# *Chapter 4*

# Leasing on Indigenous land: a human rights appraisal

## Introduction

This report has focused on proposals for the leasing or alienation of Indigenous land, with a specific focus on the Indigenous Land Tenure Principles released by the National Indigenous Council (NIC). The purpose of this Chapter is to discuss these Principles from a human rights perspective, with a particular focus on the right to development.

The NIC Principles raise three important issues from a human rights and development perspective. First, is whether the NIC Principles pay sufficient regard to the full range of social, economic, cultural and political factors that impact on development outcomes in Indigenous communities. Second, is whether the principles empower Indigenous peoples by ensuring them the ability to participate effectively in decision-making that affects them. Third, is whether the policy framework that accompanies the NIC Principles gives sufficient regard to the right to an adequate standard of living and adequate housing, and accordingly contributes to a holistic response to these issues. As this Chapter sets out, the achievement of positive development outcomes in Indigenous communities and on Indigenous communal land will depend on how these issues are addressed.

# Part I: The human rights context

# The right to development and United Nations practice

At the international level, links between human rights and development have increasingly been acknowledged over the past twenty years.

In 1986, the United Nations (UN) General Assembly passed the Declaration on the Right to Development. This recognises development as a fundamental human right which is aimed at the full realization of all other rights.

This Declaration was a watershed in human rights law, drawing together the two separate international treaties on civil and political rights, and economic, social and cultural rights.[1] The Declaration states:

> All human rights and fundamental freedoms are indivisible and inter-dependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, prom-otion and protection of civil, political, economic, social and cultural rights…[2]

Such an approach can provide a framework to guide economic and social devel-opment strategies within Indigenous communities. It recognises that rights relating to the protection of culture, non-discrimination and self-determination are inexorably linked and necessary to protect Indigenous peoples against development processes and outcomes that are exploitative, assimilationist or not beneficial. Similarly, the Declaration recognises that to ensure successful outcomes the process of development must give attention to the social, cultural and political context of a community. This is discussed in more detail later in this Chapter.

As with other human rights, the right to development sets out a framework of duty bearers, including States at a national level;[3] and rights holders, including individual and their communities.

*Within a human rights framework, duty bearers have a responsibility to respect, protect and fulfil human rights obligations[4] with each of these obligations having a specific meaning. Respect requires that States refrain from interfering with the enjoyment of rights. The obligation to protect requires States to prevent violations of such rights by third parties. And the obligation to fulfil requires that States take appropriate legislative, administrative, judicial and budgetary steps towards the full realisation of rights.[5]*

---

1    Dr Arun Sengupta, *The Right to Development as a Human Right*, 2000. Available online at: <www.hsph.harvard.edu/fxbcenter/FXBC_WP7--Sengupta.pdf>.

2    United Nations General Assembly, The Right to Development, 82nd plenary meeting, 12 December 1996, UN Doc A/RES/51/99, Preamble.

3    Dr Arun Sengupta, *The Right to Development – Report of the Independent Expert on the Right to Development*, Commission on Human Rights, September 2000, Un Doc E/CN.4/2000/WG.18/CRP.1. This category of duty holders relates to the emerging responsibilities of multi and trans-national corporations through their commitment to sustainable development and corporate responsibility. Please refer to the 2003 and 2004 Native Title Reports for a discussion of the principle of sustainable development.

4    Dr Arun Sengupta, *Fourth Report of the independent expert on the right to development*, Comm-ission on Human Rights, 18-22 February 2002, UN Doc E/CN.4/2002/WG.18/2, para 34.

5    Each definition has been set out in the *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997, para 6. Available online at: <www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html>, accessed on 29 September 05.

Australia, as a signatory to all of the key human rights treaties, has obligations to ensure these rights can be realised within a development context. This also requires that strategies aimed at economic and social development are not implemented without the effective participation of affected communities.

The close relationship between rights and development is supported by other recent developments at the UN. In 1993, the Vienna Declaration and Programme of Action was adopted by the World Conference on Human Rights and declared by the UN General Assembly. This Declaration clearly states that 'democracy, *development* and respect for human rights and fundamental freedoms are inter-dependent and mutually reinforcing'[6] and that policies must be developed at a national and international level to ensure the realisation of all of these rights. The Vienna Declaration further recognises:

> the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development.[7]

In 1995, the Copenhagen Declaration on Social Development reaffirmed the commitments made in the Vienna Declaration and the link between human rights and development. This declaration established a new consensus that places people at the centre of concerns for sustainable development. It commits States to the eradication of poverty, achieving full and productive employment and fostering safe, stable and just societies for all.

Recognising the importance of human rights in a development context, the UN Secretary General undertook major reforms of the UN system in 1997. These reforms included integrating human rights into the development activities of all UN agencies and adopting a human rights based approach to development.[8] Such an approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development and results in a development model that is based on:

- express linkage to rights
- accountability
- empowerment
- participation
- non-discrimination and attention to vulnerable groups.[9]

These reforms have been further supported by the adoption in 2003 across the United Nations system of the *Human Rights Based Approach to Development Cooperation – Towards a Common Understanding Among UN Agencies*. The Common Understanding has three principles, namely that:

- all programmes, policies and technical assistance should further the realisation of all human rights

---

6   United Nations General Assembly, *Vienna Declaration and Programme of Action*, ('Vienna Declaration') World Conference on Human Rights, 14-25 June 2003, UN Doc A/CONF.157/23. Italics added.

7   Vienna Declaration, para 20.

8   United Nations Secretary General, *Renewing the United Nations: A Programme for Reform*, 14 July 1997 UN Doc (A/51/950). Available online at: <www.un.org/reform/refdoc.htm>.

9   United Nations Office of the High Commissioner for Human Rights, *Human Rights in Development*. Available online at: <www.unhchr.ch/development/approaches-04.html>.

- human rights standards guide development outcomes across all sectors and be included in phase of programme development and implementation
- development cooperation contributes to improving the capacity of 'duty-bearers' to meet their obligations and of 'rights-holders' to claim their rights.[10]

The *Common Understanding* also identifies the following elements that are 'necessary, specific, and unique to a human rights-based approach' to development.[11]

## Text Box 1: Elements of a human rights based approach to development

- Assessment and analysis identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realisation of rights.
- Programs assess the capacity of rights-holders to claim their rights and of duty-bearers to fulfill their obligations. They then develop strategies to build these capacities.
- Programs monitor and evaluate both outcomes and processes guided by human rights standards and principles.
- Programming is informed by the recommendations of international human rights bodies and mechanisms.

Other elements of good programming practices that are also essential under a human rights based approach include that:

(i) People are recognised as key actors in their own development, rather than passive recipients of commodities and services.
(ii) Participation is both a means and a goal.
(iii) Strategies are empowering, not disempowering.
(iv) Both outcomes and processes are monitored and evaluated.
(v) Analysis includes all stakeholders.
(vi) Programs focus on marginalised, disadvantaged, and excluded groups.
(vii) The development process is locally owned.
(viii) Programs aim to reduce disparity.
(ix) Both top-down and bottom-up approaches are used in synergy.
(x) Situation analysis is used to identity immediate, underlying, and basic causes of development problems.
(xi) Measurable goals and targets are important in programming.
(xii) Strategic partnerships are developed and sustained.
(xiii) Programs support accountability to all stakeholders.

---

10 United Nations, *The Human Rights-Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies*, United Nations, New York 2003. Available online at: <www.unescobkk.org/fileadmin/user_upload/appeal/human_rights/UN_Common_understanding_RBA.pdf>.

11 *ibid.*, p3.

The UN's focus on development and the eradication of poverty was also augmented with the establishment of the Millennium Declaration Goals in 2000. These goals are set out in the United Nations Millennium Declaration and are aimed at overcoming extreme poverty and addressing the health and well-being of the world's poorest groups. The Millennium Declaration states:

> We are committed to making the right to development a reality for everyone and to freeing the entire human race from want. We resolve therefore to create an environment at the national and global levels alike – which is conducive to development and to the elimination of poverty.[13]

## The effective participation of Indigenous peoples in decision-making that affects their rights and interests

Alongside these recent developments in development and human rights practice has emerged a focus in the United Nations on the importance of ensuring the effective participation of indigenous peoples in decision-making that affects them.

