



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



TITLE OF THE PAPER

The Australian Northern Territory Land Rights Act – a model for the legal recognition of customary tenure, which provides a certain and fungible legal framework, facilitates economic development and local decision-making and establishes appropriate governance institutions.

**MICHAEL O'DONNELL
PRINCIPAL LEGAL OFFICER
NORTHERN LAND COUNCIL
DARWIN
NORTHERN TERRITORY
AUSTRALIA**

**Paper prepared for presentation at the
“2017 WORLD BANK CONFERENCE ON LAND AND POVERTY”
The World Bank - Washington DC, March 20-24, 2017**

Note: The views expressed in this paper are the responsibility of the author and not his employer.

Copyright 2017 by author. All rights reserved. Readers may make verbatim copies of this document for non-commercial purposes by any means, provided that this copyright notice appears on all such copies.

Abstract

This paper will examine the Australian *Aboriginal Land Rights (Northern Territory) Act 1976*.

It establishes a unique form of property interest coupled with a range of institutions designed to recognize and protect Indigenous customary tenure in Australian law. It bridges the gap between customary tenure and the western tenure system.

Significantly it does this in a manner that recognizes customary tenure through the grant and registration under the Torrens system of an inalienable freehold title and provides for the grant of subsidiary interests such as leases.

This engages a long-standing international discourse concerning the role of land tenure and security of title in the relief of poverty.

The tenure has formed the basis for the creation of large protected areas (IUCN Category VI) known as Indigenous Protected Areas in Australia. This is consistent with multiple economic uses.

This paper will explore how a range of public and private indigenous controlled institutions or corporate entities have emerged to manage the traditional customary estate and will cover recent developments in national government policy concerning township leasing on Aboriginal land and the Intervention.

Key Words:

Conservation, Governance, Indigenous, Tenure, Economic.



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



Introduction

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) is legislation of the Australian Parliament that was recently celebrated because of the 40th anniversary of its commencement in 2016.

The legislation establishes a unique or sui generis form of property interest coupled with a range of institutions designed to recognize and protect Indigenous customary tenure in Australian law. It bridges the gap between customary tenure and the western tenure system.

Significantly it does this in a manner that recognizes customary tenure through the grant and registration under the Torrens system of an inalienable freehold title and provides for the grant of subsidiary interests such as leases. This provides for ownership of land and enables the grant of subsidiary registrable interests with third parties (leases and licenses) for commercial and other purposes without threatening the underlying traditional ownership in perpetuity.

This engages a long-standing international discourse concerning the role of land tenure and certainty and security of title in the relief of poverty and the linkage with economic development.

The institutions established in the legal framework established by the Act facilitate and verify traditional group or communal decision-making. The decision making process prescribed conforms with the United Nations Declaration on the Rights of Indigenous Peoples enacting the requirement for free, prior and informed consent and commenced well before the Declaration.

In international terms the Land Rights Act was a late response historically to the injustice of British colonial dispossession of the various Indigenous peoples of northern Australia and the application of the doctrine of terra nullius in Australia.

The Act arose from the political struggle of Indigenous Australians to reclaim ownership of their traditional land and waters. It followed the failure of the first major common law native title claim in Australia in 1971 – *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia*, and predated the Australian High Court's land mark recognition of native title in 1992 in *Mabo (No 2) v State of Queensland*.



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



In *Milirrpum* the Court stated in relation to the customary owners (described as traditional owners in Australia) the Yolgnu peoples from East Arnhem Land in the north east of the Northern Territory that:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called a ‘government of laws, and not of men’ it is that shown in the evidence before me (*Milirrpum*, 267).

This was in marked contrast to judicial determinations early in Australian colonial history where in *Cooper v Stuart* a judge of the Privy Council stated in 1889:

There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The colony of New South Wales belongs to the latter class (*Cooper v Stuart*, 291).

In more recent times the customary tenure recognised under the Land Rights Act has formed the basis for the creation of large protected areas (IUCN Category VI Protected area, with sustainable use of natural resources) known as Indigenous Protected Areas in Australia.

This form of protected area is consistent with multiple economic uses including harvesting of natural resources (crocodile eggs) and invasive species such as Asian water buffalo, pastoralism (cattle grazing), tourism and savannah burning through the re-introduction of early season traditional burning land management practices that have provided for significant income for the benefit of traditional Aboriginal owners from the modern economy in the acquisition of Australian carbon credit units (O’Donnell 2013).

The merits of the legislation have been recognized by Australia’s former primary foreign aid organization, *Aus AID* before its absorption into the Department of Foreign Affairs and Trade for its land tenure framework and institutional basis for customary decision making with respect to customary tenure (Australia Agency for International Development, 2008).

Despite these achievements and the successful return of approximately 50% of the Northern Territory of Australia to Indigenous control under the Land Rights Act the political and economic environment in which the Northern Territory of Australia and the *Aboriginal Land*



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



Rights (Northern Territory) Act 1976 is situated is characterized by what I have described as a form of internal sovereign risk for Indigenous people.

Their property rights have regularly been subject to challenge as is their right to self-determination. For instance the High Court of Australia was involved in some 13 cases concerning the legislation mostly brought by the Northern Territory Government in the first sixteen years following its commencement (Chief Justice Robert French 2008, 9).

The last 10 years have seen the national government directly intervene and take control of the management of traditional lands and communities in certain circumstances in the Northern Territory. In 2007 the Australian Parliament authorized the Federal Government to directly intervene in some 73 communities in the Northern Territory mostly on Aboriginal freehold land under the Land Rights Act (*Northern Territory National Emergency Response Act 2007 (Cth)*)

The ‘Intervention’ or NTER was a multimillion dollar program elements of which continue to this day under the renamed *Stronger Futures in the Northern Territory Act 2012*. To facilitate this intervention the operation of the *Racial Discrimination Act* was suspended and the Federal Government compulsorily acquired township leases on Aboriginal land under the Land Rights Act for 5 years purportedly based upon the stated need to save Indigenous children from child abuse.

The Government at the time claimed its actions were a special measure designed to benefit Indigenous peoples in the Northern Territory. The stated object in the *Northern Territory National Emergency Response Act, 2007* was to ‘improve the well-being of certain communities in the Northern Territory.’ It was comprehensive and affected welfare benefits, community stores, the permit system, the Land Rights Act, criminal law sentencing and bail, alcohol consumption, the availability of pornography and the management of communities.

Needless to say a review of the ‘Intervention’ in 2008 declared that the Federal and Northern Territory governments should ensure that the *Racial Discrimination Act* continue to operate and that a relationship be re-established between governments and Indigenous peoples to work on the basis of ‘genuine consultation, engagement and partnership’ and that:

as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



Aboriginal Australians living in remote communities throughout the Northern Territory.

During the same period the Federal Government sought to implement long term tenure reforms that would see it take a direct role in managing some of the larger Indigenous communities on Aboriginal land under 99 year leases. The responsible Minister stated in 2006:

The bill provides for a new tenure system for townships on Aboriginal land that will allow individuals to have property rights. It is individual property rights that drive economic development. The days of the failed collective are over (Brough Second Reading Speech 2006).

