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September 2005

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LAND RIGHTS AND DEVELOPMENT REFORM IN REMOTE AUSTRALIA

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FOREWORD

In April 2005, Oxfam Australia approached the Centre for Aboriginal Economic Policy Research to undertake a brief consultancy to a tight time frame on the issue of land rights reform. Oxfam was concerned at the escalating media coverage of views that associated Indigenous economic disadvantage, and housing and infrastructure shortages, with land rights and native title. Such views were emanating from a variety of powerful sources including the National Indigenous Council, publications from the Centre for Independent Studies (an influential think tank), and the Prime Minister of Australia. The focus of such views was the communal and inalienable nature of much of the Indigenous estate that has grown incrementally over the past 30 years to about one million square kilometres. There were various proposals being put forward suggesting that privatising or individuating this land might generate better economic and social outcomes for Indigenous people, especially in remote and very remote Australia.

This discussion paper seeks to address this issue in two ways; by reviewing the existing literature and by examining recently available statistics, especially on Indigenous housing need and affordability. The paper focuses most specifically on the situation in the Northern Territory for a variety of reasons. First, land rights is most deeply embedded and extensive in this jurisdiction. Second, there is no doubt that some of the most intractable development, housing and infrastructure issues facing remote Indigenous communities are evident in the Northern Territory. And third, Oxfam Australia believes that the *Aboriginal Land Rights (Northern Territory) Act 1976*, as Commonwealth statute, is the piece of rights-related legislation that is most vulnerable to amendment given that the Howard government now holds a Senate majority.

A version of this paper was provided to Oxfam Australia in July 2005. In preparing it, the authors were asked to keep a general lay audience in mind; given the complexity of the issues, this has been a difficult request to meet. The authors of the paper were certainly keen that the version that Oxfam published in August 2005 should be as accessible as possible and we hope that this has been achieved. This Discussion Paper is another version of the original paper. It is intended for a slightly different audience—for the academic and Indigenous policy communities, and for Indigenous organisations—in the interests of wide dissemination and of transparency.

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September 2005

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ABBREVIATIONS AND ACRONYMS

ABA	Aboriginals Benefit Account
ABS	Australian Bureau of Statistics
AGPS	Australian Government Publishing Service
AIAS	Australian Institute of Aboriginal Studies
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cwlth)
ANU	The Australian National University
ATSIC	Aboriginal and Torres Strait Islander Commission
CAEPR	Centre for Aboriginal Economic Policy Research
CDEP	Community Development Employment Program
Cwlth	Commonwealth
HNZC	Housing New Zealand Corporation
MRE	mining royalty equivalent
NGO	non-government organisation
NIC	National Indigenous Council
NILS	no interest loans scheme
NLC	Northern Land Council
NT	Northern Territory
NZ	New Zealand
OECD	Organisation for Economic Cooperation and Development
Wai	Waitangi Tribunal claim number

ABSTRACT

There has been escalating media coverage of the view that Indigenous economic disadvantage and housing and infrastructure shortages are linked to communal title to land resulting from land rights and native title. A variety of powerful figures have been suggesting that privatizing or individuating this land might generate better economic and social outcomes for Indigenous people, especially in remote and very remote Australia.

This Discussion Paper challenges this view in two ways; by reviewing the existing literature and by examining recently available statistics, especially on Indigenous housing need and affordability. The paper focuses most specifically on the situation in the Northern Territory for a variety of reasons. First, land rights are most deeply embedded and extensive in this jurisdiction. Second, there is no doubt that some of the most intractable development, housing and infrastructure issues facing remote Indigenous communities are evident in the Northern Territory.

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EXECUTIVE SUMMARY

Recent policy debate on Indigenous disadvantage has centred on the extent to which conferring private individual ownership of, and title to, land can increase economic development and address the acute housing needs that obtain in rural and remote Indigenous communities.

Proponents of the privatisation initiative suggest that individual ownership of land will result in higher rates of economic growth and improved housing in remote Indigenous communities by providing incentives for individuals or families to raise finance, establish business ventures and build and maintain housing.

As a contribution to this debate, Oxfam Australia commissioned the Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University (ANU) to examine this issue through a literature-based case study focusing on Aboriginal land in the Northern Territory. This report investigates the extent to which individual ownership of land is likely to boost economic development of Aboriginal lands and produce better housing outcomes through examining the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA).

This research confirms that there is deeply entrenched Indigenous disadvantage on Aboriginal land in the Northern Territory expressed in many forms, including housing. However, it finds no evidence to suggest that individual ownership of land is either necessary or sufficient to increase rates of economic development or housing construction on Aboriginal land in the Northern Territory.

The evidence does not support the notion that individual ownership of low-value land in remote settings can be the driving force in lifting home ownership in these regions. Historic shortfalls in housing and associated infrastructure provision and contemporary Indigenous poverty remain the principal issues that need to be addressed first in any new policy framework directed to economic development and housing needs on Aboriginal lands. Similarly, the notion that land rights reform can unilaterally drive economic development should be reconsidered in light of cultural difference, the legacy of disadvantage, and structural factors faced by Indigenous communities on Aboriginal land in the Northern Territory.

This research concludes that there are far more significant structural issues that must be addressed in order to encourage greater economic development and address housing needs. These structural factors include the remoteness of communities from mainstream markets, relatively low populations and population densities, the need for greater investment in education and vocational skills, poor infrastructure, and the generally economically marginal nature of most lands held under Aboriginal title. In addition, there are fundamental Aboriginal cultural reasons for attachment to land, irrespective of whether that land has current commercial use or potential.

This research confirms that the ALRA statutory framework is presently capable of meeting Indigenous housing and economic development objectives. However, present levels of Ministerial involvement in decision-making about land use are excessive and burdensome by contemporary standards. Furthermore,

state agency occupation of Aboriginal-owned land generally remains on a non-commercial footing, largely to the disadvantage of Indigenous landowners and interests.

Experience in nearby New Zealand demonstrates that individualising land title can actually compromise the development of a sustainable economic base on Māori-owned land. Innovative policy settings and partnerships are now used to address long-term consequences of economic marginalisation, as well as specific issues, including home ownership on Māori-owned land. An important lesson from New Zealand is that fragmentation of land interests can create unhelpful barriers between people and increase costs associated with asset management. These problems should be avoided in Australia when considering how best to provide housing on communally-owned land.

Our recommendations are summarised as follows and detailed in the conclusion to the paper:

ALRA—careful analysis of what can currently be achieved under ALRA is needed, with any amendments focusing on diminishing the present role of the state in controlling land use decisions while retaining checks and balances necessary to protect owners' rights. State use of Aboriginal land should be put on a more business-like footing as part of a larger process to encourage realisation of opportunities presented by land ownership.

Housing—because of high levels of Indigenous poverty and unmet housing need, policy reform should clearly recognise the ongoing requirement for enhanced state investment in community, and possibly publicly-owned, housing on Aboriginal land. Any reform should only follow exploration of structural changes that might enhance prospects for public housing, community housing, and private housing all on secure leases, as viable and sustainable options on Aboriginal land.

Economic development—given that Indigenous aspirations for development might differ from those of mainstream Australians, and what is realistically possible and sustainable on most Aboriginal land certainly differs from other areas of the country, we recommend careful consideration be given to more equitable resourcing of successful land management work, especially in natural and cultural resource management. This should occur alongside exploration of innovative forms of development finance for mainstream and Indigenous businesses. Options for making better use of development capital already generated by the ALRA framework and other avenues should be explored.

New Zealand—there are lessons to take from negative aspects of New Zealand's experience of individualising land interests in the past. More recent innovative moves to provide greater support for collective land use and housing on multiply-owned Māori land also need to be considered.

Conclusion—economic development on Aboriginal land has been blighted in the past by initiatives that were poorly matched to economic, social, cultural and biophysical realities. That pattern of failure will not be broken by reforms based on uncritical commitment to particular forms of private ownership. An evidence-based approach is needed that will draw on analysis of the real achievements of ALRA and on international experience of the benefits to be derived from communal land ownership.

1. INTRODUCTION

The conduct of Indigenous affairs in Australia over the past two years has undergone a fundamental shift. The Aboriginal and Torres Strait Islander Commission (ATSIC), the national Indigenous representative organisation, was effectively abolished in early 2004 and replaced, after the October 2004 federal election, by the National Indigenous Council (NIC), an appointed advisory board. At the same time, popular discourse has increasingly represented the Indigenous policy framework and associated policies of the past 30 years as a failure, despite the ready availability of official social indicators that show improvement in most areas at the national level (Altman, Biddle & Hunter 2004). From 1 July 2004 the introduction of new administrative arrangements has seen a change in key planks of policy, from concepts such as self determination, self management and Indigenous specific programs to those of mutual obligation, shared responsibility and mainstreaming.

From 1 July 2005 the Liberal-National Coalition has control of both Houses of the Australian Parliament, providing a clear opportunity for legislative reform. In the period since the last federal election there have been a number of discussion papers and ministerial presentations that have reinforced the discourse of policy failure. Those contributions have also sought to question the role of land rights and native title as perpetuating, rather than addressing, relative Indigenous disadvantage.

Land rights laws in Australia have a history that extends back to the 1960s. South Australia introduced the first land rights law in 1966, but this Act did not authorise claims. A decade later, the Australian Parliament passed the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), which remains the most extensive land rights legislation implemented in Australia. Since 1966, substantial amounts of land have been returned, in one way or another, to Indigenous ownership. Pollack (2001) estimates that Indigenous Australians own, control, or have management arrangements over up to 18 per cent of the Australian continent, or around 1 million square kilometres. It is likely that by 2005, with recent significant native title determinations, this proportion has increased to perhaps 20 per cent of Australia. Available recent statistics (Australian Bureau of Statistics (ABS) 2004a, 2004b) indicate that Indigenous people living in remote and very remote Australia, where most land transfers have occurred, have the lowest socioeconomic status, both relative to other Indigenous Australians and to non-Indigenous Australians.

This Discussion Paper focuses on the situation in the Northern Territory of Australia where Aboriginal people have seen 44 per cent of the land mass returned to Aboriginal ownership under ALRA.¹ This amounts to an area of 594,000 square kilometres, with a further 9.6 per cent (or 120,000 sq kms) subject to claim.² Being Commonwealth law, the ALRA is amenable to reform by the Australian Parliament—reform that has rarely occurred owing to party-partisan standoffs and Indigenous opposition in the last 28 years. Research by Taylor (2003) estimates that a large proportion (over 70%) of the Northern Territory Indigenous population resides on Aboriginal-owned land; furthermore, Taylor (2002) estimates that this population is likely to grow rapidly in the next 20 years. Despite the very substantial amount of land that has been transferred to Indigenous people in this jurisdiction, there is evidence that some discrete Indigenous communities are in

economic and social crisis. In many, there is a large shortfall of housing and much of the existing housing stock is in a poor state of repair (Taylor 2004). There is no question that there are housing and economic development problems on Aboriginal land in the Northern Territory and that population growth is likely to exacerbate such problems.