This requirement has been emphasised by the human rights treaty committees, such as the Human Rights Committee in relation to the application of Articles 1 and 27 of the International Covenant on Civil and Political Rights and also by the Committee on the Elimination of Racial Discrimination (CERD) in relation to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Most recently, obligations relating to the effective participation of indigenous peoples have been synthesized into principles relating to free, prior and informed consent.

### Free, prior and informed consent

A working paper prepared for the UN Working Group on Indigenous Populations identifies that free, prior and informed consent requires that:

- No coercion or manipulation is used to gain consent
- Consent must be sought well in advance of authorization by the State or third parties for activities to commence or legislation to be implemented that affects the rights of indigenous peoples
- Full and legally accurate disclosure of information relating to the proposal is provided in a form that is understandable and accessible for communities and affected peoples
- Communities and affected peoples have meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project
- Communities and affected peoples are able to secure the services of advisers, including legal counsel of their choice and have adequate time to make decisions

---

12   Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, p52.

13   United Nations General Assembly, United Nations Millennium Declaration, 55th Session, 18 September 2000, UN Doc A/RES/55/2. Available online at: <www.un.org/millenniumgoals/background.html>, accessed on 10 October 2005.

- Consent applies to a specific set of circumstances or proposal, if there are any changes to this proposal or to the circumstances this will renew the requirement for free, prior and informed consent in relation to the new proposal or circumstances
- Consent includes the right to withhold consent and say no to a proposal.

Informed consent applies not only to administrative acts and decisions about land use, but it also applies to the legislative process itself. CERD in General Recommendation XXIII called upon states parties to:

> Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.[14]

The CERD decision of March 1999 in respect of the 1998 amendments to the *Native Title Act 1993 (Cth)* (the Ten Point Plan)[15] demonstrates the importance of effective participation in changes to legislative rights and interests. The Committee stated that:

> The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with the State party's compliance with its obligations under article 5(c) of the [ICERD].[16]

As a consequence, they called on the government of Australia to 'recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources'[17] and stressed the importance of General Recommendation XXIII as set out above. The Committee further urged:

> …the State party to suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.[18]

The Committee reiterated this view in its Concluding Observations on Australia's 13th and 14th periodic reports in March this year. Recommending that Australia 'reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.'[19]

At the domestic level, the principle of free, prior and informed consent is built into the *Aboriginal Land Rights Act (Northern Territory) 1976 (Cth)* (ALRA (NT)). This is through the requirement that in carrying out any action regarding Aboriginal land, land councils must be satisfied that the traditional owners understand the nature and purpose of the proposed action, and, as a group, consent to it (s.23(3)(a)). These rights were supported in 1999 in the bipartisan report of the House of Representatives Standing Committee on Aboriginal and Torres Strait

---

14    CERD, n.21 above, para 4 (d).
15    Reproduced at the Appendix of the *Native Title Report July 1996-June 1997*: p169. Also available online at: <http://www.humanrights.gov.au/pdf/social_justice/native_title_report_97.pdf>.
16    CERD, *Decision in respect of Australia of March 1999,* CERD/C/54?MISC.40/Rev.2.
17    *ibid.*
18    *ibid.*
19    *ibid.*, para 16.

Islander Affairs (HORSCATSIA) into the ALRA (NT), titled *Unlocking the Future*.[20] This report emphasised the importance of informed consent in relation to land use decisions made under the ALRA (NT), and in particular in respect of any decisions to amend the ALRA (NT) itself. It recommended that:

> Recommendation 1:
>
> The *Aboriginal Land Rights (Northern Territory) Act 1976* not be amended without:
>
> - traditional Aboriginal owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group giving their consent; and
>
> - any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views.[21]

It is clear from ICERD, other international instruments, the procedures of international organisations[22] and standards in the ALRA (NT) and recommendations by HORSCATSIA; that there is a well established requirement to obtain consent in respect of major changes to land rights and native title legislation. The failure to provide for such a process will potentially breach the principle of non-discrimination.

Free, prior and informed consent is also consistent with the right of self-determination which is recognised in key international covenants.[23] This right ensures that indigenous peoples are able to freely determine their political status and their own economic, social and cultural development objectives and recognizes the right of indigenous peoples to freely dispose of their natural wealth and resources. Indigenous control over development outcomes and natural resources has been upheld by United Nations committees in relation to resource and timber extraction. For example, the Committee on Economic, Social and Cultural Rights urged State parties "to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No.169."[24]

The important role of self-determination in achieving economic and social development outcomes is also recognized in the Declaration on the Right to Development and is demonstrated by the experience of North American Indian groups. As discussed below, North American Indian groups have achieved sustained economic and social development outcomes through exercising their right of self-determination and being able to control development processes that occur on their lands. In this way, self-determination builds on the right of

---

20   House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future – The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976,* August 1999, Canberra.

21   *ibid.*, pxvii.

22   For example, the World Bank, the International Labour Organisation, and UN development agencies. See UN Permanent Forum on Indigenous Issues*, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, New York January 2005, paragraphs 23-26 incl.

23   Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

24   A-I, Motoc, Tebtebba Foundation, Legal commentary on the concept of free, prior and informed consent, Working Group on Indigenous Populations, 21 June 2005, para 15, UN Doc. E/CN.4/Sub.2/AC.4/2005/2.

free, prior and informed consent by empowering indigenous communities to set their own agenda and determine their own futures.

The active participation of Indigenous peoples in decisions that affect their communities, not only relies on free, prior and informed consent but also on effective engagement between governments and Indigenous communities and organisations.

## Engaging Communities

In August 2005, the Human Rights and Equal Opportunity Commission co-hosted a workshop with the United Nations Permanent Forum on Indigenous Issues to consider the key elements which underpin the engagement of governments and civil society with Indigenous communities. The text box below sets out guidelines for engaging with Indigenous peoples and communities based on human rights principles.

### Text Box 2: Guidelines for engagement with Indigenous peoples

These guidelines were developed at the *International Workshop on Engaging with Indigenous Communities* which took part at the *International Conference on Engaging Communities* in Brisbane in August 2005.[25]

It sets out principles for governments, the private sector and civil society to engage with indigenous peoples, including in the following contexts:

- Indigenous systems of governance and law;
- Indigenous lands and territories, including sacred sites;
- Policies and legislation dealing with or affecting indigenous peoples.

The guidelines for engaging with indigenous communities specifically include:

***A Human Rights-Based Approach to Development***

- All policies and programs relating to indigenous peoples and communities must be based on the principles of non-discrimination and equality, which recognise the cultural distinctiveness and diversity of indigenous peoples;

- Governments should consider the introduction of constitutional and or legislative provisions recognising indigenous rights;

- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives;

25    Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with Indigenous communities*, HREOC, Sydney, and United Nations, New York, 2005. Available online at: <www.humanrights.gov.au/social_justice/>. For further information about the International Conference on Engaging Communities, Brisbane, August 2005, see: <www.engagingcommunities2005.org/home.html>.