In this difficult political environment one has continued to see the establishment of independent Indigenous Corporations and the maintenance of the governance structures established by the Land Rights Act. This has maintained the principle of self-determination and seen the utilization of the legal framework of the Land Rights Act to enhance local control and decision-making and facilitate economic development on traditional lands in a manner more in accordance with the traditional cultural values of the owners.

At the same time in the last few years there has again been some acknowledgement from the Federal Government of the need for Indigenous self-determination if not in explicit terms.¹

Background

In 1788 when the British Crown acquired sovereignty in Australia at law there was a complete dispossession of the various Indigenous peoples in Australia. The doctrine of terra nullius applied. There was no recognition of any form of sovereignty, a right of self-government, nor land title inhering in the original inhabitants - the First Nations of Australia.

In a belated though somewhat remarkable turnaround since the 1960s large areas of land and waters have now been returned to some Indigenous Australians. This has been described as a 'land titling revolution' significantly enhanced by in the landmark 1992 *Mabo (No 2)* decision

¹ For example the current national government for the last two terms of Parliament has adhered to a



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



of Australia's High Court where native title was recognized at law as having existed since 1788 (Altman and Markham 2015).

The recognition of customary tenure in the Australian Parliament in the Land Rights Act followed the passage of the *Racial Discrimination Act 1975* (Cth) for the first time in Australia, which implemented the International Convention on the Elimination of All Forms of Racial Discrimination into Australian law.

The Land Rights Act, which only applies in the Northern Territory of Australia was the culmination of successful lobbying by Australia's Indigenous peoples and as mentioned in particular followed the first major case seeking the recognition of native title in Australia – the Gove Land Rights Case or *Milirrpum v Nabalco Pty Ltd* where the Federal Government approved the establishment of a large bauxite mine without the consent or participation of local customary or traditional owners. It was not until 2011 that an agreement compensating affected traditional owners was negotiated by the company concerned Nabalco now a subsidiary of Rio Tinto.

The Land Rights Act whilst leading legislation should be seen in context. It is not protected or recognized under the Australian Constitution nor does it involve the recognition of any form of First Nations or Indigenous Sovereignty or right to self-government in Australia. This is manifestly different to the situation in other developed countries with a common law or British based legal system such as Canada, New Zealand and the United States of America. It does though constitute a form of self-determination consistent with the UN Declaration on the Rights of Indigenous Peoples' as I will elaborate upon later in this paper.

Indigenous Land Holdings

As of 2016 approximately '43% of Australia's landmass' or 3.3 million km² is either now held by Indigenous Australians or they have a legally recognized customary tenure. This consists of 1,768,796 km² of freehold title or exclusive possession native title. A further 1,521,579km² is held as non – exclusive possession native title (Altman and Markham, 2015).

In most cases, this land is held by the descendants of the original occupiers, the Indigenous traditional owners. Although it is important to note that most land holdings are in the more remote or regional parts of the vast continent of Australia in the north and central areas and do not benefit the majority of Indigenous people in Australia directly.



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



Population

In 2014 it was estimated that there were 686,800 Aboriginal and/or Torres Strait Islander people. This is approximately 3% of the Australian population estimated at 22,340,000 people. In Australian terms a significant proportion (21%) of Indigenous Australians live in remote or very remote areas. With 35% in major cities and 44% in regional areas. In relation to most indicators of well - being 'outcomes for Aboriginal and Torres Strait Islander Australians worsen as remoteness increases' ((NATSI Social Survey, 2016).

Material Quality of Life

A Centre for Aboriginal Economic Policy Research (CAEPR) study released in 2015 based on data from a 10 year longitudinal study (amongst other sources) found that the income of Indigenous Australians is 'much lower' than for non-indigenous Australians. It is estimated that the 'median gross weekly personal income of the Indigenous adult population was 55 per cent of that of the non-indigenous population'.

In a similar vein unemployment rates are 'about 4.5 times higher than non-indigenous rates, regardless of gender, with a higher proportion not in the labour force at all' (Howlett, Gray & Hunter 2015,3). The Australian Bureau of Statistics estimates that whilst approximately half (49%) of Indigenous people were employed in either full or part time positions in the cities and regions this dropped to 36 % in remote areas (NATSI Social Survey 2016). A different study in 2014/15 puts the percentage of Indigenous Australians employed in full time work (as opposed to part time) at 62% up from 54.5 in 2002.

It does appear that the gap between Indigenous and non – Indigenous employment with respect to full time employment is narrowing (Productivity Commission 2016).

In terms of annual income for Indigenous women 'the average income was \$26,200 compared with \$37,400 for non- Indigenous women'. For Indigenous men the ' total personal gross annual income' was \$34,500. This is significantly lower than income for non-Indigenous men estimated at \$62,600 per annum (Howlett, Gray & Hunter 2015).

In relation to those employed full time there is a significant difference with, 'Indigenous incomes being around \$23,700 and \$9,900 lower for men and women, respectively. In addition, Indigenous men who are not in the labour force had an income that was around \$10,000 lower than that of non-Indigenous men.' The authors (Howlett, Gray & Hunter 2015) of this study conclude that:



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



The economic reasons for this wage differential are associated with the relatively low-level human capital and qualifications among Indigenous Australians, as well as less access to jobs— especially ‘good’ jobs—and, potentially, discrimination (Biddle et al. 2013).

Further that:

Indigenous Australians have significantly less income from other private sources than other Australians. This could be partially because of relatively poor employment prospects experienced by Indigenous people during a long period, or because Indigenous Australians have probably received lower average wages since Australia was colonised and the first monetary-based labour market was established.

Whatever the extent of contemporaneous discrimination in the labour market, it is inevitable that historical discrimination and disadvantage mean that Indigenous people have fewer resources and capital to invest in other private ventures to increase their overall wealth. This may limit the ability of Indigenous people to participate in the labour market as workers, but it also places a constraint on the ability of Indigenous people to start their own businesses (Hunter 2013).

As a consequence of lower income from private sources, a greater proportion of Indigenous income comes from government payments. Given that Indigenous people are more likely to be out of work than non-Indigenous people, they are more likely to be dependent solely on government payments as a source of income at any one time.

In relation to education in 2014/15 only 25.7 % of Indigenous Australians had completed High School (NATSI Social Survey, 2016), although numerically the numbers of Indigenous persons completing school and graduating from University continues to grow

Despite this current and historically grim picture a recent analysis by the Australian Productivity Commission in 2016 suggests that outcomes in broad terms in some areas for Indigenous Australians have improved. These are mortality rates for children, education and employment. In addition there have been some improvements in other measures. The proportion of home ownership has increased ‘from 21 per cent in 1994 to 27 per cent in 2002.’ Although this has ‘remained at a similar level since (29 per cent in 2014-15),’ and the



proportion of people whose main source of income was employment has increased from 32 per cent to 43 per cent from 2002 to 2014/15.

Unfortunately there appears to be no improvement in family and community violence rates or long-term alcohol abuse. In the area of mental health, substance abuse and imprisonment rates things appear to be getting worse (Productivity Commission 2016)

Northern Australia

Northern Australia is characterized by a large percentage of the population being Indigenous (30% in the case of the Northern Territory) and is often located with strong land rights legislation recognizing customary tenure and group decision-making. A particular form of this tenure is the focus of this paper. As is apparent these land holdings whilst significant do not signify a concomitant high standard of living.

