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**REFORMS TO INDIGENOUS LAND TITLE IN AUSTRALIA:
SOME LESSONS FROM OTHER JURISDICTIONS**

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I INTRODUCTION

Currently, Australia is considering reforms in relation to Indigenous title to land. Proposals first emerged to convert Indigenous communal/group land holdings into individual, alienable forms of title.¹ Fresh proposals then gave consideration to retaining the underlying Indigenous communal title while allowing individual dealings with land.² The question of whether Indigenous group land holdings should be converted into individual, alienable forms of title is clearly an important issue for Indigenous Australians. Recent Australian proposals have now been formulated in amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The purpose of this paper is to review the issue of whether Indigenous title to land should be an individual title or whether collective ownership should be preserved. This paper will examine the impacts of Indigenous land reform schemes in two other settler societies: the USA and New Zealand. This paper will consider whether such individualisation of Indigenous titles has demonstrated an improvement in the economic conditions of the Indigenous communities concerned. Finally the paper will consider whether there are lessons Australia could learn from experiences in the jurisdictions discussed and how those lessons relate to the recent amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).³

¹ See Noel Pearson and Lara Kostakidis-Lianos, 'Building Indigenous Capital: Removing Obstacles to Participation in the Real Economy' (2004) 2(3) *Australian Prospect* (Viewpoint paper, Cape York Institute for Policy and Leadership, 2004)

<http://www.cyi.org.au/WEBSITE%20uploads/Speeches_Articles%20Folder/Papers%20and%20Position%20Pieces/8%20Building%20Indigenous%20Capital_removing%20obstacles%20to%20participation.pdf> 27 February 2007; Minister for Immigration and Multicultural and Indigenous Affairs, The Hon Amanda Vanstone MP, 'Being land rich and dirt poor is not good enough' (Address to the National Press Club, 23 February 2005) <<http://www.kooriweb.org/foley/news/vanstone1.html>> at 27 February 2007; Minister for Immigration and Multicultural and Indigenous Affairs, The Hon Amanda Vanstone MP, 'Initiatives Support Home Ownership on Indigenous Land' (Press Release, 5 October 2005)

<http://www.facs.gov.au/internet/minister1.nsf/content/home_ownership_5oct05.htm> at 27 February 2007; The Prime Minister, The Hon John Howard MP, in the media coverage of his visit to the Northern Territory in April 2005 supported the position that individualisation of property rights could improve the economic development of Indigenous peoples.

² Prime Minister, The Hon John Howard MP, (Speech delivered at the National Reconciliation Planning Workshop, Old Parliament House, Canberra, 30 May 2005): in which his position was that inalienable and communal Indigenous land should be retained

<<http://www.abc.net.au/message/news/stories/s1381722.htm>> at 27 February 2007.

³ The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 was given Royal Assent and became an Act on 5 September 2006.

II REFORMING INDIGENOUS LAND TITLES

Land reform which promotes economic growth and development on Aboriginal and Torres Strait Islander lands is, this author believes, a commendable aspiration.⁴ But what is not clear is the best method by which to reform traditional Indigenous land holdings and even whether all Indigenous communities wish their systems of land tenure to be transformed.⁵ The rejection of group rights to land and the creation of individual Indigenous land titles has been promoted as essential for economic development.⁶ Replacing group or collective property rights to customary/traditional Indigenous tenures with individual rights to property is not new. Policies to individualise Indigenous customary tenures were first introduced in the United States with the allotment of numerous relatively small plots of Indian Reserve Lands to individual Native Americans in the 1880s. This allotment policy, as we will see below, failed. Individualisation policies have also been promoted in post-colonial and developing economies since the 1950s and, as Fingleton reports, have failed.⁷ Such policies were first introduced in the United States with the allotment of numerous relatively small plots of Indian Reserve Lands to individual Native Americans in the

⁴ The Northern Land Council, in its Submission to the Senate states that it 'appreciates the Commonwealth's commitment to facilitate economically healthy communities including entrepreneurship and private ownership of sub-leases in towns on Aboriginal land'. Northern Land Council, 'Submission to the Senate Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006', July 2006; at http://www.aph.gov.au/SENATE/committee/clac_ctte/aborig_land_rights/submissions/sub13.pdf at 27 February 2007.

⁵ See generally land reform of customary tenures Jim Fingleton, 'Privatising Land in the Pacific: A Defence of Customary Tenures' (Discussion Paper No 80, The Australia Institute, 2005).

