



## Economic development reforms on Indigenous land

### Introduction

In 2006 the Secretary of the Department of Prime Minister and Cabinet made a revealing statement about Indigenous affairs. He argued that his own government's policy performance in the Indigenous portfolio had been a failure. He went further to say that while well intentioned, the policies and approaches of the past 30 years had contributed to poor outcomes for Indigenous people.

I am aware that for some 15 years as a public administrator too much of what I have done on behalf of government for the very best of motives has had the very worst of outcomes. I and hundreds of my well-intentioned colleagues, both black and white, have contributed to the current unacceptable state of affairs, at first unwittingly and then, too often, silently and despairingly.<sup>1</sup>

This statement was made in the context of the Australian Government's ambitious reform agenda aimed at significantly recasting Indigenous policy in remote Indigenous Australia.

During 2005 and 2006 the Government implemented legislative and policy reforms that will change the face of Indigenous communities located on communally titled land. The Government argued that communal tenures prevent Indigenous people from improving material wealth and economic circumstances. According to the Government, individual property rights will allow Indigenous Australians to accumulate assets and participate in market economies. The Government's reforms are designed to emphasise the individual as an agent in economic self development through 'building wealth, employment and an entrepreneurial culture.'<sup>2</sup> According to the Minister for Indigenous Affairs:

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1 Shergold P., (Secretary of the Department of the Prime Minister and Cabinet), *Indigenous Economic Opportunity: the Role of the Community and the Individual*, Speech delivered at the First Nations Economic Opportunities Conference, Sydney, 19 July, 2006.

2 Brough M., (Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs), *Blueprint for Action in Indigenous Affairs*, Address to the National Institute of Governance: Indigenous Affairs Governance Series, Canberra, delivered 5 December 2006, available online at <http://www.facs.gov.au/internet/minister3.nsf/content/051206.htm>, accessed at 18 December 2006.



It is individual property rights that drive economic development. The days of the failed collective system are over.<sup>3</sup>

This Chapter focuses on the Government's economic reform agenda with discussion about the following:

- individualising title on Indigenous communal lands through 99 year headleases;
- liberalising public access to Indigenous land through the modification of the permit system;
- home ownership on Indigenous lands;
- centralising government services in large Indigenous townships;
- developing regional shire councils to replace Indigenous community councils
- employment and CDEP; and
- access to capital for Indigenous economic and enterprise development.

## The government policy framework

The Australian Government's policy agenda is contained in the 2006 *Blueprint for Action in Indigenous Affairs* (hereon referred to as the Blueprint). The Blueprint defines the Government's intention to replace protectionist, welfare-based approaches to Indigenous affairs with market-based approaches to land, housing, enterprise development and employment. This means opening up Indigenous land to the wider Australian public and creating more interaction between remote communities and the Australian economy. The discourse that accompanies the Government's policy reforms defines a need to 'normalise' Indigenous communities through mainstreaming service delivery and creating market economies.

We will need to remove barriers to economic opportunity. But we are not proposing to use government programs to create artificial economies. It doesn't work. We are talking about creating an environment for the sort of employment and business opportunities that exist in other Australian towns...

Land tenure changes will be progressively introduced, subject to the agreement of traditional owners, to allow for home ownership and the normal economic activity you would expect in other Australian towns.

In places like Wadeye, Cape York and Groote Eylandt this is just beginning to happen. We want to get to the point where people living in these remote communities are not solely dependant on community or public housing. They should be able to buy their own homes. Those who don't should make a fairer contribution in rent.<sup>4</sup>

In 2005 the Australian Government announced legislative amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (hereon referred to as ALRA). One significant addition to the ALRA was a provision that permitted Governments to negotiate 99

3 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), as quoted in ABC Online, *The World Today*, 'Government to reform Aboriginal land rights', available online at <http://www.abc.net.au/worldtoday/content/2006/s1652229.htm>, 31 May 2006, accessed 8 December 2006.

4 Brough M., (Minister for Families, Community Services and Indigenous Affairs), *Blueprint for Action in Indigenous Affairs*, Address to the National Institute of Governance: Indigenous Affairs Governance Series, Canberra, 5 December 2006, available online at <http://www.facs.gov.au/internet/minister3.nsf/content/051206.htm>, accessed at 18 December 2006.



year headleases over Northern Territory townships under Indigenous communal land rights tenure. The headleases would then be divided into sub leases for individual tenants, home purchasers, businesses and government service providers.

Accompanying the tenure reforms in 2006 were proposed changes to the ALRA permit system. The ALRA permit system currently requires all visitors, non Indigenous residents and non residents to obtain a permit to enter and stay on Indigenous land. The Australian Government's aim in reforming the permit system is to liberalise land access so that the providers of goods and services can enter Indigenous land without restriction.

Integral to the government's 'normalisation' strategy are proposed changes to the Indigenous housing system and housing markets. The intention is to increase home ownership and reduce reliance on government subsidised rental accommodation. According to the Government, these reforms are dependent on 99 year leases. The Minister for Families, Community Services and Indigenous Affairs has determined that funding for home ownership schemes will be contingent on the states and territories amending their land rights legislation to make provision for 99 year headleases.

Finally, the Blueprint sets out the Australian Government's intention to limit the supply of services and financial support to small 'unsustainable' Indigenous communities. If Indigenous people on homelands and outstations want to access health and education services they will have to move to the larger townships.

The precursor to the Blueprint is the 2003 Council of Australian Governments report, *Overcoming Indigenous Disadvantage, Key Indicators* (The COAG Report). The Report is the framework on which the Indigenous reform agenda has been developed. The COAG Report has a dual focus. It maps the extent of Indigenous disadvantage using 2001 census data and it provides a framework for the focus of government action. 'Economic participation' is the apex of the tripartite COAG framework, along with creating healthy families and early childhood. The COAG Report recommends: 'improved wealth creation and economic sustainability for individuals, families and communities.'<sup>5</sup>

A key finding of the *Overcoming Indigenous Disadvantage Key Indicators*

*2003 Report* is that economic development is central to improving the well-being of Indigenous Australians.

A strategic goal of the Australian Government's Indigenous policy is to increase Indigenous economic independence, through reducing dependency on passive welfare and stimulating employment and economic development opportunities for Indigenous individuals, families and communities.

The COAG Report aims to implement 'economic participation and development' through seven specific areas for action. These are contained in the COAG *strategic areas for action* and include the following:

- employment (full-time/part-time) by sector (public/private), industry and occupation;
- CDEP participation

<sup>5</sup> SCRGSP (Steering Committee for the Review of Government Service Provision) 2003, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission, Canberra, s2.4.



- long term unemployment;
- self employment;
- Indigenous owned or controlled land;
- accredited training in leadership, finance or management; and
- case studies in governance arrangements.<sup>6</sup>

The COAG Reports on *Overcoming Indigenous Disadvantage* will be issued on a two yearly basis and will be formulated from a range of data sources including the Australian Bureau of Statistics (ABS), the Australian Institute of Health and Welfare and the Productivity Commission as well as government departments. Successive Reports will be used to evaluate the reform agenda.

Progress will be monitored through the *Overcoming Indigenous Disadvantage* reports, which measures key indicators in Indigenous social and economic well-being from a whole-of-government perspective. In particular, the increased participation of Indigenous Australians in employment and increased wealth of Indigenous Australians—collective and individual—will be monitored. In addition, improvements will be continually monitored through agencies measuring their contributions against each initiative in the strategy.<sup>7</sup>

## Indigenous land tenures

The Australian Government's reforms must be considered with full knowledge of the location, infrastructure, and legislative parameters of communally titled Indigenous land. As of June 2006, Indigenous Australians held communal rights and interests to land encompassing 19.8 percent of the Australian land mass.<sup>8</sup> While there is no doubt that the Indigenous 'estate' is now considerable, most of the land that has been returned to Indigenous people since the 1970s is remote, inhospitable and marginal. The process of colonisation over two centuries ensured that the best land was granted, taken or purchased by non-Indigenous Australians. The Crown land that was still unallocated by the 1970s remained so for good reason. However, in recent times some of the remote, coastal land under Indigenous tenure has become attractive to developers, governments and non-Indigenous residents. This trend is likely to continue as residential markets spread along the Australian coastline. Land in the central desert belt of Australia is unlikely to attract residential markets, now or into the future.

There are three ways that Indigenous land has been returned to Indigenous people. It has been allocated by governments through statutory land rights, claimed under the native title regime, or purchased on behalf of Indigenous people with funds established to provide land to the dispossessed. Indigenous Australians have also purchased land as individuals, in the same way as non-Indigenous Australians and

6 SCRGSP (Steering Committee for the Review of Government Service Provision) 2003, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission, Canberra, s2.5.

7 The Australian Government, *Achieving Indigenous Economic Independence, Indigenous Economic Development Strategy, Targeting jobs, business and assets*, 2005, available online at: [http://www.workplace.gov.au/NR/rdonlyres/B7206570-9BFD-4403-B4A3-6649065FAE5A/0/IEDStrategyBooklet\\_revised\\_FINAL.pdf](http://www.workplace.gov.au/NR/rdonlyres/B7206570-9BFD-4403-B4A3-6649065FAE5A/0/IEDStrategyBooklet_revised_FINAL.pdf) accessed 5 March 2007.

8 National Native Title Tribunal, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 7 December 2006, p1.

Note: These percentages are approximate as the information is based on broad land tenure and some small areas, usually less than 50 sq kms, are not necessarily captured.



through land councils in some states. Land that has been returned to Indigenous Australians is largely unallocated Crown land. The majority of the land is located in very remote desert regions with limited or no infrastructure, roads or utilities.

## Native Title

Indigenous traditional owners have varying rights and interests to just over 8.5 percent of the Australian land mass as a consequence of native title determinations.<sup>9</sup> By June 2006 there were 60 determinations that native title exists. However, in the majority of cases the traditional owners do not have exclusive possession of the land. Traditional owner rights to land are limited to the same customary activities as those that were practiced centuries ago and recorded by the 'first contact' non-Indigenous colonisers. The claimable land that exists under the native title regime includes unallocated Crown lands, some reserves and park lands, and some leases such as non-exclusive pastoral and agricultural leases, depending on the state or territory legislation under which they were issued.

Across Australia, just over 96 percent of all native title land is classified as very remote by the *Accessibility Remote Index of Australia* (ARIA), the most widely used standard classification and index of remoteness.<sup>10</sup>

In terms of the size, Western Australia has by far the largest areas of native title land of any Australian jurisdiction. Ninety two percent of the area of native title determinations is in Western Australia (WA). A large proportion of native title land in WA is in the Gibson, Tanami and Great Sandy Desert regions as well as in the Kimberley.

In the other states and territories native title rights and interests have been recognised over smaller parcels of land.

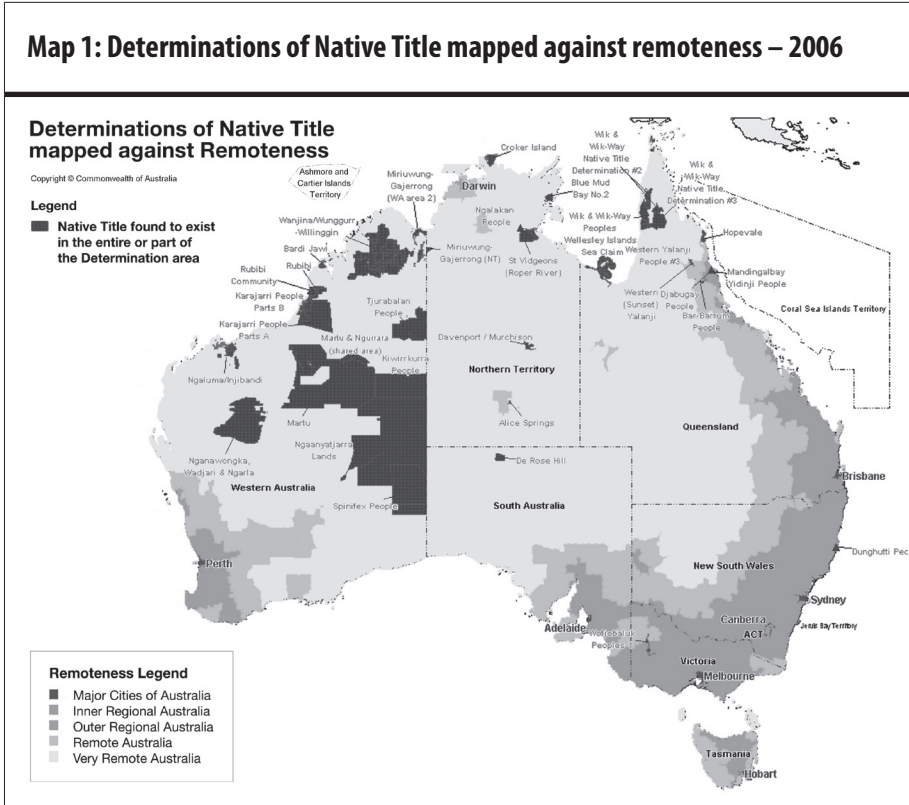
- In Queensland land under native title is in the 'very remote' Cape York region, in Far North Queensland and in the Torres Strait.
- In South Australia native title interests and rights have been recognised in the 'very remote' north central region of the state which is partially located within desert regions.
- In the Northern Territory native title interests and rights have been recognised over land and seas in 'very remote' regions, and in Alice Springs, classified as an 'outer regional' by ARIA.
- In Victoria, native title land is located 'remote' and 'outer regional' areas.
- In Tasmania there are no successful native title claims to date.
- By June 2006, New South Wales was the only jurisdiction that successfully achieved a native title determination in an 'inner regional' area. The land parcel is very small comprising 1 square kilometre on the New South Wales Coast.

9 National Native Title Tribunal *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 7 December 2006.

10 National Native Title Tribunal *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 22 January 2007.



Overall, the land over which native title interests and rights have been recognised is some of the most marginal and inhospitable land in Australia. Map 1 shows the location of Indigenous land under native title by remoteness.



**Source:** *National Native Title Tribunal 2006.*

**Note:** Remoteness areas are based on the Accessibility Remoteness Index of Australia (ARIA), Developed by the Department of Health and Aging (Austn Govt) and the National Key Centre for Social Applications of GIS (GISCA).

**Disclaimer:** The Registrar, the Native Title Tribunal and its staff and officers and the Commonwealth, accept no liability and give no undertakings, guarantees or warranties concerning the accuracy, completeness or fitness for purpose of the information provided.

**Data statement and acknowledgements:** Spatial data and/or tenure information sourced from and used with permission of: Landgate WA; Dept of Natural Resources and Water, Qld; Dept of Lands NSW; Dept of Planning and Infrastructure NT; Dept for Environment and Heritage SA; Dept of Sustainability and Environment Vic; Geoscience Australia and Australian Bureau of Statistics, Austn Govt.

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## Indigenous land rights statutes

Indigenous lands granted under state, territory and federal statute constitutes 14.4 percent of the Australian land mass.<sup>11</sup> Land under statute has been granted or purchased by governments for Indigenous people since the 1970s. Like land under native title tenure, while the land area is extensive, the vast majority of it is marginal, located in desert regions or in remote locations in the north of Australia.

Map 2 demonstrates that the land under statutory land rights is overwhelmingly represented in the central desert regions of Australia. Vast tracts of Indigenous land traverse Western Australia, the Northern Territory and South Australia. There are also large tracts of Indigenous land in the remote north eastern regions of the Northern Territory, in the coastal regions of Western Australia's northern belt and the coastal Cape York areas of Northern Queensland.

The high commercial value of the land in New South Wales (NSW) provides an exception to the trend for land to be remote and marginal. While the land granted to land councils in NSW is in many small parcels rather than large areas of country, some of it is very valuable in terms of its potential for development, both residential and commercial.<sup>12</sup>

Map 2 shows the location of Indigenous land under statutory land rights.

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11 **National Native Title Tribunal**, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 7 December 2006, p1.

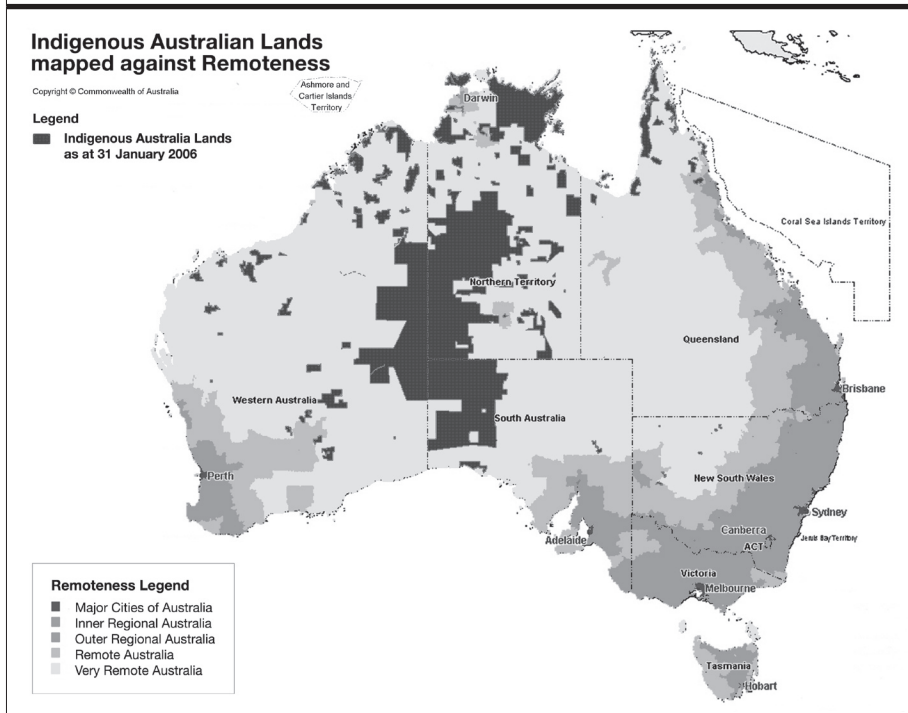
Note: These percentages are approximate as the information is based on broad land tenure and some small areas, usually less than 50 sqkm, are not necessarily captured.

