12 July 2006

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

Dear Secretary

Re: Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

Attached is research I have undertaken in relation to individualizing Indigenous title to land. I presented this research recently at a workshop on trends towards Indigenous individual title over communal lands held at the Law School, University of Melbourne last week. The subject matter in this paper may prove of interest to the Committee.

Yours faithfully,

Margaret Stephenson

TC Beirne School of Law Tel: +61 7 3365 8518
University of Queensland Fax: +61 7 3365 1454
St Lucia QLD 4072 Australia
m.stephenson@law.uq.edu.au

Indigenous Title to Land: Individual Title v Collective Title[1]

By M. A. Stephenson

Abstract

The first of recent Australian proposals to convert Indigenous communal land holdings into individual forms of title has now been formulated/crystallised in the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth). These amendments allow for the leasing of Aboriginal land held under that legislation. The purpose of this paper is to provide some historical background information in relation to the impacts of individual title schemes on Indigenous lands in overseas jurisdictions: in the USA, Canada and New Zealand. In general terms individualization has resulted in the separation of traditional owners from their lands and a loss of Indigenous owned lands. In addition, this paper provides background in relation to a number of the different landholding schemes in Canada under the Indian Act. In particular, individual property rights in reserve lands and the commercial leasing arrangements that exist in relation to reserve land are considered.

Experiences with Individualising Indigenous Title to Land

How has the individualising of Indigenous title worked in other jurisdictions? Are there any models Australia should follow or lessons Australia should learn?

1. Individual Title to Indian Reserve Lands in the USA: the Allotment System[2]

[1] A more detailed and fully referenced version of this paper is forthcoming in *Modern Studies in Property Law,* Centre for Property Law, University of Reading, UK.

[2] For a discussion of allotment see Canby WC, *American Indian Law in a Nutshell*, West Publishing Company, Minnesota, USA, 1993; Getches DH, Wilkinson CF and Williams R, Federal Indian Law*: Cases and Materials, American Case-Book Series*, West Publishing Co, Minnesota, 1998, Ch 4, pp140 –185. See Royuster JV, "The Legacy of Allotment", (1995) 27 *Arizona State Law Journal* 1; Leeds S L, "The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law", (2001) 10 *Kan. J. L. & Pub. Policy* 491;Guzman K R, "Give or Take an Acre: Property Norms and the Indian Land Consolidation Act", 85 *Iowa L. Rev.* 595; Shoemaker J A "Like Snow in the Spring Time: Allotment, Fractionalisation, and the Indian Land Tenure Problem", (2003) *Wis. L. Rev.* 729.

In the later part of the 19th century there was dissatisfaction with the Indian reservation policies in the United States. Tribal economies were not successful and many Native Americans were living in poverty. Congress passed several land Acts which divided the communal reservations of Indian tribes into individual parcels of land (referred to as allotments) for the Native Americans. The first of these Acts was the *General Allotment Act* of 1887. The allotment legislation may have been well intentioned. Many who were sympathetic to Native Americans believed that if individual Native Americans had title to land which they could cultivate this would promote economic self-sufficiency. Some who were unsympathetic to Native Americans and who resented the vast areas of "Indian lands" which were unavailable to the non-Indian settlers welcomed the legislation as a way of breaking up the tribal land mass and freeing new lands for white settlement.

Under the *General Allotment Act* portions of reservation land were allotted to individual Native Americans. Allotments of 160 acres were to be made to each head of the household, 80 acres to individuals and 40 acres to minors. To protect the Native American allottees, title to the allotted land was to remain in the United States in trust for 25 years. This meant that the allotted lands could not be sold for 25 years but at the end of that period that land was transferred to individual Native Americans in fee simple. The trust period was also intended to protect allottees from improvident sales to non-Indian settlers and also from immediate State taxation. Furthermore, the *General Allotment Act* authorized the Secretary of Interior to negotiate with the tribes for disposition of all "excess" lands remaining after the allotments, for the purpose of non-Indigenous settlement. This "surplus" land was sold to white settlers.

