RAIDERS OF THE LOST CAPITAL

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Raiders of the Lost Ark was one of my favourite childhood films. To this day I am still amazed that Indiana Jones survived an undersea voyage while clinging to a German submarine, without even an oxygen tank. In spite of such feats however, I gave this paper the title, *Raiders of the Lost Capital*, not as a tribute to the swashbuckling hero, but because in recent years, Indigenous policy has parodied the film.

Mirroring Spielberg's characters, the major players in Indigenous policy have been in search of a holy grail, whose legendary powers will instantly cure the entrenched poverty in many remote Indigenous communities. Akin to the dashing professor, the Commonwealth has not been averse to the occasional skirmish with Indigenous peoples in order to fulfil its mission. And finally, like the Ark of the Covenant, the mythical wealth of Indigenous peoples has apparently been buried all along, not in sand, but in rights acquired through native title and land rights regimes.

In the closing years of the Howard Government, conservative politicians and aligned think tanks advocated for the growth of individual property rights in Indigenous lands, on the basis that communal title impeded economic development. Such arguments were taken up by the former Minister for Indigenous Affairs, Amanda Vanstone, who used the words, 'land rich dirt poor' to describe remote Indigenous communities.[1]

Some proponents for individual property rights have sought to rely upon the work of the Peruvian economist, Hernando de Soto. For example, Noel Pearson, the Director of the Cape York Institute for Policy and Leadership ('CYIPL'), has argued that de Soto's work, *The Mystery of Capital*: *Why Capitalism Triumphs in the West and Fails Everywhere Else*,[2] finds resonance in remote Indigenous communities. According to Pearson:

> Aboriginal communities living on Aboriginal lands (though we own 'property') are locked out of the Australian property system that enables capital formation. All of our assets, in the form of lands, housing, infrastructure, buildings, enterprises et cetera – are inalienable and have no capital value therefore. … The reduction of valuable assets into valueless capital through inefficient Aboriginal property laws that are unique to Aboriginal people – is the same story that de Soto is talking about in relation to those structurally precluded from capitalism in the Third World and the former communist states.[3]

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[1] Stephanie Peatling, 'Black dilemma: land rich, dirt poor', *Sydney Morning Herald*, 24 February 2005.

[2] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2001).

[3] Noel Pearson, Review of Hernando de Soto, *The Mystery of Capital: Why Capitalism*

This paper disputes Pearson's claim that de Soto's theories are applicable to Australia. It will be argued that the circumstances of remote Indigenous communities are so different to those of de Soto's subjects that his theories have no application. This paper will be divided into three parts. By way of background, part one will discuss the nature and history of Indigenous interests in land. Part two will examine the Indigenous land tenure debate and part three will argue that the central tenets of de Soto's thesis are largely inapplicable to Australia.

Part One: Australian Indigenous Lands

As distinct from other common law jurisdictions Australia was colonised on the basis of terra nullius, with the result that relationships between Indigenous people and their lands were denied legal recognition.[4] Since the earliest days of colonisation Indigenous people have fought against dispossession; from warfare to petitioning colonial authorities for land in the nineteenth century. Such activism did not gain traction until the latter half of the twentieth century, when Australian governments began to enact land rights regimes.

State land rights legislation commonly transferred ownership of former Indigenous reserves to bodies who held title on behalf of Indigenous communities. For example, one of the earliest regimes, the *Aboriginal Lands Trust Act 1966* (SA), established the Aboriginal Lands Trust to hold title to former reserves in South Australia.[5] Likewise, titles to Aboriginal lands in Queensland are also held by trustees appointed by the relevant Minister.[6] The ability of such bodies to dispose of land was frequently circumscribed. In South Australia for example, the Aboriginal Lands Trust may grant interests in land with the consent of the relevant minister, but it cannot sell land without the approval of both Houses of Parliament.[7] Such impediments to alienability were often welcomed by Indigenous people and their supporters, who had valid historical reasons for seeking secure titles.

The Commonwealth's reluctance to acknowledge prior Indigenous ownership of land was affirmed by Prime Minister McMahon in his Australia Day statement in 1972. In response to McMahon's statement, three young Koori activists established the Aboriginal Tent Embassy on the lawns of Parliament House.[8] The Embassy became an enduring symbol of the Indigenous political struggle and galvanised support for the Opposition's policy of national land rights legislation. When the Whitlam Government was swept

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Triumphs in the West and Fails Everywhere Else (2001) in (2006) 44 *Australian Public Intellectual Network* <http://www.api-network.com/cgi-bin/reviews/print.cgi?n=0465016146> at 28 July 2007.

