Senator Scullion peddles De Soto in Arnhem Land

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The Coalition's Policy for Indigenous Affairs released on 5 September 2013 stated that Indigenous people in remote areas have no property rights. This observation is bewildering and wrong given that one-third of the Australian continent is under some form of statutory land rights or exclusive and non-exclusive native title determination following successful land claims and native title determinations over the past 35 years.

The election statement can be interpreted in various ways. It could be a genuine mistake. Or it could be electioneering hyperbole, like the adjacent suggestion in the policy statement that Indigenous people in remote Australia have no jobs, which clearly many have. Alternatively, no property might be code for land that is held under inalienable group title rather than tradeable individual title, the hallmark of private property and western capitalism.

Most pertinently, if Aboriginal traditional owners in Northern Territory townships have no property rights, then what is it that Minister for Indigenous Affairs Nigel Scullion is seeking to secure through so-called whole-of-township leases?

A media release on 17 October 2013, just a month after the election, refers to an historic Arnhem Land agreement with traditional owners of Gunbalanya to lease the township to the Commonwealth for 99 years; soon after a similar agreement was secured at Yirrkala. Both agreements received front page coverage in the Murdoch media. Such agreements, Minister Scullion proposes, will open up business opportunity and home ownership for Aboriginal people on Indigenous land. The Minister calls on communities throughout the Northern Territory to think about entering into similar arrangements with the Australian Government.

Understanding what is at stake in this reform of land tenure in the Northern Territory is extremely complex and politically fraught. But as traditional owners in the NT enjoy free prior informed consent rights it is imperative that they understand what might be at stake before finalising any long-term leases.

Despite the Minister's reference to his agreement of 17 October 2013 as historic, whole-of-township leases have been completed with six communities on the Tiwi Islands and on Groote Eylandt since 2007. This means some information is now available to inform choices that traditional owners might make.

And a similar agreement in the form of a Memorandum of Understanding was signed between Mal Brough on behalf of the Commonwealth and Galarrwuy James Yunupingu on behalf of the Gumaitj Clan on the 20th September 2007 for a township lease over Gunyangara (near Yirrkala); that MOU lapsed, as might recent 'agreements'.

Whole-of-township leases are a particular form of leasehold hurriedly introduced by the Howard Government in amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) when it enjoyed majorities in both Houses of the Australian Parliament in 2006. These leases

are often referred to as s19A leases reflecting the insertion of this section in land rights law that allows land trusts to grant a lease over an entire township on Aboriginal land to an approved Commonwealth entity, the Executive Director of Township Leasing for up to 99 years. In effect the Executive Director, a Commonwealth appointed statutory office holder is granted authority to administer these leases and to grant further sub-leases, with most revenue raised earmarked for traditional owners.

This arrangement introduced in 2007 can be contrasted with the s19 option—land use agreements—that have existed in the Land Rights Act since 1976; these are contingent on traditional owner consent on a case-by-case basis, are administered by Aboriginal land councils, and require Commonwealth ministerial approval if of large scale or long term.

The reasons for this amendment can be variably interpreted.

In 2006 in submission to a Senate Inquiry I was critical of the amendment because I could not see how the individualization of group-owned land would facilitate access to commercial finance for housing and business development.

Indeed the economic logic behind the reform was mainly driven by the thinking of Peruvian economist Hernando de Soto who argued in his influential book *The Mystery of Capital* that capitalism can address problems of poverty by formalising individual property rights in housing, land and small business. De Soto also argued that government bureaucracy is bad for the economy.

De Soto's ideas were heavily and selectively promoted as a policy option by a diverse alliance including the late Helen Hughes from the Centre for Independent Studies, the highly influential Noel Pearson and Warren Mundine and long-term bureaucrats Mike Dillon and Neil Westbury in a book *Beyond Humbug*.

I am far from alone as a critic of de Soto; in 2006 the International Institute for Environment and Development (IIED) published a thorough critique of de Soto *Mysteries and Myths: De Soto, Property and Poverty in South Africa*.

To be fair, de Soto's call for converting informal property into private property through systematic titling was a policy prescription for urbanised Peruvian slum dwellers not remote living Aboriginal Australians who enjoy a formal system of property ownership. But the IIED study showed that anticipated credit effects generally fail to materialise and converting property into capital can result in the formation of a renting class and associated inequality.