⁶ Helen Hughes, 'The Economics of Indigenous Deprivation and Proposals for Reform' (Issues Analysis No 63, Centre for Independent Studies, 2005); Helen Hughes and Jenness Warin, 'A New Deal for Aborigines and Torres Strait Islanders in Remote Communities' (Issues Analysis No 54, Centre for Independent Studies, 2005) 4. Hughes and Warin state that 'nowhere in the world has communal land ownership ever lead to economic development'; Helen Hughes, 'The Pacific is Viable' (Issues Analysis No 53, Centre for Independent Studies, 2004); Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000): De Soto's hypothesis, which has been utilised to promote the advantages of individuating Indigenous title in Australia, argues a centralised legal property system, with individual alienable title, is required to access the capitalist economy; See also Noel Pearson and Lara Kostakidis-Lianos, above n 1; See also Human Rights and Equal Opportunity Commission, *Native Title Report*, Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney-General (2004); Human Rights and Equal Opportunity Commission, *Native Title Report*, Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney-General (2005).

⁷ See Fingleton, above n 5, 35.

1880s. This policy, as we will see below, also failed. In general terms the experiences of individualising Indigenous titles in both North America and New Zealand demonstrate that individualisation of title has resulted in the separation of traditional owners from their lands and a loss of Indigenous owned lands.

III INDIVIDUALISATION OF INDIGENOUS LANDS

A The Individualisation of Indian Reserve Lands (USA)

Native American tribes' communal reservations were individuated in the late 19th century. This was achieved by the creation of individual parcels of land referred to as allotment.⁸ The *General Allotment Act* of 1887 25 USC § 331, was passed in response to a concern that Indian reservation policies in the United States failed to achieve prosperity among Native Americans. Supporters of Native Americans believed that vesting individual title to land in individual Native Americans would result in economic self-sufficiency. However, those unsympathetic to Native Americans also supported allotment policies which they interpreted as promoting the assimilation of Native Americans as farmers and destroying tribal lands reserves. This in turn would release that land for non-Indian settlement.

The *General Allotment Act* of 1887 provided for specific land distributions. Individual Native Americans were allotted certain areas of reservation land. The head of a family received 160 acres, individuals 80 acres and children 40 acres. Title to the allotted land was an inalienable fee simple title. Title was inalienable for 25 years and during this initial 25 year period the United States in held the title in trust for the Native

⁸ For a discussion of allotment see William C Canby, *American Indian Law in a Nutshell* (1993); David H Getches, Charles F Wilkinson and Robert Williams, *Cases and Materials on Federal Indian Law*, (1998) 140–85; See Judith V Royster, 'The Legacy of Allotment' (1995) 27 *Arizona State Law Journal* 1; Stacy L Leeds, 'The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law' (2001) 10 *Kansas Journal of Law and Public Policy* 491; Kathleen R Guzman, 'Give or Take an Acre: Property Norms and the Indian Land Consolidation Act' (2000) 85 *Iowa Law Review*, 595; Jessica A Shoemaker, 'Like Snow in the Spring Time: Allotment, Fractionalisation, and the Indian Land Tenure Problem' [2003] *Wisconsin Law Review* 729.

American allottee.⁹ This was designed to protect allottees from irresponsible land sales and from the impact of State taxation. The *General Allotment Act* of 1887, empowered the Secretary of Interior to purchase 'surplus' lands remaining after the allotments were made. This land was frequently sold to non-Indian settlers.

The effects of allotment policy were profound. They included the loss of traditional lands, fractionalisation of tribal lands, the checkerboard effects of land holdings on reserve lands, economic problems, the loss of cultural identity, the loss of governance ability and resultant administrative costs. Allotment policies caused a reduction in the quantity of Native American land. Native American reserve land prior to allotment totalled 138 million acres in 1887. Only 48 million acres remained post-allotment in 1934. Of this amount 20 million acres were arid or partially desert country. This loss of land occurred through sales of allotted lands (after the expiry of the trust period) and through sales of tribal surplus lands. Additionally, land sales resulted from the non-payment of the property taxes or through defaults on allotted land used as mortgage security (again after the trust period expired). Many Native American allottees were left without any lands.