[4] The invisibility of traditional land titles was confirmed in *Milirrpum v Nabalco* (1971) 17 FLR 141.

[5] *Aboriginal Lands Trust Act 1966* (SA) s 5(1).

[6] *Aboriginal Land Act 1994* (Qld) s 28.

[7] *Aboriginal Lands Trust Act 1966* (SA) s 16(5).

[8] Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights* (1999) 256.

into office months later, the atmosphere in Canberra was dense with expectation.

In 1973 Edward Woodward was appointed to the first Inquiry into Aboriginal land rights, which was confined to the Northern Territory. Woodward considered that the aims of land rights legislation should include:

- The doing of simple justice to a people who have been deprived of their land without their consent and without compensation;
- The promotion of social harmony and stability within the wider Australian community by removing, as far as possible, the legitimate causes of complaint of an important minority group within that community;
- The provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living;
- The preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs; and
- The maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority.[9]

The Whitlam Government was dismissed before the enactment of legislation based on Woodward's reports.[10] Although the Fraser Government pledged to follow through on land rights for the Northern Territory, the end product was less ambitious. In particular, an earlier clause enabling Indigenous people to claim land on pastoral leases on the basis of need was omitted from the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA).[11]

The ALRA transferred title to former reserves to Aboriginal land trusts and established a process for claims to be made over unalienated crown lands, to be determined by an Aboriginal Land Commissioner. Over the past three decades Aboriginal people have managed to claw back almost half of the lands within the Northern Territory.[12] In spite of such success, national land rights legislation never became a reality.

Almost two decades after the enactment of the ALRA, the High Court belatedly recognised the doctrine of native title in *Mabo v State of Queensland*.[13] The *Native Title Act 1993* (Cth) (NTA) was the

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[9] Quoted by Central Land Council, *Our Land, Our Life* < http://www.clc.org.au/media/publications/olol.asp> at 8 February 2008.

[10] AE Woodward, Aboriginal Land Rights Commission, *First Report* (1973); AE Woodward, Aboriginal Land Rights Commission, *Second Report* (1974).

[11] Neil Andrews, 'Antyiper meets Locke: the Alyawarr resistance at Ilperrelhelame' in Alexis Wright (ed) *Take Power like this Old Man here* (1998) 66, 72.

[12] Jennifer Norberry and John Gardiner-Garden, Laws and Bills Digest Section & Social Policy Section, Parliamentary Library. *Information Analysis and Advice for the Parliament: Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* 158 (2006) 3.

[13] (1992) 175 CLR 1.

Commonwealth's response to this watershed decision. The NTA established a process for the recognition of native title; a body of rights and interests in lands and waters that have their source in Indigenous law and custom.[14]

Comparisons of Indigenous Land Rights and Native Title Regimes

It is beyond the scope of this paper to analyse in any great detail the myriad of laws that have given rise to Indigenous interests in land. The ad hoc nature in which land rights and native title have evolved means that there is great diversity in the form such rights take, the grounds upon which such rights are either recognised or created, and the conditions that must be met by Indigenous groups who seek to utilise these statutory regimes. By way of example, native title can be distinguished from land rights because it does not owe its existence to the NTA, but to laws and customs that pre-dated the acquisition of sovereignty. Consequently, Indigenous groups who seek recognition of their native title must satisfy the Federal Court that they have continuously practiced their pre-sovereignty laws and customs without interruption; a particularly onerous requirement given the destruction wrought by colonisation. In contrast, land rights legislation may contain provision for land to be granted on the basis of economic or cultural viability.[15]

As distinct from the interests conferred under the ALRA, native title rarely resembles a freehold title because it is vulnerable to partial extinguishment. In practice, this means that in urban areas native title is likely to be characterised by usufructuary rights, if it exists at all. For example, in 2006 the Federal Court recognised the native title of the Noongar people over Perth.[16] The Noongar people's native title comprised eight rights that included the right to, 'use the area for the purpose of teaching, and passing on knowledge, about it, and the traditional laws and customs pertaining to it'.[17] By now, the difficulty inherent in any attempt to make generalisations about Indigenous interests in land should be self-evident. Nonetheless, all such rights, to some extent, have been blamed for poor living standards in remote Indigenous communities.