As a respected Australian Indigenous commentator recently wrote in 2016:

Poor, remote communities remain vulnerable. Their crippling rates of disadvantage and associated societal dysfunction are hyperpoliticised and they are targets for state intervention. (Grant 2016)

I will now go on to look at the nature of the customary tenure and governance structures recognized and established under the Land Rights Act before I examine the way traditional owners that benefit from the Land Rights Act have ‘survived the buffeting winds of policy’ to continue to forge their own pathways to achieve better social and economic outcomes (Pearson as quoted by Grant 2016).

Aboriginal Land Rights (Northern Territory) Act 1976

The Act establishes a unique or sui generis form of property interest coupled with a range of institutions designed to recognize customary tenure in Australian law, facilitate and verify traditional decision-making and enable dealings and the grant of subsidiary interests with third parties for commercial and other purposes.

An inalienable freehold title is granted and subsidiary interests such as leases and licenses may be issued. This provides certainty of title, certainty as to the legal consequences of the particular customary rights and potentially access to finance through the registration of instruments such as mortgages (Hanstad 1998).



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



The Act recognizes traditional Aboriginal owners, establishes Aboriginal Land Councils and Aboriginal Land Trusts (ALT), and gives the relevant Minister as part of the executive arm of government certain important functions. In *Wurridjal* (2009) the High Court of Australia described this legislative design in the following terms: ‘Each person or entity has different rights, duties, powers and obligations but all are interrelated and all are directed ultimately to the benefit of “the traditional Aboriginal owners” of the land.’

Importantly an independent fund – the Aboriginals Benefit Account is established to finance the process. The legislation only applies in the Northern Territory of Australia where the Federal Parliament has direct legislative power, despite the existence of local self-government pursuant to the *Northern Territory (Self-Government) Act 1978* (Cth). In terms of returning land to the control of traditional owners the Act has been very successful from an indigenous perspective with some 50% of the Territory land mass now classified as Aboriginal land under the Act (McRae 2009).

The Hon. Ian Viner, MP when introducing the Act into Federal Parliament in 1976 outlined the legislative purpose of the Act as the vesting of rights under Australian law the equivalent of traditional Aboriginal rights and to ‘recognize that within our community there are some people, the Aborigines who live by a unique and distinct system of customary law’. He further stated that this constituted a ‘fundamental change in social thinking in Australia’ and that it was the Government’s intention to ensure that Northern Territory Aboriginals would have ‘a land base that will be preserved in perpetuity’ (Commonwealth 1976).

Grant and registration of an estate in fee simple

The Act provides for the grant of an estate in fee simple (freehold title) vested in a statutory Aboriginal Land Trust (ALT). The title may not be resumed or compulsorily acquired under any Northern Territory law. A fee simple is the highest level of ownership known in Australian law. While the title is subject to some ‘unusual’ provisions in the Act it is a grant registered under the Torrens system, ‘the equivalent of full ownership’, as it includes the right of exclusive possession (*NT v Arnhem Land* 2008). The law of trespass in this case is supplemented by the requirement for a written permit to access land under the Act.

The grant may be made in accordance with two processes. First as a result of a land claim process to determine the identity of the traditional owners. Second the inclusion of an area of land in Schedule 1 of the Act. The right to make a claim ceased in 1997.



The adjective ‘unusual’ is used to indicate features different to ‘ordinary’ freehold title. These include the statutory prohibition upon the transfer or alienation of the fee simple, the trust beneficiaries, decision-making and relevant institutions.

Aboriginal Land Trust

An Aboriginal Land Trust (ALT) is established by the Minister under the Act whom also appoints its members and specifies the boundaries of the land to be held by the trust. The members are to be ‘Aboriginals’ resident in the area of the local Land Council. An ALT has no decision-making powers. The Minister in the second reading speech concerning this aspect relevantly stated:

The Government will continue to explore the possibility of the title being held directly by the traditional owners themselves. It is an aim of the Government eventually to achieve this goal but the concept presents considerable legal and practical difficulties. The trusts will be title holding bodies whose actions will be directed by the traditional owners through Land Councils (Commonwealth 1976).

This intended change has never occurred. The beneficiaries of the trust are ‘Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned’. Aboriginal tradition is defined as the ‘body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.’

The area of the grant of land does not have to be consistent with customary tradition nor do the boundaries. Consequently the area of the grant may and does cover in some circumstances a number of different Indigenous groups.

Aboriginal Benefit Account

This account by statutory mandate receives an amount equal to the royalties received by the Commonwealth or Territory government from mining on Aboriginal land in the Northern Territory. In 2012-13 financial year there was some \$128,149,000.00 in the account with approximately 39 million dollars distributed to the Land Councils to perform their statutory functions under the Act (Annual Report ABA 2013). The payment to the Land Councils was



originally set at 40% of the fund to ensure their independence from government. This changed with amendments in 2006 that now means that the amount of the funding allocation is subject to the Minister's discretion (McRae 2009).

The existence of the account ensures that funds are provided for the undertaking and verification of traditional owner decision-making and the running of the major institutions established under the Act, that is the Land Councils and ALT.

The account is also distributed for the benefit of those Aboriginal persons affected by mining on Aboriginal land, which comprises 30% of the account. The Minister may also make payments for the benefit of any Aboriginal person or group in the Northern Territory and for the cost of administering and acquiring township leases pursuant to s19A of the Act and the administrative cost of the account.

Aboriginal Land Council

Land Councils have a pivotal role to play in the legislative scheme. A Council has been described as the 'administrative' agent of the traditional owners (Commonwealth 1976). The members of the Council and its Executive governing board consist of Aboriginals living in the area of the Land Council. An ALT can only act at the direction of a Land Council. Further the Land Council is to represent traditional owners in commercial negotiations over land use, exploration and mining and other matters arising concerning the use of the land including the grant of leases and licenses.

Decisions concerning these matters by a Land Council can only be made if the *traditional Aboriginal owners* 'understand the nature and purpose' of the proposed action and as a group consent to it. This standard reflects Article 32.2 of the *United Nations Declaration on the Rights of Indigenous Peoples*, the requirement for free, prior and informed consent.

In addition the Land Council must consult with any affected Aboriginal community or group whom must have an adequate opportunity to express their view to the Land Council. In relation to the grant or transfer of an estate or interest in land pursuant to s19 or s19A of the Act, that is a lease or license the Land Council has an independent statutory duty to determine that the terms and conditions of the grant are 'reasonable'.



Significantly it also has a statutory function of determining traditional ownership in the event of disputes. Any monetary payments for land use are to be made to the Land Council which is to pay that amount to ‘or for the benefit of’ the traditional Aboriginal owners of the land.

Traditional Aboriginal owners

The *traditional Aboriginal owners* are defined to mean a local descent group of Aboriginals who: ‘(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land.’

Justice Brennan in one of the leading High Court cases concerning the Land Rights Act (*Ex parte Meneling Station* 1982) observed that this definition was fundamentally different to the ‘bundle of rights’ that ownership in Australian property law generally entails.

The term ‘*traditional Aboriginal owners*’ has a very different connotation. A traditional right to forage is the only “right” included as an element in the definition, but even that right is not necessarily exclusive of the foraging rights of others. Foraging rights, apart the connexion of the group with the land does not exist in the communal holding of rights with respect to the land but in the group’s spiritual affiliations to a site on the land and the group’s spiritual responsibility for the site and the land. Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights.