12 **Office of the Registrar, NSW Aboriginal Land Rights Act**, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 31 January 2007, p1.

Note: Lands granted to Local Aboriginal Land Councils in New South Wales are of high commercial value due to their development potential for either residential or commercial use. The land claimed under the *NSW Aboriginal Land Rights Act 1983* is currently valued at approximately \$800million. This is despite the fact that land parcels claimed in NSW are relatively small when compared to jurisdictions like the Northern Territory.



## Map 2: Statutory land rights areas mapped against remoteness – 2006



**Source:** *National Native Title Tribunal 2006.*

**Note:** Remoteness areas are based on the Accessibility Remoteness Index of Australia (ARIA), Developed by the Department of Health and Aging (Austn Govt) and the National Key Centre for Social Applications of GIS (GISCA).

**Note:** This map does not include Indigenous Land purchased by the Indigenous Land Corporation

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## Other Indigenous communal land tenures

In addition to native title and land rights tenures, Indigenous land has been purchased on behalf of Indigenous people by the Indigenous Land Corporation (ILC) since June 1995. Indigenous Australians can apply to the ILC for purchase of land under the categories of cultural, social, environmental and economic benefit. Applicants must identify the ways in which the land purchase addresses dispossession. They must also define a specific purpose for the land under one of four categories and set achievable milestones and outcomes.





- Applicants are asked to enter into a lease while the ILC owns the land. The terms of the lease include a staged work plan, including capacity development activities, and applicants are required to report on and monitor how work is going.
- Progress towards a land grant depends on successful completion of the work plan. It is the ILC's opinion that it is usually reasonable to grant land within three years of buying it.
- The ILC's purchase and divestment policy is aimed at ensuring that the land purchased will remain Indigenous-held and can provide future generations with cultural, social, environmental or economic benefits.
- The ILC must grant title to land to an Aboriginal and Torres Strait Islander Corporation as defined in the Aboriginal and Torres Strait Islander Act 2005.<sup>13</sup>

Land purchased by the ILC covers over 5.5 million hectares and cost almost \$170 million by June 2006. Since 1995 the ILC has made a total of 201 land acquisitions, 27 have been acquisitions in urban locations<sup>14</sup>

## The size and location of Indigenous communities

The 2001 census data identifies a total of 458,520 Indigenous people in Australia. Of these 121,163 were residents in remote and very remote regions.<sup>15</sup> There are 1,139 discrete communities in remote and very remote regions, of which more than half (577 in total) have populations of less than 20 people.<sup>16</sup> In most cases, larger communities represent Indigenous living areas formerly constituted as government and mission settlements. The smaller populations are outstations or homeland communities.

[O]utstation communities... had their origins in voluntary and spontaneous resettlement of Aboriginal country commencing the 1970's. These settlements are found predominantly in central Australia, the Kimberly, the top end of the Northern Territory and the Cape York Peninsula.<sup>17</sup>

Table 1 provides information about the number, population size and location of Indigenous communities.

13 Indigenous Land Corporation, *The ILC and Land Acquisition*, Website, available online at: <http://www.ilc.gov.au/site/page.cfm?u=2> accessed 12 March 2007.

14 Indigenous Land Corporation, *Annual Report 2005-06*, 2006, p34.

15 Australian Bureau of Statistics, *Population Characteristics of Aboriginal and Torres Strait Islander Australians*, 2001, ABS 4713.0, Canberra, p22.

16 Australia Bureau of Statistics, *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities*, 2001, ABS cat no. 4710.0, Canberra.

17 Taylor, J., *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy Research, Discussion Paper no. 283/2006, Australian National University, Canberra, 2006, p48.



**Table 1: Number of discrete Indigenous communities by settlement size and remoteness region – 2001**

Settlement Population Size	Major Cities	Inner Regional	Outer Regional	Remote	Very Remote	Total
1-19	0	0	6	33	577	616
20-49	0	1	8	36	228	273
50-99	1	7	13	17	64	102
100-199	3	5	12	9	51	80
200-499	1	6	11	11	77	106
500-999	0	0	0	1	17	18
1000+	0	0	3	2	16	21
<b>Total</b>	5	19	53	109	1,030	1,216

**Source:** Australia Bureau of Statistics, *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities*, 2001, ABS cat no. 4710.0, Canberra.

## Economic development limitations of Indigenous land

The Indigenous land base is not comparable with land in urban environments and large regional townships. In remote Indigenous communities almost all services are provided by governments or by church organisations. The land is inhospitable, and usually cut off from markets and cities by distance and poor road infrastructure. The tropical north is inaccessible by road during the wet season which can extend to four months each year. The climate, soil and weather are not conducive to cultivation, and tourist markets are limited in the majority of the desert regions. It is therefore difficult to develop and maintain significant enterprise ventures on Indigenous land.

Experience in remote Australia suggests that a goal of developing under-developed Indigenous-owned land will not of itself be the driver of private-sector finance availability. On its own terms, whether this land was freely alienable or not, much of this land is in the poorest land classes and is remote from markets.<sup>18</sup>

Economic opportunities are further limited by the fact that land rights regimes in Australia provide only the most minimal rights to subsurface minerals. The New South Wales *Aboriginal Land Rights Act 1983* (NSW) provides rights to minerals though significantly excludes rights to gold, silver, coal and petroleum. In Tasmania

<sup>18</sup> Linkhorn C., *Maori Land and Development Finance*, Discussion Paper 284/2006, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2006, p25.



under the *Aboriginal Lands Act 1995* (Tas), minerals other than oil, atomic substances, geothermal substances and helium are the property of Indigenous people to a depth of 50 metres. No other land rights regime in Australia provides rights to subsurface minerals. Indigenous land holders have to apply for licences for mining activity in the same way as anyone else.

While for the most part Indigenous Australians have no mineral entitlements, the existence of a mining tenement can provide royalty payments to traditional owners. Information outlining mineral rights under the land rights legislations of all Australian jurisdictions is provided at Appendix 1 of this Report.

Although commercial rights are not specifically excluded from the *Native Title Act 1993* (Cth), sections 211(2) and (3) indicate that native title interests and rights are generally expected to encompass traditional activities. These include hunting, fishing, gathering, participating in spiritual or cultural activities and acting for the purpose of satisfying personal, domestic, non-commercial or communal needs.

The case law that has defined and interpreted the *Native Title Act 1993* (Cth) clarified that subterranean minerals and petroleum are the property of the states and held this property right is sufficient to extinguish native title rights. The High Court judgement in *Ward*<sup>19</sup> determined that native title entitlements should be characterised as a 'bundle of rights' rather than an 'underlying title to land.' The practical effect of *Ward* is that the potential economic entitlements of the claimants are severely restricted. The 'bundle of rights' interpretation limits the legal recognition of economic and resource rights. Only exclusive possession under native title vests land ownership rights in traditional owners, including the right to exploit mineral resources within the existing restrictions and caveats of Australian law.

Economic development has never been primary aim of land rights legislations. If it were, valuable mineral rights would have accompanied the return of the land as it has in countries with treaties such as Canada, the USA and New Zealand. In these countries the treaty relationship means that governments have an obligation to negotiate in good faith and recognise their fiduciary duties to compensate for dispossession. This has led to large scale financial compensation settlements that have provided indigenous peoples with a solid foundation for economic development.

The real value of land returned to Indigenous ownership under Australian land rights legislation has always been strongly connected to its potential to compensate for dispossession, restore Indigenous peoples' spiritual relationship with the land, and recognise the right to self-determination. These findings are strongly reinforced by the findings of HREOC's survey of traditional owners in Chapter 1 of this Report.

Strategies for economic development on Indigenous land must therefore be made in full cognisance of the limitations of both the land itself and the land rights legislative frameworks. The topographic and location limitations of Indigenous land are integral to any considerations or policy approaches to improve economic outcomes for Indigenous people. Strategies that work in cities or on resource rich land are not applicable to the remote, marginal country that characterises much of

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19 *Western Australia v Ward & Ors* (2002) 191 ALR 1.



the Indigenous 'estate.' Governments must look to approaches that have worked in environments that broadly approximate those for Indigenous Australians.

## 99 year headleases over Indigenous townships

During 2006, the Australian Government began implementing land reforms in the Northern Territory where the land rights legislation is the jurisdiction of the Commonwealth. Underpinning the land rights reforms was the 2005 National Indigenous Council's (NIC) *Land Tenure Principles* which were discussed extensively in last year's *Native Title Report 2005*. The NIC Principles supported the maintenance of inalienable, communal tenure rights for Indigenous land, but argued to amend land rights legislations 'in such a form as to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.'<sup>20</sup>

In 2006 the Australian Government added a new section 19A to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) to provide that with ministerial consent a Land Trust may grant a 99 year headlease over an Aboriginal township to an approved entity of the Commonwealth or the Northern Territory Government.

The 99 year leasing provision of s 19A of the ALRA has the practical effect of 'alienating' Indigenous communal land. While a lease is not alienation in fact, it will have the same effect in practice. Ninety nine years is at least four generations. With potential to create back-to-back leases, there is a high probability that the leases will continue in perpetuity.

Amendments of the nature of the ALRA are likely to be replicated in other Australian jurisdictions. During 2006 the Australian Government announced that it intended to encourage other states and territories to make similar amendments to their land rights legislations through home ownership funding incentives and bilateral agreements.

I hope these changes (amendments to ALRA) motivate other state governments to amend their Indigenous land legislation to facilitate similar opportunities for Indigenous Australians who reside on community land,' Mr Brough said.

The 2006-07 Budget sees the allocation of \$107.5 million towards the expansion of the Indigenous Home Ownership on Indigenous Land Program.

The new tenure arrangements contained in the Bill will enable Aboriginal people in the Northern Territory to access this new program.<sup>21</sup>

## Obtaining consent for 99 year headleases

The 99 year lease agreements are voluntary. In order to establish a 99 year headlease, section 19A(2) of the ALRA provides that governments must consult with the wider Indigenous community of the township, and obtain consent for the

20 Gordon, S., (Chairperson, National Indigenous Council, Office of Indigenous Policy Coordination), *Indigenous Land Tenure Principles*, Media release, 3 June 2005, available online at: <http://www.atsia.gov.au/NIC/communique/default.aspx>, accessed on 14 January 2007.

21 Brough M., (Minister for Families, Community Services and Indigenous Affairs), Media Release, *Historic reforms to NT land rights*, 31 May 2006, available online at <http://www.atsia.gov.au/Media/media06/3506.aspx>, accessed 28 November 2006.



headlease from traditional owners through their representative Land Councils. The provisions for 99 year headleases are as follows:

A Land Council must not give a direction under subsection (1) for the grant of a lease unless it is satisfied that:

- (a) the traditional Aboriginal owners (if any) of the land understand the nature and purpose of the proposed lease and, as a group, consent to it; and
- (b) any Aboriginal community or group that may be affected by the proposed lease has been consulted and has had adequate opportunity to express its view to the Land Council; and
- (c) the terms and conditions of the proposed lease (except those relating to matters covered by this section) are reasonable.<sup>22</sup>

Section 77A of the ALRA specifies the circumstances under which traditional owners can give consent as a group.

Where, for the purposes of this Act, the traditional Aboriginal owners of an area of land are required to have consented, as a group, to a particular act or thing, the consent shall be taken to have been given if:

- (a) in a case where there is a particular process of decision making that, under the Aboriginal tradition of those traditional Aboriginal owners or of the group to which they belong, must be complied with in relation to decisions of that kind – the decision was made in accordance with that process; or
- (b) in a case where there is no such process of decision making – the decision was made in accordance with a process of decision making agreed to and adopted by those traditional Aboriginal owners in relation to the decision or in relation to decisions of that kind.<sup>23</sup>

Under traditional or agreed decision-making processes, a minority group may be able to consent to a 99 year headlease on behalf of the majority. Given what is at stake, it is essential that agreement and consent processes are documented and authorised by the wider traditional owner group **prior** to any negotiations for a headlease.

Agreement about what constitutes traditional decision-making, or agreed decision-making, should be decided in a *separate* and *documented* process. Unfortunately the ALRA does not contain a provision that specifies a discrete process to authorise decision-making. The step to authorise decision-making is a crucial check and balance.

Given that 99 year headleases provide pecuniary benefits to traditional owners, there is potential for money matters to override traditional considerations. Therefore, traditional owners must have certainty about *who* has authority to make decisions, and *how* those decisions should occur. This will also ensure that traditional owners control the pace of decision-making and cannot be rushed into giving consent by governments who operate on different timetables and imperatives.

The Commonwealth *Native Title Act 1993* (Cth) affords greater legislative protections to claimants and native title holders in negotiating consent for land use. The authorisation process for native title Indigenous Land Use Agreements (hereon referred to as ILUAs) provides a relevant threshold. Before an ILUA can be registered,

22 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s19A(2)(a)(b)(c).

23 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s77A(a)(b).



the Registrar of the National Native Title Tribunal must be satisfied that all reasonable efforts have been made to ensure persons who hold, or may hold, native title in relation to land or waters in the area have been identified, and that all persons so identified have authorised the making of the agreement.<sup>24</sup> Authorisation can occur through a traditional decision making process, or through an agreed process by all persons who hold common or group native title rights.<sup>25</sup> The National Native Title Tribunal provided the following explanation of the authorisation process:

- The Native Title Act 1993 requires that one form of Indigenous Land Use Agreement, the *area agreement*, be 'authorised' by *all* the persons who hold or may hold native title to the area covered by the agreement.
- The first step is to make all reasonable efforts to identify *all* persons who hold, or may hold, native title to the area covered by the agreement. The second step is to obtain the authority of persons identified in the first step (the native title group) to make the agreement.

The authorisation of the native title group may be given in one of two ways:

- In accordance with a traditionally mandated process under the traditional laws and customs of the native title group to make decision of this kind, for example if decisions must be made by a council of elders (possibly a few people who can bind the rest of the group).
- If there are no traditionally mandated decision-making processes, then the group must agree upon and adopt a decision-making process that will be used to authorise the decision.

In looking at whether an agreement has been appropriately authorised the courts have considered:

- Whether there is a body existing under customary law that is recognised by the members of the group and the nature and extent of that body's authority to make decisions binding the members of the group and the fact that that body actually authorised the relevant action (*Moran v Minister for Land and Water Conservation for NSW*).<sup>26</sup>
- Where the process is one agreed to and involves the holding of meetings, the purpose of, and agenda for, the meeting where authorisation was apparently given, and how and to whom notice of the meeting was given, as well as who attended the meeting and with what authority (*Ward v Northern Territory*).<sup>27 28</sup>

Provisions of this nature should be adopted under the ALRA to ensure that Indigenous communities and traditional owners are able to give free, prior and informed consent to 99 year headleases.

The amended ALRA also provides that under section 21C a new Land Council can be established on a slim 55 percent majority vote of people in a Land Council region

24 *Native Title Act 1993* (Cth) s203BE(5).

25 *Native Title Act 1993* (Cth) s251A.

26 [1999] FCA 1637.

27 [2002] FCA 171.

28 *National Native Title Tribunal, Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 28 February 2006.



or 'qualifying area'.<sup>29</sup> Previous to the 2006 amendments, a substantial majority was required to establish a Land Council.<sup>30</sup> The 55 percent majority is of particular concern for traditional owners of large townships.

Due to dispossession, the mission movements, and the centralisation of government resources in larger communities, many Aboriginal townships are regional hubs that accommodate large numbers of Indigenous people, many of whom are not the traditional owners of the town area. Therefore, there are many townships where traditional owners would not constitute a 55 percent majority.

The following example demonstrates the potential problems of setting 55 percent majority. The Wadeye region is home to over 2,300 people, though population numbers vary.<sup>31</sup> The Kardu Diminin people are the traditional owners of the Wadeye township area. They share their town with members of 19 other clan groups of the broader Thamarrurr region. Members of regional clans first began to move to the Wadeye township in the 1930s with the establishment of the mission. This has caused, and continues to cause tension in the region. The traditional owners do not constitute a majority of the people in the township. Hypothetically, if a vote to establish a new Land Council was to occur in the Wadeye Thamarrurr region, the traditional owners would not have the numbers to override a community decision to establish a new Land Council. Should such a Land Council agree to a headlease and fail to appropriately consult with traditional owners, under s 19A(3) of the ALRA, this would not nullify the headlease agreement.

## Alternative lease models

The Australian Government will not consider alternative lease models to its 99 year scheme and in 2006 rejected an alternative 40 year lease proposal from the Wadeye Thamarrurr Council. The Wadeye proposal would vest the land title and governance with the Wadeye Thamarrurr Council. The traditional owners argued that the 40 year model was preferable because it gave them ongoing decision-making authority over land. According to the CEO of Wadeye's Thamarrurr Council:

The concept of a Town Corporation controlled by the traditional owners, the Diminin people, is a critical aspect of the lease... The community had a right to govern itself, and would continue to oppose federal government plans.<sup>32</sup>

The Wadeye proposal was prepared with expert legal advice, though the Minister for Families, Community Services and Indigenous Affairs rejected it on the grounds

29 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s3, "qualifying area" means an area that: (a) is wholly included in the area of a Land Council; or (b) is partly included in the area of one Land Council and partly included in the area of one or more other Land Councils.

30 *Aboriginal Land Rights (Northern Territory) Act 1976*, Act Compilation (superseded), 24 March 2005 – 4 September 2006, ID:C2005C00223.

31 Taylor J., *Social Indicators for Aboriginal Governance: Insights from the Thamarrurr Region, Northern Territory*, Research Monograph No. 24, Centre for Aboriginal Economic Policy Research, ANU E Press, Canberra, 2004, Chapter 2, available online at: [http://epress.anu.edu.au/caepr\\_series/no\\_24/mobile\\_devices/ch02.html](http://epress.anu.edu.au/caepr_series/no_24/mobile_devices/ch02.html), accessed 17 January 2007.