- Such participation shall be based on the principle of free, prior and informed consent,[26] which includes governments and the private sector providing information that is accurate, accessible, and in a language the indigenous peoples can understand;
- Mechanisms should exist for parties to resolve disputes, including access to independent systems of arbitration and conflict resolution;

**Mechanisms for representation and engagement**

- Governments and the private sector should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities;
- Indigenous peoples and communities have the right to choose their representatives and the right to specify the decision-making structures through which they engage with other sectors of society;

**Design, negotiation, implementation, monitoring, and evaluation**

- Frameworks for engagement should allow for the full and effective participation of indigenous peoples in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes;
- Indigenous peoples and communities should be invited to participate in identifying and prioritising objectives, as well as in establishing targets and benchmarks (in the short and long term);
- There should be accurate and appropriate reporting by governments on progress in addressing agreed outcomes, with adequate data collection and disaggregation;
- In engaging with indigenous communities, governments and the private sector should adopt a long term approach to planning and funding that focuses on achieving sustainable outcomes and which is responsive to the human rights and changing needs and aspirations of indigenous communities;

**Capacity-building**

- There is a need for governments, the private sector, civil society and international organisations and aid agencies to support efforts to build the capacity of indigenous communities, including in the area of human rights so that they may participate equally and meaningfully in the planning, design, negotiation, implementation, monitoring and evaluation of policies, programs and projects that affect them;

---

26  The elements of a common understanding of free, prior and informed consent, as identified at the *International Workshop on Methodologies regarding free prior and informed consent and Indigenous peoples* (UN Doc: E/C.19/2005/3, 19 January 2005) are set out in the *UN Workshop on engaging the marginalized: Background paper prepared by the Secretariat of the UN Permanent Forum on Indigenous Issues*. The workshop report identifies the main areas where the principle of free, prior and informed consent is relevant; what constitutes consent; the timeframes for seeking such consent; who may provide it on behalf of an indigenous community; how it should be sought; and procedures and mechanisms for oversight and redress.

> - Similarly, there is a need to build the capacity of government officials, the private sector and other non-governmental actors, which includes increasing their knowledge of indigenous peoples and awareness of the human rights based approach to development so that they are able to effectively engage with indigenous communities;
> - This should include campaigns to recruit and then support indigenous people into government, private and non-government sector employment, as well as involve the training in capacity building and cultural awareness for civil servants; and
> - There is a need for human rights education on a systemic basis and at all levels of society.

Free, prior and informed consent and the Engaging Communities guidelines provide a clear framework for ensuring effective participation of Indigenous communities in decisions affecting their rights and interests. These standards can be considered in relation to engagement with Indigenous communities generally and in relation to the implementation of the NIC Principles through changes to State and Commonwealth land rights regimes.

## Progressive realisation of economic, social and cultural rights and the right to housing

Article 8 of the Declaration on the Right to Development states that the realization of the right to development would ensure 'equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income', achieved through appropriate economic and social reforms and the eradication of all social injustices.

The International Covenant on Economic, Social and Cultural Rights sets out a comprehensive framework of human rights obligations relating to such matters. This includes:

- the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions[27]
- the right of everyone to education, directed to the full development of the human personality and sense of dignity, strengthening respect for human rights and fundamental freedoms[28]
- the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[29]
- the right of everyone to be free from hunger [30]
- the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and the right of everyone to the enjoyment of just and favourable conditions of work.[31]

---

27    International Convention on Economic, Social and Cultural Rights, Article 11(1).
28    *ibid.*, Article 13(1).
29    *ibid.*, Article 12(1).
30    *ibid.*, Article 11(2).
31    *ibid.*, Article 7.

The Australian Government has ratified this Convention and committed to its realisation in a domestic context and through international co-operation.

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for:
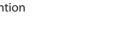
> The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and **housing** [emphasis added] and to the continuous improvement of living conditions.

The right to housing is an element within the right to an adequate standard of living and is recognised as central to the realisation of all economic, social and cultural rights.[32] The right to adequate housing is also recognized in other international human rights instruments including; the Universal Declaration of Human Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination.

In 1995, the United Nations Special Rapporteur on Housing Rights provided guidelines for the realisation of the right to housing. These guidelines indicate that while the State is not required to build housing for the entire population, those individuals or groups who are homeless, inadequately housed or generally unable to meet their own housing needs are entitled to adequate housing, provided by the State.[33]

Further, the right to housing is not merely a right to shelter and 'a roof over the head'. The right to housing requires an adequate place to live in peace, dignity and security. This is because housing is integrally linked to other human rights, including women and children's rights and the right to health and is recognised as a fundamental necessity to ensure health, wellbeing and security, consistent with other human rights.[34]

ICESCR creates a number of obligations on States for the realisation of rights set out in the Covenant.[35] First, the Covenant requires that States take deliberate, concrete and targeted steps towards meeting their obligations and that these steps be appropriate to promoting the realisation of rights. The Covenant requires that rights under ICESCR be progressively realised. This obligation recognises that full realization of economic, social and cultural rights may not be achievable in a short period of time. The progressive realisation of these rights allows for flexibility and ongoing improvements. However, a minimum core obligation is expected of States who are signatories to ICESCR. For example, 'a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant'.[36]

---

32 Office of the High Commissioner for Human Rights, The right to adequate housing (Art.11(1)), CESCR General Comment 4, Sixth Session, 1991. Available online at: <www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument>, accessed 30 September 2005.

33 Sachar, R., Special Rapporteur, *The Realisation of Economic, Social and Cultural Rights: The right to adequate housing,* Commission on Human Rights, UN Doc E/CN.4/Sub.2/1995/12, 12 July 1995, para 11.

34 General Comment 4, para 7.

35 International Covenant on Economic, Social and Cultural Rights, Article 2. Available online at: <www.unhchr.ch/html/menu3/b/a_cescr.htm>, accessed on 4 October 2004.

36 United Nations Committee on Economic, Social and Cultural Rights, The nature of States parties obligations, General Comment 3, para 10, Fifth session 1990.

# Part II: Applying human rights standards to the NIC Principles

## Background

The Commonwealth Government has made formal commitments to the participation of Indigenous Australians in the development of policies affecting them. This has been confirmed in the *Aboriginal and Torres Strait Islander Act 2005* (Cth)[37] (ATSI Act) and recent commitments by the Council of Australian Governments (COAG). The ATSI Act aims to:

> (a)  ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;
>
> (b)  promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
>
> (c)  further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
>
> (d)  ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

Similarly in late June 2005, all Australian governments reaffirmed their commitment to 'advance reconciliation and address the social and economic disadvantages experienced by many indigenous Australians' at the meeting of the Council of Australian Governments.[38] This Communiqué from COAG commits to indigenous participation at all levels; engagement with representative organisations; flexible approaches and adequate resources to support capacity at the local and regional levels.[39] The Communiqué also recognised the importance of a learning approach to service delivery and policy development.

The ATSI Act and COAG Communiqué commit to Indigenous participation. However, the ATSI Act falls short of recognising Indigenous self-governance or self-determination which can help to ensure full and effective participation and shared ownership of policies and outcomes. In relation to the COAG Communiqué, it is important that Indigenous participation is not restricted only to issues relating to service delivery but applied more broadly to fundamental changes to the rights enjoyed by Indigenous Australians. This approach is particularly important in relation to the development of the NIC Principles and the extent to which Indigenous communities affected by the Principles.

In early November 2004, following the abolition of ATSIC, the Minister for Immigration and Multicultural and Indigenous Affairs announced the establishment of the NIC, a government appointed Indigenous advisory body. The purpose of this body was to provide advice to the Federal Government on Indigenous issues

---

37    This is the name of the Act that resulted from the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005.*

38    Council of Australian Governments, Communique, 25 June 2005, Canberra.

39    Council of Australian Governments, Communique, 25 June 2005, Canberra.

and was not intended to replace ATSIC and represent Indigenous Australians.[40] Its members were appointed for their expertise and experience in particular policy areas. In recognition of the limited role of the NIC, the Chair of the Council, Dr Gordon, has stated the need for effective consultation processes to minimise misunderstandings regarding land tenure issues and to receive broad ranging feedback.[41] To date, such broad ranging consultation has not been conducted by the Commonwealth Government or the NIC on the land tenure principles.

Given the acknowledgement by the NIC of the need for further consultations with affected communities and the standards of effective participation set out above, it is essential that State and Commonwealth governments engage with Indigenous communities prior to the implementation of the NIC Principles. This engagement needs to be directed towards securing the free, prior and informed consent of Indigenous groups affected by proposals to amend their legislative rights and interests.

