

INDIVIDUAL TITLING OF ABORIGINAL LAND IN THE NORTHERN TERRITORY: WHAT AUSTRALIA CAN LEARN FROM THE INTERNATIONAL COMMUNITY

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I INTRODUCTION

Since 1977, over 44 per cent of land in the Northern Territory ('NT') has been granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*').¹ The land has been granted as communal inalienable title to the traditional Aboriginal owners.² To date, the land grants have not stimulated widespread economic growth for the Aboriginal owners.

This paper will look at the relationship between economic growth and the individual titling of communally held land. By focusing on the Northern Territory, it will address the question of whether reforming communal property title into individual alienable title will assist in stimulating economic development for Aboriginal people. Australian literature on the economic development of Aboriginal land has not widely engaged with international insights on development theory. As will be discussed below, Noel Pearson is an exception to this in his support of Peruvian economist Hernando de Soto.³ This paper seeks to respond to the proposed benefits of the de Soto thesis and add to the endeavours to breach the gap between international agrarian discourse and Aboriginal economic development.

The first part of the paper will assess the current legal status of land granted under the *ALRA* ('*ALRA* Land'). It will be seen that within the current legislative structure, broad commercial interests in *ALRA* Land can already be granted.

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1 David Pollack, 'Indigenous Land in Australia: A Quantitative Assessment of Indigenous Landholdings in 2000' (Working Paper No 221/2001, Centre For Aboriginal Economic Policy Research, Australian National University, 2001) 19.

2 *ALRA* s 3.

3 Hernando de Soto, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000); Noel Pearson and Lara Kostakidis-Lianos, 'Building Indigenous Capital: Removing Obstacles to Participation in the Real Economy' (2004) 2(3) *Australian Prospect* <<http://www.australianprospect.com.au>> at 27 July 2006.

Hernando de Soto's thesis of individual titling will then be reviewed, followed by an appraisal of the individual titling proposals that have been made in Australia. Some of the implementation problems that such proposals may confront will then be acknowledged. To complement this, and in order to assess some of the potential risks associated with such titling projects, international case studies of title reform will be considered. Indeed, case studies from the global community indicate that individuation of communal land does not always result in economic growth. Finally, it will be concluded that an economic development proposal for *ALRA* Land which takes into account international case studies, and meets the specific needs of Aboriginal people, is the preferred approach.

Yet this paper only 'skims' the surface of what is in fact a large body of literature that draws upon development theory and agrarian studies more generally, and is characterised by intense debate as to its very theoretical foundations. Within the academic sphere there is doubt as to the very premise of economic development itself, particularly in light of non-market or customary economic activity. Unfortunately, it is beyond the scope of this paper to delve deeply into these debates, but it is hoped that such a critique will necessarily follow, accompanied by greater engagement with the international land rights discourse.

II ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976 (CTH)

A The Legal Nature of *ALRA* Land

On 26 January 1977 the *ALRA* came into force.⁴ The *ALRA* created a process whereby traditional Aboriginal legal systems of land ownership in the NT were recognised by the Commonwealth government. *ALRA* Land is granted as an estate in fee simple that cannot be alienated.⁵ In this way, although it is described as a grant in 'fee simple', it is a qualified fee simple title as the power to sell the land is removed. Under the *ALRA* there are several mechanisms through which land can be granted to Aboriginal people. Schedule 1 of the *ALRA* lists Aboriginal reserves and former missions that automatically became *ALRA* Land on the enactment of the *ALRA*. Significant tracts of land were described and granted under Schedule 1, including: Amoonguna, Arnhem Land (islands and mainland), Bathurst Island, Beswick, Daly River, Delissaville, Haasts Bluff,

4 Ross Howie, 'Northern Territory' in Nicholas Peterson (ed), *Aboriginal Land Rights: A Handbook* (1981) 30. Note that s 70 came into operation on 1 February 1979.

5 *ALRA* ss 3, 10, 11.

Hermannsburg, Hooker Creek, Jay Creek, Lake Mackay, Melville Island, Petermann, Santa Teresa, Wagait, Warrabri, Woolwonga and Yuendumu.⁶

Land claims can be filed over ‘unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals’.⁷ For an *ALRA* land claim to succeed, the *ALRA* Land Commissioner must find that the claimants are the ‘traditional Aboriginal owners’ of the land.⁸ That is:

a local descent group of Aboriginals who:

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- (b) are entitled by Aboriginal tradition to forage as of right over that land.⁹

Once the Land Commissioner is satisfied that the claimants have primary spiritual responsibility for the land and are entitled to use it according to Aboriginal tradition, the Minister grants the land to a Land Trust.¹⁰ The traditional Aboriginal owners instruct the Land Council as to how the land is to be managed. The Land Council then directs the Land Trust to act in accordance with those instructions. In this way, the traditional Aboriginal owners retain the authority to make decisions over the land.

The *ALRA* legislates for restricted access onto *ALRA* Land. Those Aboriginal people entitled by Aboriginal tradition to be on that land can enter and remain without a permit.¹¹ All other persons seeking entry must obtain a permit from the relevant Land Council prior to entry.¹² Through this system, the traditional Aboriginal owners communally retain control and management of their land.