Part Two: The Indigenous Land Tenure Debate

Both proponents for reform and their detractors agree that living standards in Indigenous communities are unacceptably low. By any marker Indigenous people are among the most impoverished members of Australian society. Arguably, the most blatant indicator of such disadvantage is health. The website of the Aboriginal and Torres Strait Islander Social Justice Commissioner attests to the poor state of Indigenous health:

Indigenous life expectation is 17-years lower than other Australians;

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[14] For the definition of native title see s 223 *Native Title Act 1993* (Cth).

[15] For example, see the *Aboriginal Land Act 1991* (Qld) s 46(1)(c).

[16] *Bennell v State of Western Australia & Ors* [2006] FCA 1243 (19 September 2006).

[17] Ibid, Statement of Wilcox J.

infant mortality is three times higher; and death rates for Indigenous Australians are twice as high across all age groups.[18]

Another measure of social inequality is access to essential services and infrastructure. In spite of acquiring legal title to their lands, many Indigenous communities are yet to gain access to the essential services and infrastructure that are a feature of life in Australian cities. This disparity was recently brought into stark relief by the lack of housing in remote Indigenous communities, where in some areas 'normal' levels can exceed 15 occupants per house.[19] Whereas those in search of mainstream public housing can expect to wait for up to three years for accommodation, the waiting time in remote Indigenous communities can be greater than a decade![20]

Arguably, the lack of access to infrastructure and essential services has been one of the constants of Indigenous policy; one that is quite distinct from land tenure. The acute neglect of the needs of remote communities was the subject of an inquiry by the former House of Representatives Standing Committee on Aboriginal Affairs in 1987.[21] The Committee argued that:

> The homelands movement is here to stay and sufficient funds need to be made available to meet at least minimal objectives. The implementation of this approach will require close co-operation and co-ordination between the respective governments, homelands groups and resource agencies. The Commonwealth Department of Aboriginal Affairs will need to play a major role in these two key areas … There will also need to be clear arrangements whereby each agency is aware of its responsibility towards homeland centres …[22]

It is beyond the scope of this paper to discuss the Committee's recommendations in detail, but it is striking how many are yet to be fully implemented. For example, recommendation eight provided that:

> State and Territory governments provide funding to homeland centres for the 'essential' facilities and services which they are obliged to provide to all their citizens. These 'essential' facilities and services include water supply and reticulation, roads and airstrips, other infrastructure items such as housing and shelter and education and health services. The level of this funding should be increased in response to the growth of the homelands movement and the increasing needs of homeland dwellers.[23]

A decade after the report, the Central Land Council commissioned the writer, Alexis Wright, to edit an anthology celebrating twenty years of land

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[18] Website of the Aboriginal and Torres Strait Islander Social Justice Commissioner, <http://www.hreoc.gov.au/social_justice/health/index.html> at 20 February 2008.
[19] Michael C Dillon and Neil D Westbury, *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (2007) 160.
[20] Ibid 185.
[21] Standing Committee on Aboriginal Affairs, House of Representatives, *Return to Country: The Aboriginal Homelands Movement in Australia* (1987).
[22] Ibid [5.37].
[23] Ibid xviii.

rights in Central Australia, entitled *Take Power like this Old Man here*.[24] That the above recommendation was yet to become a reality was not lost on many of the contributors. For example, Bruce 'Tracker' Tilmouth wrote:

> A lot of people thought, and still think, that land rights would answer all needs. But at times, land rights has stopped and started with the title handover. Many Aboriginal communities do not have the infrastructure or services most Australians take for granted. Government departments and others forgot that what people were talking about was the *enjoyment* of land rights. Many Aboriginal people might have title to their land, but if they don't have roads or drinkable water or other infrastructure, then the enjoyment of land rights can be extremely limited.[25]

How much of the blame for this crisis can be attributed to land tenure is a vexed question. According to advocates for land tenure reform, a great deal of blame lies upon certain characteristics of Indigenous interests in land, in particular, its communal nature.