This outcome can be partially explained by residence in geographically remote areas, but also by the failure of governments to provide adequate service delivery to remote Aboriginal communities. It can also be explained, in part, by the fact that the Aboriginal reserve areas and unalienated Crown land that have formed the vast majority of land returned to Indigenous ownership have had marginal commercial value—hence the availability for claim in the case of unallocated Crown land. Furthermore, while substantial tracts of land have been returned to Indigenous ownership, this restitution did not generally include property rights in commercially valuable resources that have the potential to make more of a difference.

It is often overlooked that historically land rights policy has encompassed both social justice and development goals; as was noted by the Commissioner charged with inquiring into Northern Territory land rights before ALRA (Woodward 1974), land rights was but a first tentative step to economic and social equality for Indigenous people.³ The recent discourse of policy failure, from both Indigenous and non-Indigenous commentators, has focused in recent months on the issue of land rights and native title, and on what appears to be a pertinent policy question: why is it that restitution of land has not resulted in marked improvements in Indigenous socioeconomic status? This question is predicated on the following logic: the dispossession of Indigenous Australians from the land without agreement or treaty since 1788 has resulted in their socioeconomic marginalisation. Therefore, the restoration of lands since 1966 ought to have seen an improvement in socioeconomic status as measured by standard social indicators.

The apparent lack of improvement in social, economic and housing conditions has led to the suggestion, following this logic, that an important explanation for contemporary marginality and policy failure is the nature of property rights. In early 2005, Hughes and Warin (2005:1) released a Centre for Independent Studies discussion paper that argued that the communal ownership of inalienable freehold title is important in explaining housing shortages and economic under-development (cf. Duncan 2003; Altman 2004). This view has been echoed in 'Privatising Indigenous Land', a discussion paper sponsored by NIC member Warren Mundine that received much media coverage in March 2005, but that is not yet publicly available. More recently in April 2005, the Prime Minister of Australia has supported the view (when visiting Wadeye in the Northern Territory) that land privatisation and individualisation of property rights might improve housing and economic development prospects for Indigenous peoples living in remote areas.⁴ However, at the National Reconciliation Planning Workshop in late May 2005 he appeared to have adjusted this position by suggesting that the inalienable and communal nature of Indigenous land must be maintained.⁵ In June 2005, the NIC released a set of Indigenous Land Tenure Principles that sought to maintain communality and inalienability, while simultaneously acknowledging the possibility of compulsory leasing of such lands from owners to individual community residents for home ownership or business development (NIC 2005).

In preparing this Discussion Paper we are conscious of the enormous complexity of the issues currently being debated: the nature of the ALRA and the limited reform of this law since 1976; the apparent intractability of Indigenous disadvantage in remote regions; and growing shortfalls in housing and infrastructure. So as not to oversimplify complexity, we make three broad observations at the outset about issues that are all too often overlooked in public debates.

First, is the question of property rights. Much of the current debate began with a call for the amendment of land rights law to allow for the sale of land held communally (by groups of traditional owners) under inalienable title. This call quickly changed to calls for long-term leases of land to individuals, something that is currently possible under the ALRA with the agreement of landowners. Communal inalienable title under the ALRA is a form of title that attempts to accommodate existing customary rights of ownership and use of land within a western legal framework. To date there seem to have been no analyses of the potential impact on those customary rights of intersecting proposals to individualise rights to use this land in a widespread fashion through long-term leases or stronger measures.

Second, as noted earlier, there is a view that since land alienation was associated with Aboriginal economic marginalisation, land restoration should guarantee economic incorporation. Suffice to say that such a view is at best naïve and at worst convenient. On one hand, the land returned and made available for claim is generally remote and is of low commercial value. On the other, residents on this land have experienced marginalisation and relative neglect, often for decades. Arguably, the current legacy of this—poor health, housing, education and employment status—is a higher order explanation for economic and social exclusion than the nature of land tenure. It is also generally overlooked that rights in land, as a general rule, exclude rights to direct control over commercially valuable mineral resources (Altman 2002). This is very different from the situation in other settler colonies—Canada and the USA for example—where sub-surface mineral rights are not distinguished from surface ownership rights. A major cause of under-development on the Indigenous estate is that land has been returned, but without property rights or exclusive control of commercially valuable resources. A comprehensive review of ALRA conducted by John Reeves examined the issue of the apparent failure of land rights to deliver development (Reeves 1998). However his conclusions and recommendations were not supported by subsequent critical examination by academic and other commentators (see e.g. the essays in Altman, Morphy & Rowse 1999 and the 1999 Report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (Commonwealth of Australia 1999)).

Finally, there are features of remote Indigenous communities that make them fundamentally different from other Australian, and many international, economic development contexts. These communities are often in sparsely populated regions of Australia that are extremely distant, both geographically and culturally, from markets. These regions were colonised relatively late, with some parts of Arnhem Land and central Australia only colonised during the last 50 years. This has meant that customary (kin-based, non-market) systems and practices, such as wildlife harvesting and fire management regimes, continue to be robust. Indigenous worldviews remain very different from those of mainstream Australia. All too often in public discourse

cultural difference is only paid lip service and ongoing and vibrant contestation between western and Indigenous views about values and legal frameworks are ignored.

We are conscious that others will provide considered inputs to a debate that will unfold during the second half of 2005 (see e.g. Armstrong 2005; Central Land Council 2005). Our aims are principally to address some policy issues around land rights, housing and economic development in the Northern Territory. We aim to provide an evidence-based and dispassionate analysis; to provide our perspectives in an accessible manner; and to raise issues for further consideration by the Australian and Northern Territory governments, Indigenous organisations and those with land interests on Indigenous land.

This discussion paper is structured as follows. In section 2 a brief summary is provided, in lay terms, of relevant aspects of the ALRA, particularly in relation to housing and economic development on Aboriginal-owned land.⁶ In sections 3 and 4 we focus attention on the issues of housing and economic development on Aboriginal land, addressing public policy concerns about how housing shortages might be met and how capital for economic development might be raised. In section 5 we provide some information about how the issue of financing housing on communal Māori land in nearby New Zealand has been creatively addressed.⁷ In the final section of the paper we make some suggestions that should be considered before any policy reform is considered.

2. THE LEGAL FRAMEWORK

This section discusses the questions of who presently controls decisions about development of land held under the ALRA and how people or organisations obtain formal rights to use this land. Two anomalous features of obtaining rights to use land are mentioned: Ministerial control over decisions about land use, and occupation of land by state agencies. Land leased back to the state for conservation purposes under ALRA is not examined here.

THE NATURE OF TITLE TO ABORIGINAL LAND

The 'Aboriginal land' created by the ALRA is freehold title vested in statutory corporations known as land trusts, with some added rights to control mining. Land trusts hold land under the ALRA for the benefit of Aboriginals entitled by tradition to use or occupation of the land whether or not that entitlement is qualified by place, time, circumstance, purpose or permission. Land trust members are usually traditional owners.

The freehold is inalienable—it cannot be sold or surrendered, except to another land trust or the Crown. However, lesser interests in Aboriginal land, such as leases and licences, can be granted. The law usually provides that someone who owns land owns 'fixtures' (permanent structures) on it. This means that non-portable housing provided by the state on Aboriginal land normally belongs to the land trust. The Northern Territory government cannot acquire Aboriginal land by compulsory process as it lacks the constitutional powers to do so; only the Commonwealth can do this.

THE ROLE OF LAND COUNCILS AND LAND TRUSTS

There is a tripartite relationship between traditional owners, land trusts and land councils under the ALRA. This has the effect of balancing a number of customary imperatives about use of and responsibility for land with western legal accountabilities for dealings in land. The ALRA defines 'traditional Aboriginal owners' as people of common ancestry with 'primary spiritual responsibility' for defined tracts of land, according to traditional laws and customs. Unless the ALRA or some other law says so, the consent of these people is always required before others may use Aboriginal land. However, the ALRA recognises another important aspect of Aboriginal tradition: multiple, overlapping rights to different areas of land. A person can be traditionally entitled to use Aboriginal land for limited purposes without being a traditional Aboriginal owner. These limited purposes usually do not extend to building a house or conducting a business without the traditional Aboriginal owners' consent. Many such people live in townships established on former reserve land before the ALRA was enacted, either because their ancestors were moved there by the state or because they were attracted there from more remote areas by the provision of services. These people must be consulted about development on Aboriginal land, but they cannot veto such proposals. There is a third category of Aboriginal people living on Aboriginal land, particularly former reserve land: those without any traditional entitlements to use it, also usually people whose ancestors were moved or attracted there. Like people with limited traditional entitlements, they are only entitled to be consulted about developments.

The role of land trusts under the ALRA are as passive land-holding entities. They are serviced by land councils. These are larger, regional, statutory corporations with specified detailed functions under the ALRA. Broadly, they must represent the interests of traditional Aboriginal owners and other Aboriginal people with traditional interests regarding land and provide the land trusts with administrative support. If someone wants to use land held under the Act, the relevant land council must consult with the traditional landowners and affected persons as well as conduct negotiations to reach agreement for that land use. Once a proposal is agreed, the land council directs the land trust to enter into the transaction. Land councils must respond to the views of traditional Aboriginal owners and obtain their informed consent, as a collective, to any proposals. Traditional or agreed processes must be used to obtain consent. This is a substantial obligation when compared with decision-making processes for many collective endeavours in mainstream society, where majority voting mechanisms are the norm. It is also made more challenging, time consuming and costly in the many situations where a proportion of traditional owners are not resident on the land, perhaps for economic reasons.

Land councils' consultation obligations are significant. There are many residents of communities on Aboriginal land in the Northern Territory whose traditional rights to use of the land do not extend to decision-making about development of ALRA land. Some residents may have no traditional rights to the area in which they live. There are also sometimes significant numbers of non-Aboriginal people in such communities. Even though this last group is not entitled to formal consultation under the ALRA, development issues need to be considered with them in mind.

ACCESS TO AND USE OF ABORIGINAL LAND

One cannot enter onto ALRA land to visit a community in the same way one can walk up to someone's front door in the suburbs. Access to the land, even to visit communities, is restricted and largely subject to a permit system for people without traditional rights or who are not on government business. Beyond visiting or living on the land, the process of obtaining formal rights from a land trust to use land held under the ALRA differs according to the length of time for which rights are sought and the category of the applicant. In broad terms the system for obtaining rights for non-mining uses is as follows. Interests in land such as leases or licences can be granted by a land trust, at the direction of the land council, to state entities for public purposes or to any person for 'any purpose' for up to ten years without requiring Ministerial consent. The same sorts of interests can be granted to an Aboriginal person, or an Aboriginal council or association, for Indigenous-owned business and community purposes for up to 21 years without requiring Ministerial consent. Grants of interests in land for longer periods require the consent of the Minister responsible for the ALRA or his or her delegate where permitted. Any rents for these rights are paid to, or for the benefit of, traditional Aboriginal owners.