32 *National Indigenous Times*, *Wadeye says it will fight against government lease plan*, 4 December 2006, available online at: <http://www.nit.com.au/breakingNews/story.aspx?id=8969>, accessed 12 February 2007.





that banks would not provide finance for mortgages and business proposals on 40 year lease tenures.<sup>33</sup>

It's been rejected on economic grounds, it's simply unsustainable... You don't get, and will not get, banks to back the sort of financial investments that they may be asked to make in regards to substantial businesses.<sup>34</sup>

Despite differing views on the views on the financial viability of lease terms, the Minister will have the last word on this matter as \$9.5 million in housing funding for Wadeye is contingent on the Thamurrur Council agreeing to a 99 year headlease.

[T]he Minister is using as a bargaining chip, money that has already been allocated to Wadeye. He's held up \$9.5 million in housing funding... Initially he said he was holding it up until our people stop fighting and we're told the day before yesterday that the \$9.5 million that's been frozen in a trust account in Darwin won't be freed up until this lease is signed.<sup>35</sup>

The Australian Government's intransigence over the Wadeye proposal is evidence that it will not take a research-based approach to land reform by trialing different land tenure schemes such as the one proposed at Wadeye.

In fact, there are many alternative options to 99 year leases. In my *Native Title Report 2005* I provided evidence that it is currently possible to set up leases under every piece of land rights legislation in Australia except one (the *Victorian Aboriginal Lands Act 1991*). Leases can be for both residential and commercial purposes. Under land rights statute, leases require traditional owner consent, and depending on the length of the lease, Ministerial consent may also be required. Under the native title regime, leases may be issued by governments if the native title representative body agrees through an Indigenous Land Use Agreement.<sup>36</sup>

In many Indigenous townships these leases are currently operating on communal lands. The benefits of these leases are that traditional owners retain decision-making control over the land. Under the Government's 99 year headlease plan, the 'established entity' will make the decisions affecting all future development on Indigenous land.

## International experience

Perhaps one of the most compelling arguments against the Australian Government's individualised land lease scheme is that it is not based on successfully evaluated models elsewhere in the world. In fact, international evidence demonstrates poor outcomes for Indigenous people when communal tenures are individualised. While individual title may provide appropriate structures for asset management

33 National Indigenous Times, *Wadeye says it will fight against government lease plan*, 4 December 2006, available online at: <http://www.nit.com.au/breakingNews/story.aspx?id=8969>, accessed 12 February 2007.

34 ABC News Online, *Govt rejects 20-yr lease proposal*, 1 December 2006 available online at <http://www.abc.net.au/news/newsitems/200612/s1802425.htm> accessed 14 February 2007.

35 ABC Northern Territory Online, *Brough 'bullying' Wadeye into signing 99-year lease, Thamurrur Council's acting chief executive Dale Seaniger*, 17 November 2006, available online at <http://origin.abc.net.au/news/items/200611/1791655.htm?nt>, accessed 14 February 2007.

36 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission, pp66-80, available online at [http://www.hreoc.gov.au/social\\_justice/ntreport05/ch2.html#indigenous0](http://www.hreoc.gov.au/social_justice/ntreport05/ch2.html#indigenous0), accessed 6 March 2007.





and accumulation in Western urbanised economies, it is not a model that is readily transferred to economies based on communal rights. There is ample evidence from New Zealand, the United States and the World Bank confirming these shortcomings.<sup>37</sup>

I covered this issue extensively in last year's *Native Title Report 2005* providing detailed examples of the problems associated with this approach. It is difficult to comprehend the Australian Government's determination to implement a strategy that has been trialed, tested and shown to be flawed in other OECD countries. In fact, due adverse outcomes, the United States, New Zealand and World Bank are reversing past policies that facilitated individual titling. During the 1970s, the World Bank evaluated individual tenure reforms and found that they led to:

- significant loss of land by indigenous peoples;
- complex succession problems – that is, who inherits freehold or leasehold land titles upon the death of the owner;
- the creation of smaller and smaller blocks (partitioning) as the land is divided amongst each successive generation; and
- the constant tension between communal cultural values with the rights granted under individual titles.<sup>38</sup>

Recent research about similar reforms in Kenya in the 1950s corroborates the findings from New Zealand, the United States and the World Bank.<sup>39</sup> The findings from 40 years of individual titling in Kenya demonstrate no real economic benefit and limited economic leverage opportunity. In fact, formal, individual title made the land more vulnerable to bank foreclosure to recover debt. Some of the recorded disadvantages include:

- there was no evidence supporting a link between formal title and access to credit;
- that only a very small minority of Kenyans had used title to secure loans and they were generally the richer and more productive farmers;
- there had been some loan defaults leading to foreclosure and loss of the asset;
- families were hesitant in using the asset as collateral for enterprise development for fear of losing the family land;
- in passing the asset on to family members there were negative distributional consequences, including the sale of the asset;
- that the sale of the asset occurred in emergencies such as a need to pay medical expenses; and

37 See generally, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission, Sydney, 2005, available online at [http://www.hreoc.gov.au/social\\_justice/ntreport05/](http://www.hreoc.gov.au/social_justice/ntreport05/).

38 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Sydney, 2005, pp103-104, available online at [http://www.hreoc.gov.au/social\\_justice/ntreport05/](http://www.hreoc.gov.au/social_justice/ntreport05/).

39 Nyami-Musembi, C., *Breathing Life into Dead Theories of Property Rights: De Soto and Land Development in Rural Africa*, Discussion Paper No. 272, Institute of Development Studies, University of Sussex, Brighton, 2006, available online at: <http://www.gsdrc.org/go/display&type=Document&id=2580> accessed 25 February 2007.



- that women were significant losers when titles were formalised due to customary practices that ensured absolute legal ownership with the male head of the family.<sup>40</sup>

The idea of utilising the 'dead capital' of communal land is an argument put by many modern nations struggling to economically engage indigenous populations. Some of the arguments that promote individual title come from the difficulties encountered by Maori and Australian Indigenous corporations in attempting to use communal land as security for business development.<sup>41</sup> Hernando de Soto's documented research into the formalising land title in Peru is perhaps at the forefront of arguments advocating individual land title.

[B]ecause the rights to these possessions are not adequately documented, these assets cannot readily be turned into capital, cannot be traded outside of narrow circles where people know and trust each other [and] cannot be used as collateral for a loan.<sup>42</sup>

At a Land and Development Symposium in August 2005, these theories for the use and registration of customary land were discussed in relation to the Asia Pacific. Academic representatives from the Asia Pacific School of Economics and Government, the University of the South Pacific and the Australian National University promoted the formalisation of customary title, arguing for secure individual title.<sup>43</sup>

[C]ustomary land is dead capital, the declining productivity of land would cause higher poverty and insecure access to land had dissuaded long-term investment into fixed infrastructure.<sup>44</sup>

Arguing against this position was the Papua New Guinean Land Titles Commissioner, Josepha Kanawi, who put forward an argument for the registration of land to protect customary title. Along with other PNG representatives, he argued that customary title provides security, that the registration of customary land should be voluntary, and that customary titles should be able to be used as security for bank loans.<sup>45</sup>

40 Nyami-Musembi, C., *Breathing Life into Dead Theories of Property Rights: De Soto and Land Development in Rural Africa*, Discussion Paper no. 272, Institute of Development Studies, University of Sussex, Brighton, UK, 2006, available online at: <http://www.gsdr.org/go/display&type=Document&id=2580> accessed 25 February 2007.

41 Linkhorn, C., *Maori Land and Development Finance*, Discussion Paper no. 284/2006, Centre for Aboriginal Economic Policy Research, the Australian National University, Canberra, 2006.

42 de Soto, H., *The Mystery of Capital: Why Capitalism Triumphs in the West and fails everywhere else*, Basic Books, New York, 2000, pg 6 as reprinted in Manders, J., 'Sequencing Property Rights in the Context of Development: a Critique of the Writings of Hernando De Soto', *Cornell International Law Journal*, vol 177, 2004, p178.

43 'Unused Capital is Dead Capital-Doctor', *Post Courier*, 25/08/05, pg 4 as cited in Rusanen, L., *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation*, Background Paper No. 10, Aid Watch, p1, December 2005, available online at: <http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF> accessed 5 March 2007.

44 Rusanen, L., *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation*, Background Paper No. 10, Aid Watch, p1, December 2005, available online at: <http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF>.

45 Rusanen, L., *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation*, Background Paper No. 10, Aid Watch, p1, December 2005, available online at: <http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF>.



Customary land ownership...[provides]...security for the people, but ... it is under pressure from social and economic change, and therefore must be protected by registration.<sup>46</sup>

Banks in Papua New Guinea and Kenya have rejected the use of customary lands as security for loans. PNG banks 'made it clear that they would not accept customary land as security for loans until it was converted to either freehold or state land.'<sup>47</sup> In New Zealand banks indicated that 'business proposals involving Maori land might be of lower priority for institutions able to obtain easier business elsewhere.'<sup>48</sup> However, while communal title has been rejected by banks to leverage loans, formal title on small land holdings has not necessarily convinced banks of sufficient loan security. For example in Kenya, 'banks tend to shun small scale (particularly rural or agriculture-dependent) land holders [and land title] does little to change these biases.'<sup>49</sup> The associated potential for loss of the land asset through loan default is further disincentive to using land title for collateral.

It is essential that governments ensure that all stakeholders in lease negotiations are well informed of potential pitfalls as well as benefits and opportunities. Ultimately traditional land owners should be well armed with information and able to give informed consent to whichever economic model suits their purposes. There may be groups of traditional owners who decide to give consent to 99 year leases once they have considered all available evidence about its likely impacts. The concern under the current ALRA provisions is that the consent threshold is too low and it lacks the necessary checks and balances. ***In a non-Indigenous context, such standards for negotiation and consent over land title would never be tolerated.*** It is essential that the Australian Government provide the highest level of protections for traditional land owners.

## Use of the Aboriginal Benefits Account to pay for government 99 year headleases

A further concern about the administration of 99 year headleases is that they are to be funded, at least initially, from the Aboriginal Benefits Account (ABA). The ABA is an account that contains Aboriginal mining royalty monies. The only express direction on the use of ABA is that it is to be used 'to or for the benefit of Aboriginals living in the Northern Territory.'<sup>50</sup> Under the amendments to ALRA, a new s 64(4A)

46 Rusanen, L., *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation*, Background Paper No. 10, Aid Watch, p1, December 2005, available online at: <http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF>.

47 *Post Courier*, *Banks refuse to accept land as security*, 26 August 2005, p2, cited in Rusanen, L., *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation*, Background Paper No. 10, Aid Watch, p1, December 2005, available online at: <http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF> accessed 27 February 2007.

48 Linkhorn, C., *Maori Land and Development Finance*, Discussion Paper no. 284/2006, Centre for Aboriginal Economic Policy Research, the Australian National University, Canberra, 2005, p11.

49 Nyami-Musembi, C., *Breathing Life into Dead Theories of Property Rights: De Soto and Land Development in Rural Africa*, Discussion Paper no. 272, Institute of Development Studies, University of Sussex, UK, 2006, p16 available online at <http://www.ids.ac.uk/ids/bookshop/wp/wp272.pdf> <http://www.ids.ac.uk/ids/bookshop/wp/wp272.pdf>.

50 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s64(4).



states that payments must be debited from the ABA to be used for acquiring, administering and paying rents on 99 year leases.<sup>51</sup> To quote Minister Vanstone:

The scheme is designed to be self financing in the longer term with sub-lease rental payments covering the costs. Until then all reasonable costs will be met from the NT Aboriginals Benefit Account (ABA), subject to consultation with the ABA Advisory Committee.<sup>52</sup>

Northern Territory Land Council estimates expect head leasing to costs up to \$15 million over 5 years. Other commentators suggest that this is a conservative estimate.<sup>53</sup> This is a significant portion of the ABA which provides approximately \$30 million in royalties per year. Spending ABA money to pay for headlease rental will significantly reduce the overall amount available for Land Councils and the range of land management and other programs that are funded through ABA. Minister Brough's Second Reading Speech for the ARLA Amendments Bill ominously observed that 'in future, Land Councils will be funded on workloads and results.'<sup>54</sup>

The use of ABA funds to pay for headleases is contrary to its purpose. The purpose of the ABA is to provide benefit to Indigenous people *above and beyond* basic government services. The administrative costs of land leasing are basic government services. Furthermore, the use of the ABA for headleases is targeted distribution of funds to communities that sign to the leases, while others will not benefit at all.

By taking control of Indigenous land and the ABA funds, the Australian Government is limiting the capacity for Indigenous Australians to be self determining and self managing. On the one hand the Government has argued that it is promoting a culture of Indigenous economic independence through amending ALRA, and on the other it takes away the discretionary funds and control of land that provide the capacity to do so. In 1999, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report *Unlocking the Future* recommended:

As a reflection of its core principles, the Committee agrees that Aboriginal people should take as much responsibility as possible for controlling their own affairs. This applies too, for the administration of the... (ABA).<sup>55</sup>

## Modifications to the permit system

Under the current permit system in the Northern Territory, traditional owners can regulate and restrict access to people entering Indigenous land. Visitors require a permit in writing from the relevant Land Council or traditional owners.<sup>56</sup> However,

51 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 64(4A)(a)(b).

52 Vanstone, A., (Former Minister for Indigenous Affairs), Media Release, *Long term leases the way forward for NT Aboriginal townships*, 5 October 2005, available online at [http://www.atsia.gov.au/Media/former\\_minister/media05/v0535.aspx](http://www.atsia.gov.au/Media/former_minister/media05/v0535.aspx), accessed 28 February 2007.

53 Snowdon W., *Hansard*, Second Reading Speech, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Commonwealth House of Representatives, 19 June 2006, p56.

54 Brough M., (Minister for Families, Community Services and Indigenous Affairs), *Hansard*, Second Reading Speech, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Commonwealth House of Representatives, 31 May 2006, p5.

55 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*, *Hansard-House of Representatives*, August 1999.

56 Northern Territory of Australia *Aboriginal Land Act 1978* (NT), s15.



in 2006, the Minister for Families, Community Services and Indigenous Affairs responded to a question in Parliament by announcing that it was time to remove the permit system.<sup>57</sup> Within a month the Minister issued a media release calling for written submissions in response to an Australian Government discussion paper on the permit system in the Northern Territory.

...the permit system has created closed communities which are restricting the ability of individuals to interact with the wider community and furthermore to participate in the real economy.

The permit system has not acted to protect vulnerable citizens, including women and children, and in fact makes scrutiny over dysfunctional communities more difficult.<sup>58</sup>

The Governments *Permit Discussion Paper*<sup>59</sup> contains five options for action. In summary they are:

1. authorise access for people with estates or interests granted under section 19 of the ALRA ;
2. provide open access to communal or public space and maintain the current permit-based system of restricted access to non-public spaces;
3. widen the current permit-based system by expanding the categories of people eligible to enter Aboriginal land without being subject to permission.
4. reverse the current restrictive permission-based access system to a liberal system with specific area exclusions. Access to Aboriginal Land would not require a permit unless a particular area was designated as restricted; and
5. remove the permit system altogether and replace with the laws of trespass, with any necessary modification for Aboriginal land.

Amendments to the permit system are part of the Government's 'normalisation' of Indigenous townships. The Government intends to open up Indigenous land to people who are neither traditional owners nor current residents and thereby increase interaction between remote Indigenous people and with the wider Australian economy.

At the heart of debate about the permit system is the right of traditional owners, through their representatives, to decide who to include or exclude from entry onto Indigenous land. Along with this is the right to information about who is entering or exiting Aboriginal land. As the Minister for Families, Community Services and Indigenous Affairs correctly observes that:

57 Brough M., (Minister for Families, Community Services and Indigenous Affairs), *Hansard*, House of Representatives, 12 September 2006, p17.

58 Brough M., (Minister for Families, Community Services and Indigenous Affairs), *Discussion Paper on Indigenous permit system released*, Media Release, 4 October 2006, <http://www.atsia.gov.au/Media/media06/6507.aspx> accessed 5 October 2006.

59 Office of Indigenous Policy Coordination, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change? Discussion paper*, Canberra, October 2006.



given the vastness of the Aboriginal land estate and the consequent difficulties in applying normal laws of trespass, the permit system has operated to respect the privacy and culture of Aboriginal people.<sup>60</sup>

The permit system operates as a kind of passport system allowing Aboriginal people to exercise property rights on an equal footing with other Australians. The Northern Land Council made this point in its submission to the Reeves inquiry:

Traditional Aboriginal owners of Aboriginal land, like any other landowners, have as part of their title to the land the right to admit and exclude persons from their land. This is a fundamental aspect of land ownership under the general law and is also fundamental to the achievement of the aims of the Land Rights Act.<sup>61</sup>

The question of whether a permit system is discriminatory was examined in the High Court case of *Gerhardy v Brown*.<sup>62</sup> While the High Court found that the permit system established by s19 of the *Pitjanjatjara Land Rights Act* was a racially discriminatory measure, contrary to s10 of the *Racial Discrimination Act*, it also found that s19 was a 'special measure' pursuant to s8 of that Act and was therefore valid. Consequently, the permit system provides equality before the law and is a special measure to ensure non-discrimination.

Section 8 of the *Racial Discrimination Act 1975* (Cth) is modelled on Article 2(2) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)<sup>63</sup> which obliges parties to the Convention to undertake, when warranted, special measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of rights and fundamental freedoms. Special measures should not bring about the maintenance of separate rights for different racial groups after the objectives of the measures have been achieved.