Free, prior and informed consent applies both to changes to legislative rights and also to decisions directly affecting the exercise of rights in land. That is, if traditional owners agree to legislative changes that implement a new leasing regime then traditional owners should still be able to exercise free, prior and informed consent in decisions to lease specific areas of land. However, Principle 4 of the NIC Principles puts this approach in doubt. It states that:

> Effective implementation of these principles requires that:
>
> – the consent of traditional owners should not be unreasonably with-held for requests for individual leasehold interests for contemporary purposes;
>
> – involuntary measures should not be used except as a last resort and, in the event of compulsory acquisition, strictly on the existing basis of just terms compensation and, preferably, of subsequent return of the affected land to the original owners on a leaseback system basis, as with many national parks.

While this recognises the need for traditional owner consent, it qualifies this consent and allows for it to be overridden through compulsory acquisition. Arguably, adopting such an approach would not be consistent with free, prior and informed consent.

To observe human rights standards, traditional owners should be able to make effective decisions about leasing their land, consistent with the elements of free, prior and informed consent set out above. These elements allow for traditional owners' full participation in all aspects of assessment, planning, implementation and monitoring of a project. This includes the right to secure the services of expert advisers. In relation to leasing land for the purpose of home ownership and economic development, experts may include financial and legal advisers and business or community development experts. However, these experts should also aim to ensure that the skills, knowledge and expertise of traditional owners are developed in the process. This type of approach is consistent with capacity development and is discussed at length in the Native Title Report 2004.[42]

---

40    Senator Vanstone, *National Indigenous Council appointed,* media release vIPS/064/04, 6 November 2004. Available online at: <www.atsia.gov.au/media/media04/v04064.htm>.

41    National Indigenous Council, above n.1.

42    *Native Title Report 2004*, pp39-53.

Traditional owners should also have adequate time and resources to ensure that they can successfully plan the conditions of leasing that are appropriate to their community and group. For example, traditional owners will have to consider the following questions. Do they want leasing opportunities to be available to Indigenous and non-Indigenous people? Will leases be available only to individuals or can businesses or government departments apply for a lease? How long will these leases be for and how much rent should be charged? How will the permit provisions such as those that apply on ALRA land in the Northern Territory be affected by the new leasing regime? Each of these questions will impact upon the communities who may decide to lease their land. Adequate time and resources are needed to ensure that communities can respond to the full raft of issues that arise.

Adequate timeframes for decision-making should be specified and protected through legislation. The leasing of land over long periods, such as 99 years which has been suggested in aspects of the debate, should provide for a mechanism whereby the conditions for the granting of a lease is reviewed so as to monitor the impact of the changes over time. Such review processes would not effect existing and contractual lease arrangements, but may enable the long term planning necessary to achieve sustainable outcomes and ensure that the enabling legislation provisions continue to reflect and support traditional owners' interests and ever changing communities. Review and planning timeframes similar to those practiced by local government councils might be a useful guide to consider.

More broadly, legislative safeguards must be put in place to ensure that traditional owners' interests in land are protected through clear, accountable and effective decision-making processes. As discussed in Chapter 2 in relation to the disposal of land under the *Aboriginal Land Rights Act 1983* (New South Wales) (ALRA (NSW)), substantial problems have emerged. These problems have occurred through the processes of disposing of land under the ALRA (NSW). This has happened as a result of complex but inadequate provisions for the disposal of lands, lack of resources for the Local Aboriginal Land Councils to assist communities to address social and economic wellbeing, lack of safeguards, and conflict within the objectives of the Act. These types of problems not only put Indigenous rights at risk but they would discourage lenders and developers because of the high level of complexity and risk.

It is essential that Government's seeking to implement changes to land rights or native title regimes, with the consent of traditional owners, must be careful to ensure that the legislation contains provisions that provide clear and effective decision-making processes; safeguards for the protection of Indigenous rights; and adequate resources so that land councils are able to effectively engage and advise on issues relating to the complex legal, economic, cultural and social implications of leasing Indigenous lands.

If the Federal Government's objective is to address Indigenous socioeconomic disadvantage and promote economic and social development in communities, it is essential that strategies to achieve this result be developed with the full participation of those affected. Implementing a leasing proposal such as the one set out in the NIC Principles without the effective participation and free, prior and informed consent of communities is not only inconsistent with fundamental human rights, but runs the risk of failure where it is not embraced by Indigenous peoples. In the case of communally owned lands this could result in a loss of

control, use and effective ownership of Indigenous lands. To ensure positive and sustainable outcomes, the Commonwealth should use this opportunity to develop policies for Indigenous economic and social development in partnership and cooperation with Indigenous communities.

# The social, cultural and political framework for development

As noted above, developments in the UN and human rights system have been directed towards achieving improved economic and social outcomes. This framework promotes respect, protection and fulfilment of all human rights within the development process; and recognises the importance of the social, cultural and political context within development strategies.

This approach to economic development is reiterated through a sustainable development approach to business and economic activity. The sustainable development 'triple bottom line' requires that businesses and corporations not only give attention to the profit margin but also focus on the social and environmental impact of their activities. This approach has been discussed in the 2003 and 2004 Native Title Reports.[43]

The broader social, cultural and political context of Indigenous communities appears not to have been adequately considered in the development of the NIC Principles. The section below briefly addresses some key considerations relevant to the Principles, across the social, cultural and political framework of Indigenous communities.

## The social framework

The private purchase of a home or creation of a business enterprise relies on individuals being empowered to access loans, understand financial and contractual obligations and have a saving regime. Leasing, disposing of land to gain capital or to use as collateral in Indigenous communities relies on Indigenous individuals, families and communities having the resources and capacity to manage these financial processes. Without these skills and capacity, leasing or mortgaging of Indigenous land will have limited long term benefits and may in fact result in substantial loss of Indigenous lands, indebtedness and entrenched poverty.

As discussed in Chapter 3, sustainable home ownership requires a stable and adequate individual income to service debt; access to financial institutions; and a strategy to address the high cost of housing against the low value of land in remote communities. Similarly, successful businesses require the capacity to identify viable business options for a particular area of land; access to finance through demonstrated business and financial management skills; and the skills to use the Indigenous community's market advantage in a way that is not exploitative.

---

43    See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, Chapter 1 for a more detailed discussion of sustainable development. Available online at: <www.humanrights.gov.au/social_justice/ntreport03/index.htm>.
See *Native Title Report 2004*, Chapter 1, pp70-75 for a discussion of private sector obligation in relation to sustainable development agenda. Available online at: <www.humanrights.gov.au/social_justice/ntreport 04/1Consultations.html#toc5>.

It is these skills and the infrastructure necessary to provide it, such as education, housing, health care, community infrastructure and employment, which must be established for Indigenous communities to be able to successfully achieve economic outcomes. Strategies for economic development must be holistic and not only provide a mechanism to generate capital, but also ensure the infrastructure, skills, capacity and resources necessary to manage this capital are present in Indigenous communities and organisations. Matters such as health care, housing, education and employment are not only areas of need but are fundamental human rights that remain unmet in many remote Indigenous communities.

The NIC Principles are aimed at addressing economic and social disadvantage in Indigenous communities by providing an opportunity for individual home ownership and business enterprise on communal lands. However, the NIC Principles focus only on the tenure arrangements for leasing land and provide no guidance as to how the social framework of Indigenous communities can be improved. While the NIC may consider that the Principles fit within a broader framework of Commonwealth and State policies aimed at improved social and economic outcomes, the failure to build links between the Principles and broader policy objectives, casts doubt on whether these Principles will work effectively in practice. More detailed analysis of the Principles, against other Commonwealth and State policies, must be undertaken before changes are made to legislation that are aimed at implementing the NIC Principles or some other leasing scheme.