There are further points of detail, just two of which are touched on here. Grants of interests specifically for residential purposes in favour of Aboriginal people and employees of Aboriginal groups appear to always require Ministerial consent; and if the right that was granted required Ministerial consent it cannot be traded or made subject to subsidiary grants without further consent being obtained. The further consent of the land council is required for any trade in granted interests. This will include, for example, a leaseholder who wants to mortgage their interest.⁸ Of course, the land council and Minister can both consent in advance to these further interests, as occurred with the leases for the Alice Springs to Darwin rail corridor. These powers to grant and consent to interests in land are subject to judicial review by the Federal Court. Additionally, the Minister has particular powers to override land councils and land trusts in certain circumstances.

Mineral exploration of Aboriginal land requires both the Minister's and the land council's consent (or that of the Governor-General in national interest cases).⁹ A detailed exploration proposal must be presented to a land council to be canvassed with affected Aboriginal people within a one-year period. A land council may only consent to the grant of an exploration licence where the traditional owners as a group agree to it and the land council is satisfied that the licence terms (which are also the subject of negotiation or failing that, arbitration) are reasonable. Terms and conditions of consequential mining leases are the subject of similar consultation and negotiation, and cooling-off periods are imposed before miners can reapply to explore an area of Aboriginal land. Exploration and mining agreements can provide financial rewards, to be distributed either pursuant to the agreement or to Aboriginal people affected by the mine.

However, the financial benefits of mining are not limited to these negotiated monies. The ALRA maintains the former Aborigines Benefits Trust Fund as the Aboriginals Benefit Account (ABA) (see section 4 below). The ALRA requires the Commonwealth to pay into the ABA monies from Consolidated Revenue *equivalent to* the royalties paid to the Crown for mining on Aboriginal land in the Northern Territory. Most such royalties

are paid to the Crown in right of the Northern Territory as the owner of most minerals there. However, some are paid to the Commonwealth as the owner of *in situ* uranium in territories. The ABA money is distributed as follows: 40 per cent is statutorily required to be paid to the land councils for administration, 30 per cent is paid through them and royalty-receiving associations to Aboriginal people affected by mining, unspecified proportions must be granted to Aboriginal people and used to pay the ABA's administrative costs, and other amounts may be granted to the land councils to 'top up' their administrative budgets.

MINISTERIAL CONSENT TO DEAL IN LAND

The degree of Ministerial power to control dealings in land under the ALRA is striking. Whether or not controls are warranted where mining is proposed (an issue not taken up here), they appear particularly paternalistic in the context of other types of land leases and licences. Justice Woodward (1974) stressed that the legislation resulting from his recommendations would need amendment as social conditions changed. It appears this is one area where, until recently, it was assumed conditions had not changed sufficiently to warrant removing Ministerial powers over dealings in land. The 1998 review of the ALRA (Reeves 1998) was the first to recommend substantial changes to land holding structures and ending the consent and approval role of the Minister for dealings in land. In order to promote greater independence, Reeves proposed a very limited review role for the Minister over major transactions referred by Indigenous-controlled entities. This was a significant shift from Justice Woodward's original view that Indigenous peoples' land dealings required supervision by the state. That view had been only slightly adjusted in 1983, when Justice Toohey's *Seven Years On* review resulted in the extension of thresholds for categories of dealing in land from five and ten years to ten and twenty-one years (Toohey 1983).

It is important that avenues remain for landowners to have recourse to judicial review by the Federal Court of their dealings with land councils. Aside from the ultimate ability to have process scrutinised through litigation, we accept that some system of checks and balances is probably appropriate for a range of transactions. There are a number of questions to explore, however. If some layer of scrutiny over the work of land councils in arranging dealings in land is warranted, would it be more appropriately discharged by an Indigenous-controlled entity or by the state? Would it merely be an audit role to ensure process requirements are met in the event of a complaint, for example ensuring that informed consent was obtained in a timely manner from those affected? Or is there need for an active protector/regulator, additional to land councils, to address substantive matters such as whether a transaction is in the best interests of landowners? The historical record suggests that there have been few substantive disputes between land councils and their constituents, but as land rights moves to a more developmental phase in the post land claims era, the potential for such disputes increases. The point is to ensure there is an inexpensive and accessible protection mechanism for landowners. We would suggest that an external mechanism might be appropriate if it could accommodate Indigenous norms. The role of any such body might be similar to that taken by an ombudsman.

An alternative protection mechanism would allow the state to withdraw from superintending actual dealings to a position where its role was to oversee the ALRA system as a whole. As with any statute, its ongoing relevance would be kept under review and policy developed from time to time to amend the law. This would leave landowners primarily responsible for the consequences of their decisions about land use. The essence would be that Parliamentary intervention be limited to medium-term policy adjustment decided on the basis of successes and failures in policy application rather than involving micro-management of transactions by the state.

Irrespective of who evaluates proposed dealings in land, there is the question of what threshold levels should be set in 2005 for dealings requiring any remaining degrees of supervision. The length of term of dealing, bearing in mind the thresholds were last extended in 1984 after the Toohey Review, needs to be reviewed. So too does the type of dealing—whether it should involve commercial or non-commercial terms, and whether it should involve just the state or, in addition, private enterprise.

Similar scrutiny could be applied to the other Ministerial roles under the ALRA. These include power to override decisions of land trusts and land councils and power to appoint the chairperson of the ABA.

OCCUPATION OF LAND BY STATE ENTITIES

The ALRA permits indefinite ongoing 'occupation' of Aboriginal land, after it becomes Aboriginal land, by state agencies such as education or health without the owners' consent. Rental is payable only where the continuing occupation is not for a sectional 'community' purpose and then only on terms set unilaterally by the Commonwealth Minister. At a minimum, even for a statutory occupation, one would expect to see a bargaining process for setting rents with a route for disputes involving mediation, arbitration and adjudication. Leases or licences are replacement mechanisms for these occupations under the current arrangements. However, landowners cannot compel the state agency occupier to move to a lease or terminate the occupation. And while traditional owners have historically been willing to accept peppercorn (nominal) or no rents in exchange for provision of much needed services, the equity of such a practice needs to be considered, especially as service delivery often remains sub-standard.

Again Justice Woodward (1974) provides the historical context. At the time of his report there was a consensus that if land were returned to Indigenous ownership it should be subject to existing rights, including prior interests in mineral leases, and that the new owners would be entitled to all future fees payable and the right to negotiate arrangements on terms acceptable to themselves. It was assumed there would be no difficulty negotiating leases with state entities, missions or groups of Indigenous people. The consensus appeared to go further, however. In what might now be seen as an apology for the fact that many Indigenous people on their own country were in remote locations, Justice Woodward indicated that no rent should be charged for government occupation of Aboriginal land for the benefit of local communities (schools, medical facilities and the like) although rents should be charged for state occupations for broader public purposes (e.g. civil aviation facilities). For mission occupations it was accepted that nominal rental should be paid for short-term leases. Both mission and state occupation would include areas for staff accommodation.

Despite expressing considerable concern about underlying transaction costs, including negotiation costs, the report by Reeves (1998) on the ALRA does not appear to have focused on the benefits foregone by land owners through providing state agencies with rent-free land. Justice Toohey (1983), in his review of the ALRA, had also seen no reason to question the initial rationale.

Thirty years on from Justice Woodward's final report, the time has probably come for this form of uncompensated occupation to be replaced. Existing state occupation of Aboriginal land should be regularised and put on a proper legal and commercial footing through the negotiation of leases. This would counter any perception by government agencies that there is no need to have proper tenurial and commercial bases for use of Aboriginal land. The case for this regularisation would be even stronger if there were moves to make the rights and obligations of all those who occupy townships on Aboriginal land more precise. After all, if the policy of governments is to expand the footprint of the mainstream economy in order to increase economic opportunities for Indigenous landowners, then it might be incumbent on governments to put their own dealings with these communities on a normal footing. This would set an example for the standards and behaviour expected of other economic participants who may wish to do business with Aboriginal landowners.

Are there grounds for maintaining distinctions between community and broader public services in the twenty-first century? While the land is owned for the benefit of the traditional owners, services provided by the state are for the benefit of all residents, Indigenous and non-Indigenous. Traditional owners are a minority of residents in many larger townships on Indigenous land. It is not unusual for the state to pay for land use in order to deliver services. In many other circumstances the state will purchase the land it requires. That option is not available here because the land is inalienable. However, that does not mean the state should have rent-free use of land. So, while traditional owners can always maintain the prerogative not to charge rents, the option to do so should be clearly provided.

SHOULD THE NORTHERN TERRITORY GOVERNMENT BE PERMITTED TO ACQUIRE ABORIGINAL LAND COMPULSORILY?

The NIC Indigenous Land Tenure Principles propose that 'to maximise the opportunity for individuals and families to acquire and exercise a personal interest in [Aboriginal land], whether for the purposes of home ownership or business development... a mixed system of [underlying perpetual communal] freehold and [overlapping transferable individual] leasehold interests' be developed. According to the NIC, effective implementation of these principles requires that:

- the consent of the traditional owners should not be unreasonably withheld for requests for individual leasehold interests for contemporary purposes;
- involuntary measures should not be used except as a last resort and, in the event of any compulsory acquisition, strictly on the existing basis of just terms compensation (NIC 2005: 2).

If support from traditional owners was obtained, ALRA could be amended to require that traditional owners not withhold consent unreasonably to leases for, say, local housing purposes. The requirement that consent not be unreasonably withheld in such situations could be enforced, if necessary, by a court in a civil suit brought by the person seeking the lease. However, it is by no means clear whether such arrangements would be better achieved by amending ALRA or by involuntary measures such as the intervention of the state (Commonwealth or Northern Territory) exercising compulsory acquisition powers. It has not been demonstrated that the Northern Territory government cannot achieve such acquisitions by obtaining traditional owners' consent. Compulsory acquisitions in such cases would also mark another Indigenous-specific departure from the general Australian practice of compulsory acquisition of land for public purposes only.¹⁰

3. HOUSING ON ABORIGINAL LAND

The housing tenure of Indigenous households is very different to that of the general Australian population. At the time of the 2001 Census, 70 per cent of all households in Australia lived in a dwelling that was either fully owned or mortgaged. In the Northern Territory just 14.6 per cent of Indigenous households lived in a fully owned or mortgaged dwelling (Table 1). The differences between the housing tenure of Indigenous households and the general Australian population are most pronounced for Indigenous Australians living in very remote areas. In outer regional areas (for instance Darwin) 34.3 per cent of households are living in fully owned or mortgaged dwellings. In remote areas the figure is 18.1 per cent, and in very remote areas it is just 2.5 per cent. In very remote areas, 90.0 per cent of Indigenous households are in rented accommodation, as compared to 74.9 per cent in remote areas and 62.7 per cent in outer regional areas.¹¹

Australia has one of the highest rates of home ownership in the OECD. Home ownership is seen as desirable for a number of reasons including accumulation of equity that provides financial security as well as collateral for loans. It also provides secure and, over the longer term, more affordable housing. There have been suggestions that it would be desirable if Indigenous Australians in remote areas had greater levels of home ownership. One of the arguments for having a greater level of private home ownership and a viable property market is that it might result in greater private financing of dwelling construction, reducing the need for government funding.¹² Such a view, as we will demonstrate, needs further rigorous consideration. There is also a need for some assessment of the extent to which Aboriginal people aspire to own housing as a means of wealth creation.