The Minister's argument that the permit system has prevented economic development, and that its abolition will provide economic benefits requires close scrutiny. The FaCSIA Discussion paper, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change?* Observes that,

[m]any Aboriginal communities on Aboriginal land in the Northern Territory are already remote geographically. The permit system has operated to maintain or even increase that remoteness – both economically and socially. It has hindered effective engagement between Aboriginal people and the Australian economy.<sup>64</sup>

60 Department of Families, Community Services and Indigenous Affairs, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change? Discussion paper*, Canberra, October 2006, p4.

61 Reeves J., *Building on land rights for the next generation, the Review of the Aboriginal Land Rights Act (Northern Territory) Act 1976*, (2nd edn.), Aboriginal and Torres Strait Islander Commission, Canberra, 1988, p302.

62 *Gerhardy v Brown* (1985) 159 CLR 70.

63 Rees N, *Gerhardy v Brown, Aboriginal Land Rights legislation - Pitjanjatjara Land Rights Act (SA) - operation of ss8, 9 and 10 Racial Discrimination Act (Cth)*, Case note, 28 February 1985, available online at <http://www.austlii.org/au/journals/AboriginalLB/1985/20.html>, accessed 20 October 2006.

64 Department of Families, Community Services and Indigenous Affairs, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change? Discussion paper*, Canberra, October 2006, p4.



Liberalisation would also bring economic benefits that would help to promote the self reliance and prosperity of Aboriginal people in remote communities.<sup>65</sup>

The Minister argues that if Indigenous lands are opened to non-Indigenous interests, there is *a high probability that* outside operators will take the opportunity to develop businesses, especially because the commercial competition in these communities is very limited. However, I believe the economic benefits to the Indigenous community are likely to be minimal. They may include greater choice as consumers and, at most, the ability to secure waged employment with a business operator. Nevertheless, ABS data demonstrates that the private sector is not a good employer of Indigenous people.<sup>66</sup>

There is therefore some risk and great cost in giving private operators free reign on communal lands and assuming that they will assist in improving employment outcomes for Indigenous people. By giving private operators access to Indigenous lands, an opportunity is lost for the Indigenous residents. In the case of enterprises involving tourism for example, rather than owning the business, Indigenous land owners become the employees of companies who in turn capitalise on Indigenous land and culture. The most likely consequence of the Government reforms will be the profit of non-Indigenous operators from undeveloped markets.

To continue the tourism example, an alternative arrangement would be for governments to support the maintenance of the permit system while providing opportunity for Indigenous people to develop or become partners in joint venture tourism enterprises. Maintaining restricted access to the land *adds* rather than detracts from the unique nature of the tourism experience and ensures that Indigenous Australians don't have to compete in an open market with highly resourced operators. A strategy such as this one actually achieves the Government's objective of improving economic outcomes for Indigenous Australians.

There are also environmental impacts to be considered. The land degradation caused by unchecked tourism and four wheel drive activity would be impossible to monitor in national parks and on Aboriginal lands without a permit system. Open access would require greater vigilance in protecting cultural heritage, sites of significance, and sacred sites. This too is a resource issue and one that is not addressed in the Australian Government's Discussion Paper. Ultimately, the degradation of the land is the degradation of the most precious asset of Indigenous Australians, both in economic and cultural terms.

As it stands, the Discussion Paper does not canvass enough options for economic development. It does not consider for example, charging fees for the issue of permits. Currently there are some instances where permit fees are charged to visit areas such fishing spots, (on a per car basis), and art centres.<sup>67</sup> If the Government is concerned about increasing economic opportunity for Aboriginal people, one

65 Department of Families, Community Services and Indigenous Affairs, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change? Discussion paper*, Canberra, October 2006, p2.

66 Australian Bureau of Statistics, 4713.0 – *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2001*, available online at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/2B3D3A062FF56BC1CA256DCE007FBFFA?OpenDocument>, accessed 8 December 2006.

67 Reeves J., *Building on land rights for the next generation, the Review of the Aboriginal Land Rights Act (Northern Territory) Act 1976*, (2nd edn.), Aboriginal and Torres Strait Islander Commission, Canberra, 1988, p300.





option under the permit system could be to charge entry to popular sites. Ultimately the Government has responsibility to canvass the widest range of options and to engage Indigenous Northern Territorians in the development of an economic development plan.

## Discontinuation of funding and services to homelands

As a consequence of the Homeland Movement of the 1970s, thousands of Indigenous Australians moved out of missions and settlements and back onto traditional lands. The decision to return to country was primarily to resume cultural, spiritual and ceremonial connections and responsibilities to land.

It is estimated that approximately 20,000 Indigenous Australians live in communities of less than 100 people. The size of homeland communities varies, some with less than 50 people, and others with 100 and more.<sup>68</sup> According to the ABS, 70 percent of Indigenous Australians over 15 years of age recognise homelands or traditional country. Affiliation with traditional country increases with remoteness; 86 percent of people living in remote areas claim affiliation compared with 63 percent in non-remote areas.<sup>69</sup>

In 2005 and 2006 the Australian Government signalled an intention to reduce or withhold services to homeland communities. The Minister for Families, Community Services and Indigenous Affairs asserted:

The investment and effort will focus on remote Aboriginal communities or towns that have access to education and health services. This will include many small settlements. However, if people choose to move beyond the reach of education and health services noting that they are free to do so, the government's investment package will not follow them. Let me be specific – if a person wants to move to a homeland that precludes regular school attendance, for example, I wouldn't support it. If a person wants to move away from health services, so be it – but don't ask the taxpayer to pay for a house to facilitate that choice.<sup>70</sup>

National policy does not determine formulae for health and education service provision. These are determined by the states and territories. For example, education provision in the Northern Territory is based on a student to teacher ratio. A fully qualified teacher is provided when there are 22 attending students aged between six to twelve years of age. Homeland communities are usually serviced by larger 'hub' communities. The school at Maningrida in the Northern Territory provides services to 12 'satellite' homeland communities and attracts a teacher formula based on the total number of students attending in region. Teachers visit homelands for varying numbers of days per week depending on the teacher allocation that the homeland attracts under the formula.

68 Taylor J., *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Discussion Paper 283/2006, Centre for Aboriginal Economic Policy Research.

69 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, ABS series cat. No. 4704.0 Commonwealth of Australia, 2005, p1.

70 Brough M., (Minister for Families, Community Services and Indigenous Affairs), *Blueprint for Action in Indigenous Affairs*, Address to the National Institute of Governance – Indigenous Affairs Governance Series, Canberra, available online at <http://www.facs.gov.au/internet/minister3.nsf/content/051206.htm>, accessed 18 December 2006.





At this stage there is insufficient detail to assess whether homelands and other small communities will be disadvantaged as a result of the Australian Government's funding agreements. It will be through bilateral agreements that the Australian Government will be able to link funds to preconditions as it is doing with housing.

## Shire councils to replace Indigenous community councils

Alongside the land tenure reforms is the Australian Government's plan to reform the Indigenous local government system by rationalising the large number of small local community councils and replacing them with larger regional shire councils. The Australian Government has supported the Northern Territory Government's plan to reform its community councils and the Queensland Government is finalising the transition to shire council arrangements.

Currently, across Australia remote communities are governed by local governments or community councils that are based within each community. In the Northern Territory for example, the Government developed a plan to replace its 56 remote Indigenous councils with nine shire councils. The four municipal councils in Darwin, Palmerston, Alice Springs and Katherine will remain unchanged. The Northern Territory Minister for Local Government argued that the shire council model is designed to improve governance and service delivery to remote communities.

Change will ensure people in the regions have access to the services and experts many of us take for granted in the urban centres...The new local government will create a framework of certainty and better and more reliable services.<sup>71</sup>

Queensland has commenced a four year transition process to transform Aboriginal Councils into full Shire Councils. The stated intention of the transition is to improve governance. The Shire and Island Councils will be responsible to build, operate and maintain a range of infrastructure and to assist in the delivery of services.<sup>72</sup>

The transition to shire councils is an effort to rationalise resources and concentrate high level administrative expertise at the regional level. While this may achieve efficiencies in terms of the cost of local government administration it will also impact on Indigenous employment options in remote communities. The removal of community councils, including community housing associations will remove one of the few sources of remote employment.

As the lack of employment opportunity in remote communities is one of the main impediments to economic development, governments must take care to balance policy approaches. If rationalising housing services reduces employment, then one saving will mean another cost. In order to benefit from any home ownership incentives or policies, Indigenous Australians require employment.

71 McAdam, E., (Minister for Local Government (NT)), ABC News Online, *Commonwealth approves changes to NT local govt system*, 30 January 2007, available online at <http://www.abc.net.au/news/newsitems/200701/s1836647.htm>, accessed 15 February 2007.

72 Queensland Government Department of Local Government, Planning, Sport and Recreation, *Website* available online at: <http://www.lgp.qld.gov.au/>, accessed 25 January 2007.



## Housing and home ownership

During 2005 and 2006 the Australian Government announced a number of incentives to increase the rates of Indigenous home ownership and reduce Indigenous dependence on subsidised housing in remote communities. During the publicity that surrounded the initiatives, private home ownership was described as a right for all Australians who can afford this goal. In 2005 the Prime Minister had the following to say:

I'm a supporter of home ownership for everybody who can afford it, I really am. And I don't think there should be any distinction between Indigenous people and the rest of the community. I think it's patronising. I think it's discriminatory to take the view that somehow or other home ownership is something for the white community but not for the Aboriginal community... Now I'm not trying to undermine the Native Title Act but what I'm saying is that where we can develop methods of private home ownership within Indigenous communities, we should do so.<sup>73</sup>

Just over 7 percent of remote Indigenous Australians own, or have a mortgage over a home. Australia-wide the rates of Indigenous home ownership are higher at 27 percent.<sup>74</sup> Nevertheless, Indigenous Australians fall well behind the 74 percent of non-Indigenous Australians who are either buying or own their home outright.

The Australian Government's remote housing strategy is part of a reform package to encourage Indigenous Australians to embrace a culture of asset accumulation and management with paid employment as its foundation. According to the Government, land tenure reforms on communally owned land have been required in order to make home ownership possible. The Attorney General's Department along with the Department of Families, Community Services and Indigenous Affairs (FaCSIA) and Indigenous Business Australia have collaborated in the home ownership strategy. In fact initiatives for home ownership were released almost simultaneously with the announcement of the proposed amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in 2005. The home ownership initiatives included:

- funding for Indigenous Business Australia (IBA) for the *Community Homes* program which will provide low cost houses for purchase at reduced interest rates in remote communities;
- an initial allocation from the *Community Housing and Infrastructure Program* to reward good renters with the opportunity to buy the community house they have been living in at a reduced price;

73 Howard, J., (Prime Minister), Interview with Pat Morrish, ABC Radio, Cairns, 25 October 2005, available online at [www.pm.gov.au/news/interviews/Interview1651.html](http://www.pm.gov.au/news/interviews/Interview1651.html) accessed 11 January 2007.

74 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey 2002*, ABS series cat. no. 4714.0, Commonwealth of Australia, Canberra, 2004, as quoted by Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *2006 Budget Indigenous Affairs: Strengthening Indigenous Communities*, Media release, 9 May 2006, p13, 2006, available online at [http://www.atsia.gov.au/Budget/budget06/Fact\\_sheets/factsheet09.aspx](http://www.atsia.gov.au/Budget/budget06/Fact_sheets/factsheet09.aspx), accessed 10 December 2006.



- using the *Community Development Employment Projects* (CDEP) program to start building houses, support home maintenance, and to maximise employment and training opportunities.<sup>75</sup>

While the initiatives are described as 'Australia-wide measures' they are exclusively available to states and territories if, or when, they amend their land rights legislations to allow for 99 year leases. To quote the Minister for Families, Community Services and Indigenous Affairs:

These programs will be available to all States that follow the Australian and Northern Territory government's lead to enable long term individual leases on Aboriginal land... The Australian Government will consult with the States to promote any necessary amendment of State Indigenous land rights regimes to ensure access to the new programs.<sup>76</sup>

The Department of Families, Community Services and Indigenous Affairs has committed over \$100 million to increase remote home ownership from 2006 to 2010. However the Northern Territory is the only jurisdiction in a position to access this funding to date. Other states are beginning the process of reviewing their land rights legislations and it is not certain whether they will include provision for 99 year leases.

From 1 July 2006, the Australian Government is providing \$52.9 million plus capital of \$54.6 million over four years for initiatives to promote Indigenous home ownership on community title land.

The measure will assist Indigenous families living in communities on Indigenous land to access affordable home loan finance, discounts on purchase prices of houses, and money management training and support.<sup>77</sup>

The Australian Government has targeted its programs and incentives to a select group of communities in the Northern Territory; Galiwinku, Tennant Creek, Katherine and Nguiu.<sup>78</sup> Forty five new houses will be constructed for private purchase across Galiwinku and Nguiu. Discounts of up to 20 percent on house purchase prices will be available in other communities.<sup>79</sup> The discounts will be available to good renters and there is sufficient funding for up to 160 low interest home loans specifically targeted to remote.<sup>80</sup>

75 Vanstone, A., (Minister for Immigration, Multiculturalism and Indigenous Affairs), *Initiatives support home ownership on Indigenous land*, Media Release, 5 October 2005 available online at: [http://www.atsia.gov.au/Media/former\\_minister/media05/v0534.aspx](http://www.atsia.gov.au/Media/former_minister/media05/v0534.aspx) accessed 20 February 2007.

76 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *2006 Budget Summary of Indigenous Measures (Fact Sheet)*, available online at: [http://www.atsia.gov.au/Budget/budget06/Fact\\_sheets/factsheet08.aspx](http://www.atsia.gov.au/Budget/budget06/Fact_sheets/factsheet08.aspx) accessed 20 February 2007.

77 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *Strengthening Indigenous Communities – expansion of Home Ownership on Indigenous Land Programme*, available online at: <http://www.facsia.gov.au/internet/facsinternet.nsf/aboutfacs/budget/budget2006-wnwd-03.htm>, accessed 20 February 2007.

78 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *Galiwinku community gets down to MoneyBusiness*, available online at: <http://www.atsia.gov.au/media/media06/3906.aspx>, accessed 19 February 2007.

79 Knapp, R., (Group Manager, Housing and Disability Group), *Hansard*, Senate Community Affairs Legislation Committee, Estimates, Canberra, 30 May 2006, p40.

80 *Indigenous Business Australia: IBA Partnerships Announcement*, available online at: [www.iba.gov.au/ibapartnerships/newpolicy/communityhomesbudgetannouncements/](http://www.iba.gov.au/ibapartnerships/newpolicy/communityhomesbudgetannouncements/) accessed 5 February 2007.



FaCSIA will also provide money management training and support to the four Northern Territory communities and two Western Australian communities through a *MoneyBusiness* program. This program is a partnership with the ANZ Bank and is designed 'to develop skills in budgeting, bill paying and saving'.<sup>81</sup>

The incentives and announcements of 2005 and 2006 are likely to be a precursor to broader reforms in Indigenous housing. In June 2006 the Minister for Families, Community Services and Indigenous Affairs announced a comprehensive audit of Australian Government and State and Territory Government funding on public housing.<sup>82</sup> Accompanying the announcement were numerous statements about the cost of Indigenous housing and concerns about whether the states and territories were adequately managing and contributing these programs. In 2006 the Government released a discussion paper to raise potential directions for Indigenous housing: *Community Housing and Infrastructure Program (CHIP) Review Issues Paper. The Best Way Forward: Delivering housing and Infrastructure to Indigenous Australians* (Hereon referred to as the *Issues Paper*).<sup>83</sup>

While the Review has not been released, the topics canvassed in the *Issues Paper* foreshadow the areas of reform. They include the rights and responsibilities of tenants, rent payments and collection, measures to increase home ownership, improved access to mainstream public housing, and strategies to avoid duplication of municipal services and infrastructure.<sup>84</sup>

## The remote Indigenous housing profile

The dominant housing tenure for Indigenous people in very remote communities is community rental housing. In 2001, 84 percent of all remote Indigenous households were renters. Approximately seven percent of remote Indigenous householders are home owners.<sup>85</sup>

Community rental housing is built and maintained by governments. Over the past 30 years, somewhere between 500 and 1,000 community rental houses have been built each year in Indigenous communities across Australia. Once built, the houses are vested in Indigenous community organisations for ongoing management and the collection of rental payments. The medium weekly rental payment in very

81 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *Galiwinku community gets down to MoneyBusiness*, available online at: <http://www.atsia.gov.au/media/media06/3906.aspx>, accessed 19 February 2007.

Note: The \$4.4 million MoneyBusiness program includes Galiwinku, Tennant Creek, Katherine and Nguiru (Tiwi Islands) in the Northern Territory, and Geraldton and Kununurra in Western Australia.

82 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *Australian Government to Audit Housing Assistance* Press Release, available online: <http://www.atsia.gov.au/media/media06/4006.aspx> accessed 19 February 2007.

83 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *Community Housing and Infrastructure Program (CHIP) Review Issues Paper: The Best Way Forward*, Canberra, May 2006, p 3 available online at [http://www.facsia.gov.au/internet/facsinternet.nsf/via/indighousing/\\$file/chip\\_review\\_may06.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/via/indighousing/$file/chip_review_may06.pdf).

84 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *Community Housing and Infrastructure Program (CHIP) Review Issues Paper: The Best Way Forward*, Minister's Forward, Canberra, May 2006, p 13.

85 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey 2002*, ABS series cat. no. 4714.0, Commonwealth of Australia, Canberra, 2004, as quoted by Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *2006 Budget Indigenous Affairs: Strengthening Indigenous Communities*, Media release, 9 May 2006, p13, 2006, available online at [http://www.atsia.gov.au/Budget/budget06/Fact\\_sheets/factsheet09.aspx](http://www.atsia.gov.au/Budget/budget06/Fact_sheets/factsheet09.aspx), accessed 10 December 2006



remote regions is \$42 per household.<sup>86</sup> Rents are either set at per person or per household rate and are generally lower than rents in larger townships and cities. Rental payments for community housing covers some of the asset maintenance and other recurrent costs.

