



COAG Investigation into Indigenous Land Use and Administration

Advice to the Expert Indigenous Working Group

Scope of this paper

1. A significant proportion of Australia's Indigenous land holdings include large areas of undeveloped land located in remote Australia. Australia's Indigenous land holdings also includes areas that are located near mainstream markets and large population centres, however, this paper mainly focusses on the significant challenges facing economic development of those areas located in more remote or very remote locations. IBA acknowledges that there are challenges with progressing economic development of land in areas closer to mainstream markets (including infrastructure deficits and regulatory issues), but generally speaking, those challenges are of a lower order of magnitude to the challenges facing remote areas where the majority of Indigenous land is located.
2. This paper responds to the terms of reference of the COAG Investigation into Indigenous Land Administration and Use, by seeking to explore some of the economic challenges to how traditional owners may 'readily attract private sector investment and finance to develop their own land with new industries and businesses'.

Background – characteristics of Indigenous land

3. Indigenous owned land is made up of a variety of tenure types, with differing administrative and regulatory arrangements, including statutory land rights and land trusts, statutory leasehold regimes and common law native title administered under legislation. These areas share many of the characteristics of under-developed economies, for instance: economic vulnerability based on remoteness from key markets, limited or lack of industry development, poor or no jobs growth, poor infrastructure base, limited or no secondary markets, and lack of economic scale; and, significant human resource challenges based on closing the gap indicators of life expectancy, education, employment and so on. The economic reality of these areas is that commercial proposals are often considered to be too high risk to attract private investment or loan capital from private financiers.
4. In addition, given a significant proportion of Indigenous owned land is undeveloped or has only limited development, and little enabling infrastructure is in place, there are often very high start-up costs associated with land based projects, and these costs are prohibitive for most industries. The land is often not able to be used as valuable security for the purposes of attracting loan finance, and this primarily because the value of the land is generally low so that bank-standard loan-to-value ratios are unachievable. This reflects the economic circumstances of much of the Indigenous estate and other remote areas, where there are often weak secondary markets.
5. Other issues that can arise and which may impact the flow of private capital to projects on Indigenous held land, include: land arrangements may be unfamiliar to lenders or investors; there may be restrictions on the capacity to transfer, sell or assign land interests; there are competing land interests involving disputes that are unresolved; and modern land planning, land data and administrative processes may not in place. Furthermore, to be an attractive investment partner for private investors or to take advantage of the commercial opportunities that may become available, traditional owners or other Indigenous land owners need commercial capacity which generally requires ready access to sound commercial and financial services (eg to conduct feasibility assessments, to assist with commercial negotiations, or to structure proposals to ensure commercial benefit). These types of professional services are generally in limited supply in remote areas and are expensive to deliver.
6. Inalienability is an important feature that applies to a large proportion of Indigenous owned land. Inalienability ensures Indigenous land is preserved for inter-generational

social, cultural and economic benefit. This does not necessarily mean that Indigenous land owners are prevented from developing their estates, should they wish to do so. IBA believes that land owners are best placed to determine how to develop their estates for social, cultural as well as economic benefits. Development decisions include decisions about the pace of development, where development should take place, and where development should be restricted.

Transferability of Indigenous land interests

7. Should Indigenous land owners wish to develop their estate or parts of their estate, they should be free to establish transferrable or tradeable interests in land that could potentially be used as a form of security to attract private capital. Importantly, it is not necessary to disturb the principle of inalienability to create tradeable interests. For example interests such as licences and leases (or their equivalent native title land use agreement) do not impact on inalienability¹ and are sufficient to support economic development. Land owners should be free to determine any conditions they wish to set on the transferability of their land interests.
8. The ability to transfer, trade, sell or assign land interests, is an important element of a market-based economy. Firstly, a development proponent may be willing to risk their capital if they are satisfied they will be able to exit the business through sale. Often the sale will not be possible unless the underlying property interest can be also sold assigned or otherwise transferred along with the business (although this is not always the case). In IBA's experience, provided the underlying property interest is sufficient to enable the business to operate normally, it is generally not essential that the land interest is freehold. IBA has successfully been involved in many projects, where the underlying property interest is a licence or a lease. Secondly, a proponent who owns a transferrable land interest may be able to attract loan capital by using that interest as security provided the property interest is valuable².
9. IBA understands that most forms of tenure (and associated administrative arrangements) that make up Australia's Indigenous estate presently allow Indigenous owners to make decisions about development including the ability to create tradeable land interests. However, more work may need to be undertaken to improve the efficiency of the land administration systems that support the processes for obtaining and registering interests in property on the Indigenous estate. In addition, where there may be legal or administrative impediments that restrict the ability of Indigenous land owners to determine how their land is to be developed, these impediments should be reviewed by governments in full consultation with land owners. This paper does not canvass individual improvements to any particular administrative or legislative arrangement that may be in place.
10. It is important to recognise that the establishment of efficient systems involving tradeable land interests (that could potentially be used as security for the purpose of obtaining bank finance) is not a panacea, and this will not, by itself, significantly impact the flow of private capital to projects on Indigenous land in those locations where there are weak secondary markets. This is a key economic challenge that is discussed in more detail below.