A long term legacy of allotment has been the fractionalisation of lands remaining in Native American ownership. The application of State Intestacy laws to allotment lands meant that after several successive generations inherited the land, the ownership of those lands became highly fractionalised. It was not uncommon for each property owner to have more than one heir and Native Americans at these times were infrequent writers of wills. The consequential effects of fractionalisation included expensive administrative regimes for these lands and increased transactional costs. By 1928 it was clear that allotment was no longer a tenable policy. The *Meriam Report* detailed the failures of the allotment policies including extensive poverty among Native Americans. This Report was the catalyst for changing federal Indian policy

⁹ The trust status of all allotments which were held in trust in 1934, when the *Indian Reorganization Act* (discussed below) was passed, was extended for an indefinite period of time by that Act. Significant amounts of allotted Indian land continue to remain in trust status today; See Canby, above n 8, 270; Richard A Monette, 'Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising out of Early Supreme Court Opinions and the *General Allotment Act*' (1995) 25 *New Mexican Law Review* 35.

Allotment ended with the *Indian Reorganization Act* of 1934, 25 USC § 461. The *Indian Reorganization Act* of 1934 prohibited new allotments being formed and stipulated that the trust status of existing allotments should continue indefinitely. However, the passage of the *Indian Reorganization Act* of 1934 did not alleviate the problems of allotment. Many of the legacies of allotment continue today. For example, fractionated ownership of allotted lands continues to be problematic. In an attempt to resolve these problems Congress passed the *Indian Land Consolidation Act* of 1983, Pub L No 97-459, 96 Stat 2519. The *Indian Land Consolidation Act* of 1983 attempted to prevent small, undivided interests in Indian lands being inherited after the owner's death. The Act provided that, where such interests in land were not productive in the year preceding the owner's death, those interests would escheat to the Indian tribe. However, the statute was silent on the payment of compensation to the owners of such interests. The relevant provision was challenged in *Hodel v Irving*, 481 U.S. 704 (1987) and the United States Supreme Court found that the regulation was an unconstitutional 'taking' of property without just compensation. Congress then amended the *Indian Land Consolidation Act* of 1983 and again the United States Supreme Court reached a similar decision in *Babbitt v Youpee*, 117 US S Ct 727 (1997). In 2004 the *American Indian Probate Reform Act* Pub L No 108-374, 118 Stat 1773 (2004) was passed.

No clear consensus has emerged as to the appropriate reforms to be implemented and how best to remedy the consequences of the allotment policy and fractionated property. Some argue that the converting the unrestricted fee simple allotments to trust status would provide an effective solution.

B The Individualisation of Māori Customary Title (New Zealand)

New Zealand has seen enormous loss of Māori customary title lands partly through a

policy of effective ‘individualisation’ of traditional Indigenous lands¹⁰ but also through a policy of Crown purchases of customary Māori lands. Māori title was, pursuant to the Treaty of Waitangi, transferable only to the Crown. The *Native Lands Act 1862* (NZ) waived the Crown’s right of pre-emption.¹¹ Pursuant to the *Native Lands Act 1862* (NZ) and the *Native Lands Act 1865* (NZ) a process was implemented whereby Māori customary title could be converted to Crown grants in freehold. This involved the Māori Land Court conducting an investigation into the traditional ownership of customary lands that were brought before the court. The traditional owners were required to prove that in Māori law they were the owners of the land. In this way ownership of Māori lands was ascertained judicially by the Māori Land Court. Once ownership was established, the court would issue a certificate of title which could be exchanged for a Crown granted freehold. Consequentially, all confirmed Māori land owners were vested with the power to freely deal with their lands.

In this way the *Native Lands Acts 1862* and *1865* (NZ) led to the demise of customary Māori lands. Although no policy of conversion of customary title land to ‘individual’ land tenures was ever directly implemented in New Zealand, Māori customary land title was, in effect, ‘individualised’. Māori customary title could, upon receipt of a Māori Land Court ordered certificate of title, either be held in common or divided by shareholdings and was freely alienable. In this way the *Native Lands Acts 1862* and *1865* (NZ) scheme encouraged direct land dealings between Māori and private purchasers. This also led to sales of traditional Māori land to non-traditional owners and the consequential demise of Māori customary land tenures.