Aboriginal land ownership in the Northern Territory is, of course, far from informal, although Aboriginal people often live in slums in the tiny townships targeted for reform. Indeed the 2006 land reform aimed to simplify what was regarded by the Howard Government as over-regulation and institutional barriers in land matters. The Commonwealth aimed to break the perceived monopoly and inefficiency of the existing statutory system overseen by land councils and deal directly with traditional owners—an approach mining companies would covet.

There were other emerging reasons for the proposed reforms including a growing recognition that widespread reluctance by governments to enter s19 agreements with land owners since 1976 had

placed Territory and other assets at risk; and an inherent tension in townships between the rights and interests of traditional owners and of other Aboriginal residents. Both were legacies of the pre-land rights period when Aboriginal populations were paternalistically centralised and then managed by the colonising state and its agents.

The Northern Territory Intervention interrupted and obfuscated this reform project through the compulsory leasing of 'prescribed communities' for five years. The High Court in *Wurridjal v Commonwealth* [2009] HCA 2 held that 'just terms' compensation was payable for such compulsory acquisition of property; and traditional owner awareness of their property rights in townships has been heightened.

Fast forward to the present: in *Land Reform in the Northern Territory: evidence not ideology* the Central Land Council notes that over twenty 40-year housing precinct leases in its jurisdiction have been signed using existing s19 machinery. In contrast, the Executive Director of Township Leasing has completed just six s19A whole-of-township agreements since 2007 at great expense.

The establishment of the Office of the Executive Director of Township Leasing deserves careful scrutiny because it is poorly understood. For a start, the costs of running the Office and multi-year upfront payments to traditional owners come from the Aboriginals Benefit Account (ABA), a statutory body established by the Land Rights Act to hold and disburse the equivalents of mining royalties raised on Aboriginal land. This imposed arrangement is cost neutral for the Commonwealth as it is entirely funded by the ABA.

This latest land reform intervention is replete with contradictions like so much in Indigenous affairs. While ostensibly about providing certainty for all land users and placing land tenure on a commercial footing, much is made in policy rhetoric about 'respecting cultural links to land' and 'traditional land holding systems'. In reality this reform is fundamentally about extinguishing land rights in townships for a century in return for money.

And while the Executive Director is required to operate independently and commercially, he is appointed by the Minister, is implementing Commonwealth policy, and has his performance assessed by the Commonwealth. It is far from clear if this cosy arrangement administered from Canberra will ensure best outcomes for traditional owners. It has certainly not prevented the Director forgoing rent on public housing in accord with government wishes.

Traditional owners will need to carefully consider the relative benefits of s19 and s19A leases, with the former allowing them a greater say about what happens on their land and greater financial leverage, the latter purporting to provide the better commercial opportunity.

Some early analysis of 2006 and 2011 census data indicates no development difference between Wurrumiyanga where the first whole-of-township agreement was completed and nearby Pirlangimpi where Tiwi appear better off. Indeed the main change evident is a rapid growth in the non-Indigenous population at Wurrumiyanga and a growing disparity between Indigenous and non-Indigenous incomes there, which raises crucial questions about who is actually benefiting from this reform.

Traditional owners must also recognise that upfront payments from the ABA will need to be repaid from future lease and sub-lease income streams; and that the administrative costs of the Office of Township Leasing will need to be deducted from such income. Such complex detail can be easily overlooked as the Commonwealth strategically deploys apparently generous community benefit packages (including e.g. public housing, a cemetery, a football oval, a health and wellbeing centre at Wurrumiyanga) as deal-clinching sweeteners.

The right of traditional owners to make choices over the administration of their land should be respected. But choices need to be properly informed and fairly made. In whole-of-township leasing arrangements authority over land use will be ceded to the Commonwealth—a form of re-colonisation by Canberra with the Executive Director the new 'superintendent' over land administration. Whether this loss of authority is offset by development benefit will need careful assessment.

It is unclear why Senator Scullion is currently peddling a pipedream based on the ideas of de Soto in Arnhem Land. Perhaps he believes land reform will enhance economic independence through ownership of businesses and homes? It is more likely, in my view, that whole-of-township leasing will enhance dependence on the state, its bureaucrats and external businesses. It is important that traditional owners are not caught up in enthusiastic reform ideology that resists scrutiny because it appears progressive and alleges to look after their property interests—the very property interests that evidently, according to the Coalition Policy for Indigenous Affairs, do not exist.

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