

COMMENT ON THE NATIONAL INDIGENOUS COUNCIL’S INDIGENOUS LAND TENURE PRINCIPLES FROM A NATIVE TITLE PERSPECTIVE

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Introduction

The need to improve the economic circumstances of Aboriginal people is obviously an issue of great importance. Government interest in improving the ability of Aboriginal people to achieve their personal goals, whether it be individual home ownership on their own country or otherwise, is a matter which should be welcomed.

However, it is equally important that any measures aimed at achieving those goals respect the basic human rights of Aboriginal peoples and respect their property interests. Unfortunately, the current debate on improving ‘social and economic’ outcomes for Aboriginal people from their land, appears to be driven by ideology rather than sound research and analysis.

With the Prime Minister indicating that he is interested in the issue,¹ and with a Government with a newly formed Senate majority, a significant development which may guide how the government may approach this issue has been the development of ‘Indigenous Land Tenure Principles’ (‘the NIC Principles’) by the National Indigenous Council (‘NIC’) which have been delivered to the Ministerial Taskforce on Indigenous Affairs.² The NIC Principles have received broad criticism from Indigenous leaders³ and it is not hard to see why.

The NIC’s Land Tenure Principles

The NIC Principles are as follows:

1. The principle of underlying communal interests in land is fundamental to Indigenous culture.
2. Traditional lands should also be preserved in ultimately inalienable form for the use and enjoyment of future generations.
3. These two principles should be enshrined in legislation, however, in such a form as to maximize the opportunity for individuals and

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¹ Prime Minister, Mr John Howard, *Address at the National Reconciliation Planning Workshop, Old Parliament House, Canberra, 30 May 2005*:

See: <<http://www.pm.gov.au/news/speeches/speech1406.html>>.

² See: <<http://www.oipc.gov.au/NIC/communique/PDFs/ThirdMeetingNIC.pdf>>

³ See for example, Graham, C., “Howard’s War on Terra”, *National Indigenous Times*, 23 June 2005, pp.3-8.

families to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.

- An effective way of reconciling traditional and contemporary Indigenous interests in land – as well as the interests of both the group and the individual – is a mixed system of freehold and leasehold interests.
 - The underlying freehold interest in traditional land should be held in perpetuity according to traditional custom, and the individual should be entitled to a transferable leasehold interest consistent with individual home ownership and entrepreneurship.
4. 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 and, preferably, of subsequent return of the affected land to the original owners on a leaseback system basis, as with many national parks. (emphasis added)
 5. Governments should review and, as necessary, redesign their existing Aboriginal land rights policies and legislation to give effect to these principles.

These principles are directed to Aboriginal land generally and not just native title. However, in terms of legislative measures which the Commonwealth is primarily responsible for, the NIC Principles must be primarily directed towards the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA') and native title rights and interests as protected under the NTA.

Although much could be said about the appropriateness of the NIC Principles for guidance of policy with respect to the ALRA, the observations in this paper are only directed to the significance of the NIC Principles to native title and the NTA. In this regard, Principles 1 and 2 are uncontroversial. While comment could be made in relation to Principle 3, it is the fourth and fifth principles that demand the most scrutiny.

Principle 4

It is through NIC Principle 4 that the NIC has raised the issue of mandatory leasing of Aboriginal land. The principle itself refers to "*involuntary measures*" and the potential for the government to achieve the goals set out in Principle 3 through "*compulsory acquisition*" of Aboriginal land. While these measures are stated to be "as a last resort" they are nonetheless endorsed as a possible means to achieve the ends of the other principles. The NIC could have,

for example, drafted principles stating that there be no 'involuntary measures' or that no interference with native title rights and interests should occur without the consent of traditional owners. However, such directions are absent from the current principles.