On ALRA land the majority of dwellings are in community rental arrangements. Community rental is the product of a 30-year government effort in which between 500 and 1,000 dwellings per year have been built Australia-wide in discrete Indigenous communities at public expense, with ongoing management vested in Indigenous community organisations. Legally, these houses are fixtures and therefore owned by land trusts. The capital provided by Commonwealth and, to a lesser extent, State and Territory government agencies for these dwellings has been via grants rather than loans (or debt financing) and thus has not required

Table 1. Indigenous housing tenure by region (%), Northern Territory 2001

	Outer Regional	Remote	Very remote	Total
Fully owned	8.6	5.2	1.6	4.3
Being purchased	25.7	12.9	0.9	10.3
Being purchased under a rent/buy scheme	0.9	1.1	0.1	0.5
Rented	62.7	74.9	90.0	79.3
Being occupied rent-free	1.5	2.7	5.2	3.6
Being occupied under a life tenure scheme	0.1	0.1	0.1	0.1
Other tenure type	0.5	3.0	2.2	1.9
Total Indigenous households (no.)	2,461	2,002	4,616	9,079

Note: Households whose housing tenure type was not stated on the census form are excluded from this table.

repayment. Dwellings have generally been built on land to which Indigenous groups already have some reasonably secure title. Hence this should be referred to as 'community-owned' housing (Sanders 2005).

The inadequacy of the housing stock in remote Indigenous communities has been thoroughly documented (e.g. Jones 1994; Neutze, Sanders & Jones 2000; Northern Territory Government 2004). The shortage of suitable housing is likely to become more acute in the next two decades given projections that the Indigenous population in remote areas will increase at a much faster rate than will the general Australian population. For example, research by Taylor (2003, 2004) and Taylor and Stanley (2005) suggests that by 2023 the Thamarrurr region (around Wadeye/Port Keats) will experience an 88 per cent increase in population and have a housing shortfall of 760 houses. It is estimated that providing these houses for one small region alone will cost \$167.2 million.

While not just focused on Aboriginal-owned land, the most recently available research undertaken by the Northern Territory government (2004: 13–14) indicates that there is significant unmet need in Indigenous housing throughout Australia, but most particularly in the Northern Territory. Taking into account homelessness, overcrowding and the unacceptable condition of many dwellings, this need is quantified financially at \$806 million for the Northern Territory (out of a national estimate of need of \$2.3 billion). On top of this, there are housing related infrastructure needs in the form of sewerage, water and power that amount to an additional \$98 million in the Northern Territory (out of a national estimate of \$227 million). It is likely that, were Taylor-like population projections made as in the Thamarrurr region, these would be considerable underestimates of unmet needs. Clearly the fiscal challenge is very significant.

Mainstream housing models are difficult to transpose to these areas dominated by community rental because there is a limited mainstream economic base, the market value of the land is low, the capacity

Table 2. Economic status by region of residence, Indigenous households, Northern Territory, 2001

	Outer regional	Remote	Very remote	All
Employment rate (%)	52.0	42.7%	30.2	36.0
Average individual income (\$ p.a.)	22,268	17,040	10,216	13,460
Average household income (\$ p.a.)	43,630	39,405	42,748	42,257
Rent (\$ per week)	131	97	48	75

of Indigenous people in these areas to borrow money is limited and mainstream financial institutions are generally absent.¹³ The private housing market in many remote communities in the Northern Territory is extremely limited or non-existent. To provide some context for discussion of the feasibility of having private ownership of housing on ALRA land, some statistics on the income level and employment rates of Indigenous people in different areas of the Northern Territory are presented. According to the 2001 Census, in very remote areas the average individual income was just \$10,216 per annum and the average household income was \$42,748 (Table 2). The employment rate in very remote areas was 30.2 per cent. However, this includes CDEP employment. The mainstream employment rate is just 14.9 per cent (see Altman, Gray & Levitus 2005: 6). Another indicator of economic stress is that in remote areas of Australia, 73 per cent of Indigenous adults stated that they would be unable to raise \$2,000 within two weeks for an important expenditure.¹⁴

Given very low mainstream employment rates, low incomes and lack of savings among remote and very remote Indigenous people, commercial lenders would be unwilling to lend, or would lend only relatively small amounts, for housing finance irrespective of the nature of the land title. To illustrate this point we consider how much a commercial lender would be prepared to lend to a hypothetical household in which the adults each have the average income for very remote areas. For illustrative purposes we use a household consisting of four adults and five children. Based on the average individual income for very remote areas of the Northern Territory we assume this household has a monthly income of \$3,405.¹⁵ The home loan calculator for a major Australian bank produces a maximum amount that can be borrowed of \$160,157 over 30 years at an interest rate of 7.32 per cent. The monthly repayments are \$1,109 (including a monthly service fee of \$8). This will result in total repayments of \$395,278 (i.e. total interest charge of \$235,121).¹⁶ To put this into context, the current average household rent in remote areas is \$192 a month. Furthermore the living costs assumed in home loan calculators are largely based on those in large Australian cities. In remote areas the living costs represented by groceries, electricity, petrol and so on are much higher than in major cities (Taylor 2004).¹⁷ Armstrong (2005 section 5.2) explores the attitudes of financial sector experts to proposals that Indigenous land be individualised via leasehold or freehold titles for home loan or business development purposes. The responses she received indicate that conventional reasons for not advancing loans would likely apply to Indigenous land. Most prominent among them is that the land is not generally

Table 3. Details of property sales in selected remote townships, Northern Territory, 2004–05

Location	Population **	Distance from Darwin (km)	No. of sales 2004–5**	Median Block Area (sq m*)	Median Land Value (\$) (Unimproved Capital Value)*	Median Sale Price* (\$)	Median Unimproved Capital Value/ Area* (\$)
Pine Creek	619	248	13	800	20,000	43,000	25.00
Elliott*	419	850	7	1,390	6,000	15,000	4.32
Tennant Creek	3,286	1,000	71	1,000	5,100	78,000	5.00
Katherine	6,719	317	123	948	34,000	157,000	36.00

Sources: * Australian Valuer-General Northern Territory, pers. comm., 10 June 2005.

** 2001 Census. For Elliott data for the period 2003 to 2005 is used because of the small number of sales per year.

commercially valuable and that prospective borrowers will generally struggle to demonstrate that they have reliable income streams.

Given that the cost of building a house in a remote community is between \$225,000 and \$350,000 depending upon style and location (G. Chambers [Indigenous Housing Authority of the Northern Territory], pers. comm., 15 June 2005), it is extremely unlikely that most Indigenous people in remote and very remote communities would be able to afford to build a house. Furthermore, the rate of depreciation of the housing stock in remote areas is very high. This results from a range of factors including the large number of people living in houses and resulting overcrowding, and the regular movement of people which leads to highly variable residential composition.¹⁸ Current housing designs do not accommodate the culturally distinct ways in which houses are often used in remote communities, and they are often not suited to the climate. Finally, there are difficulties in getting access to tradespeople for maintenance.

The other major issue is that ALRA land would, in general, sell for a low price if it could be freely traded because of the remoteness of communities and the low commercial value of the land. Since ALRA land cannot be traded in the market, current prices are not available. An indication of possible values is provided by the average price paid for land acquired by the Indigenous Land Corporation in the Northern Territory, that is \$13 per hectare. This land was primarily pastoral leasehold and so could have a higher economic value than much of the land held under the ALRA, particularly in the arid zone.

Another indicator of the possible value of the land and the depth of the property market can be obtained from house sales in some of the smaller and more remote townships of the Northern Territory (not on ALRA or native title land). The average unimproved capital values for houses sold in the financial year 2004–05 in three locations considered ranged from \$5 per square metre in Tennant Creek to \$25 per square metre in Pine Creek and \$36 per square metre in Katherine (Table 3).

A clear message from the above analysis is that, unless income levels increase dramatically in remote Indigenous communities, a push to private ownership will not result in private financing of the construction of a significant number of new dwellings. This is primarily because the cost of constructing housing is far higher than the likely value of the land, even if individuated and privatised. Hence land would be of insufficient value to use as mortgage collateral even if the commercial banking sector was disposed to provide loans on Indigenous leasehold land.

The real policy challenge over the next few decades is how to pay for the housing requirements of remote Indigenous communities on, and off, Indigenous land. The discussion above demonstrates why we think it is unlikely that private financing by individuals (or community organisations) will result in substantial numbers of new dwellings being constructed, unless there are substantial increases in the incomes of Indigenous people in remote communities. However, it has to be acknowledged that there would be a relatively small number of Indigenous people who, if they were granted secure rights in land acceptable to lending institutions (a licence to occupy or a long-term lease), would have sufficient incomes to borrow money in order to purchase, renovate or construct a house if they so desired. Given this situation, Indigenous communities and governments will need to think innovatively and hard about alternative models.

One possibility is for governments (Territory or Australian) to continue to fund the construction and maintenance of the required houses. This could occur through constructing publicly-owned housing stock on land leased from traditional Aboriginal landowners for this purpose.

Another possibility is for governments to arrange for the construction of dwellings and then transfer ownership to Indigenous organisations representing landowners. Landowners might in turn lease these assets as a whole to a trading subsidiary that has the day-to-day operational responsibility for tenancing and maintaining the dwellings. Loans, grants or a mixture of both could fund this approach. Alternatively, the trading organisation might take a lease of land and take full responsibility for all housing constructed on it. This though has potential pitfalls, as demonstrated in north Queensland with Katter leases where housing stock in poor condition was transferred to individuals on perpetual leases without sufficient consideration of funding maintenance, repairs or replacement dwellings (see Moran et al. 2002 and the similar example from Minginui, New Zealand, below).

A further variant is for governments to provide or facilitate funding to Indigenous organisations to construct and manage dwellings, as occurred in the 1970s with Aboriginal Housing Associations (see Sanders 2000). Such a project could be undertaken in partnership with an aid organisation like Habitat for Humanity (see section 5 on New Zealand). Again, the funding might be a mix of grants and loans. Facilitated loan funding might come from private-sector financial institutions to the housing entity. This could provide opportunity for landowners' housing organisations to form meaningful relationships with financial institutions. At the household level, community residents might enter renewed housing relationships with these housing organisations rather than transact directly with the ultimate source of the finance. This might be one way of addressing concerns about how Indigenous people might offer adequate security for borrowings. If

the landowners' housing organisation has a lease of the land it might pledge this as security. It should be noted these possibilities are not certain to attract support from lending institutions given likely practical limitations on recovery methods for defaulted loans. In the USA, government guarantees have a place in the architecture of lending for housing development on Indigenous land. Their appropriateness to Australian conditions remains to be explored. There is also the issue of whether rent collected by the housing entity would be sufficient to service any loans.

