

National Native Title Conference 2007: Tides of Native Title
6-8 June 2007
Cairns Convention Centre

Mr Tom Calma,
Aboriginal and Torres Strait Islander Social Justice Commissioner

**Maximising economic and community development opportunities through
native title and other forms of agreement-making**

Good morning distinguished guests, colleagues and friends,

I would like to start today by acknowledging the Gimuy Walubara Yidinji people on whose land we are on today and pay my respect to your elders both past and present.

As you may be aware as the Aboriginal and Torres Strait Islander Social Justice Commissioner I have a responsibility to report annually to the Federal Attorney-General and the Australian Parliament on the enjoyment of human rights and native title rights of Australia's Indigenous peoples. The most recent Native Title Report and Social Justice Report will be tabled in Parliament next week. Due to parliamentary privilege I can't comment on the findings of the Native Title Report until it is made public by the Attorney-General. So instead today I am going to talk about how to maximise economic and community development opportunities through native title and other forms of agreement-making.

Last year, I conducted a survey of traditional owners to find out their views about economic development on their lands. Some of you who completed that survey might be here with us today, and you may

recall that we launched that survey at the Native Title Conference last year.

I am going to reflect on some of the findings of that Survey and also Australian Government's policies and commitments to economic development on Indigenous land. Due to time constraints I will not discuss the other governments programs and activities.

This time last year I spoke about the opportunity for service agreements to compliment land agreements, leading to development opportunities for Indigenous peoples on their lands. Today I want to focus more specifically on the ways in which Indigenous people can utilise mainstream processes to maximise opportunities for cultural, economic and community development through native title and other forms of agreement making.

I would also like to discuss some of the concerns I have with the governments 'new arrangements' and the capacity for Indigenous people to negotiate as equal partners in the many agreement-making processes that are central to the new whole of government arrangements.

We could sit and talk all day about the challenges, limitations and pressures faced by Indigenous people to achieve economic development, but I would prefer to acknowledge the accomplishments of some of those Indigenous communities and organisations who are achieving their development goals. So I will also talk briefly about some success stories including the Far North Queensland home grown Yarrabah Housing Project.

In light of recent national media, I would firstly like to stress that I wholeheartedly support the overarching objective of providing opportunities for Indigenous peoples to generate capital and undertake economic development in their own communities, including opportunities for home ownership. In fact the majority of Indigenous people and traditional owners who responded to the survey last year support the position that sustainable economic development is essential for the well-being of Indigenous communities on Indigenous land.

This is also the policy position of the Australian Government. Although the process they have chosen to implement this does not provide for the active participation and engagement of Indigenous people and as a consequence, is problematic.

We as Indigenous stakeholders must be central participants in setting the development goals and agendas for our communities. The ultimate success of these goals is dependent on our active participation.

At present, the Australian Government is failing in its obligation to ensure that its policies, legislation, and practices are inclusive of a human rights based approach to development, which makes provision for:

- the right to self-determination;
- the right to protection of culture;
- economic, social and cultural rights;

- free, prior and informed consent; and
- equality before the law.

It is imperative that those most affected by policy are actively included in the process of negotiating and deciding upon the economic and social details that will impact our communities.

This is particularly important in light of the recent amendments to the Aboriginal Land Rights Act (Northern Territory) 1976. These amendments have put some Indigenous communities in the Northern Territory in a position where they are negotiating lease-back arrangements of Aboriginal owned land with the Federal Government.

The NT Aboriginal Land Rights Act 1976 (ALRA) provides that with ministerial consent a Land Trust may grant a 99 year headlease over an Aboriginal township to an approved Commonwealth or Northern Territory Government entity.

The 99 year leasing provisions of the ALRA will have the practical effect of 'alienating' Indigenous communal land. While a lease is not alienation in fact, it will have the same effect in practice. Ninety-nine years is at least four generations and with the potential to create back-to-back leases, there is a high probability that the leases will continue in perpetuity. The effects will also mean that traditional owners and the Indigenous community will not have a say in who takes up subleases on their lands, whether it be non-Indigenous residents, or major industry.

A major concern that I have in the case of the 99 leases proposed under the current Northern Territory ALRA provisions is that the consent threshold is very low. While the Commonwealth Native Title Act 1993 (Cth) authorisation provisions provide for legislative protections and an assurance of informed consent to native title claimants for ILUAs, the same level of protection is not afforded under the NT Aboriginal Land Rights Act. The same authorisation process, which provides for authorisation through a traditional decision-making process, or through an agreed process by all persons who hold common or group rights, should be applied to lease agreements under land rights legislation. It is essential that governments ensure that all stakeholders in lease negotiations are well informed of potential pitfalls as well as benefits and opportunities. This will give traditional owners and Indigenous authorities the information they need to give informed consent to whichever economic model suits their purposes.

These negotiations are not just happening under the Northern Territory land Rights Act. They are also occurring in relation to the eighteen communities who hold special purpose leases and which are usually referred to as the Alice Springs town camps, as well as in Wadeye, on Groote Eylandt and in the Cape.