A number of points can be made in relation to Principle 4:

1. The concept of mandatory leasing, as it has been raised by the NIC, is discriminatory. It is discriminatory because the Commonwealth would not use "involuntary measures" to require non-Aboriginal property owners who jointly own property, or who are joint beneficiaries of an interest to lease their land. This is irrespective of whether the beneficiary of such coercion was one of the interest holders or not. It would not be suggested because it would be manifestly unacceptable to all other property holders.
2. To crystallise a communally held property interest in a particular individual or family necessarily requires depriving any other person with an interest of their enjoyment of that land. Unless this is done with the consent of the other owners, this can only lead to providing wealth to one individual or family at the expense of another. This is a colonial approach to economic development and wealth creation if ever there was one.
3. In developing a principle that Indigenous people's "consent should not be unreasonably withheld", the NIC has not given any guidance as to who will determine what is 'reasonable'. There is clearly likely to be different perspectives on that matter according to the cultural values of the people concerned. The NIC Principles leave that issue to the Government to determine.
4. With the exception of Indigenous peoples' interests,⁴ the safeguard of property has been a primary focus of the western legal tradition. As Gough has succinctly stated:

Englishmen did not need Locke to tell them that the chief reason why civil government was established was to protect property. The sanctity of property was (and indeed still is, however much weakened by modern legislation and attacked by modern political theory) one of the cardinal principles of the common law. Whatever rights were fundamental, we may be sure they included the right to property.⁵

It is uncontroversial that Parliament has the power to pass laws for the acquisition of property, subject only to Constitutional constraints. Every State has legislation that allows such acquisitions to occur. However, it is also consistent of common law traditions in relation to

⁴ Until the enactment of the *Racial Discrimination Act* 1975 (Cth) and the recognition of native title rights and interests in *Mabo v Queensland [No:2]* (1992) 175 CLR 1, Indigenous people were dispossessed of their land without compensation.

⁵ Gough, J.W., *Fundamental Law in English Constitutional History*, Clarendon Press, 1955, p.54.

the protection of property, and the fact that people in influential positions are very sensitive about property,⁶ that such legislation is generally limited, either expressly or in its utilisation, to acquisitions for public purposes. This is because there is a general public acceptance that acquisition of property for public purposes, such as the construction of important public infrastructure, is a necessary evil in modern society. It is however, a very different proposition to suggest that it is appropriate to compulsorily acquire land so that a private property interest can be created in another individual for their own individual benefit and wealth creation. Individuals have a right to determine how they use their property. The fact that one individual believes they may be able to make better use of it, or can generate an income from that property, is not a justification for the Government to take the step to compulsorily acquire the rights of anyone else with an interest in that property.

5. If compensation is to be payable for a compulsory acquisition, there will be an important question as to who will ultimately pay for the compensation. In the first place it will be the Government who will have the liability. Whether the compensation is ultimately paid for by taxpayers, passed on to the beneficiaries of the acquisition, or financed through other funds set aside for the benefit of Aboriginal people is matter not explained by the NIC. Either way, the economics of the proposal do not appear to have been thought through. It appears that this important issue has been left to the Government to determine as well.
6. An obligation to obtain the consent of traditional owners in relation to matters affecting their country is a basic requirement in respecting the human rights of Aboriginal people.⁷ It is also a fundamental to developing policies consistent with the cultures of Aboriginal people.⁸ There is no reasonable basis for advocating “Land Tenure Principles” which depart from the need to obtain the consent of native titleholders before a lease is created. As noted above, a principle could have been developed by the NIC which reiterated this fundamental right
7. Finally, in addition to the issues raised by requirements in the Constitution to pay just terms compensation for the acquisition of property,⁹ there may be other Constitutional difficulties associated

⁶ See for example the observations of Lord Reid in *Burmah Oil Company (Burmah Trading) v Lord Advocate* [1965] AC 75 per Lord Reid at p.101.

⁷ For example, Article 17 of the *Universal Declaration on Human Rights* provides that:

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

⁸ See Art.27 of the *International Covenant on Civil and Political Rights*.