Effects of Allotment

The allotment policy lasted from 1887 to 1934 when allotment ended with the passage of the *Indian Reorganisation Act* 1934 (discussed below). Key problems with allotment included the loss of traditional lands, the checkerboard effects of land holdings on reserve lands, fractionalisation of tribal lands, the loss of cultural identity including governing ability, economic difficulties and bureaucratic costs.

Immediate Impact of the Allotment Policy in relation to Land

As a result of *allotment* there was a reduction in the total amount of Native American land, from 138 million acres in 1887 to 48 million acres in 1934. Of the 48 million acres that remained, some 20 million were desert or semi-desert. Indian lands were lost both by the sale of allottee lands (after the 25 year trust period expired) and by the sale of tribal surplus lands. After 25 years the allottes who received fee simple titles were subject to State property tax and many forced sales resulted from non-payment of these taxes. The availability of the land as security meant Native Americans lost their land owing to defaults. The allottees were frequently left with neither their lands nor with any benefits from its disposition.

Long Term Impacts of Allotment

The failure of allotment became clearer as successive generations inherited the allotted lands. The *Allotment Act* subjected the allotted lands to State Intestacy laws which resulted in highly fractionalized ownership. A 160 acre parcel held by multiple owners was unworkable. With future generations inheriting the allotted property problems increased as each property owner often had more than one heir. Fractionalisation resulted in expensive bureaucratic processes of administering lands and increased transactional costs.

The End of the Allotment Policy

By 1928 allotment was recognized as a failure and unworkable. Congress commissioned a report, the *Meriam Report,* which documented the failure of federal Indian policy during the allotment period. The Report indicated that poverty among Native Americans was widespread. This Report provided part of the impetus for extensive changes in federal policy. Congress recognized the need to protect remaining tribal lands and ended allotment in 1934 with the passage of the *Indian Reorganization Act* (hereafter IRA). The IRA prevented the issuing of any new allotments and provided for the extension of the trust status of existing allotments (indefinitely).

The Continuing Legacies of the Allotment Policies

The end of the allotment policy did not end the problems with allotment. In the 1960s the government undertook studies of the problems relating to allotted trust lands. These studies reported that one-half of the approximately 12 million acres of allotted trust lands were held in fractionated ownership. Congress eventually passed the *Indian Land Consolidation Act,* 1983 (hereinafter ILCA) in an effort to deal with the problems of fractionated ownership of Indian lands. Congress hoped that this legislation would prevent the problem further compounding, by forbidding small, undivided interests in Indian lands to be passed on after the death of the owner. Section 207, the escheat provision, of the ILCA provided for the escheat of small undivided property interests that were unproductive during the year preceding the owner's death. No provision was made in this statute for the payment of compensation to the owners of the interests covered by s207. This provision was challenged in the case of *Hodel v Irving,* 481 U.S. 704 (1987). The United States Supreme Court found that the regulation was an unconstitutional "taking" of property without just compensation. Congress amended the ICLA to avoid the previous defects; however, the United States Supreme Court reached a similar decision in *Babbit v Youpee*, 117 US S Ct 727 (1997).

Remedies to Deal with the Implications of Allotment (and Fractionated Property)
Debates continue in the literature about how to best resolve the aftermath of allotment and what reforms could be implemented. Suggestions include the conversion of unrestricted allotments from fee simple to trust status.

2. Allotment in Canada.

In Canada, individual ownership of lands was also promoted in the latter part of the 1880s. In 1888, amendments were introduced to the Canadian *Indian Act* which mirrored the provisions of the United States *Allotment Act* 1887. These changes were designed to achieve individual ownership of reserve land. However, subdivision of land into individual allotments was voluntary. The agreement of the band council was required

prior to individual titles being issued on reserve lands. However, no individual titles were ever issued in Canada. Hence, no "allotment" of Indian reserve lands occurred.[3]

3. The Maori Experience of Individualising Title[4]

Past experiences in New Zealand demonstrate patterns of significant loss of Maori customary title lands. Much customary title to Maori land was lost through Crown purchase and a significant proportion of the balance of Maori customary title was effectively "individualized".