I am concerned that some of these negotiations involve heavy inducements and promises of large scale investment of services into the relevant community in return for giving up effective control of the land for 99 years. There is an important question as to whether those services ought to be provided without any such obligation – particularly where the funding promised relates to schooling, health facilities or essential infrastructure and housing for communities. The

motivation of government must also be questioned when they refuse to consider any model other than a 99 year leasehold scheme with government control – this is one of the sticking points in Alice Springs where the government does not appear willing to consider community ownership of the head-lease to be an option.

Such community control is a realistic option. For example, the Yarrabah Housing Project demonstrates the potential for 99 year headleases to be granted under the proposed amendments to the Qld Aboriginal Land Act, 1991. The difference here is that the Indigenous community can retain control of the lease, determine what development occurs on their lands and are the direct beneficiary of the economic outcomes.

The Yarrabah Aboriginal Shire Council is currently in the planning stages of developing a 99 year residential headlease that will be administered by the Yarrabah Aboriginal Shire Council. The main purpose of the lease is to provide economic development opportunity for the community and home ownership options.

The Yarrabah case study also provides an example of how Indigenous communities are utilising mainstream and native title processes to maximise their development opportunities. In Queensland, the Governments' Negotiation Tables process is the main method used to resolve priority issues outside of native title at the local level. They involve a sustained process of consultation, planning and negotiation between community leaders and local, state and federal government agency representatives, and draw together

the efforts and contributions of all parties involved in the negotiations to achieve an identified outcome.¹

The Yarrabah Aboriginal Shire Council and the community are engaged in joint negotiations that will collectively lead to the Yarrabah Housing Project. The negotiation tables will result in a Shared Responsibility Agreement and provide a strategy and funding plan to achieve the Yarrabah Housing Project. Negotiations leading up to an Indigenous Land Use Agreement will ensure the consent of the traditional owners is obtained and provide development opportunities for them also. This is a win / win situation. The fundamental question then is whether Minister Brough will generously fund this Indigenous community controlled and managed initiative to the same extent that he is with the 99 year lease agreements he is negotiating?

As Indigenous peoples we must have the capacity to negotiate as equal partners in the many agreement-making processes we are involved in. In terms of our capacity for economic and enterprise development, the Federal government provides a range of funding and support programs for Indigenous enterprise development.

Our survey work also considered the existing programs and funding levels by government agencies for Indigenous specific projects. These agencies included seven Government Departments plus Indigenous Business Australia and Indigenous Land Corporation.

While the Government has increased the number of programs available to support Indigenous business including loan schemes and

¹ Department of Aboriginal and Torres Strait Islander Policy, *Partnerships Queensland - Future directions framework for Aboriginal and Torres Strait Islander Policy in Queensland 2005-10*, Queensland Government, 2005, p30.

support funding, the assistance operates on a self access model. This means that groups of remote Indigenous Australians are more often not in a position to apply.

Applicants require English literacy competency, and demonstrate business knowledge and management or governance capacity to be successful in their applications. Therefore only those communities and individuals who are business literate or who have the appropriate support can access these programs.

When asked, agencies report that the most common reasons provided for unsuccessful funding applications across 33 programs, was the failure to adequately address selection criteria and incomplete applications. While ultimately the availability of program funding provides equality of opportunity, it may not lead to equality of outcomes. Governments need to be sure that communities with the greatest need for resources have the appropriate support and capacity to access available program funding.

The findings of the National Survey reveal that many Indigenous people, particularly those in remote communities are not receiving information about these programs or are unable to utilise these options.

While engaging in the system is a challenge for many of us, we are getting runs on the board. This leads me to a second case study, the Indigenous owned and operated Ngarda Civil and Mining Corporation, in the Western Pilbara region. The Ngarda Ngarli Yarndu Foundation, an initiative of the ASTIC Regional Council, successfully accessed

business enterprise support programs provided by IBA, and has been supported by their industry partner, Leighton contractors, to develop an economically viable enterprise which has provided significant community benefit by way of employment and training opportunities.

Ngarda has grown over the last five years into a multi-million dollar Indigenous owned and operated business, providing contracting services to the mining and construction industries in four regions of the Pilbara. They employ 170 people, of which 140 are Indigenous.

Ngarda Civil and Mining demonstrates a range of culturally and economically viable options available to Indigenous corporations seeking to provide a higher quality of life through education and training for remote, highly disadvantaged Indigenous communities. Despite the challenges of Indigenous run enterprise, including the high cost of living in mining regions and a poorly educated and disproportionately young employment pool, Ngarda's achievements include the capacity to effectively maintain a highly trained Indigenous workforce through culturally appropriate training programs and high quality corporate governance structures. Ngarda is a great model example for similar Indigenous enterprise developments.

For communities without independent sources of capital such as mining or significant industry, the development of representative entities will not be possible without bilateral assistance from governments. Significant efforts and interventions will be required to establish good governance and economic development capacity in remote communities.