⁹ Section 51(xxxi), *Constitution*. It is to be noted that this protection may not apply to the Northern Territory: *Teori Tau v The Commonwealth* (1969) 119 CLR 564, although the matter is not without some ambiguity: see *Newcrest Mining (WA) Limited v The Commonwealth of Australia* (1997) 190 CLR 513 at 561, 568 per Gaudron J, 600 per Gummow J, 656-657, 661

with the proposal. Native title is not a product of Commonwealth legislation. It is a pre-existing burden on the Crown's radical title to land. The common law position is that those interests are inalienable except to the Crown.¹⁰ As a result there is uncertainty as to whether a lease could be created by native titleholders themselves without complimentary State legislation. This will be particularly so where the underlying tenure is Crown land, or the subject of some other interest. In those instances land can only be dealt with in accordance with the relevant State legislative scheme.

Principle 5

Given the failings of Principle 4, the open-ended nature of NIC Principle 5 is also of considerable concern.

Principle 5 is an open-ended NIC endorsement for the Government to rework policies and legislation. It does not identify any specific legislative change. Far from the NIC providing any direction on the matter, it is left to the Commonwealth to determine what legislative change may be required.

The motivation for the NIC to put forward such an invitation is not apparent. It is more than possible that once the need to amend the NTA is raised, changes may not be limited to the matters that the NIC want to promote. Given this likelihood, it is most perplexing that despite advocating legislative change, the NIC has not identified any failing of the existing NTA to provide for leases for individuals and families of native title land.

The NTA already provides a clear process for dealings in land to occur with the consent of traditional owners through Indigenous Land Use Agreements.¹¹ Those provisions are broad enough to enable the creation of leases to individuals or families if they are desired and authorised by the relevant native title-holders or claimants. Importantly, those provisions put in place procedures that require that those interests are created with the *consent* of traditional owners. The NIC has not identified any deficiency in these provisions that would justify the re-examination of the NTA that is now being suggested in Principle 5.

It is unfortunate that the NIC has plunged into endorsing unidentified legislative change without a full consideration of the adequacy of existing regimes or how the ability for Aboriginal people to improve economic development on Indigenous land could not be achieved through policy change in existing legislative frameworks.¹² Amendments to the NTA cannot of itself achieve any increase in individual ownership of interests in land.

per Kirby J and *Northern Territory of Australia v GPAO* [1999] HCA 8 per Gaudron J at para 119.

¹⁰ *Mabo v Queensland [No:2]* (1992) 175 CLR 1 per Brennan J at 70.

¹¹ Sections 24BA – 24EC, NTA.

¹² For one view on some of these options see Senator Ridgeway, A., *Addressing the Economic Exclusion of Indigenous Australians Through Native Title*, The Mabo Lecture – National

Inappropriate Preoccupation With Privatising Indigenous Land

The inadequacy of the NIC Principles also extends to their silence on the other more direct means by which native title-holders have been denied the benefit of generating economic benefits from their country. The preoccupation with privatising Aboriginal land seems to have led other more significant barriers to wealth creation in remote communities.

Economic development in rural and remote parts of the country are largely dependent on primary production and access to natural resources. However, the primary policy response of Governments since the recognition of native title has consistently been to ensure non-Aboriginal people's exploitation of natural resources on Indigenous land can continue. The entire future act regime in the NTA is aimed at that purpose. The protections afforded to Aboriginal people under that regime are minimal. In relation to most activities they amount to no more than a 'right to comment' on the proposal. While the right to negotiate provisions in Sub-division P of the NTA are more substantive, they too have their limitations.

Despite the recognition of native title in 1992 Government policy and legislative reform in the area of land and resource management has never developed to adequately include Indigenous people. They have instead sought to maintain the *status quo* which was premised on the doctrine of *terra nullius*. In New South Wales for example, since the recognition of native title, water economies have been reformed to the exclusion of Indigenous interests. Share-market fisheries have been created without any regard to involving Aboriginal people in the industry. In both NSW and Queensland, National Parks have been created without regard to their impacts on Aboriginal economic activities.