Assuming appropriate governance of a local housing entity and access to appropriate expertise, an advantage of households entering housing relationships with a local organisation representing landowners is that local circumstances might be more readily accommodated. Many residents might be tenants of such an organisation. However, others may be in a position to purchase a dwelling. Their contractual relationship would be with the local organisation. A variation of a rent-to-buy scheme, that takes account of the accumulating equity stake the borrower has in the asset, might be appropriate. The borrowers would require occupancy rights over their dwelling and this could be obtained through a licence to occupy or a sub-lease. In the event of any default the obligations would be owed to an organisation representing the landowners rather than an outside entity, avoiding the possible problem of outsiders taking control of inalienable Indigenous land. Defaulters might revert to a temporary or permanent rental relationship, with appropriate protection of their accumulated equity stake.

The question of who would purchase such an interest in a dwelling is important. It may be an unrealistic goal for many people for some time to come and not just because of income levels. Some mainstream borrowers are required to have life insurance to cover their mortgage obligations. Actuarial measures and demographic indicators might make this an unrealistically expensive option for would-be borrowers where the term of a loan might exceed the borrower's life expectancy, given the lower than average life-expectancy of Indigenous people.¹⁹ It might also be important to explore whether the borrowers might more appropriately be members of a (close) family group involving, say, two generations rather than an individual or couple, so that the borrowing group obtains as much flexibility as possible in meeting its debt obligations in light of changing employment and other life circumstances. Intuitively, it seems that, in the short term at least, local housing organisations might have more chance of tailoring loans to these lifestyle considerations than would mainstream financial institutions.

In a pure public funding model governments would meet maintenance expenses from rents, but this cannot be assumed for the mixed or private models. Quantitative modelling work on different funding options is not currently available to better inform policy makers of the financial viability of the alternatives to publicly funded housing stock. The question is whether housing costs can be lowered or incomes raised sufficiently to put the housing needs of these communities on a sustainable footing. By sustainable we mean that a housing organisation's income from all sources covers the replacement costs of the housing stock it is responsible for. If a sustainable future can be planned, this might make one-off costs associated with transition from the current arrangements more palatable for governments. However, given the levels of employment and income in the short to medium term (and possibly the long term) it is hard to envisage a situation, whatever model

is used, that does not require substantial levels of government funding. It is unlikely, in our view, that the current rents would be sufficient to fund more than a modest proportion of the costs of the construction of replacement dwellings. The current levels of rents being collected (an average of \$48 per week per household in remote areas of the Northern Territory) are low by Australian standards. However, this may be a fair level of rental given the low quality of much of the housing stock (Northern Territory Government 2004). Looking forward, and with hopes for better quality and more appropriate dwellings, it will be important to explore carefully how much rent households can afford to pay.²⁰

This discussion of possible future options has not addressed in any detail what should be done to clarify rights and obligations over current housing stock. On Indigenous land in remote Northern Territory communities there may be many buildings that were constructed since the land was returned to Indigenous ownership and that were paid for with government money without a licence to occupy or lease of land first being obtained, the occupation of which does not constitute an ongoing occupation by a state agency. Complex legal issues would arise should there be disputes about the use of such buildings. There is a level of uncertainty, and in some cases current occupants of buildings (particularly state agencies which have never sought a lease or licence) may find they have no right of occupancy.

4. ECONOMIC DEVELOPMENT

This section addresses three key issues. First, Indigenous Australians have the right to define their own economic development objectives and to be cautious in adapting ideas from elsewhere for use in their lives and on their land. Second, there are many structural barriers to undertaking economic development on ALRA land that are of greater relevance than the challenges posed by the fact that the land is communally owned. Changing the ALRA will not bring the land closer to the markets, nor will it change its use profile. This leads to the third issue: although access to capital for economic development could be improved, the extent of present shortfalls is not a first-order critical issue, given the other challenges. However, *existing* sources of funds could be used more innovatively to allow Indigenous people greater opportunity to finance existing economic development options.

THE IMPORTANCE OF INDIGENOUS VIEWS ABOUT ECONOMIC DEVELOPMENT

A perspective that has some influence in current policy debates is that Indigenous people do, or should, aspire to 'mainstream' economic development. In reality, Indigenous people in remote areas of Australia have diverse aspirations and views about economic development for themselves, their families and communities. These range from a desire for full engagement with the mainstream market, for example in full-time jobs, to significant engagement in the customary sector, as in the harvesting of wildlife (Altman 2004; Rowse 2002). Despite the fact that there are often substantial differences between the aspirations of Indigenous people in remote communities and those of the majority of Australians, with a few notable exceptions Indigenous views about economic development receive relatively little attention in national policy debates. Indigenous

aspirations in remote communities regularly involve a smaller role for the market and a bigger role for the customary economy (something which is almost non-existent for non-Indigenous people in many areas of Australia) and by default a greater role for income support payments (including from the Community Development Employment Program (CDEP)). The extent to which Indigenous people living on Indigenous land should pursue mainstream economic development objectives is a contested matter. It is important that Indigenous views and aspirations, especially from very remote regions, are heard and taken seriously by those interested in Indigenous economic development.

LAND TITLE AND ECONOMIC DEVELOPMENT

A widely accepted position among economists about relationships between land tenure, economic development and environmental sustainability is that secure, individualised land tenure is essential (e.g. Demetz 1967; Duncan 2003). Duncan (2003) and Hughes and Warin (2005) have argued specifically that secure, individualised tenure is important if rates of economic development on Indigenous-owned land in Australia are to be maximised.

Duncan (2003: 314) provides the following definition of secure, individualised tenure:

individuals hold the rights to use the land for whatever purposes they wish, except for illegal activities and activities that attenuate the rights held by others ... The title may be freehold or it may be leasehold; but to give leaseholders the incentive to develop the land to its full potential the lease should be sufficiently long.

Duncan (2003: 314) identifies three important theoretical consequences of having such property rights:

- individuals who have secure property rights over land will be more likely to take care of it since they will be keen to see it increase in value in order to generate a higher future income stream;
- loans for investment and consumption purposes can be raised by mortgaging the land; and
- the holder of the right to the land knows that they will be able to receive the benefit of any investments they make in the land.

The idea that only individual title, rather than communal title, maximises economic development on Indigenous land in Australia is not necessarily valid just because existing rates of development on ALRA land are considered unsatisfactory. However, it should not be overlooked that, in the Northern Territory, much large scale economic development, such as long-life mines and major projects like railways, already occur to a greater degree on Aboriginal land than off it. And the blanket assumption that what works in urban and regional Australia can be readily transported to remote Indigenous Australia needs to be carefully considered on an empirical basis, case by case. Conversely, closer examination of both the nature of land and resources available and the social structure and commercial capacities of land-owning groups would provide more realistic information about production possibilities and comparative advantage—the very remoteness of much Aboriginal land limits its capacity for conventional economic development.

With these provisos in mind, it is still worth examining Duncan's theoretical consequences. It appears that the first and third 'benefit' of having secure, individualised property rights are also achievable in the context of communal property rights vested in traditional owners of ALRA land. The fact that there is communal ownership of land does *not* lead to unconstrained use of the resource and the associated 'tragedy of the commons' (Ostrom 2003), that is, resource depletion. Indeed there is growing evidence that the Indigenous estate in remote regions is amongst the most environmentally intact in Australia (Altman 2003; Australian State of the Environment Committee 2001). Balanced analysis of the costs of communal land ownership needs to consider the costs of environmental damage associated with private land ownership and commercial pressures (see Quiggin 2001 with respect to the Murray–Darling Basin). And there is ample evidence that the cost of repairing environmental damage is several factors higher than the cost of prevention. There is a growing view that communal ownership of land and inalienability is associated with intergenerational sustainability (Altman & Whitehead 2003; Whitehead, Russell-Smith & Woinarski 2005).

The situation of townships on remote ALRA lands is more complex. This is due in no small part to the ill-defined rights and responsibilities over township assets of landowners, state entities and residents, as highlighted in the preceding two sections. Again, these problems do not mandate individualising rights to land as the most appropriate solution.

In terms of certainty of receiving any benefits from investments made in the land, rights holders in ALRA land should receive them. The key thing to recognise is that acting as a group who (by kinship) are involuntarily in association is a more complex undertaking than acting singly or in voluntary association with others (e.g. through associations, partnerships and companies). While it remains a cultural imperative to act collectively in much economic endeavour, less value will be placed in such kin-based societies on individuals 'striking out' from the group for personal business ventures. Of course such activities are not prohibited, but where a person wants to make use of communal property for individual business purposes they will have to obtain the informed consent of the group. But the complexity of working in a group does not make such activity invalid. Indeed, since communal decision-making is the culturally legitimate form of decision-making, compliance adds a degree of certainty to any agreements made.

In a communal decision-making process, benefits will usually be distributed among owners according to their own systems. Initiatives to encourage individual incentive to drive the establishment of a business, take full responsibility and put in the long-term effort required to establish and make a business profitable can work with, rather than just ignore, these sociocultural dynamics.

It is worth recalling the benefits of owning ALRA land. The property rights that Indigenous people have in land can generate an economic return in a number of ways.

- The right to harvest resources allows people to hunt and gather for personal consumption (non-market production). This generates economic and health benefits. Altman (1987, 2003) has documented the continuing significance of the customary economy in Arnhem Land in imputed income terms, while more recently Burgess et al. (2005) have summarised the social health benefits of living on country.
- The right to harvest resources means that businesses can be set up which sell produce such as bush foods from the customary sector in local and regional markets, especially when commercial licences for live species sales (e.g. crocodile hatchlings) are concurrently procured.
- The right to exclude others from the land means that a fee can be charged to allow entry onto Aboriginal-owned land for recreational purposes. This currently occurs through systems of permits which are required by non-community members to enter Aboriginal land for a range of purposes including recreation, tourism, fishing, etc.
- Land can be leased to third parties for a range of purposes such as tourism, safari hunting and recreational fishing lodges and infrastructure.
- The need to obtain traditional owner consent to mineral exploration means that this lever can be used to negotiate payments in return for mining that supplement the transfer of mining royalty equivalents to the ABA, as well as for employment and business contracts at mine sites.

Indigenous people on ALRA land are already generating economic benefits from their property rights over their land in all of these ways. The use and 'sale' of a number of these rights can be used to raise finance, which in turn can be applied to a range of purposes including consumption and investment. The central question is whether communal ownership is the key to limits on the economic return that landowners obtain. Further, if economic returns are limited by communal ownership, it is necessary to assess the order of magnitude in increases in economic returns if individualisation of tenure were to occur. Potential social and environmental costs also need to be taken into account. These are difficult questions to address, and the answers are not self-evidently in favour of individualisation.

COMMERCIAL LOANS AND LAND

So what of Duncan's second benefit, loans via mortgaging the land? There is certainly some validity to the argument that communal ownership will make it more difficult for Indigenous people to obtain finance for business purposes from institutions focused mainly on doing business with the 'individualised economy'. Communal ownership of land has not prevented Indigenous people borrowing money. But while the property rights held by Indigenous people in their ALRA land can be used to raise capital, undertake joint ventures and achieve economic benefit in a number of ways, the legal and traditional customary processes required can be very complex and time consuming. They can also be more costly for both owners and business partners

than if dealing with a single owner (or holder of the property right). This complexity might mean that the nature of investments made is different from elsewhere. These processes should be examined periodically to see whether change is warranted. For example, we suggested in section 2 above that the Minister's consent role is a complicating factor that is no longer justifiable.