Originally Maori title was alienable only to the Crown. Waiver of the Crown's right of pre-emption was set out in the preamble to the *Native Lands Act* 1862. The *Native Land Acts* allowed Maori customary title to be converted to Crown grants in freehold.[5] The Maori Land Court determined ownership of Maori lands by conducting an investigation into customary lands that were brought before the court. If the traditional owners could prove that in Maori law they were the owners, they would be issued with a court certificate of title which could be exchanged for a Crown granted freehold. The Maori who were confirmed as land owners by the court had power to deal with the lands.

One consequence of the *Native Land Acts* was to facilitate the demise of collective rights of Maori land ownership and to promote "individual" land tenures. Maori land title was effectively "individualized" as title could either be held in common or divided by shareholdings. The *Native Land Acts* scheme promoted the direct land dealings between Maori and private purchasers and thus allowed sales of traditional Maori land to non-traditional owners. While the policy behind the passage of the early *Native Land Acts* was not directed at the demise of Maori land this has clearly been the result.

---

[3] Miller J, *The Canadian Campaign to turn Aboriginal Peoples into Agrarian Societies*, unpublished paper, University of Saskatoon.

[4] See generally regarding Maori land title: Baost R, Erueti A, McPhail D, and Smith N F, *Maori Land Law*, Wellington, New Zealand, Lexis Nexis, 2nd, 2004; Williams D V, '*Te Kooti Tango Whenua' The Native Land Court 1864-1909*, Haia Publishers, Wellington, New Zealand, 1999; McHugh P, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Oxford University Press, Oxford, 1991 and also see Altman, Linkhorn and Clark, *Land Rights and Development Reform in Remote Australia.*

[5] *Native Lands Act* 1862 and *Native Lands Act* 1865.

Today little Maori customary land remains in New Zealand. Currently Maori land comprises mostly Maori freehold land[6] and some Maori reserved land. Today Maori land consists of about 1.5 million hectares or 6% of the total area of land in New Zealand.

Lessons for Australia: ***Experiences with Individualising Indigenous Title to Land***

(a) Results of Individualisation

- Individualisation of Indigenous title has resulted in the significant loss of traditional customary Indigenous lands. This is evidenced in both the USA and New Zealand.
- To the Native Americans, allotment meant not only loss of property but also the loss of the ability to regulate, manage and direct activities within reservations.
- The "individualisation" experiences in both the USA and NZ indicated that the allotting of individual fee simple titles to Indigenous land holders will not necessarily achieve economic advantage or improvement in the lives of Indigenous title holders.
- Where individual Indigenous title owners have the power to act independently of community interests and deal with their share of communal lands as individual titles such titles are most vulnerable to alienation.

(b) Lessons for Australia re Indigenous lands

- The lesson is that the whole of an Indigenous community's title should never be individualised or made freely alienable.
- However, it is suggested that some parts or even a percentage of an Indigenous community's traditional lands could be freely alienable and individualised – "privatised land". With this land an Indigenous community could participate in

[6] Maori freehold land is held and managed under the *Te Ture Whenua Maori/Maori Land Act (TTWMA)* 1993. Maori freehold land is land which the Maori Land Court has determined the beneficial ownership by freehold order: s 129(2) *TTWMA*.

commercial development in the same way that non-Indigenous landholders do. At the same time it would guarantee that some traditional title is preserved.

- Decisions about individualising title should be made by the Indigenous peoples concerned and not superimposed as policy directives from government.
- Where ever possible the communal underlying "title" to Indigenous lands should be preserved. An Indigenous community's collective decision-making powers should be preserved even where part of the land is "privatised" or is "individualized" or freely alienable.
- Issues of liability of lands for taxation as well as succession rights and intestacy rules to Indigenous property would also need to be addressed.
- To avoid the "checkerboard" effect of differing tenures on Indigenous traditional lands will require careful planning.