The impact of the broader social context of communities will also effect Indigenous owned business enterprises. These enterprises cannot be established by simply creating a business enterprise. It will also be necessary to ensure the skills, knowledge and work readiness of Indigenous people in the communities is established. To adequately support successful Indigenous business enterprises, focused attention must be given to building up the social framework of a community. This could be achieved in connection with business enterprises through training and employment and improved services and infrastructure. This support must be effective, long term and designed and delivered in consultation with the community.

Consistent with the right to development and the 'triple bottom line' approach in sustainable development, it is desirable for business enterprises to seek to design business strategies that help ameliorate, the social issues affecting a community. For example, a negotiated mining agreement that includes favourable employment opportunities for traditional owners, is unlikely to deliver actual employment unless it includes a training and education scheme which allows traditional owners to become work ready.

This is not to suggest that business or economic enterprises are required to solve the social issues in a community. Instead it requires that business development strategies also include a careful analysis of the social framework of a community; identifying opportunities for the business or enterprise to address social issues that create obstacles to the economic participation of people living within the community. This approach benefits both the community and the business enterprise by enhancing the community's capacity for economic participation.

However, to fully address longstanding social issues in Indigenous communities a partnership approach between government, the community and the business enterprise is essential. Within this partnership, States retain the primary

responsibility for satisfying economic, social and cultural rights such as education, community infrastructure, health services and housing in Indigenous communities. Housing or Indigenous home ownership is a central objective of the NIC Principles and will be discussed in more detail later in this Chapter.

Further, the social framework of Indigenous communities is far more than the sum of essential services such as health, housing, education and employment. The social framework of a community is based on the networks, relationships and trust that exist among a group of people. It is these elements that also contribute to improved outcomes in communities.

Social capital recognises that social norms, networks and trust relationships such as those that exist between families and friends, school communities, ethnic, religious and community groups and even firms and government can have a beneficial impact on life indicators. Such indicators include enhanced health, better educational outcomes, improved child welfare, lower crime rates, reduced tax evasion and improved government services and responsiveness.[44]

In the seminal work on social capital and its links to community development, Robert Putnam examined two communities in Italy. One community had strong civic networks and social engagement, while the other had limited civic engagement, lawlessness and ineffective governance. Putnam concluded that prosperous and stable communities:

> … did not become civic simply because they were rich. The historical record strongly suggests precisely the opposite. They have become rich because they were civic. The social capital embodied in norms and networks of civic engagement seems to be a precondition for economic development, as well as for effective government.[45]

Social capital has also been recognized by the World Bank as an important basis for poverty alleviation and sustainable economic and human development and is being incorporated into World Bank community development projects.[46] The importance of social capital has also been identified by the Australian Productivity Commission, through its reports into gambling, competition policy and the job network. Following up on these reports the Productivity Commission released a research paper in 2003 to assist public discussion on the important role of social capital in supporting improved economic and social conditions in communities and helping to inform public policy development.[47]

Research into Indigenous social capital in Australia, identifies four characteristics of social capital unique to these communities.[48] First, the spiritual, emotional and historical connection of Indigenous groups to their land is the central feature of Indigenous social capital. Based on this connection to land, the second feature of Indigenous social capital is the sense of community and identity that is

---

44    Productivity Commission *Social Capital: Reviewing the concept and its Policy Implications*, Commission Research Paper, pix. Available online at: <www.pc.gov.au/research/commres/socialcapital/socialcapital.pdf>, 2003.

45    R. Putnam, (1993), *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton, NJ, Princeton University Press, p3.

46    <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTT SOCIALCAPITAL/0,,menuPK:401021~pagePK:149018~piPK:149093~theSitePK:401015,00. html>.

47    Productivity Commission, *op.cit.*

48    J. Bennett, *Indigenous Enterprise, Social Capital and Tourism Enterprise Development: Lessons from Cape York,* PhD Thesis, School of Tourism and Hospitality, Faculty of Law and Business, La Trobe University, Melbourne, 2005.

developed amongst a group of people who belong to and share a connection with the same area of land. And within this community the norms of reciprocity, structures of relationships and interconnectedness further reinforce community and a sense of belonging.

The third characteristic is access to resources which in Indigenous communities has been traditionally determined by relationship to the land. However, the shift in resource supply from the land to missions, wages and welfare has weakened community structures. Finally, the ability to influence change or community empowerment is created by all of the other elements of Indigenous social capital and enables Indigenous communities to influence events and control their own destiny. In other words, it allows communities to be self-determining.

Within an analysis of Indigenous social capital it can be argued:

> …that Indigenous empowerment or the *perceived ability to influence change,* rather than being an *element* of an individual's sense of community, is instead created by a sense of community, clarifying the connection between social capital and empowerment. [49]

This demonstrates that to address Indigenous disadvantage, Indigenous communities must be empowered to participate. This requires a policy approach directed towards communities and not just focused on individuals.

The NIC Principles, which recommend that inalienable communal interests in land be maintained in such a form as 'to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands' is in contrast to the notion of development of social capital. Similarly, the Prime Minister has given preliminary support to the Principles by endorsing home ownership on communal lands and 'individual aspiration as a driving force for progress… in all sections in the Australian community'.[50] Such a perspective is inconsistent with research focusing on social capital, which argues that the erosion of community and shared networks is undermining the progress of society.

In addition to the social framework of a community, cultural and political issues can have a substantial impact on achieving improved economic and social outcomes in Indigenous communities.

## The cultural framework

As discussed in Chapter 3, the Indigenous peoples' cultural characteristics and association with lands can be an important commodity. The unique nature of Indigenous connection to the land provides the basis for economic enterprises such as wildlife harvesting, natural resource management, fishing, cultural tourism and art produced for sale. This cultural framework provides Indigenous communities with an important market advantage but will only be maintained if Indigenous communities can protect their rights and interests in land in way that supports the ongoing exercise and enjoyment of culture.

Such enjoyment is upheld by international human rights standards which create obligations on government and business enterprises. Article 27 of the International Covenant on Civil and Political Rights provides:

---

49    J. Bennett, (2005), p140

50    Prime Minister, the Hon. John Howard MP, *Address at the National Reconciliation Planning Workshop 30 May 2005,* Old Parliament House, Canberra. Available online at: <www.pm.gov.au/news/speeches/speech1406.html>, accessed 19 August 2005.

> In those states in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or, to use their own language.

This right is upheld, to some extent, in Australian law by land rights and native title legislation. These laws provide a framework for recognising and protecting Indigenous cultural interests in land. They create mechanisms for the protection of cultural sites of significance and processes for negotiating 'outsiders' access to, and use of land. These laws recognise the communal nature of Indigenous connection to and ownership of land and the concomitant structure of communal decision-making for the use and disposal of those lands.

However, the greatest value of Indigenous culture is drawn from the connections to community, family and country. These ties give Indigenous people identity and a place and people to which they belong. Family, community and country bound together through a shared culture, are the basis for Indigenous identity and relationships. Every effort should be made to ensure that Aboriginal peoples and Torres Strait Islanders can protect and nurture their languages, traditions, families and communities. Healthy communities and vibrant cultures provide the basis for the empowerment and energy of Aboriginal and Torres Strait Islanders both now and into the future.

Also, the unique culture of Indigenous communities throughout Australia enhances the broader cultural context of the nation. This has recently been noted by Minister Vanstone:

> We do need to understand the richness, diversity and strength of Indigenous culture. We need to understand that when Indigenous Australians take on aspects of our culture they are not necessarily discarding their own. They are in fact, walking in two worlds.
>
> Sometimes it amazes me how many people expect Indigenous Australians to understand and take on our culture, when so few of us even bother to begin to understand theirs.[51]

This is an important acknowledgement which recognises the contribution of Indigenous cultures to the fabric of the Australian nation and also recognises the need for greater understanding of Indigenous Australians. However, this understanding should not only include an appreciation of the diversity of culture within Australia but should also translate into the adequate recognition of rights and policies designed to support and uphold cultural identity.