Justice Brennan described these as usufructuary rights protected under the legislative scheme. A statutory right of entry, use and occupation of Aboriginal freehold land in accordance with Aboriginal tradition is recognized in the Act.

This is indicative of an important part of the legislative design of the Act. The customary tenure is legally recognized and protected. While at the same time ownership of land in Australian property law is granted via a fee simple to supplement the customary tenure thereby ensuring it has equal status in Australian law as a registered proprietary interest (*Wurridjal* 2009).

This is further supplemented with a special statutory arrangement to facilitate group decision-making and independent verification of the fairness of any agreement via the Land Council with underlying statutory safeguards being vested in the executive arm of government the responsible Minister of the Crown whom must also consent to certain long-term leases.



Leasing under the Territory Land Rights Act

An important part of the legislative scheme is the ability of traditional Aboriginal owners to authorise the grant of a lease. Leases can be granted for community, government, residential and commercial purposes pursuant to s19 of the Act. Justice Brennan stated in this respect that: ‘The Aboriginal people connected with the tract of country were thus made competent to use their country in a non-traditional way if and when an Aboriginal consensus to do so should be established’ (*Ex parte Meneling Station* 1982).

There are also substantive provisions in the Act that deal with the grant of exploration and mining leases, which similarly require the consent of traditional Aboriginal owners.

In addition a township lease, a long-term head lease can be granted (since amendments in 2006 commenced) to a Commonwealth statutory officer - the Executive Director of Township Leasing pursuant to section 19A of the Act.

The introduction of the latter form of lease was the legislative fulfillment of increasing criticism of the Land Rights Act that it did not provide for individual property rights and therefore limited economic development. This criticism was symbolized by the late Helen Hughes from the Centre for Independent Studies whom advocated that communal land ownership was a primary cause of indigenous disadvantage and needed to be replaced by individual property rights (Hughes 2005). This criticism is reflective of the approach taken historically in property rights and international development literature which did not take into account customary tenure and sought its replacement by individual property rights (Terrill 2015).

An examination of the origins of the Act and especially the s 19 leasing provisions are certainly indicative of a strong focus upon maintaining customary control over all land returned under the Act. There was little emphasis on the use of land for economic development purposes at its inception.

Justice Woodward the Aboriginal Land Rights Commissioner whom reported to government before the commencement of the Land Rights Act observed that transfers should only be done with the consent of the Minister as a protective measure to ameliorate any improper or corrupt dealings. Further that in general terms that a lease should not be granted to non-Aboriginal persons and if granted be subject to Ministerial and Land Council consent (Woodward 1974). Interestingly, he further wrote that ownership ‘must be communal’ and that in relation to



leases that: ‘Communities will no doubt wish to give leases to individuals in some cases and, at some time in the future, individual title to land may become appropriate’ (Woodward 1973).

The Minister’s role is a significant part of the legal design of the legislative framework in the Act. Specifically the grant of a lease under either ss 19 (in certain circumstances)² or 19A requires Ministerial consent. Justice Toohey in a review of the Land Rights Act in 1984 was of the view that this was a ‘concomitant’ of the principle of inalienability. He further observed that the grant of a lease for a long term may infringe that principle (Toohey 1984). Originally the initial grant of a lease and any subsequent transfer of that lease was subject to Ministerial and Land Council consent. This included the situation where a loan may be secured by a mortgage in relation to the lease. This had obvious implications in relation to the fungibility of this form of lease and its use as security for a loan.

This is clearly reflective of the thinking at the time. A focus on economic development and the use of leasing in particular not only led to the new s19A township leasing provisions but also a critical change to the section 19 leasing provisions. Since 2006 restrictions on the term of the lease and a requirement for Ministerial consent for a s19 lease have been lifted so it can now be granted for any term for any purpose and subject to later transfer without the need for further consents.

In the last 10 years there has been somewhat of a leasing revolution on Aboriginal land involving the grant of leases and licenses under the Act. Prior to this period, most tenure was of an informal nature (Terrill 2015). For example in the central region of the Northern Territory some 478 leases had been processed with 511 to be considered in late 2013 (Central Land Council 2013). At the time of writing in the northern region the Northern Land Council had some 374 applications for leases or licenses under consideration with an average of one per day being received.

These subsidiary instruments (leases or licenses) now provide significant income for some traditional owners and include a range of residential and commercial purposes. In particular for stores, cattle and buffalo raising and mustering, agriculture, harvesting of crocodile eggs, public infrastructure and government services, resource extraction, fisheries, tourism and safari hunting.

² In instances, where the term of the lease exceeds 40 years and/or an amount of \$1 million.



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



Despite the increasing income from these activities the legal framework provided by the Land Rights Act has not been optimally utilized. This is so because more often than not these interests could not be used as equity to raise finance. The lease often could not be registered because it was not surveyed and therefore not able to be registered with the land titles office.

There are other legislative obstacles to creating markets and equity on Aboriginal land. The local Valuation Act does not provide for the valuation of leases where that is the only transferable instrument in the context of an inalienable Aboriginal freehold to protect the customary tenure.

Fortunately the Federal Government is funding an ongoing surveying program in communities to overcome some of these practical problems and the Northern Territory Government is prepared to support the registration of all leases on Aboriginal land under the Land Rights Act. This resonates with practical problems in the developing world.

As has been stated and quoted elsewhere the provision of essential services infrastructure, lot surveys, dispute resolution, planning and accurate land records are essential building blocks for a viable market in communities. The Land Rights Act provides the appropriate legal framework to underpin an economy but until these measures are fully implemented this potential will not be fully realized (Central Land Council 2013 quoting Deininger 2003)

The establishment of secure property rights, that is, rights that are defined with sufficient precision and can be enforced at low cost so as to instil confidence in economic agents, requires considerable investment in both technical infrastructure, such as boundary demarcation and generation and maintenance of maps and land records, and social infrastructure, such as courts and conflict resolution mechanisms.

This process is now underway at least in the Northern Territory of Australia under the Land Rights Act.

Township Leases under the Land Rights Act

The relatively new scheme pursuant to section 19A of the Act provides for a 'whole of township' lease to be granted by an ALT (at the direction of a Land Council) to the Executive Director of Township Leasing (EDTL), on behalf of the Commonwealth government. The Director may then issue subleases for any purpose and then administers the land in



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



consultation with traditional owners. Consistent with other provisions of the Act the informed consent of the traditional owners must be granted through the Land Council process. It must be satisfied that the terms and conditions of the proposed lease are reasonable. A sub-lease can then be issued for any residential, government or commercial purpose without further consent by traditional owners.

This leasing model is the result of government policy that described the Land Rights scheme as a ‘failed collective’ and that a new tenure system was needed. The relevant Minister stated that the amendments: ‘will provide for 99-year lease-backs of town centres to allow a head lease to be provided to the ... Government and for Aboriginal people, for the first time, to be able to own their own property in these places, build their own home, build their own businesses and build their future for themselves and their families.’ The Minister further stated that ‘It is individual property rights that drive economic development’ (Brough 2006).