The use of Indigenous land as security

¹ Leases do not impact on inalienability of Indigenous freehold, except potentially for some rare lease types such as leases in perpetuity. Some land interests such as easements, which 'run with the land' do impact on inalienability, however, from a commercial perspective, the equivalent can be achieved by way of an assignable easement agreement.

² Ultimately, the value of a security interest is a function of the market.

11. The ability to use of Indigenous land as security will not in itself enable the raising of finance. Firstly, in most risk assessments conducted by private financiers, collateral or security is not considered the primary credit consideration³. Other considerations are considered ahead of the available security. For instance, the case of home lending, factors that are usually assessed before security include: customer profile; employment status; sources of income; debt obligations; and credit reference history. Similarly, in the case of business lending, a variety of characteristics will be assessed first, such as: business profile; business management capabilities; size of businesses; business plan/strategy and outlook; industry overview (peer comparisons, competitive environment); and credit references history.
12. Secondly, where a lender wishes to take a security, such as over an interest in land where it is available, this security is only valuable to the extent that there is a secondary market. This means that even where Indigenous owners can create transferrable land interests, these interests may not constitute valuable security attractive to banks⁴. For example, in the case of home lending, a valuer will look at the size of the likely pool of investors or home buyers who would be interested to buy similar types of properties, ascertain if there are restrictions on who can bid for the properties in the location and research recent sales history. Banks would then lend up to an assigned percentage of the valuation. Banks apply a sliding scale of loan to value ratios. For example in large active markets with ready buyers they may lend up to say 80% of the value, being generally the most favourable percentage. This may fall down to say 50% (e.g. smaller market/fewer willing buyers) or they may even choose 0% (will not lend in that location such as very small country town or remote areas where there are very few or no resales). The higher cost of establishing and maintaining loans in remote communities is a further consideration for the banks.
13. Furthermore, the lending behaviour of banks is heavily regulated. Responsible lending requirements under the *National Consumer Credit Protection Act* have significant implications for mainstream lenders. This legislation is supervised by Australian Securities and Investment Commission and is far reaching in how lenders must assess and provide regulated credit, such as mortgages. Credit providers are legally obliged to determine that borrowing is not unsuitable for the customer. The different banks approach this in different ways, however typically they will take into account evidence such as genuine savings (i.e. whether the person has saved their own deposit), and that there has been no evidence of significant hardship in the last two years. A large number of IBA's customers, especially those in discrete Aboriginal communities, don't have genuine savings and would face hardship. Lenders also need to be cognisant of implications of providing credit to customers for home finance where the underlying value of the property could devalue over time, rather than appreciate as is the case in mainstream markets. Responsible lending principles will often preclude lenders from providing finance where there is not a reasonable prospect of an 'exit strategy' from the lending arrangement if circumstances change over time.
14. For these reasons, to date none of the major banks have shown an appetite to pilot a home lending program in a remote community, notwithstanding for example that the NT have had 99 year Whole of Township leases in place since 2007. By contrast, IBA has

³ The way the most lenders assess credit decisions is captured in the '5 C's of credit worthiness' (a mnemonic used widely in the sector to guide credit assessors), which captures the main factors to be weighed in a credit assessment: character (refers to a borrower's reputation); capacity (a borrower's ability to repay a loan by comparing income and existing debts); capital (refers to capital the borrower can put toward a the project); collateral (assets or property that can help to secure the loan) and conditions (the conditions of the loan, such as the interest rate and amount of principal).