While the NIC Principles acknowledge the importance of culture by allowing for the underlying inalienable, communally owned title to be maintained; long term leasing provisions such as 99 year leases will in practice limit the use of land and possibly erode the Indigenous cultural framework which is embedded in land. Also, the emphasis in the Principles on preserving inalienable title, but only in such a way as to maximise benefits to individuals and families, potentially threatens communal ownership of land.

As discussed in Chapter 3 in relation to the World Bank's experience in land titling throughout the world, economic development that disregards the cultural context of a community can lead to unforeseen problems and be ultim-

---

51    Minister for Immigration and Multicultural and Indigenous Affairs, *Address to the National Press Club, 23 February 2005*. Available online at: <www.atsia.gov.au/media/speeches/23_02_2005_pressclub.htm>.

ately unsustainable. Similarly, studies throughout the world, including the North American Indian experience of governance and economic development (discussed below) and the growing research linking social capital to prosperous communities, demonstrate that strong culture, communities and economic prosperity are inextricably linked.

## The political framework

Land rights legislation recognises that the rights of Indigenous communities are largely based on communal ownership and decision-making structures. However, this political framework is seen by members of the NIC as one of the key obstacles to economic development and home ownership within Indigenous communities. For example, Warren Mundine has commented that '…the idea, in the Australian context, of unlocking the economic potential of the indigenous land base by shifting some of the control away from communal entities, with their problematic governance, and in favour of forms of individual ownership' should be pursued. He continues by noting that 'it is more likely to be the communal rather than the inalienable aspects of the indigenous land tenure arrangements that may be the problem.'[52]

This view is in contrast to the findings of the North American Indian Economic Development project; and the rights of Indigenous peoples recognised at the international level. These systems recognise the fundamental importance of active and effective community governance models. In the case of Indigenous societies these governance models are communal in nature to reflect and ensure consistency with the social and cultural framework of communities.

## North American Indian experience

The Harvard Project on American Indian Economic Development[53] found that effective tribal governance structures are the key to sustainable economic development within North American Indian communities. That is, communities that have strong governance structures and are able to exercise self-determination are able to achieve significant social and economic improvements. These governance structures are largely based on existing Indigenous decision-making structures and aim to achieve a 'cultural match' with these processes.

The Harvard Project identifies five key areas for effective governance. They include:

- *Sovereignty:* Major decisions about governance structures, resource allocation and development are in the hands of Native American Indians.

- *Governing institutions:* Self-rule is not enough, it has to be exercised effectively through stable rules and keeping community politics out of day to day business and administration. Fair dispute resolutions mechanisms have to be maintained.

- *Cultural match:* Governing structures need to have credibility within Indian society and resonate with indigenous political

---

52    W. Mundine, quoted in The Australian, 18 February 2005, p1.
53    A comprehensive analysis on the work of the Harvard Project on American Indian Economic Development and its implications in an Australian context was undertaken for the 2004 *Native Title Report,* pp24-30.

culture. They also must be accepted by the community or group as a legitimate governing institution. Legitimacy is achieved through cultural match, effective governing institutions and outcomes.

- *Strategic thinking:* The project identified the importance of developing long term strategic thinking and planning taking account of assets/opportunities and priorities/concerns.

- *Leadership:* Finally, the project identifies the need for Indigenous leadership that can envisage a different future, recognise the need for foundational change, are willing to serve the groups interest instead of their own and can communicate the vision to the rest of the group.

The research by the Harvard Project has found that factors listed above must be underpinned by self-rule or self-determined economic development which appears to be a necessary condition for economic success on indigenous lands.[54] That is, self-determination or self-governance is the crucial feature of the North American Indian experience. The findings of the Harvard Project clearly state:

> We have yet to find a case of sustained, positive reservation economic performance where someone other than the Indian nation is making the major decisions about governmental design, resource allocations, development strategy and related matters. In case after case, we have seen development begin to take hold when Indian nations move outsiders from decision-making to resource role and become primary-decision makers in their own affairs.[55]

Self-governance can be understood in terms of: who is deciding how government funding for service delivery to communities is spent? Who is deciding whether to allow development on indigenous lands and what regulations will govern this activity? Who is determining the structure and purpose of indigenous governing institutions? If, Indigenous communities determine these issues a strong foundation for self-governance exists. If on the other hand, government determines these issues, self-governance declines.

However, the Harvard Project notes that these processes can be shared through a partnership mechanism which is based on equality. For example, cooperative agreements can be reached between Indigenous governing organisations and government agencies on land management or natural resources. However, these agreements must be negotiated between governments, including Indigenous governments or governing organisations, rather than agreements based on consultations with Indigenous communities.[56]

It can be understood from the North American experience that self-governance or self-determination, has two important outcomes. First, it is a process of recognising the inherent rights of Indigenous communities to be self-governing. Second, this recognition produces important practical outcomes through improved social and economic development outcomes in communities. The importance of self-determination from both a rights and development perspective is also reflected

---

54    S. Cornell, 'The Importance and Power of Indigenous Self-Governance: Evidence from the United States,' paper presented at *Indigenous Governance Conference* 3-5 April 2002, Canberra.

55    *ibid.,* p4.

56    *ibid.*

in the right of self-determination through UN human rights standards. This is discussed in more detail below.

The findings of the Harvard Project are being considered and applied in an Australian context. The Centre for Aboriginal Economic Policy Research and Reconciliation Australia have established a national Indigenous Community Governance Research Project. [57] The aim of this project is to explore Indigenous governance issues in an Australian context, providing greater understanding of the concepts of governance and support for Indigenous communities in their efforts to build their own governance structures and processes. The importance of this project and the important role of governance issues in an Indigenous context was reiterated in the most recent *Overcoming Indigenous Disadvantage*[58] report by Steering Committee for the Review of Government Service Provision.

The report notes that during consultations with Indigenous communities and academics, there was widespread understanding of the links between good governance and positive outcomes in Indigenous communities. Elaborating on this link, participants in the consultations noted that good governance includes many of the characteristics identified by the Harvard Project listed above, including the recognition and exercise of self-determination.[59]

The findings in North America contradict the view that communal ownership and decision-making is inconsistent with economic and social development. Indeed, the experience of North American Indian communities reinvigorates the purpose of communal ownership and decision-making and re-recognises the importance of self-determination, particularly in those communities seeking to achieve improved economic and social development outcomes.

## Self-determination

The right of self-determination is recognised in key international covenants.[60] These conventions state 'all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. This includes the right of all peoples to 'freely dispose of their natural wealth and resources.'

The right of self-determination is also an important feature of the Declaration on the Right to Development. Article 1(2) of the Declaration states that 'the human right to development also implies the full realization of the right of peoples to self-determination'.

Through the North American experience and international human rights standards, it can be seen that self-determination has a dual purpose. First, it provides a framework by which Indigenous political structures can be recognised as the basis for appropriate and legitimate governance in Indigenous communities.

The second purpose of self-determination as recognised within the right to development is the importance of community and an individual's responsibility and role within this broader context. Self-determination recognises the import-

---

57    More information about the Indigenous Community Governance Research Project is available at: <www.anu.edu.au/caepr/governance2.php#com>.

58    Steering Committee for the Review of Government Service Provision, Overcoming Indigenous Disadvantage, Key Indicators 2005, Commonwealth of Australia, 2005.

59    *ibid.,* p11.37.

60    Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

ance of community and values Indigenous communities as a place of belonging and identity.

The impact of social, cultural and political issues on economic development highlights the value of a holistic approach to economic development. Linked to this approach are the right to development and the sustainable development agenda recognise that development is a fundamental human right.[61] Such recognition requires that the groups or communities who wish to achieve greater social or economic outcomes or who are subject to economic development proposals must be at the centre of the process and be enabled and empowered to control the process and its objectives. They must have effective participation in the process and be able to exercise free, prior and informed consent in decisions affecting them.

Changes to legislation to enable leasing as proposed in the NIC Principles should ensure that as much as possible Indigenous people retain control over their lands even while these lands are leased.