The primary differentiating point concerning this model of leasing (and with s 19 of the Act) is that it involves traditional owners transferring control and management of the township area to a Commonwealth government officer effectively in perpetuity. This is because the term of the lease is for a maximum of 99 years or 40 years renewable and the EDTL in reality assumes the role of landlord under the ‘head’ lease. Under the legislative scheme the traditional Aboriginal owners have no further legal rights that require their consent in the issuing of subleases or the management of the particular land area.

To date there have been three long term township leases created in relation to five communities on the Tiwi Islands, Groote Eylandt and Bickerton Island in the Northern Territory. These leases are for 99 and 80 years respectively. Substantial financial packages including rent are paid by the Commonwealth Government. Interestingly it is a term of the



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



first 99-year lease that the number of non-Tiwi permanent residents is limited to 15% of the permanent residents of the township. This restriction on the transfer of sub leases according to orthodox property rights theory may eventually have a significant impact on the market value and therefore the amount of finance that can be obtained in relation to this property interest.

Thus the customary authority granted to the traditional Aboriginal owners under the original scheme of the Act is transferred to government for an existing financial benefit and the promise of individual property rights leading to a supposed better economic future, if this particular scheme of property rights is adopted by relevant traditional owners.

There is no legal reason why a long-term township lease cannot be granted to a corporation owned by traditional owners instead of the EDTL. This corporation could then manage the township in the future and issue subleases. Similarly section 19 leases provide a flexible instrument that maintains customary authority and provides for a fungible, registrable and transferable proprietary interest either as a direct lease or via a headlease and sub-leasing model. The transferability of any such leases or sub-leases to ‘outsiders’ remains a significant issue in any such approach utilizing the section 19 or 19 A leasing framework.

The difficulty until 2015 was that the Federal Government would only fund the s19A model that solely provided for the Commonwealth officer (EDTL) to assume management of the land. Thus some traditional owners thought they had no real choice in a practical sense as significant additional funding for housing and economic and social development accompanied agreement to this form of township leasing. It is obviously important that government supports self-determination and provide options to Indigenous peoples that allow them to take responsibility and manage their own affairs.

For example, there is a significant body of literature in the United States from the Harvard Project on American Indian Economic Development that self-determination is the key factor



in achieving economic development in Indian communities in the United States (Harvard Project 2017).

There is no doubt that in recent years the notion of individual property rights is starting to have a significant impact in land rights law in Australia.

On the surface there has been much in common between Traditional Owners, Territory Land Councils and Governments concerning the potential benefits of long term leasing. It allows for the maintenance of an underlying freehold title to be held for the benefit of traditional owners whilst providing for the grant of a fungible title – a long-term lease for private residential and commercial purposes. Further it only applies to the township area and not the majority of traditional lands in most instances and rent and other benefits can be paid to traditional owners as the effective landlord.

In the Northern Territory it is the maintenance of customary authority with section 19A township leases that has been of concern with Federal Government policy.

The Federal Government's 19A township leasing model still requires the informed consent of traditional owners. This on the face of it is consistent with the United Nations Declaration on the Rights of Indigenous People.

Yet as Noel Pearson recently wrote in the Quarterly Essay (2014):

Indigenous People need to think bigger than consent. We should instead talk about creative control. About coming up with solutions in equal partnership with government - or better still, with indigenous peoples *leading the way* in indigenous affairs. Should not government consent to our policy and reform ideas?

The World Bank (2014) further states that 'tenure security' and 'some measure of transferability of land rights' are the two principles of 'land tenure policy' required for 'growth and poverty reduction' in customary settings. This is the legal framework that has always existed in the Territory Land Rights Act with section 19 leases.

There is no legal reason under the Land Rights Act why a long-term township lease cannot be granted to a corporation owned by traditional owners and/or the local community. Instead of the Executive Director of Township Leasing. This corporation could then manage the township in the future and issue subleases.



Community Entity and Township Leases

It was only in 2015 that the Federal Government agreed to negotiate a different approach by permitting and funding a community entity to manage a township lease instead of a Commonwealth officer.³ The relevant Minister after negotiations with some of the descendants of the Yolngu elders that commenced the Gove Land Rights case (*Milirrpum*) – the Gumatj people announced:

The community township leasing model has been developed at the request of the traditional owners in Gunyangara, who have strong local business organisations and want to strengthen local decision-making in their community.

The leaders of the Gumatj clan had originally sought to negotiate a township lease in 2007. This clan has been the beneficiary of significant income as an affected community by the local bauxite mine already mentioned and a 2011 mining compensation agreement. Consequently it has independent income and good local corporate governance developed over a number of years.

In recent years it has invested these monies in businesses that are focused on local employment and training rather than profit. The Gumatj people now own enterprises through their own Corporations in mining and training, timber production, cattle, a butchers shop and other enterprises. As an example the mining agreement under the Land Rights Act provides for royalties, Indigenous employment, environmental protections and the protection of Indigenous culture and traditions (Davidson 2016).

The township lease for the Gumatj peoples' home community Gunyangara now approved by the Land Council (2016) will be granted to a Corporation solely controlled by the traditional owners. In future it will be able to grant sub-leases without reverting to the Land Council although it can call on its support if needs be in the future. As the Chief Executive Officer of the Northern Land Council said at the time (Everingham 2016) 'We hope the era of self-determination is returning to Aboriginal affairs where Aboriginal people take control of their own lives and their own destinies.'

A significant issue that will face traditional owners through their local corporations in the

³ The approval of the Commonwealth Minister is required for a community entity to hold a township lease.



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



future will be the extent to which they grant long-term sub-leases that are fully transferable. Obviously the more restrictions that are placed on the transfer of leases then the less value those instruments will have. On the other hand traditional owners will be concerned to ensure that large parts of their communities are not transferred to ‘outsiders’. This will be part of the delicate balance they will face in attempting to grow a local economy.

The *Forrest Review – Creating Parity* (2014) commissioned by the Australian Government which was primarily concerned with Indigenous employment recommended that 99-year leases be enabled on Aboriginal land ‘so that it can be mortgaged or traded through the open market’. This review if it means to recommend that residential or commercial leases should be fully transferable on the open market raises the real prospect that land can be transferred outside the Indigenous estate in perpetuity.

I suspect that these developments at a local level are as much about enhancing local decision making as it is about achieving a fungible title and developing local economies. The statutory framework in the Land Rights Act with a regional representative Land Council at its centre has been criticized for being too distant from traditional owners. The phrase local decision making is often used as short hand for this criticism.

A key aspect that is sometimes forgotten though in this discourse is the requirement for a Land Council to ensure that traditional owners provide their informed consent to any development proposal before the Land Council approves an agreement or lease.

Nonetheless significant calls have been made by some Indigenous people to change the approach. In 2014 Galarwuy Yunupingu a long time former Chairman of the Northern Land Council wrote:

I start at the beginning, with land ownership. Land ownership is at the core of Yolngu identity: it not only gives us our asset in the modern world, it links us together as people. The authority of the landowning clan and the clan leadership must come to life.

This is what I talk about when I say that land rights is sleeping and that it is full of everything yet full of nothing. Land rights sleep because the system does not give life to the leadership that owns the land. It does not give life to that ownership - “land rights” is a process of claim, not of use. It does not give the land the energy and



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



power it needs to be useful to its owners and to enrich their lives. It does not unlock the wealth that belongs to the landowners.