6 See *ALRA* sch 1. Note that these lands only make up Part 1 of the scheduled land in the *ALRA*. Part 2 includes land in: Ammaroo Locality; Birdum (Jommet Block) locality; Dry River Stock Reserve Locality; Elliott Locality; Mittebah Locality; Mt Peachy (Maryvale) Locality; Mt Solitaire (Hamilton Downs) Locality; Ooratippra Locality; Ranken River Locality; Soudan Locality; Tarlton Downs Locality; Undoolya Bore Locality. Part 3 includes land in: 16 Mile (Bond Springs) Locality; Alice Well Locality; Black Tank Bore (Bond Springs) Locality; Finke Locality; Forster Range (Stirling) Locality; Henbury/Orange Creek Locality; Jinka Locality; Lorne Creek Locality; Mt Kathleen (Loves Creek) Locality; Newcastle Waters Locality; No 47 Bore (Alexandria) Locality; Sandover River (Ammaroo) Locality; Williams Bore (Undoolya) Locality; Wycliffe Well Locality; Yambah Locality. Part 4 provides for land in: Bauhinia Downs; Brumby Plains; Catfish Dreaming; Eva Valley; Hodgson Downs; Innesvale; Kanturrpa-Kanttaji; Urrpantynye; Wave Hill locality; Western Desert Locality; Western Desert (North) Locality.

7 *ALRA* s 50(1)(a).

8 *ALRA* s 50(1)(a)(ii).

9 *ALRA* s 3.

10 The Minister may also grant the land to multiple Land Trusts. Part II of the *ALRA* sets out the process of granting land. The Land Trust is established by publishing a notice in the government gazette. See *ALRA* s 11.

11 *ALRA* ss 70(1), 71.

12 Section 70(1) of the *ALRA* provides: ‘except in the performance of functions under this Act or otherwise in accordance with this Act or a law of the Northern Territory, a person shall not enter or remain upon *ALRA* Land. Penalty: \$1000’. This is supplemented by section 4 of the *Aboriginal Land Act 1978* (Cth), which allows for an ‘Aboriginal who is entitled by Aboriginal tradition’ to enter and remain upon *ALRA* Land: that is, only Aboriginal people entitled by Aboriginal tradition, not all Aboriginal people, are entitled to entry to the particular area of *ALRA* Land.

B Economic Development Under The *ALRA*

Section 19 of the *ALRA* provides for economic development on *ALRA* Land. Under this section, an estate or interest in *ALRA* Land can be granted to an Aboriginal person or to an Aboriginal Association for either business, residential or community purposes.¹³ Section 19 also provides that an estate or interest in the land can be granted to the Commonwealth, the Northern Territory or to an Authority for any public purpose. A Land Trust may transfer the land vested in it to another Land Trust or surrender it to the Crown.¹⁴ Indeed, subject to fulfilling procedural requirements, a Land Trust may grant an estate or interest in *ALRA* Land to any person for any purpose:

a Land Trust may, subject to subsection (7), grant an estate or interest in the whole, or any part, of the land vested in it to any person for any purpose.¹⁵

Thus, *ALRA* Land can currently be used and dealt with commercially for any form of venture. Further, there is no limitation within the *ALRA* on the length or value of the interest that may be granted.¹⁶ This means that interests in *ALRA* Land can be granted to individual Aboriginal persons, other Land Trusts, mining companies, tourist operators, the NT government, farmers, pastoralists, the Commonwealth, missions or any other person or business for any other purpose.

It has been argued that the current legislative framework is insufficient to promote economic activity. However, it is submitted that the broadness of the power conferred by section 19 is in fact sufficient to facilitate economic growth within the existing legislation. Indeed, in both Canberra and London the granting of long-term leases (where the freehold is retained) has been sufficient to secure extensive capital investment, economic growth and widespread long-term use of the land. The tenure system of Canberra was deliberately constructed to ensure that only 99-year leases would be granted so that the Commonwealth government could retain the freehold title.¹⁷ The purpose of this was to ensure that centralised

13 Section 19(2) of the *ALRA* provides:

(2) With the consent, in writing, of the Minister, and at the direction, in writing, of the relevant Land Council, a Land Trust may, subject to subsection (7), grant an estate or interest in land vested in it to an Aboriginal, an Aboriginal Council or an Incorporated Aboriginal Association:

(a) for use for residential purposes by:

(i) the Aboriginal and his family; or

(ii) an employee of the Aboriginal or the Council or Association, as the case may be;

(b) for use in the conduct of a business by the Aboriginal, the Council or Association, not being a business in which a person who is not an Aboriginal has an interest that entitles him to a share in, or to a payment that varies in accordance with, the profits of the business; or

(c) for any community purpose of the Aboriginal community or group for whose benefit the Land Trust holds the land.

14 *ALRA* s 19(4).

15 *ALRA* s 19(4A). The consent of the Minister is not required for grants under 10 years: see *ALRA* s 7(b).

16 *ALRA* s 19(4A).

17 *Land and Leasing: The Leasehold System* (2006), ACT Planning and Land Authority <http://www.actpla.act.gov.au/plandev/land_leasing/info/index.htm> at 1 June 2006.

planning could occur and ‘speculation in undeveloped land could be avoided, and future increases in the value of land remained in the public purpose’.¹⁸

Similarly, the Duke of Westminster continues to hold his ‘London acreage’ of 100 acres in Mayfair, as well as 200 acres in Belgravia, which he leases out for business and residential purposes.¹⁹ In 2004, the wealth of the Duke of Westminster was estimated at £5000 million (approximately A\$12 000 million). In both situations, the freehold has been retained to achieve maximum financial benefit; large-scale development has occurred upon the land; and particularly in the case of Canberra, control over development has been retained. While *ALRA* Land does not have the same land value or demand as Mayfair, Belgravia or Canberra, the comparison serves to illustrate that the maintenance of freehold title and the offer of only a long-term lease does not, of itself, retard economic growth or land development. Thus, it may be that the current legislative regime provides sufficient scope for the economic development of *ALRA* Land and that it is a question of properly utilising the existing legislation, rather than reforming the tenure system.