The provision of housing in remote communities is failing to meet the demands of the growing Indigenous population. The problems are both with the number and size of houses and the quality of the housing stock. In 2001, 41 percent of remote Indigenous households reported problems with overcrowding. Fifty two percent of the Indigenous remote population reported living in dwellings requiring at least one extra bedroom, compared to 16 percent in non-remote areas.<sup>87</sup> Just over 58 percent of remote Indigenous Australians reported major structural problems of their dwellings at almost double the incidence of non-remote at 32.5 percent. The Australian Bureau of Statistics summarised the problems in remote communities in the following terms: 'overcrowding and lack of adequate facilities such as a clean water supply and sewerage disposal are particularly problematic in remote areas.'<sup>88</sup>

## Indigenous housing programs and funding

The responsibility for Indigenous public and community housing is shared between the Commonwealth and the states and territories. However, the Australian Government is the main contributor of funding, providing 73 percent of total funds, while states and territories contribute the remaining 27 percent.<sup>89</sup> The annual contribution of the Australian Government to Indigenous housing is more than \$375 million. It is clearly a large commitment and one which accounts for 30 percent of all Australian Government spending on public and community housing.<sup>90</sup> The program through which the funding is administered is the Community Housing and Infrastructure Program (CHIP).

In remote regions CHIP provides housing infrastructure and funding to maintain essential municipal infrastructure and sanitation infrastructure.<sup>91</sup> Six hundred and sixty Indigenous community-controlled housing organisations throughout Australia manage funding for local infrastructure and maintenance as well as collecting rental on Indigenous community houses. These entities provide employment for Indigenous people in remote and regional communities, though

86 Australian Bureau of Statistics, *4713.0 – Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2001*, available online at: <http://www.abs.gov.au/ausstats/abs@.nsf/b0462a212839e1e5ca256820000fe0de/2b3d3a062ff56bc1ca256dce007fbffa?OpenDocument> accessed 25 February 2007.

87 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey 2002*, ABS series cat. 4714.0., Commonwealth of Australia, Canberra, 2002, p39.

88 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey 2002*, ABS series cat. 4714.0., Commonwealth of Australia, Canberra, 2002, p12

89 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *Australian Governments helping Indigenous communities build their future*, available online: <http://www.atsia.gov.au/media/media06/4106.aspx> accessed 19 February 2007.

90 Australian Government Department of Foreign Affairs and Trade, *Indigenous programs: Education, health and housing*, Website material available online at: [http://www.dfat.gov.au/facts/indg\\_education.html](http://www.dfat.gov.au/facts/indg_education.html), accessed 20 February 2007.

91 Australian Government Department of Foreign Affairs and Trade, *Indigenous programs: Education, health and housing*, Website material available online at: [http://www.dfat.gov.au/facts/indg\\_education.html](http://www.dfat.gov.au/facts/indg_education.html), accessed at 20 February 2007.



it is likely that these organisations will be rationalised into regional entities in the near future.

## The Indigenous Business Australia home loans program

In the 2006-07 Budget the Australian Government announced a \$107.4 million package over four years to develop home ownership opportunities on Indigenous land. This funding will be used to build houses and to provide loans to Indigenous people on communal lands where individual leases are possible. The Australian Government's remote home ownership program is managed through Indigenous Business Australia's (IBA) *Community Homes* program.

IBA will expand its home lending program, *Community Homes*... and will manage and deliver incentives to assist in overcoming the barriers of the high cost of housing, low employment and income levels in remote areas.<sup>92</sup>

According to Indigenous Business Australia the additional funds will expand its home lending program, by supporting 460 families or individuals to purchase their own home.<sup>93</sup> *Community Homes* will provide access to home loan finance in all states and territories where land title enables an individual long term interest on a block of land. IBA will work with the Department of Families, Community Services and Indigenous Affairs (FaCSIA) to provide discounts on the purchase price of houses and financial literacy training for eligible participants.<sup>94</sup> Incentives also include purchase price discounts on existing community rental homes of up to 20 percent for Indigenous families with a good rental record. These incentives are part of the *Good Renter Scheme* initiative.

The *Community Homes* scheme will offer loans to low income earners with incomes starting from \$15,000. Maximum repayments will vary according to income level, starting at 15 percent of gross income for those on the minimum income level and up to 30 percent of gross income for those on higher incomes. For those on lower incomes, commencing interest rates on loans will start from zero percent per annum incrementing by 0.2 percent each year up to the maximum rate of 6 percent per annum. Grants for co-payments of up to \$2,590 each year for the first ten years will assist eligible low income borrowers to repay the loan within a loan term of 30 years. IBA will pay up to \$13,000 for loan establishment costs including legal costs, surveys, property valuations, independent legal and financial advice.<sup>95</sup>

92 Indigenous Business Australia, *More Choice for Indigenous Home Ownership*, Media Release, 10 May 2006, available online at [http://www.iba.gov.au/files/MediaRelease\\_Budget01.pdf](http://www.iba.gov.au/files/MediaRelease_Budget01.pdf), accessed 22 February 2007.

93 Indigenous Business Australia, *More Choice for Indigenous Home Ownership*, Media Release, 10 May 2006, available online at [http://www.iba.gov.au/files/MediaRelease\\_Budget01.pdf](http://www.iba.gov.au/files/MediaRelease_Budget01.pdf), accessed 22 February 2007.

94 Indigenous Business Australia, Website information, *Partnerships*, available online at: <http://www.iba.gov.au/ibapartnerships/>, accessed 22 February 2007.

95 Indigenous Business Australia, *Expansion of Home Ownership on Indigenous Land Program*, Website available online at: <http://www.iba.gov.au/ibapartnerships/newpolicy/communityhomesbudgetannouncements/>, accessed 24 February 2007.





## Home buyers in Australia

Housing affordability is determined by many factors. In attempting to determine whether remote Indigenous Australian will be able to benefit from the *Community Homes* scheme, it is necessary to consider employment opportunities and earning capacity.

A typical Australian home buyer for example, is one who lives in a city and depends on an urban economy to generate work opportunities and an income that will sustain a mortgage over a 30 year period. First home buyers are typically couples aged approximately 35 years. They have a life expectancy up to 78 years for males and 83 years for females.<sup>96</sup> They have above average incomes and in Australia, a growing proportion of first home buyers have two incomes.

The majority of owner-occupier households reported gross weekly incomes in the top two income brackets.<sup>97</sup> This is an average weekly income of \$612 to \$869 or at the highest bracket \$870 or more. The first home buyer relies heavily on debt finance and during 2004 and 2005 the average loan for first home buyers was \$210,000. The average weekly housing costs for first home buyers were \$330.<sup>98</sup>

A domestic unit with an income of say \$60,000 per annum may buy a dwelling and land package for \$240,000, and spend \$15,000 per annum over anywhere between the next 20 and 30 years in paying off this capital. In addition, such domestic units undertake to meet the recurrent costs of housing maintenance, so that their asset does not depreciate, as well as paying recurrent government taxes and charges, such as annual land rates and infrastructure service fees. Covering these capital and recurrent housing costs can consume as much as one-third or more of income in these household economies, particularly in the early years after entry to the market or when income falls through developments such as child rearing or unemployment.<sup>99</sup>

The typical remote Indigenous household has an average gross weekly income of \$267 per week.<sup>100</sup> The remote Indigenous adult has a 36 percent chance of having a disability or a long term illness which will affect income earning capacity and an average life expectancy 17 years lower than non-Indigenous Australians.<sup>101</sup> The life

96 Australian Bureau of Statistics, *3302.0 – Deaths*, Australia, 2005, 30 November 2006, available online at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/C67A858BA00CB846CA2568A9001393C6?OpenDocument>, accessed 24 February 2007.

97 Productivity Commission, *First Home Ownership*, No. 28, Melbourne, 2004, p31.

98 The Australian Bureau of Statistics, *1301.0 – Year Book Australia, 2007*, available online at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/591FBA596E76E796CA2572360002721A?opendocument>, accessed 22 February 2007.

99 Sanders, W., *Housing Tenure and Indigenous Australians in Remote and Settled Areas*, Discussion Paper No. 275/2005, Australian National University, Canberra, 2005, p7.

100 Australian Bureau of Statistics, *4102.0 – Australian Social Trends, 2004 Year Book of Australia*, Commonwealth of Australia, 2004, available online at: <http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/f62e5342be099752ca256e9e0028db17!OpenDocument> accessed 24 February 2007. Note: Equivalised gross household income is a standardised income measure which has been adjusted for the different income needs of households of different size and composition. It takes into account the greater needs of larger households and the economies of scale achieved by people living together.

101 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, ABS series cat. No. 4704.0, Commonwealth of Australia, 2005, available online at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/B41B1BF36BF3C8EFC25709900015D71?opendocument> accessed 23 February 2007.



expectancy for Indigenous males is 59 years and for Indigenous females, 65 years.<sup>102</sup> These circumstances limit the ability of Indigenous householders to service home loans over a 30 year period.

According to the ABS, Indigenous adults are four times more likely to report financial stress than non-Indigenous households. 'Financial stress' was defined by whether the household could raise \$2,000 within a week in a time of crisis. Almost three quarters of remote Indigenous residents reported experiencing financial stress as did half of those Indigenous households in regional areas.<sup>103</sup>

On a \$150,000 loan the weekly repayments over 30 years at an interest rate at 3 percent is \$145.37 per week. This is 54 percent of the average gross weekly income of a typical remote Indigenous household. Even at an interest rate of 0.2 percent, the weekly repayments are \$98.75. This is almost 37 percent of the weekly income of a remote household.

By any measure this level of repayment is not sustainable. Given that Indigenous Business Australia will not lend amounts where the repayments exceed 30 percent of the household income, it is evident that the average remote Indigenous household is in no position to support a home loan, with incentives or otherwise.

In its 1996 *Evaluation of the Home Ownership Program*, the Office of Evaluation and Audit observed that the 'profile of the Indigenous home owner is quite similar to non-Indigenous home owner in Australia.'<sup>104</sup>

Compared to the non Indigenous home owner, the Indigenous home owner is likely to be older and better educated, to have mainstream employment, higher income, and a non-Indigenous spouse, and to belong to a 'typical' nuclear family in a neighbourhood with relatively lower rates of social dysfunction.<sup>105</sup>

This profile of the Indigenous homeowner has not changed in the ten years since this report. According to more recent ABS data, those who are capable of home ownership exhibit many of the demographic characteristics of their non-Indigenous counterparts including geographic location, employment status and income level.<sup>106</sup>

Remote Indigenous Australians are the most disadvantaged group of any Australian group against every social indicator. The Government strategy to address this situation is to increase the debt burden through a home ownership scheme that will exclude the majority of remote Indigenous householders.

While the Government is offering financial incentives to encourage participation, it is likely that owning a home in remote areas will be a financial liability rather than an asset. The ongoing financial burden for all but a very small minority of

102 Australian Bureau of Statistics, 3302.0 – *Deaths, Australia, 2005*, 30 November 2006, available online at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/C67A858BA00CB846CA2568A9001393C6?OpenDocument>, accessed 24 February 2007.

103 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, ABS series cat. No. 4704.0, Commonwealth of Australia, 2005, p8.

104 Office of Evaluation and Audit, *Evaluation of Home Ownership Program, Final Report*, July 1996, p(i), at <http://www.finance.gov.au/docs/homeownershipprogram-july1996.pdf> accessed 15 January 2007

105 Office of Evaluation and Audit, *Evaluation of Home Ownership Program, Final Report*, July 1996, p(i), at <http://www.finance.gov.au/docs/homeownershipprogram-july1996.pdf> accessed 15 January 2007.

106 Australian Institute of Health and Welfare, *Indigenous housing needs 2005 – a multi-measure needs model* available online at: <http://www.aihw.gov.au/publications/hou/ihn05/ihn05-c01.pdf> accessed 23 February 2007.





remote Indigenous Australians may exacerbate poverty in remote communities and highlight disparities between the 'haves' and the 'have nots.' Notwithstanding, some Indigenous people in remote communities might be able to afford to purchase a home and governments should extend all support and encouragement to facilitate the home purchase.

## Cost, quality and maintenance of Indigenous housing

In 2006, Indigenous Business Australia put out an *Expressions of Interest* paper calling for tenders for an 'Innovative, Affordable Housing Project.' The winning tenders will ultimately provide the materials and design for houses available under the Government's home ownership scheme.

The functional brief for the 'Innovative, Affordable Housing Project' includes three, four and five bedroom house types designed with regard to culturally appropriate living arrangements, security from intrusion and robustness of materials. The *Expression of Interest* paper specified building code compliance with climatic zone categories including tropical, subtropical, humid-arid, dry-arid, warm-temperate, cool-temperate, alpine and cyclone ratings. Notwithstanding these aims, the *Expression of Interest* specified the following:

The single most important design parameter is cost effectiveness. If solutions are not significantly more affordable than prior models, they will not achieve the objective of the Project.

Skilled onsite labour is hoped to be kept to a minimum so 'this may be achieved by using...pre-fabricated modular building elements and avoiding the use of materials and finishes which require on-site labour such as in-situ concrete, plumbing, electrical work etc. The potential to use local labour to assist with the erection of buildings is anticipated to reduce the end cost of housing and provide much needed Indigenous employment in remote communities.<sup>107</sup>

The quality of the houses will be critical to the longevity of the asset and the cost of maintaining it over time. The Australian Bureau of Statistics outlined the following about Indigenous housing.

Although there are many factors which contribute to the sustainability of housing, the adequacy of design, construction and maintenance of Indigenous housing plays a crucial role. When houses are not culturally appropriate in their design, are poorly built, or where there is no systematic approach to their repair or maintenance, minor problems can escalate over time and shorten the life expectancy of houses. Given the serious backlog of housing need in rural and remote communities, it is important that resources are well targeted and provide the maximum benefit to Indigenous Australians.<sup>108</sup>

There are indications that the houses proposed for the Government's home ownership scheme will not be of the quality that governments currently provide. The new homes will be 'self built' kit homes that are to be built at less than half of

107 Indigenous Business Australia, *Expressions of Interest: Innovative and Affordable Housing Project*, Department of Families, Community Services and Indigenous Affairs, Australian Government, Canberra, 3.2, p6-7, available online at [http://www.iba.gov.au/files/Expression\\_Of\\_Interest.pdf](http://www.iba.gov.au/files/Expression_Of_Interest.pdf), accessed 27 February 2007.

108 Australian Bureau of Statistics, *1301.0 - Year Book Australia, 2004*, available online at: <http://www.abs.gov.au/AUSSTATS/ABS@NSF/Previousproducts/1301.0Feature%20Article222004?opendocument&tabname=Summary&prodno=1301.0&issue=2004&num=&view=> accessed 25 February 2007.



the cost of current Government housing cost in remote. According to the Tiwi Local Government Housing for example, the cost of a government built house on the Tiwi Islands is \$320,000.<sup>109</sup> The kit homes earmarked for the home ownership scheme have been costed ex-factory at approximately \$150,000 per home.<sup>110</sup> According to the Government they are built to cyclone code.<sup>111</sup>

[Forty-five] new houses [are] earmarked for home ownership, which [are] to be built on community land... as well as \$6 million for innovative housing solutions in remote indigenous communities... it is to look at using self-built type housing construction as a means of more cost-effective housing design and construction in remote communities... it is a reflection of concerns of the high cost of building in very remote communities.<sup>112</sup>

Up to 12 of the proposed 45 houses will be available to residents in Nguiu on the Tiwi Islands through a land reform program package and the remaining homes are earmarked for Galiwinku on Elcho Island.<sup>113</sup> In an exchange in Senate Estimates regarding the quality of the homes, the Associate Secretary of the Department of Families, Community Services and Indigenous Affairs said the following:

We know of kit homes that are being used... in other parts of Australia - the Torres Strait for example - that are meeting all of the building requirements in that area and are cyclone rated.

The *Rawlinson's Australian Construction Handbook* 2006 is widely used by industry and governments to cost infrastructure. It sets out the cost of building residential housing per square metre in urban and remote regions of Australia. In addition it provides comparative cost analyses of residential housing in major cities compared with regional areas. For example, the cost of building a house in a city such as Adelaide is the benchmark at 100 percent.

However according to Rawlinson, the cost of building the same house in Groote Eylandt is 170 percent due to the freight of materials and the need to bring in tradesmen. In Milikarpiti on the Tiwi Islands the cost is 154 percent. In dollar terms the cost of building a 150 sqm house in Adelaide is between \$152,200 and \$161,200; in Milikarpiti between \$226,196 and \$239,336; and on Groote Eylandt between \$254,750 and \$270,050.<sup>114</sup>

Given the inflated costs of remote infrastructure, it is difficult to see how governments will manage to build houses of quality for \$150,000. If the houses are of poor quality, the maintenance and structural liability will be transferred to the

109 Housing worker, *Tiwi Island Local Government Housing*, *Communication with Aboriginal and Torres Strait Islander Social Justice Commissioner*, 27 January 2007.

110 Bartlett A, *Hansard*, Senate Select Committee on the Administration of Indigenous Affairs, 30 May 2006, Canberra, p37.

111 Gibbons, W., (Associate Secretary, Department of Families, Community Services and Indigenous Affairs), *Hansard*, Senate Community Affairs Legislation Committee, Estimates, Canberra, 30 May 2006, p38.

112 Knapp, R., (Group Manager, Housing and Disability Group, Department of Families, Community Services and Indigenous Affairs), *Hansard*, Senate Community Affairs Legislation Committee, Estimates, Canberra, 30 May 2006, p37.

113 Gibbons, W., (Associate Secretary of the Department of Families, Community Services and Indigenous Affairs), *Hansard*, Senate Community Affairs Legislation Committee, Estimates, Canberra, 30 May 2006, p38.