Different Forms of Indigenous Land Holdings in Canada

1. Indian Reserve Land under the Canadian *Indian Act*[7]

Indian reserve lands were lands set aside for the use and benefit of the First Nations under Treaties. Through the federal *Indian Act* the federal government administers and manages reserve lands. The Crown retains the underlying title and ownership of Indian reserves. Canadian policy has treated Indian property rights as collective rights. However, Indian reserves have not functioned solely as collective property rights regimes. Although Band councils control the reserve land as collective property, individual property rights of the First Nations peoples who live on reserve lands have been recognised and exist within this system. These individual property rights are not in the form of a fee simple. A number of different but overlapping regimes of private property rights exist. Two of these regimes are considered in this paper.

(a) Certificates of Possession

Individual Indian Band members can acquire and exercise rights of exclusive possession of specific areas of Indian reserve lands under the Canadian *Indian Act*. This is a form of property right which is known as a certificate of possession.

A certificate of possession is proof of a lawful right to possession of land which is granted/approved by the Minister. A holder of a certificate of possession acquires rights to the subject land that generally equate with private property rights. However, the legal title remains with the Crown. Property rights under a certificate of possession are not the equivalent of a fee simple. The holder of a certificate of possession can bring an action for trespass. Land held under a certificate of possession can be subdivided or left under a

[7] See generally Shin Imai, *The 2005 Annotated Indian Act and Aboriginal Constitutional Provisions,* (2004). See also Flanagan T and Alcantara C, "Individual Property Rights on Canadian Indian Reserves: A Review of the Jurisprudence" *Alberta Law Review,* Vol 42 No 4 Spring 2005, 1019; Flanagan T and Alcantara C, "Individual Property Rights on Canadian Indian Reserves" *Queens Law Journal* Vol 29N0 2 Spring 2004, 489 and Alcantara C, "Certificates of Possession and First Nations Housing: A Case Study of the Six Nations Housing Program" *Canadian Journal of Law and Society,* Vol 20 No2, 2005.

will and is exempt from taxation. Canadian courts will hear disputes and are prepared to enforce the rights established under the certificate of possession.

A key limitation on certificates of possession is that alienation is restricted within the Band. Certificate of possession lands can be sold or leased only to another Band member. This land cannot be mortgaged, as the land is immune from seizure under legal process. These restrictions limit the usefulness of certificates of possession and increase the difficulties for business ventures and economic development projects as well as making it difficult for individuals to construct housing on the reserve. Despite the limitations with certificates of possession some Bands have successfully secured mortgages for Band members for private homeownership in relation to certificate of possession lands. One method allows the holder of the certificate of possession to formally transfer the certificate to the Band as collateral. The Band signs a guarantee with the mortgagee whereby the Band assumes the mortgage in the event of a default. The certificate is returned to the owner only after the mortgage is repaid. In case of default the Band can retake the land because it has the certificate.

Other limitations on dealing with certificate of possession lands are that the *Indian Act* includes no provisions as to the following:

- Forced sale or partition of the certificate of possession land where disputes arise,
- Division of property in divorce proceedings, and
- Succession and the disposition of certificates of possession in wills.

In the absence of statutory guidelines issues as above are dealt with by the courts. This has resulted in a body of inconsistent case law in these areas.

Lessons for Australia: *Certificates of Possession*

Certificates of possession have the potential to be a useful means of dealing with the individual Indigenous property interests on Indigenous title lands in Australia. Adopting the certificates of possession form of property ensures the preservation of the underlying collective title while allowing for the recognition of a form of individual property rights.

Canadian experiences demonstrate that with some creativity mortgages for development of individual land parcels are achievable. Despite their limitations (noted above) the certificates of possession form of title would avoid issues of alienability of traditional lands and loss of this title for future generations.

(b) Leases on Indian Reserves

The Canadian *Indian Act* allows leases to be granted on reserve land. Neither Band councils nor individual title holders can lease reserve land to non-Indians for residential purposes without Ministerial consent. It is only the Minister who has power to lease or transfer reserve lands to non-Indians.