Investors may also take the view that business prospects are simply brighter elsewhere because resolving any subsequent disagreements about the operation of a venture may be more difficult and costly, even though the group of owners is represented by its agent, the land council. There are many other investment opportunities available within and beyond Australia that are based on individualised rights that are well understood by prospective investors.

This is likely to reduce the number of people willing to undertake major investments on ALRA land, either as a joint venture or a sole investor. It may also mean that some business opportunities which would be profitable by conventional commercial criteria on individually owned land will not be considered on ALRA land. Finally it may skew the type of investment towards large-scale high-value low-risk investments or, for higher risk investments, higher returns to reward the greater risk taken (for a further discussion of these issues, see Altman & Dillon 2005). Such a pattern of investment is also likely to be in part a result of the nature of the investment opportunities in the context of low population density, low average income and the low agricultural value of the land. There is some evidence that this is indeed the pattern of investment that is occurring, with a relatively large number of mines being established on Aboriginal land and the leasing of land for the building of the Alice Springs to Darwin Railway.

Communal ownership undoubtedly influences the nature of economic activity on ALRA land. However, as we have noted, there are features of ALRA land, of remote Indigenous communities, and of the economic activities they undertake that make them fundamentally different from other Australian and many international, economic development contexts. These activities and distinctive features are probably more important for the analysis of economic development prospects, at least in the short to medium term, than the fact that the land is communally owned. It should also be acknowledged that low levels of education, poor health and relatively high rates of substance abuse in remote communities limit economic development prospects—these problems need to be addressed before development, however defined, can be enhanced. In short, there are many barriers, other than communal ownership of land, to Indigenous economic development prospects.

Environmental issues are clearly crucial from a national perspective. Indigenous participation in the customary sector and in natural and cultural resource management on the Indigenous estate is generating considerable benefits for particular regions and the nation as a whole in biodiversity conservation, fire abatement and in control of weeds and feral animals (see Altman 2003; Altman & Cochrane 2005; Altman & Whitehead 2003; Northern Land Council 2004; Whitehead, Russell-Smith & Woinarski 2005). Indigenous people are participating in bio-security, coastal surveillance, land and sea management activities (Northern Land Council 2004). There is a business case for government support of these activities. It has been estimated

that expenditure on natural resource management in Kakadu National Park is far higher than in adjacent Arnhem Land, and this might represent a significant under-investment in Aboriginal land management. Equitable investment in natural resource management is one way in which employment can be generated and regional development stimulated (Altman & Dillon 2005). The same case can be made with respect to Indigenous sea rangers, coastal fisheries protection, and coastal surveillance.

While significant investment on Aboriginal-owned land might be difficult to attract, it is ironic that 'Indigenous' interests currently hold significant amounts of capital that could be more actively utilised to stimulate economic development. These include holdings by Indigenous Business Australia and the Indigenous Land Corporation for Australia-wide use, and by the ABA for use in the Northern Territory only (Altman 2002). While space precludes a full analysis here of all Indigenous financial assets, the ABA is a significant source of potential capital and/or collateral for borrowings. It warrants closer analysis, because it could generate finance for Indigenous development predicated on land rights.

THE ABA AS A SOURCE OF CAPITAL

The Office of Indigenous Policy Coordination currently administers the ABA. The net accumulated assets of the ABA of an estimated \$100 million are ultimately controlled by the Minister for Immigration, Multicultural and Indigenous Affairs.

The payment of mining royalty equivalents (MREs) to the ABA engenders an ongoing debate. From an Aboriginal perspective, they are Aboriginal moneys generated by mining activity on Aboriginal-owned land. From a bureaucratic perspective they are public moneys because they are paid from consolidated revenue. There is a clear tension between these two perspectives. Aboriginal people want control of the ABA and have clearly stated this since a review of the Aboriginals Benefit Trust Account in 1984 (Altman 1984).

The philosophical underpinning for paying MREs is clear—Justice Woodward in 1974 (and Paul Hasluck before him in 1952, see Altman 1983) believed that mining royalties raised on Aboriginal land should constitute resources with which Aboriginal people can commit to economic advancement. However, these resources should also be used in a manner consistent with forms of economic development chosen by Aboriginal people themselves, independent of government controls and bureaucratic strictures. There is no reason to assume that these underpinnings have lost their validity. Practically, however, the control of dispersal of ABA funds has increasingly come under Ministerial control.

Of particular concern is the decision that the equity of the ABA be maintained at an arbitrary minimum of \$46 million as a buffer to guard against falls in revenue. This decision is based on a finding by the Auditor-General in 2003 that '[t]he outlook for natural resource development in the Northern Territory is neither certain, nor strong, leading to uncertainty with regard to royalty equivalents' (cited in ABA 2003: 19). In 2005 this finding would seem to be at odds with the strong performance of the mining sector and the high number of exploration agreements on Aboriginal land over the last few years (ABA 2002, 2003, 2004). Similarly, the ABA has maintained consistent incomes of over \$50 million per annum since 2002. Further to

this, payments to or for the benefit of Aboriginal people in the Northern Territory were set at only \$5 million per year in 2002–03 and 2003–04, and even these payments were subject to the approval of the Minister on advice of the ABA advisory committee. In addition, in 2003 the Minister also wrote to land councils advising that, following a thorough investigation of the issues, 'he is of the view that he does have the power to make grants with conditions' (ABA 2003: 11). The realities of this were evident during the 2004 election campaign, when the Federal government proposed accessing the ABA to fund election promises made in the Northern Territory (Liberal Party of Australia 2004).

When examining the breakdown of payments under the different sections of the ABA it is evident that grants earmarked to or for the benefit of Aboriginals living in the Northern Territory are extremely low (averaging well below \$5 million per annum) when considered against a \$100 million accumulated surplus. Also, it becomes evident that significant amounts of the ABA's income are allocated to meet its own administrative expenses, a practice that only began in the late 1990s. The relationship between direct grants and the cost of administering them seems extraordinarily high (see ABA 2002, 2003, 2004). Put plainly, administrative expenses have run at over 100 per cent of distributions in some years.

In terms of economic development, the status of the ABA raises a number of important issues. Is it appropriate that in 2005 the Minister has final approval over the expenditure of monies derived from Indigenous land that are specifically designated to be spent for the benefit of Aboriginal people? How might alternative or Indigenous views of development be given credence under such an arrangement? Could the ABA's asset base of around \$100 million be better utilised to raise capital or to underwrite borrowings for Indigenous communities for immediate needs such as enterprise development, infrastructure or customary land management? Is making the current payments to and through Land Councils enabling maximum benefits for Indigenous communities?

While the ABA represents one possibility for stimulating economic development in remote communities, it will not necessarily provide all the capital that Indigenous development might require. The complexities of Indigenous circumstances, competing concepts of how or for whom economic development occurs, and the legacy of entrenched disadvantage all mean additional sources will be needed. Of paramount importance in the current policy debate is that a diversity of Indigenous perspectives on economic development be heard and all possible avenues for appropriate and sustainable development on Aboriginal land be explored, lest the mistakes of the past be repeated. Equally, Indigenous interests and capital holdings must be better aligned and more independent of government control in order to maximise capacity to stimulate economic development in ways amenable to Indigenous aspirations in all their diversity.

5. NEW ZEALAND EXPERIENCE OF HOUSING ON COMMUNAL LAND OWNED BY MĀORI

Mechanisms used in New Zealand for housing on Māori-owned communal land offer both possibilities and warnings for an Australian audience. The warnings relate to consequences of individualising land interests such as fragmentation of land and ownership rights through succession and partition. The possibilities relate to state lending to assist with house finance, cooperative endeavours to lower housing costs to communities, and separating out occupation rights for housing purposes from title to the land.

MĀORI LAND

The communal 'Māori land' discussed here is the statutory category of Māori freehold land.²¹ Māori freehold land is held and managed under *Te Ture Whenua Māori/Māori Land Act 1993* ('the 1993 Act').²² From 1865, ownership of the majority of Māori land has been determined over time by the Māori Land Court. Land blocks were brought before the Court, or an equivalent title investigation process, to determine who had ownership rights. In simple terms, the group of confirmed owners was awarded a title to enable them to deal with the land. Ownership is divided by shareholdings or held in common. In this sense, most Māori land, even where it has multiple owners, has already been individualised.

This title determination process has attracted much criticism. It is now generally accepted that until recently the system was underweight on Māori legal norms about community rights in land, and overweight on granting rights to individuals to divide and deal with their interests separately from the remaining community of owners. Many commentators consider that enabling Māori to deal in individual interests in land without reference to the community of owners undermined the customary bases for Māori land tenure—which included group rights and group decision-making—and that this contributed to excessive sales of Māori land to outsiders in a way that was injurious to the long-term interests of those communities (e.g. Ward 1999). There is now greater emphasis on retention of Māori land for the benefit of its owners and tribal communities.

Of the land retained in Māori ownership, succession over time to the legal interests of deceased owners has led to proliferation of owners for many blocks.²³ Along with the swelling of ownership lists, the sheer number of land parcels also grew through the subdivision of Māori land. While this reflected communities of owners splitting their land interests, it also led in many cases to uneconomic land holdings.

Proliferation of owners and excessive subdivision has more recently led to moves to encourage extended family groups and tribal groups to vest individual land holdings in trustees for the benefit of the group. This lowers administrative costs and avoids the need for individual successions.

Despite the availability of these remedies the administrative state of Māori land titles continues to hinder utilisation and development by many landowners. Māori land today comprises about 1.5 million hectares or 6 per cent of New Zealand's total land area. However, the ownership of that land is divided into more

than 2.3 million interests. This is said to be comparable to the total number of ownership interests for the remaining 94 per cent of New Zealand's land area. The number of owners for blocks varies, with 10 per cent of blocks being vested in a single owner (possibly representative) through to 10 per cent with an average of 425 owners each. The overall average is 62 owners per title (New Zealand Controller and Auditor-General 2004).

With this background as context we can move to describe a range of situations encountered by people establishing or renewing housing on Māori land.

FINANCE AND SECURITY

Having sufficient regular income to be able to repay a loan is a key issue affecting many who want to occupy multiply-owned Māori land for housing purposes. State-owned lending institutions provide housing loans to low-income earners who can demonstrate ability to repay the loan.²⁴

Housing New Zealand Corporation (HNZC) lending for housing on multiply-owned Māori land is secured against the building rather than the land. A 15 per cent deposit is required. Such loans are available for houses that will be placed near road access in the mainland North or South Islands. This requirement is so that the house can be removed as a final measure in the event of loan default. It is a requirement that the house be easily relocatable (in general these are single storey pile foundation homes).