114 Rawlinson's Construction Cost Consultants and Quality Surveyors (eds.), *Rawlinson's Australian Construction Handbook*, 2006, ed. 24, Rawlhouse Publications, Perth, p26.



homeowner, most of whom have not had the opportunity of independent advice or choice of design or construction materials.

The Australian Government has committed to building quality, healthy houses. In 2005, the Minister for Immigration and Multicultural and Indigenous Affairs introduced the *Healthy Indigenous Housing* policy aimed at improving the viability and sustainability of Indigenous community housing organisations and the quality of Indigenous housing in rural and remote communities.<sup>115</sup> The aim of the initiative is to:

- improve the viability and sustainability of Indigenous community housing organisations and the quality of Indigenous housing;
- reform governance, asset and tenancy management practices; and
- continue a programme of assessing and repairing up to 500 houses in around 15 communities and continue to deliver the Army Aboriginal Community Assistance Program (AACAP) to at least four communities.<sup>116</sup>

*Healthhabitat* is a non-government organisation with responsibility to improve the health standards of Indigenous housing in Australia.<sup>117</sup> Since 1999 it has inspected over 4,500 houses situated in tropical, rural, remote and urban settings.

One of the three Directors of *Healthhabitat*, Mr Paul Pholeros argues that 'reduced capital cost' housing has a great capacity to pass on infrastructure and maintenance costs to the household through poor construction, inappropriate design and poor materials. For example, a house without roof insulation will be cheaper to build but the costs of cooling the house in a 45°C desert summer, or heating it at night in minus 5°C winter is passed on to the household. These costs increase with remoteness as the cost of electricity increases dramatically. The failure of households to pay the electricity bills can then lead to the power being cut off which in turn makes cooking and food storage exceptionally difficult. Thus, 'reduced capital cost' housing has health implications as well as poor outcomes in terms of the house life-cycle and maintenance costs.<sup>118</sup>

Mr Pholeros is in favour of strategies which seek to alleviate the Indigenous housing crisis. He stresses this problem can not be solved by providing more poor quality housing, merely because it is initially cheaper for governments. New housing must reflect critical minimum standards in key areas such as electrical safety, water supply and good quality taps to avoid leaks and failures, hot water provision, waste

115 Alfrekson, R., (Director of Evaluation and Audit), Office of Evaluation and Audit, Indigenous Programs, *Evaluation and Audit Work Program January- June 2005*, Australian Government, p14, available online at: [http://www.finance.gov.au/docs/OEA\\_IP\\_Evaluation\\_and\\_Audit\\_Program\\_2005-2007.rtf](http://www.finance.gov.au/docs/OEA_IP_Evaluation_and_Audit_Program_2005-2007.rtf), accessed 15 January 2007.

116 Australian Government, Indigenous Affairs, *Indigenous Budget Measure 7: Healthy Indigenous Housing – continuation*, Family and Community Services Portfolio, available online at: [http://www.atsia.gov.au/Budget/budget05/c\\_fact\\_sheet\\_7.pdf](http://www.atsia.gov.au/Budget/budget05/c_fact_sheet_7.pdf) accessed 26 February 2007.

117 Pholeros P., (Adjunct Professor in the Faculty of Architecture, Design and Planning, University of Sydney, Director Healthhabitat), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 26 February 2007.

118 Pholeros P., (Adjunct Professor in the Faculty of Architecture, Design and Planning, University of Sydney, Director Healthhabitat), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 26 February 2007.



removal with well installed drainage and treatment of sewage. He cites examples of poor choice of materials in communities reliant upon bore water and other areas with high levels of mineral salts which quickly degrade taps and plumbing which may cost up to \$2,000 a visit in remote areas to repair a single fault.<sup>119</sup>

## Maintenance of infrastructure in remote areas

Housing maintenance in remote Indigenous communities is expensive and access to maintenance services is intermittent. Small communities often lack relevant trades people, meaning that plumbers, electricians and others need to be flown in to carry out routine maintenance. Given the structural problems with housing stock, and extreme climatic conditions that characterise remote living in desert communities and the tropical north, home maintenance requirements are high. For example, between 2001 and 2002, over 80 percent of Indigenous communities with a population in excess of 50 experienced interruptions to electricity provision. Twenty percent experienced more than 20 interruptions over this period. Sixty three percent of power outages were caused by storms, 59 percent occurred because of equipment breakdown, 42 percent were planned outages for maintenance, and 5 percent were due to system overload. Significantly, vandalism accounted for one percent of all power outages.

Between 2001 and 2002, 48 percent of Indigenous communities experienced sewerage system overflows or leakage. Rather than poor management or vandalism, the predominant causes were blocked drains at 51 percent, equipment failure at 33 percent and design or installation problems at 28 percent.<sup>120</sup>

These statistics affirm the claims of Indigenous people and their advocates who observe that the poor quality and unsustainable design of remote infrastructure is the cause of many of the maintenance problems. These figures refute Australian Government claims that infrastructure is not respected and poorly maintained because the asset is not owned.<sup>121</sup> This view was expressed by the Prime Minister in a speech in October 2005 where he observed:

[O]ne of the reasons... [that the houses are in] appalling [condition] is that people don't own them. Simple as that... once you own something you value it and you look after it, it's human nature. That's been the experience of all societies... home ownership, private land ownership is a key to family and social stability and Aboriginal people are no different from the rest of us.<sup>122</sup>

119 Pholeros P., (Adjunct Professor in the Faculty of Architecture, Design and Planning, University of Sydney, Director Healthabitat), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 26 February 2007.

120 Australian Bureau of Statistics, *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities 2001*, ABS cat 4710.0., Commonwealth of Australia, Canberra, p22, Graph 3.16b.

121 Australian Bureau of Statistics, *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities 2001*, ABS cat 4710.0., Commonwealth of Australia, Canberra, unpublished additional information request, Department of Families, Community Services and Indigenous Affairs, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 7 February 2007, p1.

122 Howard, J., (Prime Minister) with Morrish P., *Interview ABC Radio*, Cairns, available online at: [www.pm.gov.au/news/interviews/Interview1651.html](http://www.pm.gov.au/news/interviews/Interview1651.html) on 11/01/07 12 February 2007.



In a policy announcement in October 2005, the then minister for Indigenous Affairs announced the use of the Community Development Employment Projects (CDEP) program to build houses, support home maintenance, and maximise employment and training opportunities in support of the home ownership scheme.<sup>123</sup> To date there has been no national data to outline the size or impact of this initiative.<sup>124</sup> As the Australian Government has not yet collected or collated CDEP housing maintenance and building data, it is only possible to assess progress by individual project. Programs such as Alpururulam in the Northern Territory,<sup>125</sup> and the Torres Strait Infrastructure program,<sup>126</sup> are involving small numbers of CDEP recruits in manual labour and apprenticeship placements. The planned housing construction program in Wadeye has also been designed to involve CDEP participants in the assembly of kit houses.<sup>127</sup> The projects include constructing roads and sewage systems as well as apprenticeship programs geared toward community infrastructure support and maintenance.

Ultimately the quality of the housing construction will impact on the life of the asset and the cost of its maintenance. It will be essential that the highest standards are applied to the development of any asset targeted for the Indigenous home ownership scheme. At this stage the Australian Government is not monitoring the development of the CDEP house building and maintenance scheme and therefore there are some serious concerns about coordination and quality control.<sup>128</sup>

### Australian housing markets

While not an immediate issue for the remote housing market, wider trends in property prices in Australia will be relevant in the future. The escalating housing market in Australia provides increasing financial impediments for potential home buyers in many Australian cities and coastal areas. In 2006, Australia's home affordability fell to a level comparable to that reached in 1989 when interest rates

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123 Vanstone, A., (Minister for Immigration, Multiculturalism and Indigenous Affairs), *Initiatives to support home ownership on Indigenous land*, Media Release, 5 October 2005 available online at [http://www.atsia.gov.au/Media/former\\_minister/media05/v0534.aspx](http://www.atsia.gov.au/Media/former_minister/media05/v0534.aspx) accessed 20 February 2007.

124 Siewert R., Knapp R., (Group Manager, Housing and Disability Group, Department of Families, Community Services and Indigenous Affairs), *Hansard*, Community Affairs Legislation Committee, Budget Estimates, 30 May 2006, Canberra p45-46, Senator Siewert: '[H]ow can people comment...on the involvement of Aboriginal communities in construction and maintenance if there is no hard and fast data about which communities have been involved, where it has happened, how many houses have been involved et cetera? Have you done such an evaluation?' Robert Knapp: 'Not that I'm aware of.'

125 Australian Government, *Shared Responsibility Agreement, Alpururulam, Northern Territory*, 'Community Centre and Internet Café', signed 4 May 2005 available online at <http://www.indigenous.gov.au/sra/kitold/nt01.pdf> accessed 26 February 2007. For details of the Agreement see <http://www.indigenous.gov.au/sra/search/srasearch.aspx>, accessed 26 February 2007.

126 Australian Government, *Indigenous Affairs (Budget) 2003, Fact Sheet*, Canberra, 2003, available online at [http://www.atsia.gov.au/facts/old/fs\\_cameo.pdf](http://www.atsia.gov.au/facts/old/fs_cameo.pdf), accessed 26 February 2007.

127 Wayne Gibbons, (Associate Secretary, the Department of Families, Community Services and Indigenous Affairs), *Hansard*, Senate Standing Committee on Community Affairs, 12 February 2007, p102.

128 Siewert R. and Knapp, R. (Group Manager, Housing and Disability Group, Department of Families, Community Services and Indigenous Affairs), *Hansard*, Community Affairs Legislation Committee, Budget Estimates, 30 May 2006, Canberra p45-46.



were at 17 percent.<sup>129</sup> While interest rates are now at 7.55 percent, it is the increase in the cost of houses as well as taxes that have moved property out of the reach of many. In fact, by international standards, Australia has a dismal rating in housing affordability. According to the 2007 *Annual Demographia Survey*, every Australian city is rated as 'seriously' or 'severely' unaffordable in a global study of 159 cities.<sup>130</sup>

The Demographia survey rates housing 'unaffordable' when the median house price passes three times median household incomes. Housing is 'seriously unaffordable' when it passes four times median household incomes and 'severely unaffordable' when it passes five times median household incomes.<sup>131</sup>

After Western Australia, the Northern Territory property market had the most rapid growth during 2006. Property prices in Darwin increased by 17.6 percent.<sup>132</sup> The median house price in Darwin is now \$344,000.<sup>133</sup> Interstate investors have been the main contributors to the rising house prices in Darwin. In recent years, investors have moved their attention from the flattened markets of the eastern states of Melbourne, Sydney and Brisbane to more remote markets like Darwin.

The real concern for prospective Indigenous home buyers is that investors will buy in their remote communities in search of new markets with capital growth. While desert communities are never likely to tempt the investor, remote coastal townships may be attractive given that Australian coastal real estate prices have escalated over past decades. A township like Nguui in the Tiwi Islands for example, has potential appeal because it is located in an idyllic setting and it offers recreational activities such as fishing in pristine waters.

The property market trends are ominous for low income earners in remote regions. There is a real risk that the Government's home ownership strategy will create property markets that will exclude the very people they have been designed to benefit. Even with incentives and low price houses, the cost of housing and the increases in the market will make home ownership very difficult for the majority of remote Indigenous Australians.

We may see a situation where non-Indigenous investors and sea-changers buy the absolute waterfront blocks of the many coastal townships where 99 year leases are available. Over successive generations, low income Indigenous families may be relegated to the cheaper back blocks. Should some remote property markets move in the same ways as they have across Australia, the Government scheme will be encouraging the most disadvantaged Australians into a property market that is one of the most impenetrable markets in the world.

129 Kryger T., *Home loan affordability – measurement and trends*, Research Note no. 8 2006–07, Statistics and Mapping Section, Parliamentary Library of Australia, 9 November 2006, available online at <http://www.aph.gov.au/Library/pubs/RN/2006-07/07rn08.htm> accessed at 21 February 2007.

130 Wendell Cox Consultancy, *The 2007 Demographia Survey*, sourced from The Property Council of Australia website, available online at: [http://propertycouncil.gravitymax.com.au/residential/page.asp?622=283194&E\\_Page=17720](http://propertycouncil.gravitymax.com.au/residential/page.asp?622=283194&E_Page=17720), accessed 21 February 2007.

131 Wendell Cox Consultancy, *The 2007 Demographia Survey*, sourced from The Property Council of Australia website, available online at: [http://propertycouncil.gravitymax.com.au/residential/page.asp?622=283194&E\\_Page=17720](http://propertycouncil.gravitymax.com.au/residential/page.asp?622=283194&E_Page=17720) accessed 21 February 2007.

132 Australian Bureau of Statistics, *6416.0 - House Price Indexes: Eight Capital Cities, Dec 2006*. 15 February 2007, available online at: <http://www.abs.gov.au/AUSSTATS/abs@nsf/mf/6416.0?OpenDocument> accessed 21 February 2007.

133 Australian Broadcasting Corporation, *Stateline, Territory Property boom - house prices continue to soar*, Broadcast 17 February 2006, available online at: <http://www.abc.net.au/stateline/nt/content/2006/1572885.htm>, accessed 21 February 2007.



There is great potential for non-Indigenous Australians to benefit from the Government's long-lease tenures on communal land. Non-Indigenous investors and home buyers will be able to move into emerging remote markets with relative financial ease. This will add additional pressure to the cost of housing for the Indigenous residents as markets are established and prices become competitive. The most probable consequence of the Government's strategy is that remote Indigenous Australians will be further marginalised in their own communities.

## Summary of concerns and challenges regarding remote Indigenous housing

The Australian Government's home ownership policy is poor policy for the following reasons. First, it is not based on an evaluated approach. Rather, the policy is contrary to evaluations of international models which show that similar individual land tenure approaches were seriously flawed and led to a loss of communal lands. Second, the home ownership incentives are poorly targeted and will not be accessible to the vast majority of remote Indigenous Australians for whom the policy is intended. Over time, in some regions housing markets will become increasingly inaccessible and Indigenous people with incomes on the margins will miss out. Third, it is more likely that non-Indigenous people will be the main beneficiaries emerging markets in remote communities.

If these are the consequences of the home ownership policy, then the Government strategy will further entrench Indigenous disadvantage and become another policy failure in the litany of failures that the Secretary of the Department of the Prime Minister and Cabinet so eloquently describes.<sup>134</sup>

The Australian Government and others will continue to argue that remote Indigenous Australians should not be prevented from purchasing their own homes in the same way as the majority of other Australians can purchase a home. In principle, this is correct. However it is not useful to consider home ownership as a right. It is not a right when the vast majority of Indigenous people in remote communities are not in a financial position to achieve this goal. By international human rights standards, adequate housing is a right.<sup>135</sup> It is essential therefore that governments support this right and ensure that adequate funding is maintained in community and public housing programs.

134 Shergold P, (Secretary of the Department of the Prime Minister and Cabinet), *Indigenous Economic Opportunity: the Role of the Community and the Individual*, Speech delivered at the First Nations Economic Opportunities Conference, 19 July, 2006: 'I am aware that for some 15 years as a public administrator too much of what I have done on behalf of government for the very best of motives has had the very worst of outcomes. I and hundreds of my well-intentioned colleagues, both black and white have contributed to the current unacceptable state of affairs, at first unwittingly and then, too often, silently and despairingly.'

135 *International Covenant on Economic, Social and Cultural Rights*, Article 11(1): The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the international co-operation based on free consent.





As I argued in last year's *Native Title Report 2005*, if Indigenous Australians and others want to purchase homes on communal lands they can already do so without changes to land tenures.<sup>136</sup> There are existing leasing options to accommodate home ownership that do not require Indigenous land owners to sign their lands over to governments. In addition, some Indigenous councils are aiming to manage their own lease tenures and home ownership programs while maintaining decision-making control over developments on communal lands. The Yarrabah Housing Project case study at Chapter 7 of this Report describes this model.

Governments can best assist Indigenous people to be home owners by investing in their personal and skills development, by developing an ethos of responsible personal finance management, by discussing the virtues of home ownership over an extended period of time and by focusing incentives on responsible renting. Through such initiatives and over time, more Indigenous Australians will be financially able and better placed to make an informed decision to purchase a home.

## Indigenous employment

The current labour force participation rates, occupations and locations of Indigenous Australians demonstrate the potential challenges of the remote economic reform agenda. Access to sustainable employment will be essential for remote Indigenous Australians who are keen to participate in the home ownership scheme.

As a proportion of the population, Indigenous Australians are represented at a much higher rate in very remote regions of Australia than in any other region. The remoteness means that Indigenous Australians are dependant on smaller economies for employment, government services and life opportunities. Economies of scale dictate that opportunities in remote areas are not as abundant as those routinely available to urban citizens. Almost 70 percent of Indigenous Australians live outside the major urban centres and almost 18 percent live in very remote regions of Australia. Table 2 shows the proportions of the population by region. In very remote areas, Indigenous people are 45.4 percent of the population, while they are only 1.1 percent of the urban population.<sup>137</sup>

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136 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, pp66– 80, available online at: [http://www.hreoc.gov.au/Social\\_Justice/ntreport05/ch2.html#part-ii](http://www.hreoc.gov.au/Social_Justice/ntreport05/ch2.html#part-ii) accessed 27 February 2007.

137 Taylor J., *Population and diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Discussion Paper 283/2006, Centre for Aboriginal Economic Policy Research, 2006, p5.