I will now address one issue that is linked to the social, cultural and political framework – housing and home ownership. Because of its emphasis in this debate I will comment specifically on the links and relationship between home ownership and the human right to adequate housing.

## Home ownership and the right to housing

Individual home ownership is a key objective of the NIC Principles. However as discussed in Chapter 3, the Principles focus only on land tenure issues and fail to address the substantive social and economic obstacles to home ownership for Indigenous communities. Given this failure it is likely that home ownership schemes in Indigenous communities will only benefit a small number of individuals who have the financial resources and capacity to manage home ownership obligations.[62]

For the majority of Indigenous Australians, especially those living in remote areas sustainable home ownership is likely to remain out of reach. This is particularly while unemployment, poor health, low levels of education and high risk behaviours continues to feature in Indigenous communities. Compounding these key socioeconomic indicators, adequate housing is fundamental for a stable and safe community environment. However, housing does not have to be in the form of home ownership but can include rental accommodation or community owned housing. Indeed for disadvantaged groups, housing through home ownership may be unachievable and therefore must be provided through other mechanisms. The obligation on Australia (the State) to provide housing to disadvantaged groups arises from the Government's commitment to a number of international human rights treaties which are discussed above. This commitment is important within Indigenous communities in Australia and especially in remote communities where there is an acute housing shortage.

Based on a multi-measure model that examines homelessness; overcrowding; affordability; dwelling condition; and connection to services, including power,

---

61    Declaration on the Right to Development, Article 2(1).
62    J.C. Altman, C. Linkhorn, and J. Clarke, *Land Rights and Development Reform in Remote Australia*, Discussion Paper No.276/2005, Centre for Aboriginal Economic Policy Research.

water and sewerage – Indigenous housing needs in Australia is substantial. Indigenous and non-Indigenous comparable housing indicators show that:

> Indigenous people have high rates of homelessness with a rate of 1% of the population compared to 0.25% of the non-Indigenous population…

and:

> Overcrowded Indigenous houses account for some 10.2% of all Indigenous households, compared to a rate of only 1.7% for non-Indigenous house-holds.[63]

New South Wales and Queensland consistently record high levels in each of the measures. However, current Indigenous housing needs are most acute in the Northern Territory where 2.4% of the Indigenous population are homeless; 34.7% live in overcrowded households; 19.4% of Indigenous households are under affordability stress and 25.2% of houses require major repair or replacement. The estimated cost of meeting the existing housing need in the Northern Territory is $806 million. Additional spending is also needed to upgrade housing-related infrastructure: costs estimates range from between $98 to $400 million.[64]

This analysis is against current housing needs and fails to take account of a rapidly increasing Indigenous population. Research by the Centre for Aboriginal Economic Policy Research (CAEPR), focusing on just one community in the Northern Territory; estimates that the population of this area will increase by 88% in the next twenty years. Such increases will lead to a shortfall of 760 houses, with an estimated cost of $167.2 million.[65]

From the information summarised above, it is clear that Indigenous communities in Australia face a serious housing shortage across a number of indicators including homelessness and inadequate housing. Furthermore, the income of families within these communities is inadequate to address these problems. These communities clearly have a claim on the Australian Government under a range of international conventions to ensure that their housing needs are met.

Commonwealth, state, territory and local government agencies work with Indigenous communities to provide safe, healthy and sustainable housing for Indigenous people.[66] The Commonwealth provides substantial support to Indigenous housing remote areas through the Aboriginal Renting Housing Program (ARHP);[67] Community Housing and Infrastructure Program (CHIP); and the National Aboriginal Health Strategy (NAHs).[68] In addition, state and territory governments also contribute funding for Indigenous housing.

---

63    Northern Territory Government, *National Issues in Indigenous Housing 2004/05 and Beyond,* Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, September 2004, p12.

64    Northern Territory Government, 2004, p14.

65    Summarised in J.C. Altman, C. Linkhorn and J. Clarke, *Land Rights and Development Reform in Remote Australia,* Discussion Paper No.276/2005, Centre for Aboriginal Economic Policy Research, Australian National University.

66    Australian Government, Department of Family and Community Services, *Indigenous Housing/ Accommodation.* Available online at: <www.facs.gov.au/internet/facsinternet.nsf/indigenous/ programs-housing_accommodation.htm>.

67    Australian Government, Department of Family and Community Services, *Aboriginal Renting Housing Program.* Available online at: <www.facs.gov.au/internet/facsinternet.nsf/indigenous/ programs-arhp.htm>.

68    Australian Government, Department of Family and Community Services, Community Housing and Infrastructure Project. Available online at: <www.facs.gov.au/internet/facsinternet.nsf/ indigenous/programs-chip.htm>.

However, a number of reports raise concerns that the level of funding provided by Commonwealth and state/territory governments may be inadequate to meet the increasing Indigenous housing shortage. A report by the Northern Territory government notes that Commonwealth funding for ARHP and CHIP have not increased substantially since 1991. The report notes that ARHP funding has remained fixed at around $91 million since 1991, With the exception of a $29 million increase of funding over three years from 2002-2005.[69]

Similarly, the report claims that funding for both the Community Housing and Infrastructure Project (CHIP) and the National Aboriginal Health Strategy (NAHS) has increased from a combined amount of $138 million in 1991-92 to $172 million in 2002-2003. Again this increase can largely be attributed to a short-term increase of an extra $40 million in 2002-03 which was allocated for municipal services through CHIP.[70] Northern Territory government funding for Indigenous housing has not increased substantially since 1999, remaining at approximately $4 million per annum.[71]

To ensure Australia complies with its obligations to provide adequate housing to Indigenous communities through progressive improvements and targeted action, attention needs to be directed towards increasing State, Commonwealth and Territory funding for Indigenous housing commensurate with identified housing need. This is necessary to ensure that progressive realisation, aimed at reducing inequality is achieved. Progressive realisation is not achieved if indicators worsen and more people are without adequate housing.

A key objective of the NIC Principles is to increase Indigenous home ownership on communally owned lands in the Northern Territory this may include remote communities on ALRA (NT) land. While this proposal may be intended to help alleviate the housing shortage in these communities, it is unlikely that many people in remote areas will be able to support the financial obligations of home ownership. Therefore, ongoing commitment by State, Territory and Commonwealth Government's for the provision of housing and infrastructure to remote communities is essential. As discussed above, funding across all sectors of Government may need to be reassessed to ensure it keeps pace with housing needs in these communities.

If the NIC Principles are acceptable to traditional owners communities, it will be important to ensure that ongoing government responsibility for the provision of housing and infrastructure is maintained at necessary levels. The funding required to support home ownership schemes should not be diverted from existing resources such as ARHP and CHIP as I am concerned that these resources are inadequate to meet existing needs and should not be depleted through new initiatives. Funding to support home ownership schemes should come from other Commonwealth government sources.

---

69    Northern Territory Government, *National Issues in Indigenous Housing 2004/05 and Beyond,* Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, September 2004; Commonwealth Grants Commission, (2001). *Report on Indigenous Funding 2001, Supporting Material,* Commonwealth of Australia, Canberra p122-123 shows that ARHP funding has remained at $91 million between 1996-97 and 1999-00 and between 2000-01 and 2002-03.

70    Northern Territory Government, *National Issues in Indigenous Housing 2004/05 and Beyond,* Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, September 2004, p6.

71    Indigenous Housing Authority Northern Territory, *Annual Report 1999-2000;* 2000-01; 2002-03; 2003-04, Northern Territory Government, Darwin.

# Chapter summary

The findings of Chapter 2 demonstrate that there is a discriminatory potential for the NIC Principles is real and should be implemented with caution. Also, while the NIC Principles seek to change communal ownership arrangements to increase individual leasehold interests, existing land rights and native title legislative regimes already have the capacity to provide for individual leasing arrangements. Despite this, the potential to realise economic or home ownership outcomes for Indigenous communities has not been fully explored and there has been a lack of government policy directed towards using Indigenous land to achieve these outcomes within existing frameworks.