III DE SOTO’S LAND REFORM THEORY

While de Soto has written widely on economic development, this paper will only focus upon the aspects of his thesis that have been relied upon in the Australian debate; that is, the importance of a centralised legal property system, and the role of individual alienable title in accessing the capitalist economy.²⁰ However, it must be understood that for de Soto, individuation of title is only part of the process required for the generation of a capitalist economy.²¹ It is also important to acknowledge that de Soto creates a binary model that divides the world into developed and underdeveloped people and economies. As stated in the introduction, this is a premise that remains contentious.

De Soto emphasises the importance of centralised legal systems to Western capitalist economies. In *The Mystery of Capital*, he argues that the West has successfully produced fiscal wealth, because its property system facilitates an easy separation of assets from their owners. He contrasts this with non-Western property systems where property is held communally or without formal exchangeable titles, making it difficult to transfer, speculate on, or borrow against.²² It is argued that property rights, which depend upon relationships for

18 Ibid.

19 ‘1 to 10; Rich List 2004’, *The Sunday Times* (London), 18 April 2004, 10.

20 Hernando de Soto, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000) (*The Mystery of Capital*); Hernando de Soto, *The Other Path: The Answer to Economic Terrorism* (1989) (*The Other Path*). Such a partial critique of the de Soto thesis has obvious limitations. However, the purpose of this paper is to focus upon how a portion of his thesis has been used to substantiate claims in Australia for the benefits of individual titling. As such, the shortcomings of only assessing a part of his work are acknowledged.

21 For instance, in the *Mystery of Capital* de Soto sets out ‘five mysteries of capital’. These include the mystery of: political awareness; missing information; capital; political awareness; missing lessons of US history; and legal failure: see de Soto, *The Mystery of Capital*, above n 20, ch 1.

22 With respect to formal legal property systems, de Soto argues that:

recognition, are difficult to enforce. For de Soto, the centralised system documents the law and makes it accessible; as opposed to a pluralistic system, which depends upon the interpretation of elders to determine rights.²³ As such, he advocates for centralised legal systems that enforce and regulate individual rights, as the preferred mechanism for protecting property rights.²⁴

De Soto argues that economic growth is dependent upon the creation of a capital economy. He maintains that most societies and people have the assets they need, but that those assets are under-utilised because they are held in a 'defective' manner.²⁵ Since it is difficult to determine the ownership of property and assets, it is almost impossible to transfer them:

Because the rights to these possessions are not adequately documented, these assets cannot readily be turned into capital, cannot be traded outside of narrow local circles where people know and trust each other, cannot be used as collateral for a loan, and cannot be used as a share against an investment. In the West, by contrast, every parcel of land, every building, every piece of equipment, or store of inventories is represented in a property document that is the visible sign of a vast hidden process that connects all these assets to the rest of the economy.²⁶

De Soto describes assets and capital that cannot be used to generate further capital as *dead capital*.²⁷ According to de Soto, the use of capital to create capital is at the heart of the mystery of the financial success and dominance of the West. The frequent exchange of assets allows for a representative value of those assets to be created. In this way, an individual's wealth can be determined on the basis of their existing property and assets.²⁸ A mortgage or loan can then be secured through the representation of those assets, and further assets or capital can then be acquired.²⁹ That is, capital creates further capital.

Although de Soto relies upon a contestable binary construction of Western and non-Western systems, he rejects the idea that culture is the determinant of whether capitalism will prosper. Rather, he asserts that economic growth can be generated in all societies if the requisite conditions are met.³⁰ Indeed, the universal applicability of this theory is central to its wide appeal. The application of de Soto's theory to the context of Aboriginal land tenure leads to the conclusion that *ALRA* Land could be reformed to become individually titled,

releasing owners from restrictive local arrangements and bringing them into a more integrated legal system facilitated their accountability. By transforming people with property interests into accountable individuals, formal property created individuals from masses. People no longer needed to rely on neighbourhood relationships or make local arrangements to protect their rights to assets. Freed from primitive economic activities and burdensome parochial constraints, they could explore how to generate surplus value from their own assets: de Soto, *Mystery of Capital*, above n 20, 55.

23 Ibid 54.

24 Ibid.

25 See *ibid* ch 2.

26 Ibid 6.

27 See especially de Soto, *Mystery of Capital*, above n 20, chs 2, 3, 6.

28 See de Soto, *The Mystery of Capital*, above n 20, 47.

29 Ibid 39.

30 De Soto writes that 'the disparity of wealth between the West and the rest of the World is far too great to be explained by culture alone': *ibid* 4.

alienable and exchangeable. In this way, land is transferred from ‘dead capital’ to become a part of the mainstream exchangeable property system.

