

Submission to Native Title Leading Practice Agreements Discussion Paper

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1 SUMMARY

This submission notes that after 50 years of land transfers, some 70,000 Aborigines and Torres Strait Islanders living on Indigenous lands have the lowest living standards in Australia. The failure to identify individual landowners has imposed a communist economy that, together with the denial of education, has led to joblessness, welfare dependence and consequent high levels of alcoholism, drug abuse and violence. In contrast, the majority of Aborigines and Torres Strait Islanders—some 330,000—work in capital cities and regional towns and have mainstream living standards. The Discussion Paper’s perpetuation of communist economic solutions will continue to deny mainstream living standards to Indigenous Australians living on Native Title and other Indigenous lands. Individual Aboriginal and Torres Strait landowners must be identified and entitled to the same combination of private and communal property rights as other Australians, if they are to benefit from past, present and future Native Title determinations. They must also have the same governance protection as other Australians.

A list of research papers, notably *Private Housing on Indigenous Lands*, that form the basis of this submission is attached.

2 RETURNING LAND TO INDIGENOUS AUSTRALIANS—50 YEARS OF FAILURE

The arrival of European settlers in Australia in 1788 started a process that resulted in the transfer of responsibility and control (‘ownership’) of land from the Indigenous inhabitants. By 1960, almost all freehold land in Australia was owned by non-Indigenous Australians; non-freehold land was generally under the ownership and control of territory, state, and federal governments.

For the last 50 years, multiple processes have returned ownership and control of about 20% of Australian to Indigenous Australians. The Native Title process is one element in this return of land to traditional owners:

- Land grants by territory, state, and federal governments—eg *Aboriginal Lands Trust Act 1966* (SA), *Aboriginal Land Rights (NT) Act 1976*
- Native Title process, following the *Native Title Act 1993*
- ILC (Indigenous Land Corporation)—Statutory Authority, created 1995

About 60% (330,000) of Indigenous Australians live and work in capital cities and regional towns. Their standard of living is similar to other Australians, though this cohort of Aborigines and Torres Strait Islanders reflects that as an ‘emerging’ socio-economic group (like migrant groups) they are occupationally and in income terms still skewed toward less skilled occupations. The children of these Aborigines and Torres Strait Islanders tend to have similar literacy and numeracy pass rates to other Australian children, similar school

attendance and retention rates, with almost all going on to some combination of work, vocational training and tertiary studies. Some 68% of these Aborigines and Torres Strait Islanders own or are buying their own houses, compared to 72% for all Australians. This difference is undoubtedly accounted for by lagging occupational status.

Another 140,000 Aborigines and Torres Strait Islanders who also live in capital cities and regional towns are welfare dependent. Their socio-economic characteristics are similar to welfare dependent non-Indigenous Australians.

About 70,000 Indigenous Australians live on lands that have been returned to Indigenous control—hence Indigenous lands. These Australians are land rich (0.3% of Australians living on 20% of Australia) but have the lowest standards of living in Australia. Their lives are characterized by appallingly low literacy and numeracy, 80% or higher unemployment rates with consequent welfare dependence, egregious rates of alcoholism, drug abuse, gambling and violence, particularly against women and children. Together with a high incidence of preventable diseases, the result is a life expectancy on Indigenous lands that is about 30 years below the Australian average. The poverty and dysfunction on Indigenous lands is well known and documented. It is a paradox that Aborigines and Torres Strait Islanders have to leave Native Title and other Indigenous lands to attain decent, mainstream Australian living standards. The return of large areas of land has failed to deliver prosperity.

When the transfers of vast amounts of land failed to deliver prosperity, a parallel transfer of funds set in. These funds are in both cash (mining royalties and other payments), and services: about \$5 billion annually on top of normal government expenditure on health, education, welfare and so on. These increasingly large flows of funds have also failed to deliver prosperity.

Differences between Aborigines and Torres Strait Islanders living on Indigenous lands and those living in capital cities and regional towns have been obscured by government reports such as the Steering Committee for the Review of Government Service Provision's *Overcoming Indigenous Disadvantage, Key Indicators, 2003, 2005, 2007 and 2009* (Productivity Commission) which average socio-economic characteristics for these disparate groups. Averaging socio-economic outcomes, whether deliberately or through statistical error, has obscured and distorted the 'evidence base', resulting in policies that have delivered appalling living standards on Indigenous lands.

