



LAND RIGHTS & TOWNSHIP LEASING

DR BELINDA BURBIDGE RESEARCH FELLOW AIATSIS

THIS YEAR MARKS THE 40TH anniversary of the passing of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) and 50 years since the Wave Hill walk-off by Gurindji people in protest of low wages and poor working conditions.

In celebrating this anniversary, land rights were a key feature of this year's National Native Title Conference in Darwin, Northern Territory. Panel addresses by both David Ross, CEO of the Central Land Council (CLC) and Northern Territory's first Indigenous minister, Jack Ah Kit reminded us of the long history of battles and achievements by key Indigenous leaders from the CLC and Northern Land Council (NLC) since the enactment of the ALRA.

Although there was much to celebrate, the anniversary of the ALRA at the conference was also a moment of reflection and critique; an examination of both the benefits of and issues within land rights. This article addresses one aspect of land rights – township leasing, which was the topic of a thought-provoking presentation by Michael O'Donnell, Principal Legal Officer, NLC.

Township leasing was officially introduced in 2007, after amendments to the ALRA in 2006.

Township leasing 'was not formally part of the *Northern Territory National Emergency Response Act 2007* (Cth) (INTER) but was introduced as an amendment at the same time as the intervention.'¹ The introduction of township leasing was preceded and accompanied by 'a well-publicised debate about communal and individual ownership of Aboriginal land'.² This debate tended to view communal title as a European notion of communalism, rather than reference to the complex systems of Aboriginal land tenure, regulating variable rights and interests.³ By reducing Aboriginal land tenure to European communalism; it then became logical to juxtapose 'communal' Aboriginal land tenure with individual development in an oppositional manner.

Leon Terrill (lecturer at UNSW, and previously, senior lawyer, CLC) noted how the debate around the NTER popularised the perceived 'dualism between communal ownership/culture on the one hand and individual ownership/ economic development on the other'.⁴ O'Donnell lent support to this understanding by reminding the conference audience of a quote by Minister Brough in 2006 when he introduced township leasing:

The days of the failed collective are over. The bill provides for a new tenure system for township leasing on Aboriginal land that will allow for individuals to have property rights.

Brough's quote is indicative of the political rhetoric of that time where local community development was synonymous with home ownership. Township leasing was introduced as another mechanism for community members to individually and formally rent housing with the view towards a longer term goal of ownership.

A township lease is a voluntary, long-term lease over the whole of a community, typically but not always 99 years in length.⁵ Township leases have been entered into by communities on the Tiwi Islands at Wurrumiyanga, Milikapiti and Wurankuwu and on Groote Eylandt at Angurugu, Umbakumba and Milyakburra.⁶ Township leasing has been targeted at the larger communities on ALRA land, which includes 50 per cent of the land area in the Northern Territory.⁷

The process for obtaining a township lease in the Northern Territory generally begins when traditional owners and the local land council consider and negotiate a lease proposal by the Australian

Government, which must be formally approved, with traditional owner consent, by the land council under the ALRA.⁸ A Land Council's statutory function in this case is to ensure that the traditional aboriginal owners as a group understand the nature and purpose of the proposed lease and consent to it, ensure that any Aboriginal groups or community that may be affected are consulted and have an opportunity to express their views and to ensure that the terms and conditions of the lease are reasonable. To date, the lease has been held by the Executive Director of Township Leasing (EDTL), an independent Commonwealth statutory office holder who works with local traditional owners through a consultative forum.⁹ A range of financial incentives including housing have been offered generally from the ABA by the Commonwealth to aboriginal traditional owners when being asked to consider these leases.

Section 19 of the ALRA already provided a mechanism for granting leases over Aboriginal land, although there have been only a small number of s19 leases granted prior to 2007. Instead, communities used a more informal arrangement for land allocation and there were few lease arrangements or formal agreements in place between the landowners and occupiers of particular buildings or lots.¹⁰ O'Donnell drew on a quote by Justice Brennan about the flexibility of s19 leasing, which 'empowered Aboriginal people of the country to use their land in a non-traditional way if there was a consensus to do so.'¹¹

The move to township leasing is one way of 'formalising tenure', resulting in more structured arrangements for the allocation of land and infrastructure in communities.¹²

However, O'Donnell argued that the introduction of township leases was an example of 'internal sovereign risk', which is the risk and uncertainty Aboriginal and Torres

Strait Islander people face in relation to their rights to land when the legal rules and terms of investment are constantly changing.¹³

O'Donnell's observations reflect one of the key issues surrounding the introduction of township leasing, which is community governance.¹⁴ Within township leasing, although original consent by traditional owners is provided at the level of the head lease, the remainder of the decision-making powers sit with the EDTL. The EDTL has a general obligation to consult with the consultative forum; however, even if the EDTL acts in good faith, there is no legal obligation for the EDTL to accommodate the views of the community members about decisions regarding the grant of individual subleases and development proposals.¹⁵

According to the Australian Government there are advantages to the decision-making powers of the EDTL:

As the EDTL does not have to consult with traditional owners on every sublease, it can make decisions more quickly. The EDTL may also have greater resources than Land Councils for community planning.¹⁶

There is an alternative argument that faster decisions and subsequent planning and development are not as important as considered local decision-making by community members. O'Donnell stated that township leasing has moved decision-making powers further away from local Indigenous owners, placing them at 'arm's length' from the consultative process.¹⁷

In addition, Terrill has argued that the development of a 'traditional owner's consultative forum' is a 'simplistic' approach to address the tension that exists between traditional owner and non-traditional owner residential community members in local Indigenous decision making.¹⁸

Another critique has been made in relation to whether township leasing is achieving its goal of individual home ownership and economic development. In 2014 the Indigenous Law Centre reported there had only been 16 grants for home ownership and that most residents in township leasing communities live in rental housing.¹⁹ They also question whether township leasing has increased economic development, as at that time there had not been a substantial increase in home ownership or the development of individual businesses.²⁰ Home ownership and the Indigenous Business Australia (IBA) home ownership loans program on Aboriginal land is also available in relation to section 19 leases.