IV THE PUSH FOR TENURE REFORM

The debate on *ALRA* reform has a history that predates the current discussions. Similar issues of economic development and the nature of land rights were canvassed in John Reeves’ 1998 review on the *ALRA*,³¹ which were subsequently the subject of extensive debate.³² Then in February 2005, Amanda Vanstone, the then Minister for Indigenous Affairs, described Indigenous Australians as ‘land rich but dirt poor’.³³ In April 2005, the Minister for Employment and Workplace Relations, Kevin Andrews, gave a speech entitled ‘The Business of Indigenous Affairs’.³⁴ In that speech he stated that ‘Australian policy makers have been very slow to realise that the development of private property and the benefits of workforce participation would be healthy for Indigenous peoples’.³⁵ At the same time the Centre for Independent Studies (‘CIS’) published *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities*.³⁶ The CIS, an influential Australian think tank,³⁷ argued that ‘nowhere in the world has communal land ownership ever led to economic development’.³⁸

One of the most important advocates of the need to individually title Aboriginal land is Noel Pearson. Relying upon de Soto’s work, he has suggested that individual titling communal Aboriginal land, may be a means of establishing economic independence.³⁹ He consequently argues for reform of communally held Aboriginal land through a de Soto-inspired model of individual titling:

While de Soto’s work does not deal with the specifically Indigenous situation, his insights are directly relevant: the reason that Indigenous Australians are unable to build capital is that they lack the necessary proprietary legal infrastructure to leverage the assets that they do have. What many Indigenous Australians have in common with the poor living in countries studied by de Soto is that the form of property they have is

31 John Reeves, *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal and Rights (Northern Territory) Act 1976* (1998).

32 Jon Altman, Frances Morphy and Tim Rowse, ‘Land Rights At Risk? Evaluations of the Reeves Report’ (Research Monograph No 14, Centre for Aboriginal Economic Policy Research, Australian National University, 1999). Indeed, John Taylor writes that ‘[t]he most basic methodological flaw in the Reeves Review’s assessment of the second term of reference is the lack of any conceptual framework to explain at the outset why an association between the institutional arrangements surrounding the Land Rights Act and social, cultural and economic outcomes for Aboriginal people in the Northern Territory should be expected’: at 100. See also Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (1999).

33 Stephanie Peatling, ‘Black Dilemma: Land Rich, Dirt Poor’, *The Sydney Morning Herald* (Sydney), 24 February 2005, 2.

34 The Hon Kevin Andrews MP, ‘The Business of Indigenous Affairs’ (Speech delivered at the Institute of Public Affairs Monologue Series, Melbourne, 13 April 2005).

35 *Ibid.*

36 Helen Hughes and Jenness Warin, ‘A New Deal for Aborigines and Torres Strait Islanders in Remote Communities’ (Issues Paper No 54, The Centre for Independent Studies, 2005) 1.

37 *Ibid.*

38 *Ibid.*

39 Pearson and Kostakidis-Lianos, above n 3, 7.

not conducive to participation in a transactional economy.⁴⁰

He argues that within the current legal framework, communally held inalienable land is ‘dead capital’ by virtue of the fact that it cannot be borrowed against or separated from its owners.⁴¹ Thus, for Pearson, the existing land tenure system and incapacity of Aboriginal people to ‘leverage their base asset in order to build capital’ is a critical cause of Aboriginal economic disempowerment.⁴²

V PROBLEMATISING THE INDIVIDUAL TITLING OF *ALRA* LAND: DEMYSTIFYING DE SOTO

A Cultural Disparities with Individual Titling

Recent findings of the Aboriginal Land Commissioner recognise the continued existence of Aboriginal law and custom and the practice of caring for traditional lands.⁴³ It is questionable whether legislative amendment alone will be able to change the existing perception of the land, so that land is viewed as an exchangeable commodity.

It is suggested here that the continued existence of a non-market economy⁴⁴ on *ALRA* Land may create an impediment to the realisation of a market economy.⁴⁵ Parts of the NT have only effectively been colonised in the last 50 years, and the customary non-market systems of land management and food harvesting remain

40 Ibid, 1.

41 Ibid.

42 Ibid.

43 See the October 2005 decision by the Federal Court of Australia in *Gawirrin Gumana v Northern Territory of Australia* (No 2) [2005] FCA 1425 (‘Blue Mud Bay’) where rights to land and sea were recognised.

44 Altman notes: ‘The customary economy is made up of a range of productive activities that occur outside the market and that are based on cultural continuities: hunting, gathering and fishing occur within the customary economy, but so too do a range of other activities like land and habitat management, species management and the maintenance of biodiversity. A distinctive feature of the customary economy is that it is not monetised; consequently, its value has remained either unquantified or unrecognised in the mainstream terms’: Jon Altman, ‘Sustainable Development Options on Aboriginal Land: The Hybrid Economy in the Twenty-first Century’ (Discussion Paper No 226/2001, Centre For Aboriginal Economic Policy Research, Australian National University, 2001) 5.