The return of lands to landowner trusts/councils has established a communist economy on Indigenous lands. Together with a denial of mainstream education, resulting in illiteracy and non-numeracy now prevalent in a third generation, this is the principal cause of the economic and social dysfunction prevalent on Indigenous lands. Indigenous townships lack the normal businesses—hairdressers, repair shops, convenience stores, motels—of Australian country towns. The only jobs are public sector jobs. Worse than in communist Soviet Union, doctors, nurses, teachers, and administrators are non-Indigenous. Drab communal stores behind iron bars have the selection of a communist shop in Omsk. Only the snow is lacking.

As in the USSR, a *nomenklatura* of prominent families enjoy high incomes and good housing. Meanwhile, the majority of Aborigines and Torres Strait Islanders exist in crowded, substandard dwellings that often lack basic facilities (just as in Soviet housing). They would not be certified fit for occupation in mainstream Australia. It is already evident that the current \$6 billion 'social' housing program will leave much sub-standard housing when it is completed. On 99.9% of Indigenous land—equivalent to the 20th largest country in the world—Aborigines and Torres Strait Islanders cannot build their own home or business premises. They are denied the subsidies available to private home owners; subsidies which

are much larger than any benefits inherent in low ‘social’ housing rents. The absence of real education and employment compounds the problems of extra welfare and pretend ‘Indigenous only’ jobs as rangers, health workers and assistant teachers. With no private homes to save for and no room for lounge suites, children’s desks or other furnishings, alcoholism and drug abuse become an obvious outlet—as they were in the Soviet Union.

3 REASONS FOR FAILURE

The transfer of land and funds has not delivered prosperity because of poor underlying policies. Several fundamental policy changes must be implemented for Native Title and other land transfers to deliver prosperity to Aborigines and Torres Strait Islanders:

1. Identify individual landowners
2. Match Indigenous organisations with traditional ownership
3. Introduce private property rights side by side with communal rights
4. Separate land ownership from local government
5. Upgrade Indigenous lands to freehold or perpetual leasehold
6. Remove governance apartheid

3.1 IDENTIFY INDIVIDUAL LANDOWNERS

The ownership of lands returned to traditional owners under Native Title (as in other transfers) is held by Indigenous organisations. Australians in every sphere of life have both individual and communal property rights. They own individual homes, have shares in corporations and are members of voluntary organisations which own property. These organisations may own property communally, but they all have a membership list that enables benefits to be passed to members. An explicit membership list is an important part of proper governance. This is denied to Indigenous Australians, who have been relegated to a communal no-man’s land. Unlike body corporates or gated communities, Indigenous landowning organisations do not identify individual landowners.

By failing to identify individual Indigenous landowners in Native Title agreements, benefits from the agreements flow to the landowning organisation rather than to individual landowners. Mining royalties are paid to organisations rather than individuals, and long term leases for private housing and business do not exist. For example, the *Aboriginals Benefit Account* received over \$430 million on behalf of Northern Territory Aborigines in the last two financial years. If those royalties were paid directly to the 54,000 Aborigines in the Northern Territory, each person would have received \$8,000—the equivalent of \$32,000 for a family of four. Not all Northern Territory Aborigines are landowners, so actual payments would have been higher.

An option not raised in the Native Title discussion paper is that of using Native Title benefits to fund individual long term savings accounts. Once individual landowners are identified, they should have the option of having Native Title benefits paid into individual accounts, similar to Australian individual superannuation funds. These funds could be used, as in Singapore, to finance housing loans. Using royalty funds for mortgage finance would enable Aborigines and Torres Strait Islanders to build houses and business premises, making a substantial contribution to a real economy in townships.

3.2 MATCH INDIGENOUS ORGANISATIONS WITH TRADITIONAL OWNERSHIP

Indigenous landowner organisations should match traditional ownership patterns. The current situation varies by location. NSW has 119 Local Aboriginal Land Councils, while just two

(the Northern Land Council and Central Land Council)—are the landowners for the mainland Northern Territory Indigenous lands. Despite decades of discussion about the inappropriateness of these two land councils for managing land ownership, the existing structure remains unchanged.