Due to a lack of funding and the prescriptive operational guidelines for NTRBs and PBCs, native title entities are also restricted in their capacity to proactively support or initiate economic development for their constituency. This was flagged as a significant frustration by the NTRBs who participated in the 2006 Survey. With few established Indigenous entities with any capacity or mandate to engage with the Australian Government's self access model of economic development, the Australian Government's Indigenous Coordination Centre (ICC) has become the interface between organisations and access to programs. They have a role to coordinate government services and negotiate Shared Responsibility Agreements. However for this to be successful, effective Indigenous governance and representative structures are a precondition for ICCs to support economic development for Indigenous people in each region.

Of course strategies for economic development on Indigenous land must be made with a full appreciation and understanding of the limitations of both the land itself and the land rights legislative frameworks.

As we know,

- the majority of land that has been returned to Indigenous people is predominantly remote, with limited or no access to roads, infrastructure and markets;
- land under native title is subject to caveats in terms of what can occur on the land and requires negotiations with governments and other stakeholders which can take years; and

- land under land rights and native title is communally or collectively owned by traditional owners and is in most instances inalienable.

Policy approaches to economic development must account for these limitations but also recognise that the foundation to achieving the goal of economic development for Indigenous people is based not only on meeting the objectives of the Government's Economic Development Strategy, but primarily on the traditional ownership and, from the traditional owner's perspective, as I mentioned earlier, management of their lands and their capacity to use their lands to address a range of social, political and economic problems.

A number of mining and exploration ventures in Australia are located on land that is subject to native title or native title claim. This requires mining companies to negotiate with traditional land owners regarding land use. The Argyle Participation Agreement, the third case study I would like to discuss today, is a best practice model for ILUA negotiations, but also provides an example of how Indigenous communities can leverage native title agreements and government funding arrangements to achieve economic and community development goals.

The Argyle experience underscores the importance of several factors which contribute to sustainable communities and economic development, particularly Indigenous self-government through capable organisations able to meet all corporate and legislative requirements. Issues such as decommissioning of the mine site, native title negotiations and the ongoing management of significant

cultural sites impacted by mining operations are dealt with through a series of Management plans and provisions contained in the ILUA. Programs including cross-cultural training for Argyle Diamonds employees, training and employment programs for local people and Indigenous business development are also facilitated through the ILUA and various subsidiary agreements.

The Gelganyem and Kilkayi Trusts were established to manage the Indigenous components and responsibilities of the Argyle ILUA. This includes how royalty monies are used for community projects that also attract government, non-government and/ or philanthropic contributions directed towards developing those effected Indigenous communities.² The Gelganyem and Kilkayi Trusts entered a Shared Responsibility Agreement with the Australian Government to develop an education and training fund. The Trust dedicated funds obtained from the ILUA and the government has matched the funds through another SRA. This is a good example of the use of a native title agreement to leverage another agreement or program for strategic economic and development outcomes.

Agreements such as Argyle are successful because the parties have integrated into the negotiation process a human rights based approach that is based on the fundamental tenet of principled engagement. Central to the human rights based approach to development, is ensuring engagement and participation of Indigenous peoples in policy making and decision making processes that directly relate to our interests. Native Title Representative Bodies, Prescribed Bodies Corporate, and traditional owners must be active participants

² Gelganyem Trust and Kilkayi Trust, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 17 November 2006, p3.

in all areas of policy development, not just native title and land rights, to ensure that the best possible outcomes are achievable through agreement-making. And the timeframe for such a process must not be driven by or truncated for political expedience but at a pace that is comfortable and realistic for Indigenous peoples.

The artificial segregation of native title processes from the whole of government 'new arrangements' perpetuates the struggle for economic and community development. It is imperative that native title processes be integral to the broader Indigenous economic development agenda in order to give Indigenous peoples the greatest potential to pool their resources and skills to address disadvantage.

My friends, I could go on and talk about the importance of a rights based agenda for sustainable economic development, the need to engage with and develop the capacity of our people, and the importance of providing a balanced and full picture of home ownership, agreement making and wealth creation - but if I did there would be no surprises when you read the 2006 Native Title and Social Justice Reports next week.

What I would like to conclude with though is that there are many lessons to learn from the past in Indigenous affairs and many successes to celebrate. Also, there are lessons to be learned from the current situation of economic burden from mainstream Australia society and overseas.

My greatest fear is that ideology is driving the economic agenda in relation to Indigenous affairs and not well research or evidence based

public policy. And the timeframes imposed by government are symptomatic of bullying and do not afford respect for people to make decisions on land and personal finances. As a senior executive from Westpac in effect said in a forum I participated in recently, “money management training has been happening in the Cape for the past 7 years and we are now seeing Indigenous people with savings and developing a money management ethos”. I ask does this not clearly indicate that many of our people are not in a position to make an informed decision on personal finances and tenure of their greatest asset – their communal lands.

Let’s recognise that not all of us will be or will want to be home owners or entrepreneurs; that governments and our people have responsibilities and that good management requires careful planning, lots of unbiased information from independent sources, resources and time to consider and make an informed decision.

Thank you.