Township leasing does, however, provide a financial benefit to local community from rental income. The EDTL sets the rent for township leasing, whereas in communities without township leasing the land councils set the rent with the consent of traditional owners. The Indigenous Law Centre reports the rent amounts have been similar,²¹ suggesting the EDTL are acting in good faith in this regard. And although rental income benefits the 'traditional owners' it does not necessarily benefit businesses and service providers.²² Significant rental monies are now also flowing to some traditional owner groups through s19 leases administered by Land Councils.

According to Terrill, township leasing is the preferred model by governments but is less popular among Indigenous landowners.²³ Anindilyakwa Land Council chairman Tony Warramarrba critically reported to The Australian newspaper that township leasing had 'taken away our self-determination'.²⁴ Other community members and the Australian Government are now seeking alternative models within the existing township leasing legislation to provide more autonomy to community organisations and local decision making.

In the past, the Central Land Council had proposed a model involving the wholesale formalisation of leases through s19 of the ALRA.²⁵ Another model involves a community entity holding the township lease rather than the Executive Director. For example, Thamarrurr Council has previously proposed that a town corporation could hold the head lease.²⁶ A similar model has been developed for the community of Gunyangara, Northern Territory via a Memorandum of Understanding between Gunyangara and the Commonwealth.²⁷ Within this MOU, signed in July 2015, the Gumatj Aboriginal Corporation representing traditional owners of the town area will hold the head lease and have the power to issue sub-leases without having to seek approval from the Northern Land Council or the Government.²⁸ The Commonwealth is also working with traditional owners in Mutitjulu and Pirlangimpi to implement community entity township leases that vary according to the needs of each community.

The advantage of this model is that the entity that holds the head lease may be a traditional owner corporation, rather than a Commonwealth officer, that already has strong community relationships and local cultural authority. This model may strengthen local organisations, businesses and decision-making within communities.

Endnotes

- ¹ O'Donnell, 2 June 2016.
- ² Terrill, 2011: 164.
- ³ Dodson and McCarthy, 2006: 16–17.
- ⁴ Terrill, 2011: 164.
- ⁵ Indigenous Law Centre, July 2014: 1.
- ⁶ Department of Prime Minister and Cabinet, September 2015: 2.
- ⁷ Indigenous Law Centre, July 2014: 1 and AIATSIS 2016.
- ⁸ Department of Prime Minister and Cabinet, September 2015: 2.
- ⁹ Department of Prime Minister and Cabinet, September 2015: 1.
- ¹⁰ Terrill 2011: 163 and Indigenous Law Centre, July 2014: 2.
- ¹¹ Brennan J quoted in O'Donnell, 2 June 2016.
- ¹² Indigenous Law Centre, July 2014: 2.
- ¹³ O'Donnell, 2 June 2016.
- ¹⁴ Indigenous Law Centre, July 2014: 3.
- ¹⁵ Department of Prime Minister and Cabinet, September 2015: 1.
- ¹⁶ Indigenous Law Centre, July 2014: 4.
- ¹⁷ O'Donnell, 2 June 2016.
- ¹⁸ Terrill, 2011: 173.
- ¹⁹ Indigenous Law Centre, July 2014: 4.
- ²⁰ Indigenous Law Centre, July 2014: 4.
- ²¹ Indigenous Law Centre, July 2014: 4.
- ²² Indigenous Law Centre, July 2014: 4.
- ²³ Terrill, 2011: 160.
- ²⁴ The Australian, 18 April 2016, p.1.
- ²⁵ Terrill, 2011: 161.
- ²⁶ Terrill, 2011: 161.
- ²⁷ Department of Prime Minister and Cabinet, July 2015: 1.
- ²⁸ The Australian, 31 July 2015, p.1–2.

References

- Aikman, Amos. Galarrwuy's dream fires new lease plan for Arnhem Land. *The Australian*, 31 July 2015: 1–3.
- Aikman, Amos. Community leaders want overhaul of 'resented' township leases. *The Australian*, 18 April 2016: 1–2.
- Australian Institute of Aboriginal and Torres Strait Islander Studies 2016, Land Rights, viewed 20 July 2016, <http://aiatsis.gov.au/explore/articles/land-rights>
- Department of Prime Minister and Cabinet. Fact Sheet: Gunyangara Community Entity Township Lease. July 2015: 1.
- Department of Prime Minister and Cabinet. Fact Sheet: Township Leasing. September 2015: 1–4.
- Indigenous Law Centre. What is Township Leasing? Research Brief. July 2014:1–4.
- O'Donnell, Michael. The Northern Territory Land Rights Act: local decision making the role of land councils and recent developments in township leasing. Presentation at the National Native Title Conference, 2 June 2016, Darwin Convention Centre, Darwin.
- Terrill, Leon. 2011. Five years on: Confusion, illusion and township leasing on Aboriginal land. *Property Law Review*: 160–178.
- Watson, N. 2007. Implications of land rights reform for Indigenous health. *Medical Journal of Australia* 186(10): 534–6.

The author gratefully acknowledges Michael O'Donnell, Principal Legal Officer, Northern Land Council and the Department of Prime Minister and Cabinet for their insight and comments on the article.