Decisions for use of our land should happen naturally and through clear pathways, always directed by local landowners, reflecting their priorities. In the 1970s, our leaders were not ready to take full responsibility in the new era of land rights, but now the time is right to move to a new model with political authority transferred to the regions.

The Land Rights Act enables the transfer of authority to local people — so let it be done. In northeast Arnhem Land we will ask for a transfer of power to clan leaders with strict rules for governance and responsibility.

The Northern Land Council will retain an important role as a central service body, an umbrella body.

This transfer is now underway with the recent approval by both major regional Land Council's in the Northern Territory of 99 year township leases at both Guyangara and Mutujulu communities. The key difference being that these communities will be managed locally and controlled by either the traditional owners or the local community and not permanently by the Commonwealth government directly (Morrison 2015). In relation to the Mutuluju community the Director of the Central Land Council stated (Central Land Council 2016):

...when the CLC first proposed a community leasing model, in 2010, the Commonwealth resoundingly rejected it. "Traditional owners consistently opposed the Commonwealth's township leasing model, so we persevered. We are very pleased Indigenous Affairs Minister Nigel Scullion has accepted our model,"

A profound change in government policy since the Intervention in 2007 has now occurred. The approval of a community entity and the attached funding is a Ministerial decision under the Land Rights Act. Unfortunately these reforms are still being undertaken without the benefit of an assessment of the political economy of the community involved. That is the social, economic, cultural and political circumstances of the people involved to try and establish the best way forward. Although, at least the Federal Government is now providing traditional owners in the Territory with some real choice.



Indigenous Protected Areas and the Modern Carbon Economy

The other area major area in which traditional owners have driven change and economic development in their own way on Aboriginal land under the Land Rights Act has been in the inter-related fields of:

- conservation via the voluntary establishment of Indigenous Protected Areas;
- the establishment of local ranger groups to manage these conservation areas and;
- the grant of section 19 licenses under the Land Rights Act to enable Indigenous controlled Corporations to have the project rights to earn carbon credits in the modern economy from the re-introduction of traditional management practices through early dry season savannah burning projects.

In Northern Australia in 2016 there were approximately ‘70 eligible offsets projects registered’ with some 2.4 million carbon credits issued conducting early dry season fire management in accordance with the current Federal Government’s Emission Reductions Fund. This has produced both an important source of income for Indigenous groups as well as reducing greenhouse gas emissions from wildfires (Department of the Environment and Energy 2017).

In Australia there are now ‘over 70 dedicated Indigenous Protected Areas across 65 million hectares’ which is approximately 45 % of Australia’s national reserve system (DPMC 2017).

The protection and maintenance of biological diversity is “a principal objective” in Australia’s ‘national conservation and environment’ policies (Adam 2009). This is sourced in the *Convention on Biological Diversity* (Convention), which was opened for signature at the Rio Earth Summit on the 5 June 1992. It entered into force for Australia on the 29 December 1993. The adoption of the Convention (despite its inadequacies to some) has had a major impact in Australia by providing the legal beachhead to address the loss of biodiversity in Australia.

The Convention has domestic application in Australia with the enactment of the *Environment Protection and Biodiversity Act, 1999* (EPBC Act). The Convention is implemented at a policy level through, amongst other things *Australia’s Biodiversity Strategy 2010-2030*.

The Convention requires *In-situ* conservation including through a system of protected areas (Article 8). A Protected area is defined in the Convention (Art.2). The revised IUCN



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



definition is more commonly used:

A protected area is a clearly defined geographical space recognized, dedicated and managed, through legal and other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values (Dudley, 2008).

Both definitions include private land as well as public or government controlled reserves or national parks (Farrier 1996). The establishment of Protected Areas is one of the principal means by which Australia has implemented the Convention to conserve biodiversity. The IUCN relevantly includes Indigenous owned areas such as land under the Land Rights Act:

The IUCN definition of protected areas is intended to be applied to protected areas across biomes, ownership and governance types, motivations, management objectives, and jurisdictional levels. This includes marine areas, forest areas, inland water areas, sacred sites, and areas voluntarily conserved by communities and indigenous or traditional peoples, as well as private protected areas (Lausche, 2011).

Australia uses the IUCN categories in the EPBC Act in establishing Commonwealth Reserves. Australia's policy response has been to create the National Reserve System. The National Strategy for the National Reserve System 2009 – 2030 approved by the Natural Resource Management Ministerial Council in May 2009 designates four types of protected areas; public reserves (or government-owned); Indigenous Protected Areas; private protected areas; and shared management reserves. This covers some 18% of Australia's landmass comprising over 137 million hectares in 2016. This policy aims to establish a 'comprehensive, adequate and representative system of protected areas' (CAR) (National Reserve System 2016)

As is apparent from these figures Indigenous Protected Areas (IPAs) are now a vital component of Australia's National Reserve System and a significant measure by which Australia implements its international obligations under the Convention on Biological Diversity. The Indigenous "estate" comprises "some of the most intact and nationally important wetlands, riparian zones, forests, rivers and estuaries.." in Australia and includes "natural and cultural landscapes of national and international significance"(Altman, Buchanan & Larsen 2007).



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



The recognition of Indigenous controlled and managed land as a self-declared or voluntary protected area was initially made possible according to Bauman and Smyth (2007) in the 1994 IUCN revised Guidelines:

The 1994 IUCN guidelines, however, provided acceptance of Indigenous ownership, use and management of land as being compatible with protected area status. The guidelines also recognized that conservation outcomes rather than statutory management arrangements were the key factor in determining whether protected area status should be recognized over a particular area of land.

This development was clearly significant as many Indigenous land owners did not want to forgo their hard earned control of traditional land and waters in Australia under the Land Rights Act. For example in relation to the Dhimurru IPA in the Northern Territory traditional owners saw joint management with a Territory government conservation agency as ‘conceding too much control’ and the risk of their values ‘becoming subservient’ to non-Indigenous conservation values (Altman & Kerins 2012).

The IPA program allows for the voluntarily declaration and recognition of new protected areas substantially on terms set by traditional owners themselves without having to transfer any land title to government agencies: “...the IUCN guidelines provide for the possibility of protected areas to be managed under Indigenous law, without the protection of statutory law’ (Bauman & Smyth 2007).

The flexibility in the IUCN Guidelines that recognise the right of self-determination is a major incentive for the formal involvement of Indigenous peoples in biodiversity conservation according to international and national environmental law and allows the IUCN to endorse the following statement: “...the recognition of ICCAs that fully meet protected area definitions and standards in national and regional protected area strategies is one of the most important contemporary developments in conservation’ (Dudley 2008).

The key characteristics of an IPA in Australia have been the voluntary agreement of traditional owners to manage their land as a protected area, sole Indigenous legal control and management in accordance with Indigenous values “independent of national, state or territory conservation legislation’ (Bauman, Haynes & Lauder 2013). The IUCN Guidelines describe the distinctive features of an Indigenous controlled protected area as being “socio-political arrangements” with the State that provide for the self-declaration of the protected area as an exercise of self-determination constituted by free and informed consent of the people



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



concerned to establish agreements with the State agency concerning the management of the protected area (Dudley 2008).

This significant development at both the domestic and international level importantly also complies with the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*. The Declaration requires Indigenous peoples free and prior informed consent concerning the management and control of their traditional lands, the right to the conservation and protection of the environment of their traditional lands and the right to determine plans for development or use of their lands and resources.