Arguments for Reform

Few Australian Governments could ever be accused of being champions of Indigenous rights. However, whereas previous federal governments had indifference towards such rights, the Howard Government had enmity. One of the catch cries of its first successful election campaign was the promise of 'bucket-loads of extinguishment';[26] realised in 1998 with the enactment of the *Native Title Amendment Act 1998* (Cth).

So when Prime Minister Howard announced his intention to reform Indigenous land titles in 2005, many within Indigenous communities were understandably alarmed. While visiting Wadeye the former Prime Minister said:

> I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking more towards private recognition. It's a view that I've held for some time. I certainly believe that all Australians should be able to aspire to owning their own home and having their own business. Having title to something is the key to your sense of individuality, it's the key to your capacity to achieve, and to care for your family, and I don't believe that indigenous Australians should be treated differently in this respect.[27]

In the same year the National Indigenous Council, an advisory body established in the aftermath of the dismantling of the Aboriginal and Torres Strait Islander Commission, released its 'Indigenous Land Tenure Principles'. The brief document called for a 'mixed system of freehold and leasehold

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[24] Alexis Wright (ed), *Take Power Like This Old Man Here* (1998).

[25] Ibid xi.

[26] The former Deputy Prime Minister and Minister for Trade, Tim Fischer, quoted by the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (1997) 37.

[27] Michelle Grattan, 'Howard tilts at title fight', *The Age*, 10 April 2005.

interests'.[28] Most controversial was principle four, which suggested the use of compulsory acquisition for 'individual leasehold interests for contemporary purposes'.

What followed was a polarised debate about the supposed evils of communal land tenure. Conservative think tanks claimed that communal land tenure not only prohibited economic development but also encouraged corruption and personal violence. For example, Gary Johns of the Bennelong Society hailed the failure of the 'land rights revolution'. Writing in *The Australian*, Johns claimed that:

> The Aboriginal interest in land has been displaced, displaced by royalties. Royalties, untaxed have been spent on cars and grog. The abundance has displaced the cultural meaning attached to land. Which Aboriginal leader is about to swap? It sounds a bit like those dope heads in Mullumbimby who professed to the alternative lifestyle, but bludged off the dole and traded in illegal drugs, or were reduced to the status of trinket sellers.[29]

One of the most influential proponents for land tenure reform was Helen Hughes of the Centre for Independent Studies ('CIS'). In the book, *Lands of Shame*, Hughes argues that Indigenous people in remote communities have been the victims of 'exceptionalist policies' that include the apparent recognition of customary law and culturally appropriate school curricula.[30] Hughes is highly critical of what she describes as the 'Coombs socialist model' of communal land ownership and the permit system, which she argues has been used as a veil for corruption. Her solutions include 99-year leases that she claims will result in the 'burgeoning of private land use' and the dismantling of the 'pernicious permit system'.[31]

Hughes often makes sweeping generalisations in her work, as evidenced by her failure to distinguish between native title and land rights regimes. In *Lands of Shame* Hughes claims that, '… Aborigines and Torres Strait Islanders have acquired native title rights to over a million square kilometres, equalling 20 per cent of Australia, and ranging from about one per cent of New South Wales to more than 40 per cent of the Northern Territory.'[32] However, Hughes appears to take no account of the diversity of such interests.

Hughes' sweeping generalisations also apply to Indigenous land holders, who she alternately labels as 'Big Men' or their pawns.[33] Those who work to advance the interests of Indigenous land holders are not spared rebuke:

> Land councils were supposed to marshal income by leasing their land for productive purposes to commercial enterprises. They have proved to be singularly inept in realising returns. They have not sought long term benefits through employment

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[28] National Indigenous Council, *Indigenous Land Tenure Principles* (2005)
[29] Gary Johns, 'Leaving Home Lands', *The Australian*, 7 February 2006.
[30] Helen Hughes, *Lands of Shame* (2007).
[31] Ibid 185.
[32] Ibid 45.
[33] Ibid 46.