Native Title claims are generally lodged by groups of traditional owners and are therefore aligned closely with traditional ownership. Indigenous land determined by the Native Title process, however, may have a different Indigenous landowner organisation from contiguous Indigenous land created by other processes. Governments should support changes in Indigenous landowner organisations to enable them to align with traditional ownership.

3.3 INTRODUCE PRIVATE PROPERTY RIGHTS SIDE BY SIDE WITH COMMUNAL PROPERTY RIGHTS

High Australian (and other western democracy) living standards are based on the co-existence of communal and private property rights: we drive on public roads; schools and town halls are built on public land and we enjoy public parks and foreshores, while at the same time many of us work in private businesses and own our homes. For 50 years the transfer of lands to Indigenous Australians has not allowed private property rights—home and business ownership—on Indigenous lands.

The issue of private property rights on Indigenous lands continues to be misrepresented by pretences:

- That land must be all communal or all private, despite non-Indigenous land being a mixture of communal ownership side by side with private ownership.
- That because communal ownership works for hunters and gatherers, it is also suitable for people who want to live in a modern house and drive a Toyota LandCruiser.
- That solely communal ownership can deliver prosperity equal to combined private and communal ownership (despite world-wide evidence to the contrary).
- That Indigenous Australians are not interested in private home ownership, despite their high homeownership rates on non-Indigenous land and those who have applied for homeownership in Nguu on the Tiwi Islands under long-term leasing.

3.4 SEPARATE LAND OWNERSHIP FROM LOCAL GOVERNMENT

The lack of local government in many parts of remote Australia led governments to empower Indigenous organisations to act as local government proxies. Some of these Indigenous organisations were landowner associations. The result has been confusion between the roles of Indigenous landowners and that of local government. Both landowners (whether private or communal) and local government have roles that affect the land, but those roles are not the same and must be managed by separate organisations. Governments (at any level) represent all residents, whether they own land or not. Non-landowners can vote for governments. A landowner corporation however, represents the interests of the land owners. Only land owners can vote in a strata title or gated community corporation.

Property ownership entails responsibilities as well as delivering benefits. On non-Indigenous land there is a clear distinction between the responsibilities of residents who vote in local government elections, and property owning groups such as strata blocks of units, company title buildings or gated communities. Landowner groups make decisions about the proportion of their lands to be used for communal purposes, the proportion to be allocated to private homes and businesses and land to be used for future development. These decisions are made under the regulatory approval of local and territory/state governments. Indigenous landowner corporations should follow the same process. They need democratic representation of their

members to make meaningful decisions about their lands and the use of incomes from land. This means identifying individual landowners. The task of identifying individual landowners has been made more complex by 50 years of avoidance, but it is a task communities can and must resolve.

The Northern Territory has successfully separated local government from Indigenous landowner associations by creating Shire councils. Other states need to follow suit. An Indigenous-only landowner corporation is quite acceptable; an Indigenous-only local government is not.

3.5 UPGRADE INDIGENOUS LANDS TO FREEHOLD OR PERPETUAL LEASE

The return of Indigenous lands to traditional owners has occurred under multiple laws and systems. The result is a hodge-podge of different land ownership including inalienable freehold, alienable freehold, leases of various types and durations, reserves and ILUAs.

Indigenous lands, on which Aborigines and Torres Strait Islanders have the right to live should be upgraded to freehold, or to perpetual or 999 year leasehold. This will simplify administration and identify where Aborigines and Torres Strait Islanders have real property rights. Land grants such as Queensland's Deed of Gift in Trust lands are examples of lands that should be upgraded to freehold. Where Indigenous land boundaries and ownership types are fragmented, they should be consolidated to match traditional ownership groups. Without consolidation governance issues will not be solved.

3.6 REMOVE GOVERNANCE APARTHEID

The Australian government operates an apartheid governance system. The Office of the Registrar of Indigenous Corporations (ORIC) exists so that Indigenous organisations do not have to meet the governance standards applied by the Australian Security and Investment Commission (ASIC). Implicit in continuing to operate a separate, less rigorous Indigenous governance regime is an acceptance that Indigenous Australians do not deserve the higher level of governance and probity that non-Indigenous Australians obtain from organisations that operate under ASIC.