45 Jacobsen, Jones and Wybrow write that ‘externalities of the industrial atmosphere also include the network of conventions, rules, common understandings in a cultural and socio-economic environment. The Aboriginal traditional culture does not share these common understandings which may impede development. Dasgupta acknowledged that social networks can block the growth of markets. In this social interaction, relationships are of central importance. Therefore, a different set of economic policies may be required for remote area economic development where these conditions are prevalent.’: Ben Jacobsen, Craig Jones and Roy Wybrow, ‘Indigenous Economic Development Policy: A Discussion of Theoretical Foundations’ (Paper presented at the Social Change in the 21st Century Conference, Centre for Social Change Research, Queensland University of Technology, 28 October 2005) 4.

relatively intact.⁴⁶ Over 80 per cent of men and women surveyed in remote communities frequently fish or hunt,⁴⁷ and non-market food sources remain significant.⁴⁸ The continuing existence of the non-market economy suggests a potential theoretical gap in the presumed application of a market economy to the Aboriginal owners of *ALRA* Land.⁴⁹

A primary consideration is the actual division of the communally held *ALRA* Lands. Under Aboriginal law, people are entitled to use land even though they are not the actual owners of it. For instance, a matrilineal right may not encompass ownership as such, but may constitute responsibility for care of the land and use rights.⁵⁰ Reforming communal rights into individual alienable title will limit or entirely remove the use rights of those people who are not issued with the title. Consequently, *if* the imposed system is respected, use of traditional lands will be constrained by the private property rights of other people who hold the individual title.

Yet, for many Aboriginal people living on *ALRA* Land, the intrinsic value lies in the opportunity to access and care for all of their traditional lands. Titling the land into individual parcels is likely to obstruct the cultural practice of accessing and caring for all traditional lands. The Central Land Council has acknowledged the potential for such non-fiscal losses:

For our region the move to abolish communal land ownership would create widespread social chaos, have a *major detrimental effect on traditional laws and culture*, threaten the security of the significant Aboriginal land base, and further entrench poverty.⁵¹

In considering an individuation process, it is important that the losses subsequently sustained through the limitations imposed on non-market economies and land access are not underestimated.

46 Jon Altman, Craig Linkhorn and Jennifer Clarke, 'Land Rights and Development Reform in Remote Australia' (Discussion Paper No 276/2005, Centre for Aboriginal Economic Policy Research, Australian National University, 2005) 3. In an outstation of 25 people, customary activities had provided a food yield to the approximate value of A\$72 800: see Jon Altman, 'Economic Development and Participation for Remote Indigenous Communities: Best Practice, Evident Barriers, and Innovative Solutions in the Hybrid Economy' (Speech delivered to the Ministerial Council for Aboriginal and Torres Strait Islander Affairs, Sydney, 28 November 2003).

47 Australian Bureau of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey' in *ABS: Australian Social Trends* (2005) 52, 54.

48 Jon Altman, 'Economic Development and Participation for Remote Indigenous Communities' above n 46, 2.

49 The importance of an awareness of cultural norms in the development of policy, and the shortcomings of attempting to construct development by only an understanding of the dominant paradigm, has been well documented by Ben Jacobsen, Craig Jones and Roy Wybrow in their paper presented at the Social Change in the 21st Century Conference: above n 45.

50 See, eg, *Northern Land Council & Others v Olney J, The Aboriginal Land Commissioner & Attorney-General for the Northern Territory* (1992) 105 ALR 539.

51 Central Land Council, 'Communal Title and Economic Development' (Policy Paper, Central Land Council, 2005) 3–4.

B Logistical, Financial and Employment Realities

It is worth considering that the existing logistical challenges of initiating and sustaining commercial enterprises in Aboriginal communities are unlikely to be resolved through tenure reform. Aboriginal communities in central Australia have populations of under 1000 inhabitants⁵² and each is generally several hundred kilometres from the next community or town, constraining market access.⁵³ Few communities are serviced by sealed roads and, in times of flooding, road access can be severed. Telecommunications are also at a preliminary level. In order to contact individuals in such communities, the common practice is to either ring the school or health clinic and leave a message for a client or, alternatively, ring the community phone box. It is not argued that these factors in themselves constitute a barrier to every form of market engagement.⁵⁴ However, any proposed development of the land does have to function within such logistical realities which will not be resolved through tenure reform.

The premise behind individual titling is that individuals and their immediate families can generate wealth through their plot of land by either selling the land on the open market or using the land for agriculture or small business. However the value of the land and the ability to farm it to generate a profit is suspect. The average cost of pastoral land acquired in the NT by the Indigenous Land Corporation is \$13 per hectare.⁵⁵ In semi-arid or arid regions the land value diminishes further;⁵⁶ it is unlikely that such land will be sold for significant sums. The NT is also a difficult farming environment for the small land holder and it is 'in agricultural ventures that northern development has had its most spectacular failures'.⁵⁷ There are numerous reasons for this, including difficult soils and challenging extreme seasons.⁵⁸ The NT landholders who do prosper tend to be those who own several stations, and have external financial support in times of difficulty. For instance, the Consolidated Pastoral Company Pty Ltd, owned by the Kerry Packer estate, holds 17 properties, a total holding of five million hectares and runs 300 000 head of cattle.⁵⁹

52 Ibid.

53 Ibid.

54 See Jon Altman, 'Economic Development and Participation for Remote Indigenous Communities', above n 46. Altman discusses hybrid economy options and notes that recent estimations value the Aboriginal art sector at 'a minimum \$100 million per annum Australia-wide, with most art produced at remote communities': at 3.

55 Jon Altman, Craig Linkhorn and Jennifer Clarke, 'Land Rights and Development Reform in Remote Australia', above n 46, 3.