> objectives. They lack professionalism in negotiations because they engage lawyers and other consultants on the basis of their communitarian beliefs and support for quick cash returns.[34]

While land councils are not beyond reproach, Hughes appears to overlook the reality that for much of the past thirty years, land councils have been forced to devote significant resources to litigation which has its origins, at least in part, in the stubborn refusal by Australian governments to acknowledge Indigenous rights to land. Wright's anthology, *Take Power like this Old Man here*, provides insight into the David and Goliath battles fought by Aboriginal people in the Northern Territory and their land councils in order to breathe life into the ALRA.[35] In the early days of the Act, non-Indigenous Territorians openly hurtled abuse at claimants, land council staff and even Commissioners. Most startling was an anecdote about a meeting between a former Northern Territory Minister and the Central Land Council in relation to a mining project. In order to explain the impacts of the project, the Minister sent a departmental officer armed with a milo tin, silver foil and a toy truck![36] In light of such resistance, it is naive to suggest that land councils have failed dismally because their major focus has not been on reaping economic benefits from Aboriginal lands.

Arguably, the most influential Indigenous proponent for land tenure reform has been Noel Pearson, the Director of the Cape York Institute for Policy and Leadership (CYIPL). Last year, his Institute released the report, *From Hand Out to Hand Up*, which provided a model for socio-economic reform in Cape York. [37]

The report explained the absence of an economic base in Cape York by a skills shortage, 'self-constraining beliefs' and land tenure.[38] It observed that there was an absence of freehold land in most reserve communities, with the bulk of the land held by Aboriginal Councils. Like Hughes, the CYIPL argued that communal title impeded investment in Indigenous communities:

> Communal ownership hinders development because of the potential for disagreements over the appropriate uses for the land. In addition, all owners would stand to gain from improvements, rather than simply those who pay the costs of making those improvements. Communal ownership thereby creates a disincentive to invest in improvements to the land as a standard kind of 'free rider' problem. Inalienability discourages business development because inalienable land is of limited (if any) resale value and is worthless as collateral for loans.[39]

The depiction of inalienable communal land as 'dead capital' is taken from Hernando de Soto's work, *The Mystery of Capital: Why Capitalism*

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[34] Ibid 46-47.
[35] Wright above n 24.
[36] Ibid 252.
[37] Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Cape York Welfare Reform Project Design Recommendations* (2007).
[38] Ibid 313.
[39] Ibid 314.

Triumphs in the West and Fails Everywhere Else.[40]

Part Three: The Application of de Soto's Thesis to Indigenous Australians

Hernando de Soto is the President of the Institute of Liberty and Democracy ('ILD'), a think tank based in Lima, Peru. The website of the ILD provides that in 1979 de Soto headed a group of mining companies in Lima and was increasingly frustrated by 'regulatory barriers'.41 After examining Lima's property laws, de Soto developed the concept of 'extralegality' ie the exclusion of the poor from the legal apparatus for wealth creation. Extralegality is the lynchpin of the ILD's philosophies. The ILD describes itself as, '… an intellectual force in the field of development but also as an agent of change in the developing and post-Soviet world in the effort to move the assets of the poor from the extralegal economy into an inclusive market economy.'[42]

According to de Soto, poverty in the developing world is not the result of a lack of resources and assets. To the contrary, the poor are asset rich. A case in point is Haiti; de Soto measures the collective value of the assets of Haiti's poor as, 'more than 150 times greater than all the foreign investment received since the country's independence from France in 1804.'[43]

What the poor lack are the legal foundations for wealth creation, especially entrepreneurs who face numerous hurdles to bringing their businesses into the legal realm. In order to prove this argument, de Soto attempted to establish a garment workshop in Lima. He claimed that the time taken to comply with all relevant legal requirements was 289 days and the cost of compliance exceeded the average monthly wage by thirty-one times.[44]

According to de Soto, breathing life into the 'dead capital' of the poor is the key to alleviating poverty in the Third World:

> '… capital is not the accumulated stock of assets but the potential it holds to deploy new production. This potential is, of course, abstract. It must be processed and fixed into a tangible form before we can release it – just like the potential nuclear energy in Einstein's brick. Without a conversion process – one that draws out and fixes the potential energy contained in the brick – there is no explosion; a brick is just a brick. Creating capital also requires a conversion process.'[45]

This conversion process is essentially a body of property laws that accommodates the poor.

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[40] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000)
[41] Website of the Institute for Liberty and Democracy <http://ild.org.pe> at 27 February 2008.
[42] Ibid.
[43] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000) 6.
[44] Ibid 18.
[45] Ibid 40.