¹⁰ See generally regarding Māori land title: Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith, *Māori Land Law* (2nd ed, 2004); David V Williams, ‘*Te Kooti Tango Whenua*’ *The Native Land Court 1864-1909* (1999); Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991); Jon Altman, Craig Linkhorn and Jennifer Clark, Oxfam Report: ‘Land Rights and Development Reform in Remote Australia’ (Discussion Paper No 276, Centre for Aboriginal Economic Policy Research, Australian National University, 2005).

¹¹ The *Native Lands Act 1862* and the *Native Lands Act 1865* were passed (Hereinafter *Native Lands Act*).

Today little Māori customary land remains in New Zealand.¹² What was once customary title is today generally ‘Māori freehold land’. Māori freehold land is land where the Māori Land Court has determined the beneficial ownership by freehold order. Māori freehold land is held and managed under the *Te Ture Whenua Māori Land Act 1993* (NZ). Māori freehold land is held under individual titles. Despite effective ‘individualisation’ these titles are frequently multiply-owned by Māori people and are collectively managed. This is due, in part, to the fact that Māori owners rarely write wills and succession laws have allowed the interests of deceased owners to be inherited by large numbers of multiple owners.¹³ Fractionalisation issues, similar to those in post-allotment North America, are mirrored in New Zealand. In addition, Māori land has also been partitioned and/or subdivided which has produced numerous blocks of small uneconomic land parcels. Today, families and tribal groups are persuaded to have traditional land holdings held by trustees for the benefit of the whole community or held in Māori Corporations to avoid individual succession and reduce administrative costs.¹⁴ Māori land now comprises about 1.5 million hectares or 6 per cent of the total area of land in New Zealand.

***C What Lessons Could Australia Learn from the History of Individuating
Indigenous Lands?***

The key consequence of individualisation of Indigenous title, in both the USA and New Zealand, has been a significant loss of traditional customary Indigenous lands. Native Americans experienced not only loss of property through allotment but also the loss of autonomy, as the individualisation of lands also deprived the communities of the ability to regulate, manage and direct activities within reservations. The ‘individualisation’ that occurred in the USA and NZ highlights that allotting individual fee simple titles to Indigenous land holders does not necessarily result in

¹² Apart from foreshore and seabed customary rights recognised in *A-G v Ngati Apa* [2003] 3 NZLR 643, today customary title would include only small land parcels previously ignored and possibly lands where survey errors took place.

¹³ Many Māori Land Court orders of ‘individual titles’ were made in favour groups of Māori families as well as individual land holders. Boast et al, above n 10, 155.

¹⁴ Altman et al, above n 10.

economic success for the Indigenous title holders.¹⁵ It is also clear that where individual Indigenous title owners have the power to act independently of community interests and deal with their share of communal lands as freely alienable individual titles, the loss of traditional lands will be greatest.

Removal of collective rights and responsibilities in traditional/customary land tenures is not the only means to reform such title. The above studies suggest that in any reform of land tenure the preservation of the group's rights to the underlying communal/traditional title is vitally important. It would seem that the whole of an Indigenous community's title should not be individualised or made freely alienable. This would guarantee that some part of the traditional title is preserved. It is possible that a system can be developed wherein other property interests can be created (eg. leases of Indigenous lands) and individual rights could be recognised (eg. possibly formalised possessory rights of occupation on Indigenous lands) without compromising that underlying collective traditional/customary title. Thus a feasible reform could be to preserve the collective ownership and management rights of the traditional owners while introducing formal mechanisms to support individual rights, such as occupation rights and also the means to promote commercial development, such as through leasing.¹⁶

This is not to say that no individuating of Indigenous title should ever occur. For many communities, the appropriate method of land reform may involve a balanced portfolio of a variety of land tenures and interests. Such portfolio could include a percentage of traditional lands that are deemed alienable and individualised, thus becoming 'privatised land'. Decisions about individualising title should be the

¹⁵ For a discussion of Native Americans as agriculturalists see Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (1990) 37. She notes that pre-European contact, 'agricultural products accounted for about 75 per cent of the food consumed by North American Indians'. The failure of individualization of title to produce economic success in farming is well documented; See also Rebecca B Bateman, 'Talking with the Plow: Agricultural Policy and Indian Farming in the Canadian and U S Prairies' (1996) 2 *The Canadian Journal of Native Studies* 211, 217-9; Bill Robertson, 'Māori Land Tenure – Issues and Opportunities' (Paper presented at the New Zealand Institute of Surveyors Annual Conference, Auckland, October 2004) <<http://www.surveyors.org.nz/Documents/MAORI%20LAND%20TENURE%20Feb%202005.pdf>> at 27 February 2007; Altman et al, above n 10.