56 Ibid.

57 John Woinarski and Freya Dawson, 'Limitless Lands and Limited Knowledge: Coping with Uncertainty and Ignorance in Northern Australia' in John Handmer, Tony Norton and Stephen Dovers (eds), *Ecology, Uncertainty and Policy, Managing Ecosystems for Sustainability* (2001) 92. They later note that '[d]evelopers have ignored the constraints imposed by the environment, the visions have failed, and the remnants of forsaken development have been left to be reabsorbed by a resilient land': at 83.

58 Failed agricultural attempts in northern NT include rice, sugar cane, cotton and grain sorghum production: *ibid.*

59 These properties include: Allawah; Argyle Downs; Auvergne; Brantwood; Carlton Hill; Dungowan; Ellerston; Humbert River; Isis Downs; Ivanhoe; Kirkimbie; Manbulloo; Mimong; Mt Marlow; Newcastle Waters; Newry; Nockatonga: see Consolidated Pastoral Company Pty Ltd <www.pastoral.com/properties.html> at 6 June 2006.

The 586 530 square kilometres of *ALRA* Land will have to be mapped and surveyed to a smaller scale before it can be subdivided. While state governments are already struggling to find the resources to provide tenure history reports for native title claims, it could take decades to complete such a large-scale cadastral surveying project.⁶⁰ Meetings of all the traditional owners would have to be convened to determine the subdivision of the land. In terms of scale, land decision meetings can involve over 2000 km in travel (per driver) and run for up to a week, with several meetings being required to resolve any one material issue. The meetings to determine the individual land boundaries, which are contrary to traditional practice, are likely to be massive logistical and financial exercises. The World Bank warns against the high cost and low returns that can arise in the individual titling of communal lands where there is low population density and the land is remote:

In situations characterised by low population density and limited access to infrastructure and markets, the costs of delimiting and enforcing boundaries to individual plots would be prohibitively high. In this context, individualised titling may not be the most cost-effective solution. There are many cases where the benefits of full-blown titling will not be enough to justify the costs (which include not only the establishment but also the maintenance of registries). Titles that have been generated at a high cost may easily become worthless if landowners do not have an incentive to update them, as happened for example in Kenya.⁶¹

The World Bank policy shift against individual titling programs (discussed further below) reflects a change in development theory marked by the recognition that existing customary title can be more cost-effective than implementing a new individual title system.

In addition to this, many *ALRA* Land residents have a limited income flow. Employment and income rates for Aboriginal people living in remote and very remote regions are low. For Aboriginal people in remote areas, the mainstream employment rate is 14.9 per cent.⁶² Over 60 per cent of Aboriginal people living in very remote areas have a weekly income of less than \$200, with the average yearly income for Aboriginal people in remote areas being approximately \$9000.⁶³ The cost of building a standard house in a remote area is \$225 000 to \$350 000.⁶⁴ As such, loans will be essential for Aboriginal people to construct dwellings or other commercial infrastructure on the land. How these loans will be financed remains to be addressed. Considering the low income and employment

60 Marcus Priest, 'Native Title Claims Clogging the System', *Australian Financial Review* (Sydney), 3 February 2006, 82. In this article, Priest writes that '[t]he Federal Court is struggling to keep control of costs amid protracted resolution of native title claims... "Native title hearings commonly occupy months, usually in remote locations," court spokesman Bruce Phillips said. "These cases often progress very slowly for reasons, including lack of resources, quite outside the control of the court".'

61 Klaus Deininger and Hans Binswanger, 'The Evolution of the World Bank's Land Policy' in Alain de Janvry et al (eds), *Access to Land, Rural Poverty and Public Action* (2001) 407, 418–19.

62 Jon Altman, Matthew Gray and Robert Levitus, 'Policy Issues for the Community Development Employment Projects Scheme in Rural and Remote Australia' (Discussion Paper No 271, Centre for Aboriginal Economic Policy Research, Australian National University, 2005) 12.

63 Will Sanders, 'Housing Tenure and Indigenous Australians in Remote and Settled Areas' (Discussion Paper No 275, Centre for Aboriginal Economic Policy Research, Australian National University, 2005) 14.

64 Altman, above n 62, 15.

base, together with the fact that many banks are withdrawing service provision in remote Australia, finance for developing the land is a genuine concern.⁶⁵

The benefit of individual titling *ALRA* Land is premised upon several unproven factors. It presumes that Aboriginal people will be willing to compromise the non-market economy of their land. It assumes the existence of markets and supporting infrastructure. It also presumes that the environment will be conducive to development. However, the reality of the NT environment suggests that generating an income from small parcels of land will be challenging and, that without access to finance, Aboriginal people will face significant hurdles in generating capital from their individual plots. In addition to these factors, the non-monetary value of land for Aboriginal people stands to be compromised by individual titling. As such, the high cost of such a scheme leads to serious doubts as to whether such a project is appropriate for *ALRA* Land.