The NIC Principles are of concern when measured against international human rights standards and strategies for economic and social development. The NIC itself is not an Indigenous representative body – it does not speak on behalf of Indigenous Australians. The NIC Principles are not endorsed nor have they been developed with effective participation and free, prior informed consent of the people affected by these principles. Such a process disempowers the communities for whom the Principles are intended to benefit. This is inconsistent with important human rights standards and inappropriate from an economic and social development perspective. This perspective, first and foremost requires that communities who are the subject of policies for economic and social development must be active participants and the central driving force behind the policies.

Secondly, the NIC Principles focus only on land tenure as a basis for economic and social development outcomes. They fail to draw links between the social, cultural and political framework of communities, even to the extent that these issues will impact on the viability of leasing arrangements in communities. That is, the NIC Principles have not considered how the social conditions in Indigenous communities will support sustainable home ownership and business enterprise. Nor have the principles addressed the cultural context of communities in terms of communal ownership of land and the economic benefits that can be gained from Indigenous communities' strong connection to their land through an ongoing and vibrant culture. Such benefits may include customary harvesting, eco-tourism and art and crafts. Instead, the Principles focus and prioritise the welfare of the individual and do not address how the wellbeing of the community can be improved. The NIC Principles situate the political context of communities in negative terms. Communal ownership and decision-making are seen to be inhibitors of economic and social development outcomes. This view fails to appreciate how the experience amongst North American Indians where governance and self-determination are recognised as fundamental to economic and social development in communities, can be applied in an Australian context. Further, there is a lack of analysis and rigour in the debate regarding the extent to which communal ownership inhibits economic development.

Finally, it is useful to note that there are other opportunities for economic and social development on Indigenous land which have been discussed in more detail in Chapter 1. *The Native Title Report 2004* explored these issues and focused on promoting economic and social development outcomes for native title holders and claimants through the native title system. It aimed at creating economic and social development through existing or enhanced rights and interests in land.

This Report set out a new framework for agreement making and proposed new objectives for the native title system.

However, the native title system also creates a number of barriers to Indigenous economic development. The test for recognition and extinguishment and the limitations these standards impose on native title rights and interests create limitations for economic development. Specifically, the failure of the native title system to recognise commercial rights in natural resources and the highly specific nature of rights, limit the benefits that can be gained through native title negotiations. In addition, the right to negotiate process creates additional barriers through limited timeframes and mediation processes. Recommendations 4 and 5 below address these concerns.

It is clear that better economic and social outcomes in Indigenous communities are goals shared by most Indigenous leaders and communities. It is also clearly a goal of commonwealth, state and territory governments. However, how to achieve this outcome is more contested. What is essential are open and informed dialogues around creating economic and social development in Indigenous communities; be they urban, rural or remotely based. Such dialogue must be based on the active participation of traditional owners, Indigenous communities and their representative organisations. It must also be driven by respect for rights, cooperation and a learning approach to policy development. A policy framework or legislative change developed from anything less is unlikely to alter the socioeconomic conditions affecting Indigenous communities.

## Recommendation 4: Leasing regime consent

> That no state, territory or commonwealth legislation affecting the rights and interests of Aboriginal and Torres Strait Islander peoples in land be amended without traditional Aboriginal or Torres Strait Islander owners in the relevant jurisdiction first understanding the nature and purpose of any amendments and through their representative organisations, ie land councils, PBCs and NTRBs giving their consent to legislative change.

## Recommendation 5: Leasing regime conditions

> If traditional owners consent to legislative changes that implement a new leasing regime, as set out in recommendation 4, changes should address each of the following and be developed with the effective participation of land councils and traditional owners:
>
> a) comprehensive provisions setting out the necessary elements of decision-making for leasing land
>
> b) providing legislative protection for the right to free, prior and informed consent to the grant of each lease
>
> c) establishing safeguards such as Land Council oversight of the decision to ensure Indigenous control of the decision

**172**

> d)  statutory independent legal and financial advice and support for strategic planning
>
> e)  statutory timeframes which allow for informed consent to be reached by the traditional owner group
>
> f)  statutory review period which would allow for the renegotiation of conditions under which leases can be granted
>
> g)  provisions that make the dealing void if it is the product of unconscionable conduct, duress, fraud or undue influence.

## Recommendation 6: Leasing regime resources

> Decisions to lease land must be accompanied by adequate resources. Land councils or statutory authorities participating in the process must be provided with additional resources to support the new leasing regime. These resources may be used to provide independent legal and financial advice and to engage community development or strategic planning experts to assist communities plan the impact and outcomes of leasing on their communities.

# Recommendations

The following recommendations address concerns raised in this Report in relation to: implementing leasing proposals through changes to state, territory or commonwealth land rights legislation; Indigenous housing and home ownership schemes; and the native title system.

## Recommendation 1: Native title policy reform

That State, Territory and Commonwealth governments alter their native title policies to:

– increase funding to NTRBs and PBCs

– adopt and adhere to the National Principles on economic development for Indigenous lands set out in the *Native Title Report 2004*. These principles are that native title agreements and the broader native title system should:

1. Respond to the traditional owner group's goals for economic and social development
2. Provide for the development of the group's capacity to set, implement and achieve their development goals
3. Utilise to the fullest extent possible the existing assets and capacities of the group
4. Build relationships between stakeholders, including a whole of government approach to addressing economic and social development on Indigenous lands
5. Integrate activities at various levels to achieve the development goals of the group.

## Recommendation 2: Housing options

If Indigenous groups consent to leasing options, home ownership options may be supported through:

– extending the Home Ownership Programme administered by Indigenous Business Australia to offer affordable home loans over Indigenous communal lands

– establishing a 'good renters programme' for tenants in community housing on communal lands to accumulate equity through regular rent payments.

These initiatives need to be developed in genuine partnership with Indigenous land holders and must take account of the socioeconomic factors particular ro communities on communal lands, including: annual incomes, existing infrastructure, building and maintenance costs, low land value, skill bases, health and life expectancy levels to prevent inter-generational debt.

These new initiatives must receive additional funding that is not drawn from existing Indigenous housing programs such as the Commonwealth Community Housing Infrastructure Program and Aboriginal Renting Housing Program.

## Recommendation 3: Housing programs and human rights standards

That all governments ensure that Indigenous housing programmes are designed so that they are consistent with human rights obligations relating to progressive realisation and an adequate standard of housing. This requires that housing programmes are resourced and supported at a level commensurate with need and with targets and benchmarks established in collaboration with Indigenous peoples.

## Recommendation 4: Leasing regime consent

That no state, territory or commonwealth legislation affecting the rights and interests of Aboriginal and Torres Strait Islander peoples in land be amended without traditional Aboriginal or Torres Strait Islander owners in the relevant jurisdiction first understanding the nature and purpose of any amendments and through their representative organisations, ie land councils, PBCs and NTRBs giving their consent to legislative change.

## Recommendation 5: Leasing regime conditions

If traditional owners consent to legislative changes that implement a new leasing regime, as set out in recommendation 4, changes should address each of the following and be developed with the effective participation of land councils and traditional owners:

a) comprehensive provisions setting out the necessary elements of decision-making for leasing land

b) providing legislative protection for the right to free, prior and informed consent to the grant of each lease

c) establishing safeguards such as Land Council oversight of the decision to ensure Indigenous control of the decision

d) statutory independent legal and financial advice and support for strategic planning

e)   statutory timeframes which allow for informed consent to be reached by the traditional owner group

f)   statutory review period which would allow for the renegotiation of conditions under which leases can be granted

g)   provisions that make the dealing void if it is the product of unconscionable conduct, duress, fraud or undue influence.

## Recommendation 6: Leasing regime resources

Decisions to lease land must be accompanied by adequate resources. Land councils or statutory authorities participating in the process must be provided with additional resources to support the new leasing regime. These resources may be used to provide independent legal and financial advice and to engage community development or strategic planning experts to assist communities plan the impact and outcomes of leasing on their communities.