¹⁶ These views are echoed by Fingleton, above n 5.

province of the Indigenous peoples concerned. Other factors that require consideration include the regulation of payments of taxation and rates, how Indigenous lands should be dealt with as security for mortgages, in what circumstances could partition occur and, in addition, how rules of succession and division of property on divorce might apply to Indigenous property. To prevent 'checker-boarding' effects in large areas of Indigenous lands the impact of differing tenures on Indigenous traditional lands will need careful planning.

IV AMENDMENTS TO THE ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976

Amendments in 2006 to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) alter the existing customary land tenure system. Prior to the 2006 amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) title to Aboriginal land that has been successfully claimed is an inalienable fee simple. It is a type of communal customary title which mirrors traditional systems of landholdings. Title is held by a Land Trust for the benefit of the traditional owners and is managed by a Land Council.¹⁷ Leases for residential, commercial, public purposes and for mining and as well mortgages were permitted with Ministerial consent.¹⁸ Interests can be

¹⁷ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 10, 11.

¹⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 19, 20. Section 19(4A) allows the grant of an estate or interest to any person for any purpose and this included the grant of a lease. The grant of such an interest was subject to the Land Council being satisfied that the grant was reasonable (s 19(5)(c)) and where a lease exceeded 10 years, the Commonwealth Minister's consent was required (s 19(7)). Sub-leasing and mortgaging were also permitted under s 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). However, s 19(8) prevented the holder of an interest transferring this interest except with the consent of the Land Council and Minister. This section was a matter of concern to the Land Councils who considered that it restricted a mortgagee's ability to enforce a mortgage as the consent of the Land Council and Minister were required at the time of the enforcement; See Northern Territory Government and the Northern, Central Tiwi and Anindilyakwa Land Councils, *Detailed Joint Submission to the Commonwealth Workability Reforms of the Aboriginal Land Rights (Northern Territory) Act 1976* (2003) 13 <<http://www.nt.gov.au/dcm/people/pdf/200310SummaryDocALRAProposedReforms.pdf>> at 27 February 2006; Central Land Council Public Policy Paper, *Communal Title and Economic Development*, (2005) at 5, <<http://www.clc.org.au/AboutUs/CLC%20tenure%20paper.pdf>> at 27 February 2007. See also House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Parliament of the Commonwealth of Australia, *Unlocking the Future, The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (1999) 46-47.

granted (without Ministerial consent) to an Aboriginal person, Aboriginal Council or Aboriginal Association if such interests do not exceed 21 years.¹⁹

The 2006 amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) empower the Land Trusts to undertake whole-of-community leasing.²⁰ The new leasing arrangements are designed to promote individual home ownership by Indigenous peoples and sub-leasing for businesses, both Indigenous and non-Indigenous.²¹ Under the new leasing arrangements ‘township’ land can be leased to an Entity, possibly a Commonwealth government body. Rental payments by the Entity to the Land Trust (to cover the costs of the head-lease) will come from the existing Aboriginal Benefit Account.²² Rent from the sub-leases goes directly to the Entity. The traditional land owners are not permitted to negotiate lease terms which relate to the payment of sub-lease rental. Leases can be for periods up to 99 years with replacement leases permitted to be negotiated. The Entity as head-lessee has power to grant sub-leases of land in the townships to tenants, including Aboriginal sub-tenants. Nothing in the amendments requires the head-lessee to consult with the traditional owners in relation to the sub-leases or in relation to other issues concerning the townships.

This model of land reform retains the underlying Indigenous communal title while allowing for individual dealings with land. Thus, the worst features of individualising title in the North American and New Zealand models appear to be avoided. However, a number of criticisms of the amendment scheme, many of which have been identified

¹⁹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19.

²⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) sub-s 19A. Other aspects of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) have been altered by the 2006 amendments, including the powers of the Land Councils, but these changes are beyond the scope of this paper, which focuses on tenure and leasing changes.

²¹ Commonwealth, *Parliamentary Debates*, Senate, 8 August 2006, 93 (Gary Humphries).