⁴ In remote Australia, where most of the Indigenous estate is located, secondary markets are generally weak.

been able to provide home lending in remote communities in the NT and in Queensland due to its unique government subsidised business model and interest free funding. This has enabled IBA to accept the significant risks associated with these locations and is able to accept up to 100% of the valuation/purchase price.

High start-up costs are prohibitive to many industries

15. The costs for starting-up business on undeveloped land with a poor infrastructure base, including the cost of pre-feasibility and feasibility assessments, and land development costs, are generally more expensive than in developed markets, and this cost can be prohibitive to many industries (other than those sectors with high return prospects such as the resources sector).
16. IBA has been involved in a number of land developments or feasibility studies in remote Australia, across a number of tenure types. In every case the land development costs were expensive, and acted as a deterrent to private capital investment. This deterrent applies to both Indigenous held land and non-Indigenous land located in remote areas. For example, a housing development project in a remote area involving a large engloba block (in this case the block was ordinary freehold adjacent to Indigenous held land) involved very significant up-front development expenditure and took many years before construction of the first home could commence. Those development costs included: pre-feasibility, feasibility, environmental and cultural clearances, hydrological assessments, planning and cadastral surveys, zoning changes, land clearing permits, establishing essential services infrastructure (eg pipes, water, sewerage, power, roads etc). These development costs were very significant and were met by government. Private finance was not available to support the development phase. This example is by no means unique.
17. Whilst genuine start-up costs are tax deductible, these costs can only be claimed over 5 years under current taxation arrangements, which is generally not sufficient to attract developers to projects in remote and under-developed areas.
18. In addition, the unregulated nature of many Indigenous land holdings can result in an ad hoc approach to development, which can impact on the willingness of lenders or investors to risk their capital and can impede the orderly economic development of Indigenous land assets. Modernising the land use planning regimes including investment in surveying (particularly in those areas where there is close settlement such as towns), and in the integration of cadastral data about land use and land dealings, would be of benefit. IBA understands that significant work has been undertaken to redress some of these deficiencies, for example, in the NT where cadastral survey's in towns on Aboriginal land is well progressed. COAG should consider whether this work could be accelerated to ensure that modern planning approaches apply to areas of Indigenous land where there is significant development (eg towns), and that Indigenous owners are adequately consulted.

The way forward

19. There is no simple solution to the question of economic development of Australia's Indigenous estate, particularly in those areas remote from mainstream markets where there are significant infrastructure and human resource constraints. The challenge involves fundamental economic issues, which cannot be resolved easily, and cannot be solved in the short or even the medium term. Most of these challenges are not a function of land tenure or land administration per se, but are a function of the broader economy.

20. One of the key challenges to attracting private loan finance and investment capital to projects on Indigenous land holdings (or other remote or isolated private land holdings that may be outside the Indigenous estate) is that most projects do not achieve acceptable returns based on the level of risk⁵. Generally, high risk projects will need to achieve higher returns in order to meet the risk/return parameters of banks and other financiers, or investors. However, creating the market conditions that rebalance the risk/return profile of projects on the Indigenous estate is not straight forward, and will require long-term investment, including in potentially expensive enabling infrastructure such as transport as well as other measures that might stimulate revenue and create incentives for a broader range of industries to invest so that markets are strengthened over time.
21. IBA suggests that the COAG investigation could focus effort on investigating measures that reduce the risks to private investors and financiers wishing to participate in projects in undeveloped markets that characterise much of the Indigenous estate. In particular, IBA suggests that COAG could consider development finance approaches, many of which have been adopted world-wide, to leverage private capital investment into risky markets. These approaches could build in incentives to infrastructure investment on Indigenous lands. On the revenue side, COAG could give consideration to stimulating development of the Indigenous estate through the taxation system, and could consider ways to fund the high up-front development costs of projects on the Indigenous estate.
22. Human resource issues are also important and COAG should consider ways to build the commercial capability of Indigenous land owners such as increasing the availability of commercial advice and assistance for Indigenous land owners through additional resourcing.
23. Specific measures that the Expert Indigenous Working Group may wish to consider are outlined in more detail below.