Long-term leases of reserve lands are possible under the *Indian Act*. A Band can "surrender" or designate" land to the federal government for the purpose of leasing. The surrender and lease processes are commonly used for leasing for commercial development, such as construction of buildings for shopping centres, as well as for the development of natural resources on Indian land. Surrender can be absolute, or by a "designation". An absolute surrender extinguishes the First Nations' interest in the land. Surrender by "designation" is common in commercial leasing and it is often also conditional, thus enabling the Band to negotiate terms in the development agreement directly with the developer. It is not uncommon for the Band to first negotiate the terms of the lease directly with the developer prior to the government designating the reserve land, which it then leases on the same terms and conditions to the developer. The *Indian Act* gives an absolute veto to the Band regarding commercial development. The Band can refuse to surrender their land or can surrender only on stipulated conditions. In this way the Indian tribes retain control of commercial developments.

After surrender the government enters into a contract in the form of a lease with the development company. The government holds the lease directly with the third party – either Indigenous or non-indigenous. First Nations are not a party to that lease. The Minister is bound to act in accordance with the terms of the surrender. The lease

agreement usually specifies that the designated land is to be returned to the Indian community as soon as the designated use stops. Leases are drafted on the basis that all the benefits go to the Indian tribe. Surrenders under the *Indian Act* are not surrenders in the usual conveyancing sense.

Long term leases can also be granted by a certificate of possession owner and this must be done through the Department of Indian Affairs. Profit from such leases goes to the individual certificate of possession holder and the Band receives no revenue. Such leases have been granted for 99 years to companies who have built gated communities and residential neighbourhoods. After 99 years the land reverts to the certificate of possession holder.

The Surrendered and Designated Lands Register records details of transactions relating to lands that have been surrendered for sale or designated for leasing.

Lessons for Australia*: Leasing of Indigenous Lands*

The "designated lands" leasing system for commercial development has the potential to be applied to Australian Indigenous lands. Long term leases allow for economic improvement while preserving the reversionary interest, the underlying collective/communal title, for the traditional owners. This model is frequently used in Canada for mineral development on Indian reserve land. In Canada, it is common in the area of natural resource development for Indigenous Bands to make their own agreements with developers. In this way the Indigenous community accepts responsibility for the terms of the agreements. "Designated leasing" is one method by which commercial and economic development could take place on Indigenous lands in Australia, without making that Indigenous title freely alienable.

Property rights on Indian reserves, even accepting their limitations, demonstrate the variety of alternative tenures of Indigenous lands that are feasible and that facilitate commercial development without resort to an individual Indigenous title which is freely alienable.

Conclusion

To briefly summarize the lessons in this review:

- The consequences of individualising Indigenous title have in two jurisdictions (USA and NZ) resulted in loss of traditional lands.
- It is obvious from the US model that allotting discrete and freely alienable portions of Indigenous lands to individual allottees may result in significant loss of Indigenous landholdings.
- Preservation of the underlying communal/traditional title is vitally important. Other property interests can be created without necessarily compromising that underlying title. For example, the leasing of reserve lands and certificates of possession support individual title as evidenced in Canada.
- "Individualisation" of title has not necessarily resulted in increased economic benefits for the Indigenous peoples affected.
- Future Indigenous generations will be faced with the consequences of individualising Indigenous title if free alienability is permitted. This should be a prime consideration in relation to any new forms of tenure being reviewed.
- It is the Indigenous community who should make the decision as to whether Indigenous title is to be a collective title or an individual title. This should never be superimposed by a paternalistic government.
- Significant loss of traditional title could mean in Australia a return to pre-*Mabo* days where Indigenous communities search for new land rights.

The messages is clear from the review of Indigenous title that prior to implementing any changes in Indigenous land tenure we, in Australia, should carefully consider all implications which flow from the proposed changes and proceed with caution prior to embracing significant land reforms.