²² The Aboriginal Benefit Account was to benefit Indigenous peoples from mining on their lands. It seems that the traditional owners are thus effectively funding the renting of their own land.

by the Land Councils in the Northern Territory, should be noted.²³ In general terms the 2006 amendment scheme removes much of the control that Land Councils (on behalf of the traditional owners) currently exercise over their lands.²⁴ Traditional owners are removed from direct involvement in the leasing process and in the decision making about their land, for example the traditional owners have no role in the planning and development of the 'township' lands, they have no role in the environmental and cultural heritage management, and they have no say in who can access the townships and who can obtain a sub-lease and live on their lands. This scheme places control in relation to such matters with the government Entity. Under the amendments all of the sub-lease rental will go to the government Entity and the land owners are precluded from negotiating head lease conditions which contain provisions relating to the payment of sublease rental.²⁵ Additionally traditional land owners will have no input into sub-leases that are granted for purposes not acceptable to the community, such as for alcohol distributors or gambling sites. The traditional owners are effectively excluded from participating in the sub-leasing process. By placing such decisions with the Entity, the capacity of the traditional owners to negotiate terms in the head-lease is far more restricted than it would be for a head-lessee under commercial leases.²⁶ As the traditional owners have no role in management of these lands or in the negotiation of the sub-leases and as 99 year leases are renewable, the loss of control by traditional owners could continue for generations in relation to what are potentially valuable township lands. The amended legislation does not include detailed provisions in relation to the operation of the 99 year head-leases and the renewal processes. Nor does it provide detail in relation to the powers and composition of the government Entity.

²³ See generally Senate Community Affairs Committee Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Submissions received by the Committee as at 25 July 2006: <http://www.aph.gov.au/SENATE/committee/clac_ctte/aborig_land_rights/submissions/sublist.htm> at 27 February 2007. See the Northern Land Council Submission and Central Land Council Submission.

²⁴ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (as amended 2006) ss 19A-19D.

²⁵ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19A(15) of the Amended Act 2006.

²⁶ It is an established principal of leasing that a head-lessee may refuse consent to the issuing of a sublease in certain circumstances.

While the leases appear to be voluntary arrangements, concerns have been expressed that communities may feel compelled to sign leases in order to obtain financial support and fundamental services.²⁷ The use of the Aboriginal Benefit Account to finance the leasing is also of concern.²⁸ In addition, the reality is that many members of the Aboriginal communities affected will not have the income to maintain a mortgage to finance 'home ownership'.²⁹ Furthermore, it remains uncertain whether real economic benefits will ultimately be delivered to the Indigenous traditional owners and whether better outcomes can be achieved with the 2006 proposed amendments.³⁰ A resolution of the above discussed issues in relation to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) amendments would result in a much improved leasing scheme.

V CONCLUSION

To briefly summarise the lessons in this review: The conversion of traditional/customary collective Indigenous land tenures to individualised title has been implemented previously in the United States and New Zealand and in neither jurisdiction has it been successful. In both jurisdictions the consequences of individualisation have produced freely alienable title which has meant a significant loss of traditional/customary lands and in both jurisdictions the Indigenous peoples have received no increased economic benefits from the individualised tenures.

Ultimately, it should be the Indigenous community who decides whether their Indigenous title is a collective title, an individual title, a freely alienable title or even a

²⁷ See Central Land Council Submission, above n 23.

²⁸ The Aboriginal Benefit Account was to benefit Indigenous peoples from mining on their lands. It seems that the traditional owners are thus effectively funding the renting of their own land. The government position is that the Aboriginal Benefit Account will be used as a source of funding only until the scheme generates its own funding. However, it is uncertain if rents received from the sub-leases will ultimately cover the rent and administration expenses of the head lease.

²⁹ See Central Land Council Submission, above n 23.

³⁰ See Northern Land Council Submission, above n 23 and see Northern Territory Government and the Northern, Central Tiwi and Anindilyakwa Land Councils Submission, above n 18. The Central Land Council argues that changing the leasing arrangements will not, by itself, result in more businesses being started nor will it increase home ownership; See Central Land Council Public Policy Paper, above n 18 and see Central Land Council Submission, above n 23; See Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 7 (Mal Brough).

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leased title. Moreover, it should be the Indigenous community who decides when and on what terms any leasing or commercial development occurs. It should be remembered that in introducing land reform measures for Aboriginal and Torres Strait Islander lands that future Indigenous generations will be faced with the consequences of that reform. Significant loss of traditional title or loss of control of such title could potentially lead Indigenous communities to search for new recognition of their land rights.