In Australia Indigenous representatives have defined an IPA in the following terms:

An Indigenous Protected Area is governed by the continuing responsibilities of Aboriginal and Torres Strait Islander peoples to care for and protect lands and waters for present and future generations. Indigenous Protected Areas may include areas of land and waters over which Aboriginal and Torres Strait Islanders are custodians, and which shall be managed for cultural biodiversity and conservation, permitting customary sustainable resource use and sharing of benefit. This definition includes land that is within the existing conservation estate, that is or has the ability to be cooperatively managed by the current management agency and the traditional owners.

Needless to say an Indigenous Protected Area may be subject to separate and possibly competing policy objectives within Indigenous communities and in Australian law. The legal recognition of Indigenous traditional rights to land and waters such as under the Land Rights Act includes rights that facilitate Indigenous involvement in the modern Australian economy and the protection of Australia's biodiversity. The concern to ensure economic development on the Indigenous estate to maximize employment and wealth creation will not be solely achieved by the provision of environmental services consistent with the establishment of IPAs (Bauman, Haynes & Lauder 2013).

Category V and VI Protected Areas

This is to some extent ameliorated by the fact that all IPAs on Aboriginal land under the Land Rights Act are category VI protected areas, except one which is Category V. There are 15 IPAs on Aboriginal land in the Northern Territory.

The primary objective of these respective categories is:



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



- Category V: To protect and sustain important landscapes/seascapes and the associated nature conservation and other values created by interactions with humans through traditional management practices.
- Category VI: To protect natural ecosystems and use natural resources sustainably, when conservation and sustainable use can be mutually beneficial.

Both categories permit some intensive uses including forestry, agriculture and tourism. The IUCN Guidelines describe Category VI as areas that ‘remain as predominantly natural ecosystems’. There is also an emphasis on conserving cultural values and what are described as sustainable and traditional natural resource management systems (Dudley 2008). This includes activities such as hunting, grazing and savannah burning.

The establishment of *Indigenous Protected Areas* by Aboriginal peoples which now forms a significant part of the country’s national reserve system has been a significant advance for those traditional owners concerned. It has been accompanied by carbon abatement legislation and the establishment of indigenous ranger programs in many parts of Australia (O’Donnell 2013). This has assisted Indigenous people in some areas by earning carbon credits managing their country in a traditional manner by the reintroduction of early dry season fire management regimes in the northern Australian tropic savanna areas.

Indigenous Rangers and Working on Country Programme

The Working on Country (WoC) programme funded by the Federal Government has been instrumental in providing employment to Indigenous rangers who provide ‘land management’ and other services’ on Indigenous Protected Areas. Ranger groups also assist traditional owners in managing Aboriginal land under the Land Rights Act more generally. The income to support these programmes is also sourced from the private sector, carbon trading and general fee for service work where available.

At a national level government funding through either the IPA or WoC programmes supports some ‘777 FTE ranger positions in 109 ranger groups, Together, they employ over 2600 Indigenous people in either full-time, part-time or casual jobs’ (Australian Government 2016).

I will now describe the work of one Aboriginal Corporation as an example of the way traditional owners are taking advantage of their position under the Land Rights Act in this policy context.



Wardekken IPA

The Wardekken IPA in Western Arnhem Land in the Northern Territory is managed by Wardekken Land Management Ltd in accordance with an approved Plan of Management (2016-2020). This is a not for profit company limited by guarantee. The Indigenous Board is constituted by local traditional owners from more than 36 clan groups.

The IPA area comprises some 1.4 million hectares and was originally established in 2009 and has employed in excess of 250 Indigenous people since then. The focus of its work is on early season fire management consistent with traditional land management practices, feral animal (Asian water buffalo, wild pigs) and weed (mission and gamba grass) control. The meat is harvested for general community benefit.

This work is done on traditional homelands, which also provides for the continuance of cultural practice and facilitates the passing on of traditional knowledge from generation to generation, as people are living and working on their traditional country outside the major communities where social problems are generally greater.

The social, cultural and economic impact is significant. It has been estimated by an independent evaluation that for every \$1 invested there has been a return of \$3.40. This has been calculated as a social return on investment of \$55.4 million in total since 2008. The carbon emission offsets generated are valued at \$4.4 million. As well as the local employment outcomes an associated venture utilizing private capital has established a school within the IPA area that has a bilingual and 'bicultural curriculum under development'. The school attendance rate is reported at 87% (Wardekken Annual Report 2015-2016).

In summary the independent evaluation by Social Ventures Australia (2016)⁴ states:

The Wardekken IPA and associated Indigenous Ranger programme has had a transformative effect on Nawarddeken to whom the land belongs, enabling them to stay on country and manage their land while connecting with culture and ancestors. Significant value is derived from the IPA's fire management work conducted by Rangers on country using traditional and contemporary practises, which has generated significant revenue for Nawarddeken as a result of carbon offset sales facilitated through innovative partnerships including the West Arnhem Land Fire Abatement (WALFA) Project.

⁴ This report dated February 2016 was commissioned by the Federal Government.



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



This is made possible by a legally binding instrument (license) granted pursuant to the statutory process described under section 19 of the Land Rights Act. Further programmes of this nature have been assessed as providing ‘real jobs’ with associated flow on effects in to the local community and economy (Productivity Commission 2016).

Conclusion

In customary settings one can have both a form of collective ownership and individual property rights. The Northern Territory Land Rights Act is an example. The customary or traditional authority continues to underlie the decision-making and rights of management. Leasing is the preferred method for the provision of individual property rights on portions of the estate as long as underlying customary authority is maintained.

This paper has demonstrated how the land tenure and governance framework established in the Land Rights Act for over 40 years can continue to respond to the developing aspirations of Indigenous peoples in meeting their needs for self-determination and economic development. The legal framework by itself will never be enough as the serious needs in education, health, housing and employment must still be addressed so that a viable economy and market can develop and wellbeing significantly improve. Nonetheless there are a number of locally driven initiatives emerging based upon this sound legal framework.

The maintenance of an underlying inalienable title may still limit the fungibility of a lease be it only because of perceptions. Traditional owners will not relinquish permanently control over large areas of their traditional estates. An approach whereby government supported by financial institutions provide guarantees to limit the risk of loss of land in the market place would ensure that we can keep world leading approaches to the recognition of customary tenure and encourage economic development without asking Indigenous Australians in the Northern Territory to surrender control of traditional lands.



References

Aboriginal Land Rights Commission First Report July 1973 The Parliament of the Commonwealth of Australia 1973- Parliamentary Paper No.138, 20.

Adam, Paul (2009), *Ecological Communities – The Context for Biological Conservation or a Source of Confusion* 13 AJNRLP 1.

Altman, J and Kerins, S (eds) (2012), *People on country: vital landscapes, Indigenous futures*, Federation Press, Sydney, 126.

Altman, J.C., Buchanan G.J and Larsen, L (2007) *The environmental significance of the indigenous estate: natural resource management as economic development in remote Australia* CAEPR Discussion Paper No. 286/2007.

Altman, J and Markham, F. (2015). Chapter 9 Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities. In Sean Brennan, Megan Davis, Brendan Edgeworth, Leon Terrill (Eds.), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment ?* Federation Press.