HNZC also has a low-deposit (3%) loan programme for low and modest income earners wanting to buy or build in rural and regional areas. This low deposit scheme connects with a self-build program, targeted at Māori, called Kapa Hanga Kainga - Group Self Build. This is for people who want to build their homes as part of an extended family (*whānau*) group. Grants to help with architects and other project management costs are available under this scheme.²⁵

RIGHTS TO USE LAND FOR HOUSING

Land used for housing might be owned by a narrow or wider group of owners. An extended family group that owns a parcel of Māori land outright, is prepared to operate as a single economic unit for housing purposes, and wishes to build or renovate a house or houses on the land is an example of the former. Assuming the owners have the means to repay a loan, the land could be mortgaged to a lender prepared to make loans against Māori freehold land.²⁶

The situation becomes more complex where ownership is more widely held and only some of the owners live on the land. Others may live in regional or urban centres to access work and recreational opportunities. The land may be incapable of housing all owners because of size or topographical limits. Broadly, owners of land in this category have at least three options: partition, leases or occupation orders.

The Māori Land Court can order the partition of Māori freehold land to provide an owner with a dwelling site, although this is not encouraged. The test for any partition is that the Court must be satisfied the partition is necessary for the effective operation, development and utilisation of the land.

Owners may lease the whole or a portion of a block to some of their number for housing purposes. The lease may or may not be on market rental terms. Where the land is Māori freehold land and the lease is for three years or longer the Registrar of the Māori Land Court must note the lease under the 1993 Act. Long-term leases of more than 52 years (including renewals) require agreement from half the owners (undivided interests where the land is held in common) or 50 per cent of the shareholders (defined interests) as well as approval from the Māori Land Court.

The Māori Land Court may make occupation orders in favour of owners of land for a set term or to terminate on an event, such as death. Orders may also be made in favour of persons entitled to succeed as owners to the land. An occupation order entitles a landowner to exclusive use of part or all of the land as a dwelling site. A number of orders may be made for different areas in one land title. Before making an occupation order the Māori Land Court must have regard to the best overall use and development of the land, the effect of the proposal on the owners' interests, and the opinions of the owners as a whole. The Court must be satisfied that the owners have had sufficient notice of the proposal and time to discuss it; that there is a sufficient degree of support from the owners; that the owners understand the interest may pass by succession; and that the applicant's interest in the block is sufficient to justify an occupation order.

Under this arrangement, the community of owners remains intact and there is no further fragmentation of land titles as no partition takes place. No survey is required. The applicant provides the court with a sketch plan of the proposed house site or an existing dwelling.

The occupier will be liable for local authority rates for the area of the parent block occupied. The occupier will also have to meet other costs such as establishing any connections to power and telephone. Rental money may or may not be payable by the occupant to the owners, either once or periodically for the right to occupy the land. The terms of the order will address whether ownership of the building will pass to the landowners at the conclusion of the occupation order, with or without compensation being payable to the holder of the order or their estate.

If Māori freehold land is vested in trustees or is owned by a Māori Incorporation the consent of the trustees or committee of management must be obtained for any application for an occupation order. Additionally, the terms of trust may authorise the trustees to grant directly licences to beneficiaries to occupy portions of the land for a dwelling. Such a licence is negotiated between the trustees and the applicant and is noted by the Registrar of the Māori Land Court. Such a licence to occupy has the same effect as an occupation order.

Two examples are given here to illustrate practical challenges connected with providing housing on Māori land.

TORERE: AN EXAMPLE OF A PARTNERSHIP

Habitat for Humanity is an NGO founded in 1976 to eliminate poverty in housing throughout the world. As an organisation, it works in partnership with local communities to address housing problems. It claims to complete a new home somewhere in the world every 26 minutes. Its New Zealand operations are with a range of communities, including Māori tribal groups.²⁷

In 1999 the Ngāi Tai *iwi* (tribe) formed a partnership with Habitat for Humanity to eradicate substandard housing on land owned by tribal members at Torere in the Eastern Bay of Plenty region of the North Island of New Zealand. It is known as Te Hinahina o Te Rangimarie Housing Project. Habitat treated this as a pilot project for attracting government funding to joint venture with *iwi* around New Zealand.

The core problem to address was that 20 families were living in sub-standard housing. Ngai Tai and Habitat presented a proposal to government that would see housing funded by split contributions from the *iwi* (\$10,000 per house), Habitat (\$20,000 per house) and the State (\$40,000 per house). In 2000 the New Zealand government agreed to provide an interest free loan of up to \$800,000 in support of the project, through HNZC.

Between September 2000 and October 2003, 21 houses were built to house more than 55 *iwi* members. House recipients contributed 500 hours of sweat equity in labour towards their own and other families' houses. Under the system the occupying family purchases the house through a no-interest, no profit mortgage. Using the skills obtained from the project the tribe can continue to build homes for its members.

MINGINUI: AN EXAMPLE OF A TRIBAL VILLAGE

Minginui is a former state-forestry village in the tribal area of Ngāti Whare. It is remote by New Zealand standards, being located in an inland valley away from major roads. It is surrounded by commercial plantation and indigenous protection forest. By 1987 the state was no longer interested in owning this village as a result of structural economic reforms that began in 1984. At this point the village comprised a number of houses on fenced allotments and community infrastructure. All the land was owned by the state and administered by the New Zealand Forest Service. Private owners of a mill near the village, Carter Holt Harvey, owned a number of the houses on parts of the land that were leased from the state.

The government decided to return ownership of the whole village to Ngāti Whare at no cost. This was achieved by 1988. By this point the 38 houses and accompanying leases owned by Carter Holt Harvey had been transferred to their occupiers as part of a redundancy package when the mill closed as part of the economic restructuring then occurring.

By agreeing to take ownership of the village, Ngāti Whare were committing to a situation requiring significant reinvestment to protect and grow this asset base. By the time of the hand back the Forest Service village assets were not well maintained. This bears some similarities to the Katter lease system mentioned earlier. Both the sewerage and water systems were at the end of their useful economic lives. An August

1987 study rated 50 of 84 houses surveyed as substandard.²⁸ The local municipal authority had earlier itself refused to take responsibility for the village unless the infrastructure was first repaired.

The Crown returned the land to the tribe in one title. Title was vested by the Māori Land Court in an ancestor of the *iwi* in trust.²⁹ The trustee administrators leased the land to a trading company. The trading company operates the village.

Around the time of the return around 94 per cent of villagers were of Māori descent. About 80 per cent identified as *tangata whenua* (people belonging to the traditional tribal groups of that area). The villagers then comprised mostly skilled forestry workers and their families. At this point there was very little regular work available. Most villagers were made redundant by the economic restructuring process between 1984 and 1987.

Occupants of houses had a new landlord after the return, the trading/administrative arm of the Ngāti Whare tribe. It was intended the tribal trust would sell the house buildings to their occupants to generate capital to fund infrastructure needs in addition to the modest weekly levy occupiers pay to run the village. Over time, the occupants' rights were formalised by the sale of houses and granting of occupation licences for the house plots by the tribal administrators. The levy paid by occupants is the annual income source for maintaining the village.

The community numbers around 200 people now, down from an estimated 500 in its vibrant heyday as a timber village. Unemployment remains entrenched given the isolation of residents from work opportunities. Alternatives such as art or eco-tourism have yet to become established.

Overall, the evaluation from a study of this village (Hutton 2004) is that despite good faith and good intentions the administration of the village has been beset by a lack of capacity and money to operate such an asset. Basic repairs to houses have been financed privately or through HNZC's rural financing programmes. The infrastructure continues to deteriorate with the only significant upgrade since 1986 being the resealing of the main road. There are issues about the establishment of any market to facilitate the transfer of houses and occupation licences given restrictive conditions requiring consent of the Ngāti Whare trading enterprise to transfers. This situation plays out the basic tension in striking a balance between the rights of individuals and those held by the group. However, balanced against these difficulties for Ngāti Whare must be a sense of pride at being one of very few communal owners of a village in New Zealand.

6. SUMMARY AND RECOMMENDATIONS

In 2005 there is a new approach in Indigenous affairs administration in Australia. Alongside this new approach, the issues of land rights, native title and development have resurfaced. While these issues have a national focus from the perspective of the government's National Indigenous Council (NIC 2005), comments by the Centre for Independent Studies (Hughes & Warin 2005) and by the Prime Minister (Howard 2005), have focused to a greater extent on remote communities and the Northern Territory.

ALRA represents the apex of Indigenous land rights law in Australia. It is a Commonwealth statute that has been in place for nearly 30 years. Aboriginal land covers nearly 50 per cent of the Northern Territory and over 70 per cent of the Northern Territory Aboriginal population lives on Aboriginal-owned land. Given these features, CAEPR was commissioned to produce a report for Oxfam Australia, who sought some evidence-based research on issues associated with potential land rights reform.

This is not the first time that ALRA has come under scrutiny since the election of the Howard government in 1996. In 1998, a far-reaching review by Reeves (1998) found that land rights had failed to deliver development. However the recommendations of this review that called for sweeping reforms of ALRA have not been actioned to date, perhaps because they were heavily criticised by a Parliamentary Inquiry (Commonwealth of Australia 1999) and by academics (see the essays in Altman, Morphy & Rowse 1999). Those matters do not need to be revisited here because the issue of land rights reform is now being approached from a different direction, with a focus on shortcomings in ALRA in delivering finance for housing and development on Aboriginal land held under inalienable communal title. What is importantly different in 2005 is that with the demise of ATSIC, a policy formation and service delivery organisation that was directly elected by Indigenous Australians, this issue is left to be articulated by the government's own appointed NIC and by mainstream bureaucratic agencies. Another relevant factor is that from 1 July 2005 the Australian government has a Senate majority that could see reform of ALRA that was previously unlikely, as the wider political support for reforms was absent.

THE ALRA

With these two broad issues (housing and development) in mind, this paper examines the ALRA land use provisions. It has not looked in detail at Part IV of ALRA (relating to mining).

Examination of the ALRA shows:

- that many of the objectives for enhanced development and improvements to housing can be achieved under the existing law or with very minor modifications to it;
- that the scope of Ministerial powers remaining nearly 30 years after the ALRA was passed makes dealings in land complex from a regulatory point of view and restricts the freedoms of owners, through their agents, to control development and to take responsibility for their actions. In the non-mining context at least, these powers appear excessive and burdensome today;
- that some state agencies maintain a privileged position in occupying Aboriginal land without payment. This practice is at odds with ideas of extending commercial business practice to Indigenous Australia; and,
- that no case for increased compulsory acquisition powers over Aboriginal land has yet been made out.

We recommend:

- that there be more in-depth exploration with land councils and state agencies of what is legally possible at present with leases and sub-leases;
- that Ministerial controls over non-mining uses of Aboriginal land be wound back, and that there be related in-depth examination with land councils and state agencies of appropriate replacement accountability mechanisms; and
- that Australian and Northern Territory government dealings with traditional owners of Aboriginal townships be placed on a more business-like footing, including by the payment of fair rents for agency occupied land.

HOUSING

Examining housing issues, especially in townships on Aboriginal land, the key issue is that there is enormous unmet need. In urban and regional Australia this would be addressed by state agencies responsible for public housing. For Aboriginal communities there has been a history of under-provision in a context of rapid population growth and relative population stability, with over 70 per cent of the Northern Territory Indigenous population living on Aboriginal land. In other words, populations are growing and are not moving away.