Potential measures that the Expert Indigenous Working Groups could consider elevating through COAG

I. *Infrastructure investment*

The biggest capacity constraint in areas where most of the Indigenous estate is located is the chronic lack of enabling infrastructure. Governments should consider how best to increase investment in critical enabling and essential services infrastructure. In this context, IBA welcomes the recent announcement by the Treasurer in the Commonwealth Budget of a \$5 billion Northern Australia Infrastructure Facility to create access to concessional loans for companies seeking to invest in infrastructure projects in the north. Consideration could be given to how this fund could be used to leverage vital infrastructure projects on Indigenous held lands.

II. *Development finance, guarantees and risk insurance*

The Australian Government (through the Export Finance and Insurance Corporation) offers risk insurance, guarantees, and concessional loan finance to Australian companies seeking to access emerging markets overseas. Other developed countries have established similar development finance agencies. For example, the US Government's Overseas Private Investment Corporation (OPIC) mobilises private capital to help solve critical economic challenges in developing countries. OPIC provides investors with financing, guarantees, political risk insurance, and support for private equity investment funds, and these facilities are underwritten by the US Treasury. The provision of guarantees and risk insurance by these types of development finance agencies is a proven model for leveraging

⁵ Of course, there are some obvious exceptions, such as the resources sector.

private capital investment to high risk markets. COAG could consider approaches to the development of these types of facilities domestically to encourage private investment into Indigenous land. This could be achieved by expanding the capacity of existing facilities (for instance IBA currently has a limited capacity to offer guarantees with the consent of the Commonwealth's Finance Minister⁶), or establishing new development finance facilities. Essentially, this approach involves the public sector providing credit enhancement and/or take-up the "first loss piece" (eg risk equity component) of development activity, so that other private investors and financiers can participate. Domestic examples in other markets would be the Clean Energy Finance Corporation and the Australian Renewable Energy Agency.

III. *Funding for development costs and land use planning and data administration*

COAG could consider how to best meet the high up-front development costs associated with development of Indigenous land. This could include consideration of establishing a land development funding pool that would allow Indigenous land owners to accelerate development of their land. This pool could support funding for development costs such as: land use resource appraisals; land use planning; assessing the highest value and best use of land; land development feasibility studies; town planning; cadastral surveys; changes in zoning and other development application processing costs; hydrological survey's; and, social, environmental and cultural clearance processes.

In addition, to complement and support this measure, COAG could consider ways to accelerate the introduction of more modern and efficient systems of lease application and registration, particularly in areas where there is close settlement or more intensive development is expected. This should be undertaken in full consultation with Indigenous land owners and their representative organisations. In particular, a national approach to the integration of cadastral data sets and related land use and leasing information concerning Indigenous land holdings should be pursued as a priority. Administrative spatial data sets relating to Indigenous land could be accessible to Government, industry and the public through searchable databases (nationally or via existing state/territory data bases). Indigenous land owners, who wish to develop their land, could be supported to prepare land development plans for inclusion in these public databases.

IV. *Incentives through the taxation system*

COAG could investigate the use of the tax system to support development on Indigenous held lands. For example, 40-880 of the *Income Tax Assessment Act 1997* currently allows deductions for feasibility and other start-up costs, however, these may only deducted in equal proportions over 5 years. The potential impact of allowing deductions to be claimed up-front by businesses expending capital to develop Indigenous land could be modelled and further considered through COAG.

V. *Support for commercial capability of Indigenous land owners*

In IBA's experience, there remains a significant need for Indigenous land owners to access good quality commercial and financial advice. Private investors may be reluctant to risk capital where they are uncertain of the commercial capacity of a prospective partner. Assisting Indigenous land holders to make sound commercial decisions by supporting the establishment of a funding pool that can be used to subsidise commercial and financial advice, and to build the commercial capability of Indigenous land owners, would be beneficial. There are many participants in the commercial advisory/capacity building space including the private sector, professional networks, educational institutions, and

⁶ IBA can play a role with a development finance approach. However, IBA is capital constrained. This means that IBA's capacity to provide guarantees, concessional finance and investment capital, is limited by the size of its capital base. A significantly bigger facility would be needed in order to make an appreciable difference to capital flows to projects on the Indigenous estate.

governments. IBA also has a role to play. Any approach to delivery will need to be cognisant of the multi-faceted environment in which commercial capability services are delivered.