VI INTERNATIONAL ATTEMPTS TO ACHIEVE ECONOMIC DEVELOPMENT VIA INDIVIDUAL TITLING

Critical and empirical studies of the economic benefits of individual titling programs over communal land suggest that the link between individual titling and economic growth is extremely tenuous – if it exists at all.⁶⁶ Julian Quan, a senior advisor for the UK Department for International Development (‘DFID’), writes that there is a lack of evidence to support the link between individual titling and economic development:

Empirical evidence tends to refute this pessimistic view of customary tenure, which in reality, is more complex and less inimical to economic growth. The introduction of individualised titles, by contrast, has in practice benefited powerful private interests, creating opportunities for land concentration in the hands of political and other local elites, with few safeguards for the non-formalised land rights of rural communities ... In many cases, improvements in the supply of credit, to which land titles supposedly enable greater access, have simply not been forthcoming for smallholders. On the other hand, titling has in some cases led to increasing landlessness and poverty, by undermining the livelihoods of those depending on customary land rights.⁶⁷

65 ‘Given very low mainstream employment rates, low incomes and lack of savings among remote and very remote Indigenous people, commercial lenders would be unwilling to lend, or would only lend relatively small amounts for housing finance irrespective of the nature of the land title ... Based on the average individual income for very remote areas of the Northern Territory we assume this household has a monthly income of \$3405. The home loan calculator for a major Australian bank produces a maximum amount that can be borrowed of \$160 157 over 30 years at an interest rate of 7.32 per cent. The monthly repayments are \$1109 (including a monthly service fee of \$8). This will result in total repayments of \$395 278 (i.e. total interest charge of \$235 121). To put this into context, the current average household rent in remote areas is \$192 a month’: Jon Altman, Craig Linkhorn and Jennifer Clarke, ‘Land Rights and Development Reform in Remote Australia’, above n 46, 12.

66 Tim Anderson, ‘Privatise ALRA Land Rights? The Lessons from Papua New Guinea’, *Green Left Weekly*, 13 April 2005 <www.greenleft.org.au/back/2005/622/622p11.htm> at 6 June 2006; Robert Home and Hilary Lim, *Demystifying the Mystery of Capital: Land Tenure and Poverty in Africa and the Caribbean* (2004) 145–156.

67 Julian Quan and Camilla Toulmin, ‘Evolving Land Rights, Tenure Policy in Sub-Saharan Africa’ in Julian Quan and Camilla Toulmin (eds), *Evolving Land Rights, Policy and Tenure in Africa* (2000).

In Botswana, for example, the attempt to convert communal land into individual titles was beset by problems. While the government allocated land, the individuals could not take possession of their allocation because no enforcement mechanisms were provided to protect their new property rights.⁶⁸ Those people who did secure land sought to retain ownership of it, and strongly opposed market pressure to release their land onto the open property market.⁶⁹ Studies found that many people were hesitant to use their title as collateral for bank loans because of fear that it would result in the loss of their land.⁷⁰ The experience in Botswana demonstrates the inherent problem with presuming that simply because tenure reform occurs, people will seek to sell or mortgage their land, or treat it as a speculative commodity.

In New Zealand, land has been granted to Maori people under the *Te Ture Whenua Maori/ Maori Land Act 1993* (NZ). The grants have occurred via a Maori Land Court process. The land is granted to the community, and the community then confers control over different land parcels to individuals. The system has been criticised for its overemphasis on the individual, which is perceived to have led to community division at ‘the expense of Maori legal norms about community rights’.⁷¹ Furthermore, individual autonomy has undermined the traditional process of community decision-making.⁷²

As part of its UN-Habitat program, the United Nations published the *Urban Land for All* report in 2004 (‘UN-Habitat Report’). The report found that policy makers had been blinded by the concept of individual titling and had not fully explored the wider range of tenure options that may have been more appropriate to the project recipients.⁷³ This report strongly warns of the difficulties that can arise in individual titling projects.⁷⁴ Indeed, a large-scale individual titling program was undertaken in Peru, under which wide tracts of desert land (adjoining urban areas) were formally granted to people who already had informal possession of the land.⁷⁵ The UN-Habitat Report concluded that individual titling in Peru had been very expensive, had not provided tenure security, and had not increased the access to credit, which was required to generate economic growth from the land. The closing sentence notes that:

even with full government support and the advantage of unlimited free land to develop, only a small proportion of poor households with titles have been able to obtain full services or formal credit.⁷⁶

68 Ibid.

69 Home and Lim, above n 66, 145.

70 Ibid.

71 Jon Altman, Craig Linkhorn and Jennifer Clarke, ‘Land Rights and Development Reform in Remote Australia’, above n 46, 22.

72 Ibid.

73 United Nations Human Settlements Programme (UN-HABITAT), *Urban Land for All*, 14, UN Doc HS/724/04E (2004).

74 Ibid.

75 Ibid.

76 Ibid.

Studies of Papua New Guinea ('PNG') show that individual titling land projects, have not brought long-term benefits.⁷⁷ In many instances land was exchanged for cash or vehicles that were not retained in the long term.⁷⁸ As a result, people have lost control of their land and the assets that they exchanged for it. Non-Government Organisations in PNG have labelled such programs a 'disaster'.⁷⁹ In 2001, when news of the proposed land individuation reforms became public, riots broke out and four people were killed.⁸⁰ Considering that customary land is the site for the greatest production of crops and livestock in PNG (rather than plantations or estates), this is not surprising.⁸¹ Indeed, retaining the customary land tenure has been credited as the central reason for the increased standard of living in certain parts of PNG.⁸² In places where there has been economic stagnation, it has been observed that:

The answers are only too clear to everyone on the ground: roads, education, *good* roads, markets, *maintained* roads, distribution networks, infrastructure (e.g. *roads*), security, quality health services and an end to political corruption-for starters ... there are a number of constraints which are inhibiting this advancement but customary land tenures are not among them.⁸³