Under ORIC, many organisations report late, file incomplete reports, or do not report at all. Financial reports that do not add up are common. Indigenous organisations incorporated under ORIC and territory and state laws often receive special exemptions in law or by administrative fiat from rigorous reporting. There appears to be a belief, reflected in the creation of ORIC, that less rigorous reporting than to ASIC is doing Aborigines and Torres Strait Islanders a favour. It is not. The single most effective policy decision to improve governance is to abolish ORIC and have all organisations involved in the Native Title process regulated by ASIC.

Current government emphasis on 'capacity building' in Indigenous organisations is a similar apartheid approach. Pretend 'capacity building' programs deliver tertiary certificates and diplomas to Indigenous people in remote areas—many of whom cannot read the certificate they receive. Such 'capacity building' does not compensate for, but exacerbates, the failure to deliver mainstream education in Indigenous schools.

The Discussion Paper implies that the problems associated with Native Title can be overcome by improved governance. Improved governance is necessary but not sufficient. Even if organisations involved in Native Title claims were models of transparency and reporting perfection, without fundamental policy reforms benefits will continue to be wasted.

4 CONCLUSION

The Native Title process is only one of the processes returning land to traditional owners. The lack of benefits to the Indigenous landowners from the process, however, is due to policies that affect all return of Indigenous land. The Native Title discussion paper envisages a continuation of a communal economy on Indigenous lands. Worldwide experience shows that communist economies do not thrive. Communal business fails to lead to economic development, but encourages patronage and corruption. That returning land to Indigenous Australians in a communal system has not resulted in prosperity is not a surprise. What is surprising is the view that prosperity can be delivered without addressing fundamental policy flaws.

CIS publications on Indigenous affairs

Lands of Shame, Helen Hughes, 2007

Policy Monographs

- PM113 *Private Housing on Indigenous Lands*, Helen Hughes, Mark Hughes and Sara Hudson, 2010
- PM110 *Indigenous Education 2010*, Helen Hughes and Mark Hughes
- PM107 *Indigenous Employment, Unemployment and Labour Force Participation: Facts for Evidence Based Policies*, 2010, Helen Hughes and Mark Hughes
- PM105 *Closing the Accountability Gap: The First Step Towards Better Indigenous Health*, 2009, Sara Hudson
- PM94 *Revisiting Indigenous Education*, 2009, Helen Hughes and Mark Hughes
- PM92 *From Rhetoric to Reality: Can 99-year Leases Lead to Homeownership for Indigenous Communities?*, 2009, Sara Hudson
- PM86 *CDEP: Help or Hindrance? The Community Development Employment Program and its Impact on Indigenous Australians*, 2008, Sara Hudson
- PM83 *Indigenous Education in the Northern Territory*, 2008, Helen Hughes

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- IA122 *Healthy Stores, Healthy Communities: The Impact of Outback Stores on Remote Indigenous Australians*, 2010, Sara Hudson
- IA116 *Educating the Disadvantaged*, 2009, Jennifer Buckingham, John Fleming, Jean Illingworth, Chris Goddard
- IA110 *Indigenous Participation in University Education*, 2009, Joe Lane
- IA88 *Kava and after in the Nhulunbuy (Gulf of Carpentaria) Hinterland*, 2007, Helen Hughes
- IA86 *What is Working in Good Schools in Remote Indigenous Communities?* 2007, Kirsten Storry
- IA78 *Indigenous Governance at the Crossroads: The Way Forward*, 2007, John Cleary
- IA73 *Tackling Literacy in Remote Aboriginal Communities*, 2006, Kirsten Storry
- IA72 *School Autonomy: A Key Reform for Improving Indigenous Education*, 2006, Julie Novak
- IA65 *Education and Learning in an Aboriginal Community*, 2005, Veronica Cleary
- IA63 *The Economics of Indigenous Deprivation and Proposals for Reform*, 2005, Helen Hughes
- IA55 *Lessons from the Tiwi Islands*, 2005, John Cleary
- IA54 *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities*, 2005, Helen Hughes and Jenness Warin

Occasional Papers

- OP100 *Welfare Reform and Economic Development for Indigenous Communities*, 2005, Noel Pearson

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Helen Hughes, 'Strangers in Their Own Country: A Diary of Hope,' *Quadrant*, 52:3, (March 2008)

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