Australian Government (2015) *Minister Scullion: Gnyangara a step closer to township lease* <http://www.indigenous.gov.au/news-and-media/announcements/minister-scullion-gnyangara-step-closer-township-lease>

Australian Government (2016), Department of Environment National Reserve System retrieved at <http://www.environment.gov.au/land/nrs>.

Toni Bauman, Chris Haynes, Gabrielle Lauder (2013) *Pathways to the co-management of protected areas and native title in Australia* AIATSIS Research Discussion Paper No. 32,18.

Bauman, Toni and Smyth, Dermot (2007). *Indigenous Partnerships in Protected Area Management in Australia: Three case studies*. Australian Institute of Aboriginal and Torres Strait Islander Studies.

Brough, Hon. Mal (2006) Second Reading Speech, 31 May 2006 Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Minister for Indigenous Affairs 31.

Central Land Council (2013) *Land Reform in the Northern Territory: evidence not Ideology* http://www.clc.org.au/files/pdf/ALRA_Tenure_paper_-_final_Nov_2013_EDIT.pdf



Central Land Council *Township leasing our way: CLC approves community driven model for Mutitjulu* <http://www.clc.org.au/media-releases/article/township-leasing-our-way-clc-approves-community-driven-model-for-mutitjulu/>

Chief Justice Robert French (2008), *Rolling a Rock Uphill ? - Native Title and the Myth of Sisyphus*, 10 October 2008 Judicial Conference of Australia National Colloquium.

<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj10oct08.pdf>

Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 1976, 2,4.

Davidson, Helen (2016). *Indigenous-owned company approved to open mine in Arnhem Land* The Guardian <https://www.theguardian.com/australia-news/2016/aug/17/indigenous-owned-company-approved-to-open-bauxite-mine-in-arnhem-land>

Department of the Environment and Energy (2017) Draft Explanatory Statement *Carbon Credits (Carbon Farming Initiative) Amendment Rule 2017 (No. 1)*.

Department of Prime Minister & Cabinet (DPMC) (2017) Australian Government [Retrieved from https://www.dPMC.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas](https://www.dPMC.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas)

Dudley, N. (Editor) (2008). *Guidelines for Applying Protected Area Management Categories*. Gland, Switzerland: IUCN, 9

Everingham, Sarah *Breakthrough land agreement gives traditional owners more development control* <http://www.abc.net.au/news/2016-11-21/breakthrough-agreement-give-traditional-owners-more-control/8043042>

Fitzpatrick, Daniel (2006). Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access *Yale Law Journal* 996, 1001.

Farrier, David (1996) *Implementing the In-situ Conservation Provisions of the United Nations Convention on Biological Diversity: Questioning the role of National Parks* 3 AJNRLP 1, 4.

Grant, Stan (2016). *The Australian Dream Blood History and Becoming* Quarterly Essay Black Inc.

Hanstad, Tim (1998) Designing Land Registration Systems for Developing Countries, *American University International Law Review* 13, no. 3.



Harvard Project 2017, *American Indian Economic Development*. Retrieved at <http://hpaied.org>

Howlett M; Gray, M and Hunter, B (2015). *Unpacking the Income of Indigenous and non-indigenous Australians: Wages, Government Payments and other Income*. CAEPR Working Paper No. 99/2015 Centre for Aboriginal Economic Policy Research School of Social Sciences College of Arts & Social Sciences The Australian National University. ISSN 1442-3871.

Hughes, Helen (2005) *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities* Retrieved at <http://www.cis.org.au/publications/issue-analysis/article/845-a-new-deal-for-aborigines-and-torres-strait-islanders-in-remote-communities>

Lausche, Barbara (2011). *Guidelines for Protected Areas Legislation*. IUCN, Gland, Switzerland.

McRae, Nettheim and others *Indigenous Legal Issues* (4 ed.) Thomson Reuters 2009, 243.

Morrison, Joe (2015) Keynote Speech at Garma Retrieved at <http://www.nlc.org.au/media-releases/article/keynote-speech-at-garma-festival>

O'Donnell, Michael (2013) *Native Title – a right to burn and fire the land? Savanna burning and the Carbon Farming Initiative in northern Australia* 30 EPLJ 553

Pearson, Noel (2014) *A Rightful Place - Race, recognition and a more complete commonwealth* Quarterly Essay 55 Black Inc.

Social Ventures Australia (2016), Department of the Prime Minister & Cabinet *Social Return on Investment analysis of the Warddeken Indigenous Protected Area and associated Indigenous ranger programme* Full Report.
<https://www.dPMC.gov.au/sites/default/files/publications/Warddeken%20SROI.pdf>

Toohey, Mr Justice (1984) *Seven Years On - Report by to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*. AGPS Canberra.

Terrill, Leon. 2015. *Beyond Communal and Individual Ownership Indigenous Land Reform in Australia*, Routledge.

Wardekken Land Management Ltd *Annual Report 2015-2016*.



Woodward, Mr. Justice *Second Report April 1974 Aboriginal Land Rights Commission*, Commonwealth Parliament 1974 - Parliamentary Paper No.69.

World Bank (2104) Land Policy: Sector Results Profile

<http://www.worldbank.org/en/results/2013/04/15/land-policy-results-profile1>

Yunupingu, Galarrwuy *Teach Our Young People to Look Up* The Australian August 2, 2014.

Reports

Annual Report ABA (2013). Retrieved at

<http://resources.fahcsia.gov.au/annualreport/2013/appendixes/k/index.html>

Australian Agency for International Development (2008). *Making Land Work* Volumes 1 and 2, Canberra, ACT.

Australian Bureau of Statistics (ABS) Regional Statistics, Northern Territory, Mar 2011 <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1362.7Feature%20Article1Mar%202011?opendocument#Aboriginal>

Australian Bureau of Statistics (ABS) (2016) National Aboriginal and Torres Strait Islander Social Survey , 2014-15 (NATSI Social Survey).

Justice Woodward Aboriginal Land Rights Commission First Report July 1973

The Parliament of the Commonwealth of Australia 1973- Parliamentary Paper No.138

Anderson, P and Wild, R (2007). Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse.

http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf

Northern Territory Emergency Response (NTER) (2008) Review Board Report. Retrieved at <http://www.nterreview.gov.au/report.htm>

Productivity Commission, (2016) Overcoming Indigenous Disadvantage Key Indicators 2016 Report. 9.1; Key Indicators Overview 2016; Main report Chapter 4. Retrieved at <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016>



Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



Legislation

Aboriginal Land Rights (Northern Territory) Act 1976.

Aboriginal Land Rights (Northern Territory) Amendment Bill 2006. The Minister for Indigenous Affairs Hon. Mal Brough Second Reading Speech 31 May 2006.

Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth), Part 3 Divisions 10 and 11.

Environment Protection and Biodiversity Act, 1999 (Cth)

Northern Territory National Emergency Response Act, 2007.

Cases

Cooper v Stuart (1889) 14 App Cas 286.

Mabo (No 2) v State of Queensland 175 CLR 1.

NT v Arnhem Land Aboriginal Land Trust 236 CLR 24,63 [50].

The Queen v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327, 357-358.

Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia 17 FLR 141.

Wurridjal v Commonwealth (2009) 237 CLR 309, 450[391].