Examination of the housing situation in the Northern Territory and on Māori land in New Zealand shows:

- that historically there has been a particular form of housing provision on Aboriginal land, based on grants-funding of community housing. This has resulted in very low rates of home ownership that are now regarded as problematic;
- that there is considerable evidence that state investment in housing and infrastructure has been inadequate and will need to increase dramatically to deal with backlogs and high population growth;
- that individualising title or even occupancy rights will not result in a sudden inflow of commercial finance for housing due to the lending requirements of commercial banks, the relative poverty of Aboriginal people living on Aboriginal land, and the relatively high costs of housing; and,
- that the costs of individualising Māori land in New Zealand, including fragmentation to uneconomic parcels and successions, should be kept in mind alongside more recent and positive developments to encourage housing on multiply-owned land via licences to occupy portions of the land.

We recommend:

- reform that will lead to rapid enhanced investment in community housing to meet the unmet and forecast needs identified by the Northern Territory government;
- examination of options to enhance overall household income in Aboriginal communities as a necessary precursor to improved and sustainable housing either in community or private ownership; and
- exploration with land councils and state agencies of structural options for the enhanced provision of community housing and public and private housing that includes making the accountabilities of landowners and residents better articulated and better understood. Such options could include:
 - community housing involving partnerships, or significant financial relationships, with state agencies and/or the private sector;
 - public housing on land leased from traditional owners to allow it to be debt financed by government; and
 - private housing via leases and sub-leases where household income levels make this viable and where it is sought.

ECONOMIC DEVELOPMENT

Examining economic development on Aboriginal land requires adjusting mainstream assumptions in order to confront the challenges of remoteness and the low commercial value of much of this land, and to take account of the aspirations of Aboriginal land owners. It is land that remains relatively intact environmentally.

A consideration of economic factors leads us to conclude that:

- accessing capital is not an issue of the highest order in the context of the many barriers to development posed by remoteness, absence of economies of scale, and historical legacies. There has been limited debate about what might constitute appropriate development on Aboriginal land. Many of the existing contributions to the debate are from people who appear to have little direct experience of remote situations;
- those who argue that communal inalienable title is renowned for being sub-optimal for raising commercial finance fail to look at the particular features of remote Australia in order to critically evaluate what development is possible and whether individualised land tenure is in fact necessary to achieve possible development options;
- the same point can be made about the need to critically examine whether individualised tenure is compatible with Indigenous aspirations. Those aspirations frequently prioritise kin-based, communal decision-making;

- there is little recognition of the forms of development already occurring on Aboriginal land that do reflect local realities and aspirations. There is similarly little remuneration for activities that generate national benefit and that could readily be re-defined as employment;
- communal ownership does make investment complex and generates high transaction costs. However, as with housing issues, some ALRA provisions including anachronistic ministerial approval requirements add further and unwarranted administrative complexities to investment on Aboriginal land; and,
- paradoxically, mechanisms in the ALRA that generate capital from mining on Aboriginal land, the most promising economic benefit from much of this land, are channelled to the ABA. This capital could be used more innovatively for development on Aboriginal land.

We recommend:

- that diverse Indigenous aspirations for development on Aboriginal land be more clearly articulated, acknowledged and considered in public debates;
- that greater emphasis be placed on what mainstream commercial development is realistically possible on Aboriginal land and how environmentally, economically and socially sustainable such development might be;
- that greater recognition and more equitable state resourcing of successful development projects on Aboriginal land be explored, especially in the customary sector and in natural and cultural resource management;
- that debate about innovative forms of development finance for Aboriginal development be promoted, including profit-related loan schemes and no interest loan schemes where there are social as well as economic benefits and where there are positive national benefits; and,
- that debate occur on whether the circa \$100 million accumulated reserves held by the ABA should be placed under Aboriginal control and be more readily available for development (via grants and/or loans) on Aboriginal land.

NOTES

1. Northern Territory Department of Infrastructure, Planning and Environment, Aboriginal Land Rights (Northern Territory) Act, Summary <<http://www.ipe.nt.gov.au/whatwedo/indigenousland/pdf/lclaim.pdf>> [accessed 22 June 2005].
2. In addition there have been acquisitions by the Indigenous Land Corporation (ILC) since 1995 and pockets of land granted as excisions or community living areas under the *Pastoral Land Act 1992* (NT).
3. Altman (1996) and Taylor (1999) have noted that there is no official statistical basis upon which to measure the impact of land rights on Indigenous socioeconomic status.
4. The visit was in the week of 3–8 April 2005. It followed a February 2005 address by the Minister for Indigenous Affairs (Senator Vanstone) to the National Press Club that highlighted the apparent inability of land rights to deliver socioeconomic outcomes and made clear that the Australian Government was contemplating changes to land rights.
5. The Prime Minister's address is available at <<http://www.pm.gov.au/news/speeches/speech1406.html>>.
6. In discussions about the Northern Territory we generally use the term 'Aboriginal'.
7. An international focus on other settler colonies was included in our brief and, serendipitously, an expert legal researcher from New Zealand (Craig Linkhorn) was visiting CAEPR. The New Zealand experience provides positive comparative information. We did not delve into the complexities of Canada and the USA at this juncture beyond reviewing basic information about the block grant housing program for indigenous land in the USA and the guide produced by the Bank of Montreal concerning indigenous borrowers.
8. The ALRA may need amending if Ministerial consent to land dealings is retained as at present for situations where consent is obtained for a purpose restricted to Aboriginal people but the grantee of that land interest wants to create a subsidiary interest, say a mortgage, in favour of a non-Aboriginal person.
9. Part IV of the ALRA was the subject of extensive review conducted by the Australian government, the Northern Territory government and Indigenous land councils in 2003–04.
10. Since 1998, the Northern Territory *Land Acquisition Act* has allowed the Crown to acquire land compulsorily for 'any purpose whatsoever'. This was a response to the *Native Title Amendment Act 1998* (Cwlth), which permitted the compulsory acquisition of native title for private purposes where other titles are similarly permitted to be acquired *by law*. However, the *Native Title Act* does not require that *in practice* both native title and other titles be so acquired, and it remains to be seen whether these powers will be used to acquire native title more than other titles.
11. An Indigenous Household is a household where any family in the household is defined as an Indigenous family or a lone person household where the lone person is of Aboriginal and/or Torres Strait Islander origin. Group households are not included. An Indigenous Family is one where either the reference person and/or spouse/partner is of Aboriginal and/or Torres Strait Islander origin. This is the standard definition in the 2001 Census Dictionary.
12. Although housing and infrastructure provision is primarily the responsibility of state and territory government, in the Northern Territory the Commonwealth Government is the major source of funding for Indigenous housing (Sanders 2005).

13. As will be discussed later, much of this land *does* have significant biodiversity conservation value as landscapes are relatively intact.
14. Data from the National Aboriginal and Torres Strait Islander Social Survey 2002.
15. The Census records gross income but for the purpose of this exercise we assume that none of the household members are in paid employment and their after-tax income is the same as their gross income. This income level seems low for a family of this composition who rely on income support and would receive a pension or allowance plus substantial amount of Family Tax Benefit Part A and B. However, for the purposes of this paper we take the census data on incomes in very remote areas in the Northern Territory at face value.
16. Calculations from the Commonwealth Bank of Australia Home Loan Calculators <<http://www.commbank.com.au>> [accessed 23 June 2005].
17. In addition to low employment rates and incomes, there are a number of other factors which are likely to make it difficult for Indigenous people in remote areas of the Northern Territory to borrow money from a commercial lender. For example, there is often a substantial movement of occupants into and out of a dwelling. This means there can be substantial fluctuations in household incomes. This can be problematic since in order to have a high enough household income to pay back a substantial mortgage a number of adults will need to agree to contribute to the loan repayments.
18. For example in Wadeye the average number of residents per house is 16 (Taylor & Stanley 2005) and in Maningrida it is between 15 and 20 persons per house owing to substantial seasonal variation and movement between township and outstations (Altman, calculation based on discussion with Town Clerk, June 2005).
19. There is a 20-year gap between Indigenous and non-Indigenous life expectancies. At the Good Shepherd Micro Credit conference in Melbourne (9–10 June 2005) a major difference noted between Indigenous and non-Indigenous borrowers under the no interest loans scheme (NILS) was that Indigenous borrowers were more likely to default over a short repayment period of 12 months owing to unexpected death.
20. Rental assistance is available as a supplementary payment to people receiving other support and who rent private or community-rental dwellings. Income-related rents are available to tenants of public housing. Rental assistance contributes money towards rent over a threshold up to a maximum (currently \$80 per week threshold with a maximum of \$100 assistance (dollar for dollar matching to a top rent of \$280). The Northern Territory Government (2004:17) provides nationwide data that indicates that Commonwealth Rent Assistance—the Australian Government's largest housing program—is not accessed on an equitable (needs) basis by Indigenous people.
21. Māori freehold land is land the beneficial ownership of which has been determined by the Māori Land Court by freehold order.
22. By way of general context the 2001 Census records show 86 per cent of Māori live in urban areas and that approximately 30% of Māori aged 15 years and over own or partly own their usual place of residence (see <<http://www.statistics.govt.nz>>). Private housing stock, on general land, owned by Māori in the major urban and regional centres away from their tribal lands is not the focus of this discussion. Sanders (2005) gives ownership by dwellings containing Indigenous households in Australia as 28.2 per cent in 2001. These statistics are not directly comparable.
23. In broad terms, unless altered by will, succession to Māori land is generally by all children equally to their parent's estate.

24. One of these products (Kiwibank Welcome Home Loan) contains options for no deposit as well as low deposit lending and will consider up to six sources of household income where people living in an extended family situation want to purchase a house. Loan insurance matching outstanding debt is available (payment in full on death of outstanding balance; repayments for up to two years for loss of work because of illness or injury).
25. Tribal groups may apply to HNZC for a grant, low interest loan or capital funding from the Housing Innovation Fund. This is designed to assist non-profit groups increase their involvement in provision of rental housing or home ownership for low-income households where the private market is not meeting demonstrated needs. An example would be where a tribe wanted to develop housing for elders near the tribe's traditional meeting house complex (*marae*). Te Puni Kōkiri (Ministry of Māori Development) and HNZC collaborate on a Special Housing Action Zones programme. This programme is to assist communities to repair or build housing. Te Puni Kōkiri funds a Community Housing Plan that identifies needs and community resources (e.g. labour) and recommends a way forward. HNZC loans funds for capital expenditure to implement the plan (see <<http://www.hnzc.co.nz>> and <<http://tpk.govt.nz>>).
26. There is resistance by private-sector housing lenders to accept Māori freehold land as adequate security for such loans which are typically granted by state lending institutions. There is not room to explore this 'market failure' here.
27. See the Habitat for Humanity website <<http://www.hnzc.co.nz>>.
28. New Zealand Ministry of Works (1987), *Feasibility Study on the Possible Transfer of Minginui to the Whakatane District Council*, cited in Hutton (2004).
29. Title to the land was vested in the tribe's eponymous ancestor Wharepakau to be administered by trustees (Te Amo 2004).

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