The reluctance to concede any right to Aboriginal people in the ownership and exploitation of natural resources has been reflected by the approach of Governments in the litigation of the native title cases to date. Governments have strenuously opposed any right of Aboriginal people to trade in natural resources or any commercial exploitation of natural resources. Ownership of natural resources such as minerals has also been opposed.

Many governments have to date been reluctant to recognise even the most basic of native title rights and interests in land. The Commonwealth has been particularly litigious and there has been more than one instance where a settlement of a native title claim has been scuttled or delayed because of the Commonwealth Government's approach to mediation.¹³ It seems to the writer

Native Title Conference, Coffs Harbour 3 June 2005, pp.9-12, See:

<<http://www.aiatsis.gov.au/rsrch/ntru/conf2005/papers/RidgewayA.pdf>>. See generally, Behrendt, J., "Lardil Peoples v State of Queensland" [2004] FCA 298, *Indigenous Law Bulletin*, Vol.6, Issue 2., May 2004, pp.16-17.

¹³ In the Wellesley Sea Claim, for example, the Commonwealth refused to mediate at all. The Western Australian Government was recently critical of the Commonwealth Governments approach to mediation in the Bardi Peoples Native Title Claim: see for example ABC Online, "War of Words Erupts over WA Native Title Claim", 21 June 2005,

See: <<http://www.abc.net.au/news/newsitems/200506/s1396818.htm>> and Shiel, F., "Threat to Historic Native Title Deal", *The Age*, 15 October 2003, See:

to be more than curious that there is such a current preoccupation with privatising Indigenous interests in land when Governments create such enormous hurdles to the recognition of those interests in the first place. In the context of the *Native Title Act* 1993 (Cth) at least, the preoccupation with privatising Indigenous interests in land is little more than a diversion to what are really more substantive barriers to Indigenous wealth creation.

Where Court's have found in the favour of Governments in relation to these issues, the injustice which flows to Indigenous people has not been remedied through changes in Government policy.

In the Wellesley Island Sea Claim,¹⁴ for example, the Court made a factual finding that under their own laws and customs, the Lardil, Yangkaal, Gangalidda and Kaiadilt people owned their sea country and were entitled to give or withhold their permission to the accessing and taking of resources from that area. Those rights could not be recognised as native title rights, not because they did not exist, but because of the inherent limitations on native title identified in the *Croker Island case*.¹⁵ The effect is that those Peoples have been deprived of the ability to control and exploit the most significant resource in their country capable of being developed into a sustainable industry for their community. Even at present, the Queensland Government is creating a developmental fishery right on their doorstep in a manner which does not involve the Aboriginal community, does not guarantee a single job and which will only cause animosity to the traditional owners of the area concerned.

It is a pity that in purporting to develop principles for improving 'social and economic' outcomes for Aboriginal people from their land, the NIC has chosen to ignore these important and fundamental issues.

Questions of Process and Consultation

Finally, it is relevant to say something about the process by which the NIC Principles appear to have been adopted by the NIC and recommended to the Ministerial Taskforce.

When the NIC was appointed the Minister explained that: "The National Indigenous Council will provide expert advice to the Australian Government on policy, program and service-delivery issues affecting Aboriginal people and Torres Strait Islanders."¹⁶

The Terms of Reference for the NIC reflect that view.¹⁷ The Minister went on to note that: "Members of the NIC were not selected on the basis that they represent any specific region, organisation or agency. They will be presenting their views as individuals, based on their areas of expertise."¹⁸

<<http://www.theage.com.au/articles/2003/10/14/1065917412319.html>>.

¹⁴ *Lardil Peoples v State of Queensland* (2004) FCA 298

¹⁵ *Commonwealth v Yarmirr* (2001) 208 CLR 1

¹⁶ Senator Amanda Vanstone, *Press Release*, 6 November 2004: See:

<<http://www.atsia.gov.au/media/media04/v04064.htm>>.