Throughout his work, de Soto refers to the 'bell jar' effect; a metaphor for property laws in the developing world which benefit only the wealthy minority. De Soto argues that the West and in particular, the United States of America, has managed to avoid the bell jar effect, but this is a recent phenomenon. According to de Soto, a century ago the United States of America was a Third World country. However, the nation prospered by legitimising the extralegal arrangements of its 'pioneers':

> Like Third World authorities today, American governments tried to stem the exponential increase of squatters and extralegal arrangements; but unlike Third World authorities, they eventually conceded that, in the words of one US congressman, 'the land system is virtually broken down … and instead of legislating for them, we are to legislate after them in full pursuit to the Rocky Mountains or the Pacific Ocean.[46]

In order to discover the extralegal arrangements of the poor, law-makers have to do what de Soto refers to as 'listening to the barking dogs.' He provides an example of discovering such informal arrangements in Indonesia. While walking through some rice fields in Bali, de Soto noticed that whenever he crossed a boundary between two plots of land he would hear a dog barking, thus providing rudimentary foundations for a formal body of property laws.[47]

There are a number of possible flaws in the *Mystery of Capital*. For example, de Soto's historical analysis of the United States of America omits reference to the contribution of slavery to the establishment of infrastructure and industry. Likewise, there are few references to the dispossession of Native Americans and its historical legacies. De Soto's frequent assertions that the West has successfully avoided the 'bell jar' effect are also contentious given the huge gap between the wealthy and the poor in American society. In recent years several commentators have disputed de Soto's theories, but there has been limited analysis of attempts to apply his work to Indigenous Australian communities.[48]

Indigenous Australian Communities

Although many Indigenous Australians live in abject poverty, they have little else in common with those who are the subjects of the *Mystery of Capital*. De Soto's subjects were part of an urban drift in the Third World that began in the 1950s. Developments such as the mechanisation of farming techniques, the promise of better health care in the cities and improved roads between rural and

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[46] Ibid 110-111.
[47] Ibid 170-171.
[48] See Ann Varley, 'Private or Public: Debating the Meaning of Tenure Legalization' (2002) 26.3 *International Journal of Urban and Regional Research* 449; Diana Hunt, 'Unintended Consequences of Land Rights Reform: The Case of the 1998 Uganda Land Act' (2004) 22(2) *Development Policy Review* 173; Ben Cousins et al, 'Will Formalizing Property Rights Reduce Poverty in South Africa's "*Second Economy*"? Questioning the Mythologies of Hernando de Soto' (Policy Brief No 18, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, 2005).

urban areas, resulted in migrations of millions of farm workers:

> In China alone more than 100 million people have moved from the countryside to the cities since 1979. Between 1950 and 1988 the population of metropolitan Port-au-Prince rose from 140,000 to 1,550,000. By 1998, it was approaching 2 million. Almost two-thirds of these people live in shanty towns.[49]

In contrast, the communities described by Hughes and Pearson are in remote locations. Admittedly, the experiences of Indigenous labourers who were forced off stations after the advent of equal wages and increased mechanisation of pastoral activities, find some resonance in *The Mystery of Capital*, but there was no comparable drift of millions of Indigenous people into Australia's cities.

Furthermore, the historical forces that underwrote the establishment of many remote Indigenous communities find no resonance in *The Mystery of Capital*. For example, the outstation movement was spawned by the desire to maintain relationships with traditional lands, the assertion of autonomy from governments and missionaries and for some, an attempt to escape from the corrosive impacts of larger settlements.[50] The voices of the poor are not heard in *the Mystery of Capital*, but it is implicit that most moved to cities in search of economic prosperity.

Unlike de Soto's subjects, most Indigenous communities have relatively small populations. By way of example, seventy-two percent of the Aboriginal population in the Northern Territory live on Aboriginal lands.[51] This population is divided into 641 communities, 570 of which have populations of less than two hundred.[52] Consequently, Indigenous people would never have access to the markets that presumably abound in the areas described by de Soto.

In order to characterise Indigenous lands as 'dead capital', one would have to overlook the multiple dimensions of relationships between Indigenous Australians and their lands. For many Indigenous people, maintenance of the custodian relationship with the land remains paramount. By way of example, in a recent survey conducted by the Aboriginal and Torres Strait Islander Social Justice Commissioner, traditional land owners throughout Australia were asked to list their priorities for their lands. The majority of respondents prioritised land and sea management and cultural heritage protection ahead of enterprise development.[53] Arguably, such results suggest that Indigenous Australians should be distinguished from the subjects of *The Mystery of Capital*, whose relationships with their lands appear not to be rooted in traditional law and custom.