**Table 2: Indigenous and non-Indigenous population distribution by remoteness category, 2001**

	Non-Indigenous	Indigenous	Indigenous % of total
Major city	12,732,492	138,494	1.1
Inner regional	3,932,907	92,988	2.3
Outer regional	1,907,688	105,875	5.3
Remote	284,160	40,161	12.4
Very remote	97,473	81,002	45.4
Total	18,954,720	458,520	2.4

**Source:** Australian Bureau of Statistics (ABS) 2003a.

Across Australia the employment rates for Indigenous people aged 15 years and over are 42.7 percent, and much lower than for non-Indigenous people who are employed at almost 64 percent.<sup>138</sup> The ABS includes in its 'employed' data category, Indigenous people who are participating in the work for the dole scheme; the Community Development Employment Program (CDEP). This means that the real employment rates for Indigenous people are lower than the figures suggest. CDEP employs approximately 28 percent of remote Indigenous people compared with 3.6 percent in non-remote areas, so it is remote regions where Indigenous employment rates are most likely to be inflated. Nevertheless, Table 3 demonstrates that Indigenous people in remote regions are less likely to be employed in full-time work than Indigenous people in non-remote areas. It should also be noted that most government funded projects that generate employment opportunities are funded on an annual basis and are submission based projects.

138 Australian Bureau of Statistics, *Summary of Findings, 4714.0 - National Aboriginal and Torres Strait Islander Social Survey, 2002*, Commonwealth of Australia 2004, available online at: <http://www.abs.gov.au/Ausstats/abs@.nsf/0/AD174BBF36BA93A2CA256EBB007981BA?Open>, accessed at 15 January 2007.



**Table 3: Indigenous and non-Indigenous labour market participation as a percentage of the population, 2002**

	Indigenous			Non-Indigenous	
	Remote	Non-Remote	Total		Total
Full-time Employed	18.9*	25.3*	23.6*	Full-time Employed	45.2
Part-time employed	28.8*	15.4*	19*	Part-time employed	18.3
Total Employed	47.9*	40.8*	42.7*	Total Employed	63.5
Unemployed	4.4	11.3	9.4	Unemployed	3.7
Not in labour force	47.8	47.9	47.9	Not in labour force	32.8

**Source:** Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2002*.

\*This data includes people employed through CDEP.

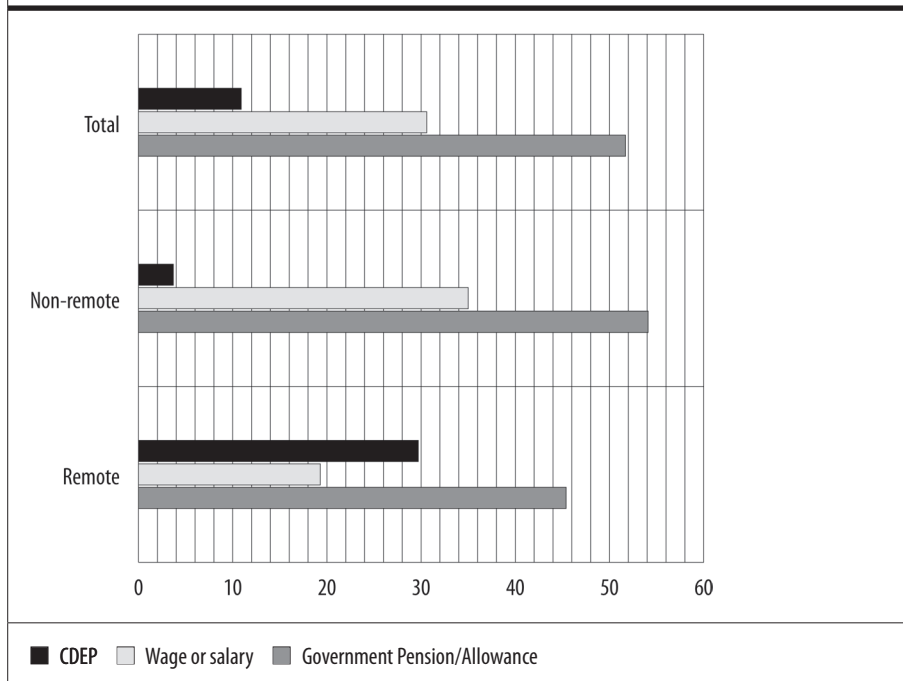
An important factor contributing to low employment rates is the lack of employment opportunity in regional and remote regions where 70 percent of Indigenous Australians are located.<sup>139</sup> The Government's 2006 policy to put a 12 month limit on CDEP participation in regional and urban areas is likely to inflate unemployment rates in the future.<sup>140</sup> Graph 1 identifies the sources of income for Indigenous people by their location. Indigenous people in remote and non-remote locations are most likely to source their income from a government pension or allowance. Indigenous people in remote areas were less likely to be in waged employment than people in regional and urban areas. Participation rates in CDEP were highest in remote locations.

139 According to the ABS, lower rates of education attainment may also contribute to lower Indigenous employment rates. Australian Bureau of Statistics, *Summary of Findings, 4714.0 – National Aboriginal and Torres Strait Islander Social Survey, 2002*, Commonwealth of Australia 2004, available online at: <http://www.abs.gov.au/Ausstats/abs@.nsf/0/AD174BBF36BA93A2CA256EBB007981BA?Open>, accessed at 15 January 2007.

140 Andrews K., (Minister for Employment and Workplace Relations), *CDEP Guidelines For 2006*, Speech, 26 March 2006, available online at <http://mediacentre.dewr.gov.au/mediacentre/AllReleases/2006/March/CDEPGuidelinesFor2006.htm> accessed 24 February 2007.



**Graph 1: Source of income for Indigenous people aged over 15 years by remoteness as a percentage of the Indigenous population 2002**



**Source:** Australian Bureau of Statistics, 4714.0, *National Aboriginal and Torres Strait Islander Social Survey, 2002*.

## Occupation

In 2001 the most common occupation for Indigenous people Australia-wide was labouring work. Rates of Indigenous labourers increased with remoteness.

The main occupation group for employed Indigenous persons was Labourers and Related Workers (24%) while the main occupation group for non-Indigenous persons was Professionals (18%). A relatively high proportion of both Indigenous and non-Indigenous persons were employed as Intermediate Clerical, Sales and Service Workers (18% and 16%, respectively).

The proportion of employed Indigenous persons working as Labourers and Related Workers rose markedly with increasing geographic remoteness from about one in ten (11%) in major cities to about one in two (47%) in very remote areas.<sup>141</sup>

<sup>141</sup> Australian Bureau of Statistics, 4713.0 – *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2001*, available online at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductbyCatalogue/2B3D3A062FF56BC1CA256DCE007FBFFA?OpenDocument>, accessed 8 December 2006.



In 2001 the private sector was the employer of 55 percent of all employed Indigenous Australians. In comparison, the private sector was the employer of 82 percent of non-Indigenous people.<sup>142</sup> This finding is significant in the light of the Government's argument that a private sector market economy will provide real employment to Indigenous people. To date, the private sector has not been a strong employer of Indigenous people. If these employment trends are replicated on Indigenous land, it is unlikely that Indigenous Australians will be major beneficiaries of a remote market economy.

Collectively, the labour market data demonstrates poorer outcomes for Indigenous Australians against all indicators. If remote Indigenous Australians are put in a position where they have to compete with non-Indigenous people for employment, it is almost inevitable that there will be an increase in levels of Indigenous employment disadvantage.

In recognition of this disadvantage, the Minerals Council of Australia (hereon referred to as the MCA) is working with the mining industry sector to ensure employment quotas for Indigenous Australians through Indigenous Land Use Agreements under the native title regime. The case studies of the MCA Memorandum of Understanding and the Argyle Agreement at Chapters 3 and 5 of this Report outline industry-based Indigenous employment initiatives in more detail. Similar interventions are required in remote communities without mines. Without these interventions, Indigenous people will fall further behind non-Indigenous Australians. Unfortunately, under the Government's intended reforms, such interventions are unlikely. Interventions such as these would be contrary to the Government's intention to create market economies to replace the interventions of welfare economies and CDEP.

## **Programs supporting Indigenous enterprise and economic development**

In order to support and stimulate economic development on Indigenous land, the Australian Government has developed a range of programs that provide funding and resources to Indigenous organisations and individuals. The programs are based on a self-access model requiring applicants to undertake tasks such as developing business plans and applying for start up funds. Program funding is available through Australian government departments and statutory authorities including the Indigenous Land Corporation and Indigenous Business Australia. The programs cover a wide range of areas including home ownership schemes, business development schemes, employment programs, governance training, finance programs, financial management programs, loan schemes, and joint venture projects.

In order to assess the take-up rates and expenditure on national Indigenous economic development programs, I surveyed government agencies and statutory authorities with responsibility to administer national programs during the 2005 –

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142 Australian Bureau of Statistics, *4713.0 – Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2001*, available online at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/2B3D3A062FF56BC1CA256DCE007FBFFA?OpenDocument>, accessed 8 December 2006.



2006 financial year. Nine entities provided data on 33 national programs. Funding entities provided information about the following:<sup>143</sup>

- the aims of the program;
- the number and type of indigenous entities applying for funding;
- the number of successful applicants;
- the reasons for unsuccessful applications;
- the category of applicant by organisation type;
- total budget allocation for program; and
- total expenditure for the program.

## Survey findings

The survey responses from Australian Government Departments and statutory authorities demonstrate that there are a good range of economic development programs available to Indigenous Australians. The programs fall under the following categories:

- industry and business development;
- land management, heritage protection and the environment;
- employment;
- land acquisition;
- community infrastructure; and
- capacity building.

The aims and targets of the programs demonstrate good strategic alignment with the objectives of the Australian Government's *Indigenous Economic Development Strategy*. According to the survey data, during 2005 – 2006 the total annual expenditure across all programs was in excess of \$246,503,887. Detailed survey responses for each program are provided at Appendix 2 of this Report.

## Industry and business development

Four government departments and one statutory authority provided funding towards ten programs for *Industry and Business Development* during 2005 – 2006. Providers of program funding include:

- the Department of Employment and Workplace Relations (DEWR);
- the Department of Agriculture, Fisheries and Forestry (DAFF);
- the Department of Industry, Tourism and Resources (DITR);
- the Department of Communication, Information Technology and the Arts (DCITA); and
- Indigenous Business Australia (IBA).

143 Department of Employment and Workplace Relations; Department of Families, Community Services and Indigenous Affairs; Department of the Environment and Heritage; Department of Agriculture, Fisheries and Forestry; Department of Transport and Regional Services; Department of Industry, Tourism and Resources; Department of Communication, Information Technology and the Arts; Indigenous Business Australia; and the Indigenous Land Corporation.



The ten programs provided funding and support for Indigenous business development, Indigenous business support, development projects on Indigenous land, advice and training on ways to improve returns from trusts and investments, and programs to support home ownership.<sup>144</sup> It is not possible to provide an accurate total expenditure under the category of *Industry and Business Development* because DEWR could not disaggregate funding data across their various programs.<sup>145</sup> DAFF were unable to provide any funding data for programs relevant to this category. Aggregated expenditure under *Industry and Business Development* which includes DCITA, DITR and Indigenous Business Australia in the 2005-2006 financial year was \$78,999,570.

## Land management, heritage protection and the environment

Three government departments provide funding towards five programs specifically related to *Land Management, Heritage Protection and the Environment*. They include the Department of the Environment and Heritage; the Department of Agriculture, Fisheries and Forestry; and the Indigenous Land Corporation. The programs are all directed to improved heritage and conservation outcomes and improved land management. In the 2005-2006 financial year a total expenditure in excess of \$17,894,248 was allocated to Indigenous program applicants.<sup>146</sup>

## Employment

The Department of Employment and Workplace Relations administers all six programs related to Indigenous employment. All programs aim to address the particular disadvantage of Indigenous Australians in the labour market, and stimulate Indigenous economic activity through employment opportunities.<sup>147</sup> Individual program expenditure was not provided by DEWR for employment programs.

## Land acquisition

The Indigenous Land Corporation administers the funding related to land acquisition. The programs include the Environment Acquisition Program, the Cultural Acquisition Program, the Social Acquisition Program, and Economic Acquisition Program. In the 2005-2006 financial year a total of \$7,934,024 was expended on land acquisitions.

144 **Australian Government**, *Achieving Indigenous Economic Development: Indigenous Economic Development Strategy, targeting jobs, business and assets*, pp14-18.

145 **Department of Employment and Workplace Relations**, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 200*, 26 February 2007.

Note: DEWR reported a total expenditure of 77, 710 000 across 9 programs across two categories, Industry and Business Development and Employment.

146 **Note: Funding data was not provided for all of the programs related to the Land Management, Heritage Protection and the Environment category.**

147 **Department of Employment and Workplace Relations**, *Annual Report 2005-2006*, p65, available online at [www.dewr.gov.au](http://www.dewr.gov.au), accessed 23 February 2007.



## Community infrastructure

The Department of Families, Community Services and Indigenous Affairs, and the Department of Communications, Information Technology and the Arts provide funding for five programs specifically related to access to, and improvement of community infrastructure. In the 2005-2006 financial year in excess of \$31,483,097 was allocated to Indigenous program applicants.<sup>148</sup>

## Capacity building

The Department of Transport and Regional Services, and the Department of the Environment and Heritage provide funding towards six programs specifically related to capacity building.<sup>149</sup> These programs contribute to the development of self-reliant communities through partnerships with other governments, communities and the private sector. In the 2005-2006 financial year a total of \$32,482,948 was allocated to Indigenous program applicants.

## Applications for program funds

In excess of 1,544 funding applications were submitted for the 33 economic development programs and 1,109 were successful. While this is a 72 percent success rate, 414 of these applications were not successful.

Five of the nine entities were able to provide data specifying which categories of Indigenous organisation were successful in their funding applications.<sup>150</sup> The following is collated data by Indigenous group type:

- Aboriginal Shire/Community Councils were successful in 529 of their 752 applications across seven programs;
- Community Corporations were successful in 227 of their 334 applications across nine programs;
- Native Title Representative Bodies were successful in 20 applications across six programs. Data regarding success rates was inconclusive;<sup>151</sup>
- Land Councils were successful in 78 of their 98 applications across eight programs;
- Prescribed Bodies Corporate were successful in 77 applications across four programs. Data regarding success rates was inconclusive; and<sup>152</sup>

148 Note: Funding data was not provided for all of the programs related to the *Community Infrastructure* category.

149 Note: This includes the two home ownership programs provided by Indigenous Business Australia.

150 Note: Departments were asked to disaggregate applicant data by group type under the following categories: Native Title Representative Bodies, Land Councils, Prescribed Bodies Corporate, Aboriginal Shire/Community Councils, Individual Traditional Owner Groups and Community Development Organisations. Five entities provided funding breakdowns by applicant type.

151 Note: Data on number of unsuccessful applicants was not provided.

152 Note: Data on number of unsuccessful applicants was not provided.





- individual traditional owner groups submitted 38 applications across five programs. Data regarding success rates is inconclusive.<sup>153</sup>

Given that only five entities could identify their funding recipients by organisation type, I was unable to make any overarching assessment of the relative capacity of Indigenous organisational types. It would be beneficial for the Australian Government to conduct an audit of all 33 national programs and collate the data to determine which Indigenous organisational types are accessing programs. This information will determine whether there is equitable distribution of economic development funding and support across the Australian Government economic development strategy. Given that the programs provide targeted funding to redress disadvantage, it is important to be able to assess the overall efficiency and effectiveness of the strategy to see whether it is achieving its intended objectives.

Without data provided across all departments it is difficult to:

- assess the priority areas for funding;
- determine which organisations are applying for categories of funding;
- determine which organisations require more intensive assistance with the preparation of funding applications; and
- determine whether there are regional variations in funding applications.

The nine entities were asked to specify the most common reasons for unsuccessful funding applications. Almost without exception across the 33 programs, the reason for unsuccessful applications included:

- failure to adequately address selection criteria; and
- incomplete applications.

To ensure that all Indigenous organisations can be competitive in the application process, targeted assistance in the form of workshops, plain English guides, application templates and training in the preparation of applications is required.

While ultimately the availability of program funding provides equality of opportunity, it may not lead to equality of outcomes. Governments need to be sure that communities with the greatest need for resources have the appropriate support to access available program funding. Reliable data will permit governments to assess the barriers that exclude some Indigenous groups from obtaining program funding.

## Agreements and economic development

The Indigenous Land Use Agreements of the native title regime and the Australian Government's Shared Responsibility Agreements both provide opportunity for Indigenous Australians to leverage or enhance economic activity on Indigenous land.

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<sup>153</sup> Note: Data on number of unsuccessful applicants was not provided.



## Indigenous Land Use Agreements

Indigenous Land Use Agreements (hereon referred to as ILUAs) provide one of the only ways in which the native title regime provides opportunity for economic development outcomes for traditional owners. An ILUA is an agreement through which native title holders negotiate and agree to terms and conditions that may include economic and employment opportunities. ILUAs can be negotiated under the following subject categories:

- access;
- co-management;
- community living area;
- consultation protocol;
- development;
- extinguishment;
- government;
- infrastructure;
- mining;
- petroleum/gas; and
- pipeline.

When registered, Indigenous Land Use Agreements bind all parties including the native title claimants or holders to the terms of the agreement. Some of the economic development provisions contained in ILUAs include provision for education and training, scholarship positions, compensation payments to Indigenous trusts, employment opportunities and quotas, and freehold land in exchange for extinguishment of native title rights. Each ILUA contains different provisions depending on the nature of the agreements and the resources, interests and capacity of the signatory parties.

During the 2005 – 2006 financial year, a total of 68 ILUAs were registered in Australia. This represents a significant escalation in the overall number of ILUAs. By June 2006 there were a grand total of 250 registered ILUAs since they were first introduced in 1998.<sup>154</sup>

ILUAs are usually initiated when governments, industry or other interests require access to the land or use of the land to progress economic and development plans. This means that the land either holds precious subsurface resources or it is located in an area where governments or industry plan to develop infrastructure such as gas pipelines. In many areas of Australia, particularly the desert regions, there are limited opportunities for traditional owners to leverage economic outcomes through ILUAs. Where there are no mineral riches and no plans for future development there are very limited opportunities for ILUA agreements.