¹⁷ NIC Terms of Reference, See: <http://www.oipc.gov.au/NIC/Terms_Reference/default.asp>.

¹⁸ Senator Amanda Vanstone, *Press Release*, 6 November 2004: See:

However, it cannot be reasonably expected that all members of the NIC will have appropriate expertise on all matters which are put before them. As NIC Member, Mary Ann Bin-Salik was reported as saying in response to a question as to why the NIC had called for compulsory acquisition of Aboriginal land: “I didn’t know it was about that, but I’m only interested in education.”¹⁹

It is probably for this reason that it is expected that the NIC “will use its contacts and networks to assist consultation.”²⁰ Although it is not clear what resources are being made available to the NIC to consult with bodies which may have particular expertise in relation to matters under its consideration, it is essential that the NIC ensure that it obtains such advice and not take action or make recommendations until that process is complete.

However, that is not what has occurred in the development of the Land Tenure Principles. Drafts of the Principles were circulated by the NIC at the National Aboriginal Representative Bodies Conference in Coffs Harbour on 1-3 June 2005. Representative Bodies were invited to respond to those by 15 June 2005. It is not clear why there was such a rush to finalise the principles in that timeframe even though it was far too short to allow full consideration of the issues raised in the Principles and to provide a detailed response.

Notwithstanding the timeframe, a number of responses were forwarded to the NIC. The writer is aware that many of the concerns outlined out above in relation to Principles 4 and 5 were forwarded by the Carpentaria Land Council Aboriginal Corporation (‘CLCAC’) to the NIC in a submission dated 15 June 2005 for the purposes of their consideration of the appropriateness of the Principles.²¹ The CLCAC requested in that letter that its concerns be tabled at the meeting of the NIC. The Queensland Indigenous Working Group also forwarded a submission on behalf of Aboriginal representative bodies in Queensland objecting to the principles.²² Notwithstanding these representations the NIC has proceeded to endorse the Principles. Why the NIC ignored the advice of these organisations which deal with the interests of native title holders on a daily basis are unclear. In such circumstances it would be expected that the NIC would have been able to provide a better justification for the Principles than what has been provided to date.²³

In its Third Communique the NIC explained: “A working group should be established that includes Indigenous experts and other stakeholders, to advise on all issues for effective consultation.”²⁴

<<http://www.atsia.gov.au/media/media04/v04064.htm>>.

¹⁹ Graham, C., “Whodunnit?: The Mystery Surrounding the NIC’s Black Land Advice to Government”, *National Indigenous Times*, 7 July 2005, p.4.

²⁰ NIC Terms of Reference, <http://www.oipc.gov.au/NIC/Terms_Reference/default.asp>.

²¹ Letter from CLCAC to Sue Gordon, Chairperson of NIC, dated 15 June 2005.

²² Letter from Queensland Indigenous Working Group to Sue Gordon, Chairperson of NIC, dated 15 June 2005.

²³ See responses provided in Graham, C., op.cit, 7 July 2005, p.4.

²⁴ Sue Gordon, NIC Communique, 16 June 2005. See:

< <http://www.oipc.gov.au/NIC/communique/PDFs/ThirdMeetingNIC.pdf>>

NIC Chairperson Sue Gordon has been reported as explaining “We’ve made some recommendations to government on how they can go about talking to people, that’s all.”²⁵

In the first place it can be noted that this intention is not reflected in the NIC Principles which were provided to the Government. More fundamentally, if the NIC is acknowledging that it does not have the appropriate expertise to deal with these issues, then it beggars belief that the NIC would endorse the Land Tenure Principles and forward them to the Ministerial Task Force prior to the establishment of a Working Group that would be in a better position to determine whether the Principles are appropriate.

²⁵ See Graham, C., op.cit., 7 July 2005, p.4.