It has also been identified that in PNG, the security provided by communal land ownership provides greater opportunities for the customary owners. People have left their land periodically for education or employment purposes, with the security that they may still return to resume land use.⁸⁴ This is particularly beneficial in places such as PNG where the state does not have a comprehensive social security system.⁸⁵

In Africa, the formalising of communal property rights into individual title has had a particularly detrimental impact on women. During the process of institutionalising customary ownership and land rights, the paternal inheritance structure was given priority, ignoring the access and use rights of women.⁸⁶ In determining the meaning of 'custom' when institutionalising property laws, 'men found they were able to manipulate "custom" in order to exercise greater control

77 Tim Anderson, above n 66.

78 Ibid.

79 Ibid.

80 Clive Hamilton, 'Preface' in Jim Fingleton (ed), *Privatising Land in the Pacific: A Defence of Customary Tenures* (Discussion Paper No 80, The Australia Institute, 2005) vii.

81 'Most agricultural production takes place on land held under customary tenures, including three of the four best-performing subsectors in PNG agriculture, domestically marketed food, vanilla and betel nut': Michael Bourke, 'Agricultural Production and Customary Land in Papua New Guinea' in Jim Fingleton (ed) *ibid* 6–16, 14.

82 This relates to the Mekeo people. A further benefit is to women: 'if a given parcel of land in this category lies unused, then others – typically near kin, clanswomen's children, or in-laws – can exercise secondary rights to use it. Also, in-marrying women acquire definite rights of use in their husbands' blocks of clan land': Mark Mosko, 'Customary Land Tenure and Agricultural Success: The Mekeo Case' in Jim Fingleton (ed), *ibid* 16–22, 20.

83 Ibid 21.

84 Chris Lightfoot, 'Does Customary Land Make Economic Sense?' in Jim Fingleton (ed), *ibid* 22–8, 24.

85 Ibid.

86 Ingrid Yngstrom, 'Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate Over Land Policy and Changing Tenure Systems' (2002) 30(1) *Oxford Development Studies* 21–40.

over land to the detriment of women'.⁸⁷ In fact, the concept of chieftaincy and tradition were used to disguise discriminatory economic and political agendas.⁸⁸ In this way, the complex customary laws that recognised multiple use and access rights were codified into a single title system, where the rights of women were largely excluded from the codification process. As such, many rights were lost in the process.⁸⁹

In recognition of the failure of individual titling programs to generate economic growth, the World Bank has begun to move its policy focus away from individual titling. The complexity of communal title has been acknowledged in line with the benefits of maintaining the existing land structures:

Traditionally, communal tenure arrangements have often been considered an economically 'inferior' arrangement equivalent to collective cultivation. To facilitate economic growth and prevent the static and dynamic efficiency losses that were assumed to be associated with this tenure arrangement, establishment of the freehold and the subdivision of the commons were proposed as the most appropriate solution. However, results of indiscriminate application of this method often failed to bring about the desired benefits because the links to other markets were not sufficiently taken into account ... Instead of imposing an unrealistic and often artificial dichotomy between private and communal title, policy makers' attention should focus on ways to enhance security and effectiveness of property rights under existing arrangements.⁹⁰

Indeed, the World Bank's key policy advisor has stated that individual land titling is of limited value when market distortions limit an equitable distribution of land.⁹¹ He noted that 'where credit markets are imperfect, the benefits from titling programs can easily favour the better off'.⁹² The policy shift by the World Bank away from individual title is indicative of the harm that can arise from artificially evolving communal title without proper and thorough consideration of its consequences.

The warning that can be taken from these global attempts at individual titling is that not only are problems likely to arise, but the proclaimed benefits of the process may not be forthcoming. It gives rise to the serious question of whether individual title reform is the unilateral answer or, indeed, an answer at all.

VII CONCLUSION

The shortcomings of individual titling schemes are being acknowledged internationally because of their failure to produce economic growth, as well as their tendency to create social problems. It is arguable that, in the NT, the existing *ALRA* legislation adequately provides for economic enterprise to occur. In other places, such as Canberra and London, withholding freehold title, coupled with the offer of only a lease, has not retarded economic growth. While the low income and employment levels of Aboriginal people in remote places needs to be

87 Ibid 24.

88 Ann Whitehead and Dzodzi Tsikata, 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-Turn to the Customary' (2003) 3 *Journal of Agrarian Change* 67–112.

89 Ibid.

90 Klaus Deininger and Hans Binswanger, above n 61, 418–419.

91 Ibid; Quan and Toulmin, above n 67, 38.

92 Deininger and Binswanger, above n 61, 418–419.

addressed, it is precisely these factors (until they are remedied) that may obstruct the development of the land if it is individually titled.

What is required is a scheme that considers the existing circumstances of Aboriginal people in remote areas and is tailor-made to those circumstances: a scheme that acknowledges non-market values of the land, the cost of individual titling and the social risks that may accompany it. De Soto provides a thesis that is worthy of consideration, but it must be considered within the wider international context rather than on its own. While individual titling may work in places where there are landless people, the soil is rich, and towns and markets are nearby, there are serious questions as to whether it will work in the current conditions of *ALRA* Lands. As the international community begins to wind back individual titling programs, and even warn against them, it is concerning to think that Australia may be about to embark upon such a scheme. If such legal reform is attempted in Australia, an explanation of why the lessons offered by the global community have been ignored will need to be provided.