De Soto's work also overlooks the importance of a 'cultural match'

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[49] De Soto, above n 43, 17.
[50] See Wright, above n 24.
[51] Olga Havnen, 'Presentation on the Northern Territory Emergency Intervention', <http://www.nationalaboriginalalliance.org/docs/cao_presentation>.ppt at 7 March 2008.
[52] Ibid.
[53] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (2006).

between Indigenous peoples and their governing institutions. The importance of this balance has been highlighted by the Harvard Project on American Indian Economic Development. In essence, the Project revealed that economic development depends in part on the freedom of Native Americans to define their own governance institutions.[54] Such research serves as a warning against the imposition of alien institutions on Indigenous societies without due regard for Indigenous cultural norms.

Unlike the entrepreneurs described in the *Mystery of Capital*, many remote Indigenous communities do not suffer from 'extralegality'. Rather, they are incorporated into the formal property system, albeit in forms unique to Indigenous people, such as titles conferred under the ALRA or the recognition of native title under the NTA. Not all such regimes are efficient, particularly the processes for recognition of native title, but this is not necessarily on a par with the examples of extralegality described by de Soto.

The multi-faceted nature of Indigenous interests in land also means that not all are capable of being made fungible and in particular, many of the usufructuary rights that commonly make up native title. By way of example, it is not clear how the Noongar people's right to 'use the [claim] area for the purpose of teaching, and passing on knowledge, about it, and the traditional laws and customs pertaining to it' could or indeed, should be exchanged.

The application of de Soto's thesis to Indigenous lands is also problematic because of the numerous examples of successful developments on Indigenous lands, suggesting that at least in some circumstances, Indigenous people are not impeded by a 'bell jar'. For example, over 300 Indigenous Land Use Agreements have been registered under the provisions of the NTA.[55] Such agreements touched upon, 'exploration and mining, land access, the management of national parks and reserves, compensation for loss of native title rights and infrastructure development.'[56] Likewise, it is difficult to argue that the lands held by Aboriginal land trusts under the ALRA are 'dead capital', given the prevalence of mining on those lands. According to the website of the Central Land Council, 'Mining on Aboriginal land contributes more than a billion dollars a year to the Northern Territory economy and accounts for eighty per cent of the Territory's income derived from mining.'[57]

Finally, Indigenous people have not always gained from incorporation into mainstream property laws. A case in point is native title. When the High Court recognised the doctrine of native title in *Mabo v The State of Queensland*,[58] many of the details of how native title would sit with non-Indigenous property rights were left unanswered. Rather than allowing the

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[54] See the website of the Harvard Project on American Indian Economic Development < http://www.hks.harvard.edu/hpaied/overview.htm> at 11 March 2008.

[55] 'More than 300 ILUAs registered' (2007) 25 *Talking Native Title: News from the National Native Title Tribunal* 5.

[56] Ibid.

[57] Website of the Central Land Council, <http://www.clc.org.au/OurLand/mining.asp> at 28 February 2008.

[58] (1992) 175 CLR 1.

Courts to fill in such blanks through subsequent case law, the Commonwealth Parliament enacted the NTA; prioritising practically all property rights over native title.

Arguably, the fragility of rights such as native title is a symptom, not of extralegality, but the fractured relationships between Australian Governments and Indigenous peoples. The confused state of these relationships is evidenced by the absence of infrastructure and essential services described above. It is also manifest in the State's piecemeal acceptance and rejection of Indigenous claims to land.

Conclusion

Unlike the Ark of the Covenant, Indigenous land tenure reform is not a key to unlocking the mysteries of socio-economic disadvantage in many Indigenous communities. I would like to think that before even considering an expedition to the harsh terrain of Indigenous affairs, the esteemed professor, Indiana Jones, would study the circumstances of Indigenous Australians and conclude that for reasons of history, culture and law, de Soto's theories find no resonance. Perhaps, like many in Indigenous affairs, he would also take a deep breath as yet another nondescript box was added to the warehouse of mysteries that governments lack the will to genuinely explore.