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Secure Tenure for Home Ownership on Native Title Lands

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Secure tenure for home ownership and economic development on land subject to native title

1 Proposition

The full range of tenure possibilities open to native title holders for home ownership and economic development are often not fully explored.

There remains a disjuncture between the exercise of individual property rights on the one hand and the exercise of collective or communal forms of ownership and control on the other.

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2 'Living on Our Lands' Study

We (Ed Wensing and Jonathan Taylor) explored these issues in terms of options for enabling home ownership and economic development possibilities to be realised in remote Aboriginal communities during the 'Living on Our Lands' study for the WA Dept. of Indigenous Affairs in 2011-12.

This examined the case of the Aboriginal Lands Trust (ALT) reserve lands in Western Australia.

3 The ALT Estate in WA

The ALT Estate comprises about 12% of WA or 27M ha:

- 255 Reserves held under the LAA Act, of which 84 are proclaimed under the AAPA Act (Total about 23M ha);
 - 6 Pastoral Leases (Total about 1.1M ha);
 - 9 General Purpose Leases (Total about 2.1M ha); and
 - 59 Freehold Titles (Total about 0.83M ha).
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- Approximately 8,000 Aboriginal people inhabit the ALT in largely remote communities.

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4 The ALT Estate in WA

WA is quite unique, because unlike other jurisdictions, WA does not have a statutory Aboriginal land rights system.

What is termed 'Aboriginal land' in WA is held in trust as a reserve for the 'use and benefit of Aboriginal inhabitants' and is administered by Ministerial discretion.

This reflects a 'protection' style of land holding, reminiscent of 19th Century approaches.

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5 The ALT Estate in WA

It is the continued aim of the ALT and of successive State governments in WA to transfer ownership of the Aboriginal estate to Aboriginal people.

However, there are a number of restrictions which diminish the utility of ALT land as an economic asset and its use as security against a loan.

6 The characteristics of the ALT Estate in WA

Land proclaimed under the AAPA Act must always be for ‘the use and benefit of the Aboriginal inhabitants’.

Under existing rules of transfer, the ALT may sell, lease or dispose of land it holds to any Aboriginal person (or entity), PROVIDED the land will continue to be ‘for the use and benefit of Aboriginal people/inhabitants’.

Any dealings in ALT land must be approved by the Minister.

7 The characteristics of the ALT Estate in WA

Invariably, ALT held lands are subject to a variety of Aboriginal interests and all dealings in the estate must make reasonable efforts to identify and reconcile these interests.

A legitimate interest may amount to:

- a native title determination; or
- a registered native title claim; and/or
- an entity holding a registered Crown title;
- a lessee or sub-lessee;
- a resident or inhabitant of the land in question; and/or
- a historical, heritage or other connection to the land.

8 The characteristics of the ALT Estate in WA

ALT lands are deemed not to have extinguished native title.

Land subject to native title is inalienable, can only be surrendered to the Crown and the native title rights are not able to be 'assigned, restrained, garnisheed, seized or sold' or 'made subject to any charge or interest ... as a result of the incurring, creation or enforcement of any debt or other liability of the body corporate'. (S.56(5) NTA)

ALT land subject to native title is therefore unusable as security against a loan.

9 The characteristics of the ALT Estate in WA

While the Native Title Act allows for the non-extinguishment principle to be applied, native title holders cannot enter the market to realise the value of their property rights by leasing, mortgaging or selling them.

The Crown retains a monopoly over the acquisition and extinguishment of those rights. (Gover 2012).

We were asked to examine whether an appropriate form of tenure exists that might assist in the sustainable transfer of the ALT estate to Aboriginal people, or whether a new form of tenure is required.

10 Aboriginal people's aspirations relating to land

Based on the case studies for the 'Living on Our Lands' study, we identified the following as important considerations in Aboriginal people's aspirations relating to land:

- Connections to country are vital to Aboriginal culture and land is intimately linked to their being and identity as Aboriginal people.
- Having fought for their native title rights, Aboriginal people are reluctant to extinguish them.
- Under Aboriginal culture, they retain collective responsibility for decision making about land.
- Aboriginal people want to leverage their land and property rights to be able to participate in the modern economy, the same as anyone else.

Principles for Indigenous Land Tenure Reform

To assess whether existing forms of tenure in WA provide adequate recognition and protection of Aboriginal people's aspirations relating to land, we applied the following principles:

- The inalienability of Aboriginal lands should be preserved.
- The elements of customary ownership should be able to combine with Torrens title issued by the Crown.
- Tenure reform should provide Aboriginal people with stronger forms of ownership and respect Aboriginal decision making authority.
- Tenure arrangements to distinguish between interests of native title holders, occupants and those with historical ties.
- Compulsory acquisition to be used only as a last resort, and only after full consideration of economic, social, political and cultural consequences.

12 Crucial Question

The crucial question is:

- Are there existing forms of tenure that would enable Aboriginal people to retain their cultural and collective responsibility and decision making for land, and which would also enable them to leverage their land in response to home ownership and economic development opportunities?