In addition, not all ILUAs are lucrative or beneficial for traditional owners. Recent research by Griffith University has found that although about a quarter of Indigenous Land Use Agreements are delivering substantial outcomes to Aboriginal people in Australia's major resource regions, half have little by way of substantial benefit, and

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154 National Native Title Tribunal, Annual Report 2005-2006, Commonwealth of Australia 2006, p72, available online at: <http://www.nntt.gov.au/publications/data/files/AnnualReport20052006.pdf> accessed 27 February 2007.



a quarter should never have been signed. Professor O'faircheallaigh from Griffith University recommended that better negotiated outcomes could be obtained for Indigenous groups through organised approaches that identify traditional owner aspirations.<sup>155</sup>

Detailed discussion regarding economic development possibilities and challenges of ILUAs is contained in the case studies of this Report, specifically the Argyle Participation Agreement and the South Australian State-wide ILUA framework.

## Shared Responsibility Agreements

Shared Responsibility Agreements (hereon referred to as SRAs), are agreements between governments and Indigenous communities for services and resources in regional and remote Australia. They are based on the principle of mutual obligation. The Australian Government provides a service or a resource in exchange for input or mutual obligation from the community. This might include the commitment of community funds, or the achievement of certain targets in improved education, employment or health outcomes. SRAs are increasingly being used to address service and infrastructure requirements in communities. According to the Office of Indigenous Policy Coordination, SRAs mean that:

Communities... take responsibility for determining their own priorities for change and to work out what they can contribute to making things better. This contribution could involve using community assets, such as a community centre, upgraded sports facility or tourism business; or it could be a commitment to invest time and energy towards outcomes.<sup>156</sup>

SRAs can be coordinated in a way that enhances or creates the preconditions for enterprise and economic development on Indigenous land. For example, SRAs can be used to specify capital improvements or targeted training that supports economic activity. An SRA can be a small or a large agreement and it can be initiated by traditional owners or community members. SRAs can also be linked to other agreements such as ILUAs. It is the view of the President of the National Native Title Tribunal, that although there are legislative rules about the criteria for registration and the purpose of an ILUA, there is scope for SRAs and Regional Partnership Agreements to support mutual outcomes.<sup>157</sup>

Land is a significant issue for Indigenous communities, and the Tribunal strongly supports Indigenous communities making best use of available agreement-making options, and better integrating agreements about native title and other forms of Indigenous agreements. The Tribunal can see no reason why negotiations relating to native title can not be run in parallel with negotiations of other forms of Indigenous agreements, and would encourage a situation where all relevant

155 Corbett T., O'faircheallaigh C., *Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTAs, Arbitration Provisions*, Department of Politics and Public Policy, Griffith University, Brisbane, 2006.

156 Office of Indigenous Policy Coordination, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Social Justice Report 2005*, p2.

157 National Native Title Tribunal, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2006*, 22 February 2007, p2.



stakeholders are brought to one table to address issues relevant to the community in a coordinated approach.<sup>158</sup>

Currently there is only one SRA that directly complements an Indigenous Land Use Agreement.<sup>159</sup> Traditional owners of the East Kimberley area have entered a Shared Responsibility Agreement with the Australian Government to develop an education and training fund. The traditional owners dedicate funds obtained from the ILUA and the government has matched the funds through an SRA agreement. This is a good example of the use of one agreement to leverage another for strategic community development.

For more detailed analysis of the Shared Responsibility Agreements please see Chapter 3 of my *Social Justice Report 2006*.<sup>160</sup>

## Assessment of the self-access model for Indigenous economic development

While the self-access model provides for equality of opportunity, it will not necessarily lead to equality of outcomes where there are glaring disparities between the capacity and contexts of Indigenous communities. The current Australian Government strategy of 99 year leases and home ownership will not assist remote, desert communities where there has been limited history of development. Businesses and residents are unlikely to move into these areas. In places where the land is marginal and there is no mining activity and no history of enterprise development, targeted government assistance will be necessary to support models of Indigenous governance and the development of entities with business expertise.

The remote regions we represent essentially have no economic development whatsoever. Most people accept that economic development and security is essential for a sustainable future.<sup>161</sup>

Governance structures and business experience are essential components of any business venture. Creating a successful business in the Australian marketplace is difficult by any measure. The Australian Productivity Commission identified that between 7 and 8 percent of all small businesses in Australia fail within their first year of operation.<sup>162</sup>

In resource rich regions like Eastern Arnhem Land, the Pilbara and parts of the Queensland Cape York region, mining activity has involved Indigenous leaders in business planning, negotiation and enterprise opportunities. The resultant agreements with mining companies have created governance models and in

158 National Native Title Tribunal, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2006*, 22 February 2007, p4.

159 *Agreements, Treaties and Negotiated Settlements Project, Gelganyem Education and Training Shared Responsibility Agreement, 2005*, available online at: <http://www.atns.net.au/biogs/A002885b.htm> accessed 5 March 2007.

160 See generally, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission, Sydney, 2007.

161 Ngaanyatjarra Council Aboriginal Corporation, *Survey Comment, HREOC National Survey on Land, Sea and Economic Development 2006*.

162 Bickerdyke I, Lattimore R and Madge A, *Business Failures and Change: An Australian Perspective*, Productivity Commission Staff Research Paper, AusInfo, Canberra, 2000, p184.



some instances, increased financial and business literacy amongst the Indigenous community. As a result, entities have been developed with a specific mandate to increase economic development activity on behalf of the Indigenous people of the region.

The Gurang Land Council (Aboriginal Corporation) GLC(AC) region is a resource rich area and is seen as a prime area that will be targeted for opportunities by mining and exploration companies for years to come... Currently, within the GLC(AC) region, there are approximately 8 more ILUAs in the negotiation or registration stage. These agreements concern mining, state government tenure resolution, infrastructure, access and a pipeline.<sup>163</sup>

Across remote Australia, there are few established entities with any capacity or mandate to engage with the Australian Government's self access model of economic development. The Australian Government *Indigenous Coordination Centres* (hereon referred to as ICCs) have a role to coordinate government services and negotiate Shared Responsibility Agreements in the 30 Australian regions where they are located. ICCs accommodate 'Solution Brokers' who are personnel with responsibility to implement 'employment, participation, training and enterprise opportunities for Indigenous Australians in their ICC region.'<sup>164</sup>

With such a broad ambit of responsibility over large regions, economic development outcomes are likely to be some way off, if they are to be possible at all. Governance and representative structures will be a precondition for ICCs to support economic development on behalf of the Indigenous people within each region. To this end, the Australian Government has announced that it is currently consulting with Indigenous people to decide on local representative networks.

The networks will be different in each area. They may be set up at a number of levels—regions, communities, groups of organisations, clans or families. It depends on what is suitable in any one area, and what local people want.<sup>165</sup>

Native title entities are unable to proactively support or initiate economic development. A lack of funding and prescriptive guidelines limit the capacity of Prescribed Bodies Corporate and Native Title Representative Bodies respectively. Neither group is in a position to initiate or support economic development because both entities are limited by funding linked to functions of the *Native Title Act 1993* (Cth). The Office of Indigenous Policy Coordination (hereon the OIPC) outlined the following parameters for funding.

Funding to Native Title Representative Bodies (NTRBs) under the Native Title Program (NTP) is not formula driven. Within the constraints of the funding available within the NTP (\$55.1M in 2006-07 financial year), funding to individual NTRBs is determined on the basis of Operational Plans developed by NTRBs that identify and cost prioritised native title activities to be progressed in the funding year. Funding is also provided to meet the operational overheads associated with

163 The Gurang Land Council (Aboriginal Corporation), *Survey Comment, HREOC National Survey on Land, Sea and Economic Development 2006*.

164 Australian Government, *Office of Indigenous Policy Coordination, Secretaries' Group Annual Report 2005*, Website, available online at: [http://oipc.gov.au/performance\\_reporting/sec\\_group/ar2005/section1\\_1.asp](http://oipc.gov.au/performance_reporting/sec_group/ar2005/section1_1.asp) accessed 28 February 2007.

165 Australian Government, *Office of Indigenous Policy Coordination, Indigenous Coordination Centres*, Website, available online at: <http://www.indigenous.gov.au/icc/sra.html#anchor2>, accessed at 28 February 2007.



implementing and delivering the funded Operational Plans. It is open to NTRBs to seek additional funding to meet unforeseen native title matters during the course of the funding year and to seek variations to Operation Plans to meet emerging and changed priorities.<sup>166</sup>

The Operational Plans of NTRBs are based on activity prescribed under Division 3 s203B of the *Native Title Act 1993* (Cth). These activities include facilitation and assistance, certification, notification, agreement making and internal review functions.<sup>167</sup> NTRBs have reported in numerous forums and submissions that they are under funded to perform their statutory obligations. This precludes these bodies from providing support for economic development that is not strictly within agreements and processes associated with native title.<sup>168</sup>

It is difficult to assess the capacity of land councils to engage in economic development activity. The land council respondents to the 2006 national survey of traditional owners provided mixed responses about their relative capacities.<sup>169</sup> In the Northern Territory it is likely that land councils will have limited capacity since the amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in 2006. The new provisions under s64 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provide a revised funding formula that will dramatically limit discretionary funds for activity such as enterprise and economic development.

Ultimately, the capacity for Indigenous Australians to engage in economic development should not be left to chance. Remote Indigenous communities require good governance and business expertise to access program funding and to develop economic development agreements. For communities without independent sources of capital, the development of representative entities will not be possible without bilateral assistance from governments. Significant efforts and interventions will be required to establish governance and economic development capacity in remote communities.

## Conclusion

Good policy is based on trialed and evaluated approaches that provide assessments of the relative advantages and disadvantages of policy impacts and outcomes. Good policy benefits the greatest number of the target group for whom it is intended. The Australian Government reform agenda is not based on an evaluated approach or from trials within Australia or overseas. In fact the international experience of individualising land title the United States, New Zealand and Africa in past decades has led to poor outcomes for Indigenous people including the loss of land and few economic benefits if any. These countries are reversing land reform approaches that individualise title.

166 Office of Indigenous Policy Coordination, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006*, Email, 3 July 2006.

167 *Native Title Act 1993* (Cth), Division 3, s203B.

168 Note: Chapter 1 of this Report provides further evidence of the relative capacity of NTRBs to engage in economic and develop activity beyond the requirements of the *Native Title Act 1993* (Cth).

169 Human Rights and Equal Opportunity Commission, *National Survey of Traditional Land Owners Australia*, 2006, See Chapter 1 of this Report.



The Government's reforms radically recast the meaning and intention of land rights and the implementation of the reforms during 2005 and 2006 have individually and collectively reduced the capacity of Indigenous Australians to have decision-making control over land and administrative affairs. Some of the reforms will have far reaching implications that will last beyond any political term and any lifetime of the politicians and the people on whom it will impact. It is therefore imperative that the Australian Government ensure the highest threshold of Indigenous participation and consent for any initiative that will remove the authority of traditional owners to make decisions over traditional lands and seas.

In accordance with Article 1 of the *Declaration on the Right to Development*, Indigenous peoples (like every other person, and all peoples) are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development. It is imperative that those most affected by policy are included as active participants in the process of negotiating and deciding upon the economic and social policies that will impact on their communities. Indigenous stakeholders require control of the development goals and agendas for economic development especially because the ultimate success of these goals is dependent on our active participation. Crucial to the successful implementation of the right to development for Indigenous people is the Government's obligation to ensure that its policies, legislations and practices make provision for the following:

- the right to self-determination;
- the right to protection of culture;
- economic, social and cultural rights;
- free, prior and informed consent; and
- equality.

## Findings

- 2.1 The Australian Government has begun a process of implementing reforms to Indigenous communal lands that have the potential to radically change the nature of Indigenous communities on these lands.
- 2.2 The Australian Government's economic reform agenda on Indigenous land will be evaluated by successive COAG reports.
- 2.3 The marginal nature of the majority of Indigenous land and the legislative restrictions on the resources and the rights of Indigenous tenures, severely limit capacity for economic development.
- 2.4 The majority of Indigenous communities are located in desert areas where there is limited or no development potential. A minority of Indigenous communities are located in resource-rich areas with well-developed governance structures, experience in negotiating agreements, and capacity to leverage economic opportunities. This means that Indigenous communities have vastly different contexts and capacities and therefore require different forms of support.
- 2.5 The Australian Government has rejected proposals by Indigenous communities who have put up alternative models to the Government's 99 year headlease model.





- 2.6 International evidence demonstrates that individualising lease tenures on communal lands such as those proposed under section 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) [99 year headleases] leads to a loss of communal lands, and few, if any, economic benefits.
- 2.7 The Australian Government has signaled an intention to reduce services to homeland communities.
- 2.8 The home ownership scheme administered by Indigenous Business Australia and central to the Australian Government's economic development strategy is outside the financial reach of the majority of remote Indigenous households.
- 2.9 The Australian Government has emphasised 'cost effectiveness' as the most important criteria for the provision of homes for purchase under the home ownership scheme.
- 2.10 Indigenous houses in remote locations have high maintenance requirements due to construction problems, poor choice of building materials and extreme weather conditions.
- 2.11 Australian housing markets are escalating and investors are increasingly looking to remote markets for capital growth.
- 2.12 The private sector is not a reliable, proven employer of Indigenous Australians.
- 2.13 There are a wide range of economic development programs that are targeted to Indigenous people, but there is differential capacity for Indigenous Australians to obtain any benefit from a self access model.
- 2.14 The capacity of Indigenous people to leverage opportunities from ILUA and SRA agreements is largely dependent on the existence of strong local governance and entities with capacity to progress economic outcomes.

## Recommendations

The following recommendations outline approaches to economic development on Indigenous land that:

- emphasise Indigenous participation in the development of policy;
- provide high thresholds for obtaining Indigenous consent to economic development strategies, initiatives and agreements; and
- emphasise policy approaches that are supported by reliable research, trial processes and on-going evaluation.

**Recommendation 2.1**

That the Australian Government support a range of land leasing options on communal land including options where leases are held by traditional owners through their elected entities for varying periods of time. That the *Community Homes* program be extended to communities with alternative lease schemes where the lease period is commensurate with the maximum loan repayment period.

**Recommendation 2.2**

That all land leasing options on communal land be rigorously and progressively monitored and evaluated and that evaluative research be utilised to inform existing and future lease options.

**Recommendation 2.3**

That the Australian Government provide evidence (domestically and internationally) of models where individual tenure rights have led to improved economic outcomes for indigenous peoples living on communal lands.

**Recommendation 2.4**

Governments legislate to ensure that consent and authorisation processes for 99 year leases are consistent with those required by sections 203BE(5) and 251(A) of the *Native Title Act 1993* for authorising Indigenous Land Use Agreements.

**Recommendation 2.5**

That the Australian Government remove section 64(4A) from the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

**Recommendation 2.6**

That governments ensure employment contingencies or re-deployment training for Indigenous employees who become unemployed as a result of the transition from community administration to a shire council model.

**Recommendation 2.7**

In recognition of the continuing disadvantage of remote Indigenous Australians, that governments commit to providing subsidised, quality community housing and public housing according to need, and that no funds from existing rental housing schemes be redistributed to home ownership schemes.

**Recommendation 2.8**

That houses constructed under the home ownership scheme be of the highest quality and that regulations be developed to government guarantee liability and indemnify home owners for agreed periods against structural flaws in the house and the associated infrastructure.

**Recommendation 2.9**

That the Australian Government develop a planned, supervised and strategic approach to train CDEP employees working on the house building and maintenance program to ensure adherence to the highest industry construction standards. That the Government maintain national data on the program and that CDEP employees be provided with award wage employment once they have completed the training.

**Recommendation 2.10**

That the Australian Government direct ICCs to work with Indigenous land entities (including representative bodies) to strategically link Shared Responsibility Agreements to land agreements in ways that will increase economic development projects and opportunities.



### **Recommendation 2.11**

That governments provide bilateral support to fund and develop regional Indigenous governance structures that are attached to entities capable of the following:

- developing and sustaining an economic development strategy for the region;
- applying for funds from governments and other sources; and
- coordinating appropriate training and development to support regional economic development.



## Introduction to the case studies

Some interesting economic development activities are occurring in Indigenous communities across Australia. There are numerous examples of communities working intensely to develop employment, enterprise and housing options for local people. There are also instances where Indigenous and non-Indigenous people are working collaboratively to improve land agreements so that they provide sustainable outcomes for Indigenous Australians.

The following case studies are an extension of the recommendations in this Report and the recommendations of my Native Title Report 2005. They provide examples of economic and social development that emphasise Indigenous involvement and management of all aspects of agreement-making and enterprise development. They demonstrate that when provided with the opportunity and support from government and non government stakeholders, Indigenous Australians can exercise responsible self determination and self management for the benefit of our people.

The case studies provide only a small sample of good practice in agreement making an enterprise development in Australia. Two of the case studies describe system-wide approaches to land agreements and enterprise development, based on government and industry collaboration. Three case studies describe regional approaches to land and enterprise development.

The case study at Chapter 3 describes a collaborative approach between the Australian Government and the minerals industry to support Indigenous economic development in eight trial sites across Australia. Chapter 4 provides another system-wide approach, outlining South Australia's State-wide approach to Indigenous Land Use Agreements. Chapter 5 describes a regional agreement; the Argyle Indigenous Land Use Agreement in the Kimberley, Western Australia. Chapter 6 describes the development of an Indigenous owned and managed enterprise in the Pilbara. Chapter 7 provides an example of a township lease agreement and a home ownership scheme that has some similarities and some marked differences with the leasing and home ownership approaches of the Australian Government.

### Case Studies

- Chapter 3: The Memorandum of Understanding between the Minerals Council of Australia and the Australian Government and the East Kimberley Regional Partnership Agreement
- Chapter 4: South Australia's State-wide Indigenous Land Use Agreement Framework
- Chapter 5: The Argyle Participation Agreement
- Chapter 6: Ngarda Civil and Mining
- Chapter 7: The Yarrabah Housing Project

