and extent of these ‘townships’ is unknown and thus the breadth of impact of the lease cannot be fully measured.

In our view major consequences are likely to flow from this transfer of power from traditional owners to both the government entities and non-traditional owners. These consequences directly affect the capacity of traditional owners to fully effectively participate in decisions about their land.

- In the absence of any institutional arrangements for the involvement of traditional owners in decision-making about the land, at least in the short to medium term disruption and disharmony is likely to continue to be feature of townships with non-traditional owners occupying traditional lands without apparent consent (in customary law terms). This is exacerbated by the removal of the operation of the permit provisions of the Act from the townships.
  - While in law there is preservation of the underlying inalienable freehold title, the removal of the traditional owners from enjoyment, management and control in fact, is likely to result in an alienation of traditional owners from the physical and economic benefits of their land as well as the spiritual associations with it. This is especially the case given the capacity to renew the lease. Whether or not this is a desired outcome or the scheme, it is in our view an inevitable one.
  - If the new scheme is to proceed then at the very least there should be incorporated into the head lease provisions that permit or even mandate the involvement of traditional owners in land management, planning and environmental and cultural heritage management (even though the last of these will still presumably be covered by the Northern Territory aboriginal heritage protection scheme)
- ii. On our reading of the amendments the exploration and mining provisions of the Act will not apply to the townships. We see no justification for this exclusion. It directly impacts on the capacity of traditional owners to manage their land. Further, it does not impact upon the stated aims of the legislation. On the contrary, in our view, the retention of these provisions would support the economic development aims underlying the proposal.
- iii. The consent provisions relating to the lease are of concern.
- While it will be necessary to obtain consent in line with s23(3) of the Act, the effect of any breach is diminished as a breach will not invalidate the lease. This is of concern in two respects. The usual incentive for compliance no longer exists. In addition, with the amendments that make it easier to establish small land councils there is concern that the skills and resources necessary to ensure compliance with the consent provisions will be absent and thus make breaches of this provision more likely. This raises a question about compliance with the international law standard for free, prior and

informed consent and the inadequacy of any remedies available to traditional owners for a breach.

- The negotiation and consent of any lease should be entirely divorced from any negotiations for the delivery of government and citizenship services. To the extent that there is any association between these negotiations, serious questions must arise about full and informed consent and good faith, arms length negotiations.

iv We have a number of concerns about the rental proposals.

- There is no justification for rental payments or administrative costs of the scheme to be taken from the Aboriginal Benefits Trust Account. To do so is effectively to pay the rent to the lessor with the lessor's money! If this proposal is to form part of a government policy to achieve particular policy objectives then the rental payments should come from government revenue. Interestingly, this issue was one of major concern for the international participants in the workshop who considered it the obligation of the government as lessee to fund the rental payments. We understand that it is anticipated that the rental from the sub-leases will ultimately fund rent and administrative costs. It is unclear how long it will take to achieve this position or whether in fact sufficient rental will ever be received to adequately fund the rental and administrative costs. In any event, if ABTA funds are to be used there should be provision for reimbursement of the fund from rental from sub-leases.
- We note that in the current Bill the rental is capped at 5%. We see no reason for such capping and suggest that the rental should form part of the overall negotiation if the scheme is to proceed.

## **b) The sub-leases**

We are concerned at the lack of any involvement of traditional owners in the sub-leasing process. They will have no capacity, as traditional owners, to affect who lives in their community, where they live, what activities they are involved in, how decisions are made about their community. This accentuates the impact of the scheme on the dis-aggregation of traditional owners authority over their land.

With the move towards individual title and the operation of securities over land, we consider it highly likely that, to the extent that a land market exists, it will result in a transfer of economic power from traditional owners as an entity, to individuals, whether they are traditional owners, other indigenous people or non-indigenous people.

Under both the leases and sub-leases it appears that there will be a loss of aboriginal owned land.

#### **4. Experiences elsewhere**

A number of presentations to the workshop involved consideration of similar individual title schemes in other jurisdictions. Importantly, similar schemes were implemented in Canada, the USA and New Zealand in the mid 19<sup>th</sup> century: the Allotment Act 1887 in the USA, amendments to the Indian Act 1888 in Canada and the Native lands Act 1865 in New Zealand. The detail of these schemes varied from each other (and the current Australian Amendments). However, the common effect of these proposals was the transfer of large amounts of land out of indigenous ownership. For example, in the United States there was a reduction in the total amount of Indian-held land from 138 million acres in 1887 to 48 million acres in 1934. There are sufficient similarities in content and effect to predict that these current proposals will have similar effect: the large scale transfer of land out of the hands of traditional aboriginal owners.

If this is the aim of the current proposals, we have no doubt that it will succeed.

On the other hand, there are more recent schemes, particularly in Canada that allow for leasing arrangements but which do not result in large scale loss of indigenous held land. It is for this reason that we support leasing arrangements through the existing, slightly amended provisions, of the Aboriginal Land Rights (Northern Territory) Act.

Yours faithfully

Associate Professor Maureen Tehan, Law School, University of Melbourne  
Associate Professor Lee Godden, Law School, University of Melbourne

#### **Workshop attendees included:**

Ms Jude Wallace, Department of Geomatics, University of Melbourne  
Dr Jenny Beard, Law School, University of Melbourne  
Professor Juanita Pienaar, Law Faculty, University of Stellenbosch, South Africa  
Associate Professor Richard Boast, Law Faculty, Victoria University, Wellington, NZ  
Ms Margaret Stephenson, Law Faculty, University of Queensland  
Mr George Yapao, Law Faculty, University of Papua New Guinea  
Mr Darren Dick, Human Rights and Equal Opportunity Commission  
Ms Fabienne Balsamo, Human Rights and Equal Opportunity Commission  
Ms Tina Takagaki, Productivity Commission, Melbourne  
Mr Bill Genat, VicHealth Koori Health Unit, Centre for Health and Society, University of Melbourne