The WA Land Tenure System

The WA land tenure system includes a number of different forms of land tenure, including :

- Individual ownership (Absolute Fee Simple LAA s.74)
- Registered leasehold (General lease – fixed term LAA s.79)
- Delayed freehold (Conditional Purchase LAA s.80)
- Individual or communal ownership (Conditional fee simple – for use and benefit of Aboriginal people LAA s.83)
- Individual or communal registered leasehold (Conditional leasehold – for use and benefit of Aboriginal people LAA s.83)
- Reserve (LAA s.41)
- Pastoral lease (LAA s.101)
- Survey strata title (STA s.5A).

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14 Assessing land tenures in WA

We developed a tenure assessment matrix that assesses whether any of the existing forms of tenure can satisfy the Indigenous land tenure reform principles mentioned above.

Assessing land tenures in WA

TENURE TYPES (in WA)	ATTRIBUTES									
This form of tenure	Does NOT require the extinguishment of native title rights and interests (A 'No' answer means that native title would need to be extinguished.)	Combines the elements of customary ownership with the Crown's Torrens title system - i.e. guarantees security of title and priority of interests	Enables landholder to retain cultural connections, while also enabling the exercise of proprietary ownership for home ownership or economic development	Enables collective ownership and management and is respectful of Aboriginal decision making and authority	Is capable of being assigned (sub-leased) to Aboriginal people, governments, infrastructure agencies and/or other people	Is capable of being used as security for a mortgage	Enable subsidiary titles to be used as security for mortgage loans	Includes provisions to minimise exposure to undue financial risk	Enable rental incomes from third parties to flow back to the Aboriginal owner or ownership group	Allows interests to revert to the ultimate Aboriginal owner or ownership group
Individual Ownership (Absolute Fee Simple) (LAA s.74 Freehold)	No	No	No	No	Yes	Yes	Maybe	Yes, but exercised by financial institutions, not the state	Yes	No
Delayed Freehold (LAA s.80 Conditional Purchase, Freehold title issued when conditions met and premium paid)	No	No	No	No	No	Yes	No	Yes	Yes, after conditions have been fulfilled	No
Registered Leasehold (General lease for any purpose) (LAA s.79 Fixed Term)	Yes	Yes, potentially can	Yes	Yes, if issued to Aboriginal community	Yes, with Ministerial approval	Yes, with Ministerial approval	Yes, with Ministerial approval	Yes, exercised by the state	Yes, with Ministerial approval	No
Registered Leasehold (General lease for any purpose) (LAA s.79 In Perpetuity) (a)	No	Yes, potentially can	No	Yes, if issued to Aboriginal community	Yes, with Ministerial approval	Yes, with Ministerial approval	Yes, with Ministerial approval	Yes, exercised by the state	Yes, with Ministerial approval	No
Individual Ownership (Conditional Fee Simple) (LAA s.83 For use and benefit of Aboriginal people only)	Yes, provided the title does not 'affect' the native title rights and interests	No	Yes, with Ministerial approval	No	No	No	No	Yes, but only at time of title issue	Maybe, with Ministerial approval	No
Communal Ownership (Conditional Fee Simple) (LAA s.83 For use and benefit of Aboriginal people only)	Yes, provided the title does not 'affect' the native title rights and interests	No	Yes, with Ministerial approval	Yes, if issued to Aboriginal community	No	No	No	Yes, but only at time of title issue	Maybe, with Ministerial approval	No
Registered Leasehold (Individual, Conditional, In Perpetuity) (LAA s.83 For use and benefit of Aboriginal people only)	Yes, provided the title does not 'affect' the native title rights and interests	No	Yes, with Ministerial approval	No	No	No	No	Yes, but only at time of lease issue	No	No
Registered Leasehold (Individual, Conditional, Fixed Term) (LAA s.83 For use and benefit of Aboriginal people only)	Yes, provided the title does not 'affect' the native title rights and interests	No	Yes, with Ministerial approval	No	No	No	No	Yes, but only at time of lease issue	No	No
Registered Leasehold (Communal, Conditional, In Perpetuity) (LAA s.83 For use and benefit of Aboriginal people only)	Yes, provided the title does not 'affect' the native title rights and interests	No	Yes, with Ministerial approval	Yes, if issued to Aboriginal community	No	No	No	Yes, but only at time of lease issue	Maybe, with Ministerial approval	No
Registered Leasehold (Communal, Conditional, Fixed Term) (LAA s.83 For use and benefit of Aboriginal people only)	Yes, provided the title does not 'affect' the native title rights and interests	No	Yes, with Ministerial approval	Yes, if issued to Aboriginal community	No	No	No	Yes, but only at time of lease issue	Maybe, with Ministerial approval	No
Reserve (Setting aside Crown land by Ministerial Order in the public interest and for a dedicated purpose) (LAA s.41 Reserve)	Depends on purpose	No	No	No	No	No	No	No	No	No
Reserve (Requires Parliamentary approval to amend purpose or area, or to cancel the reservation. (LAA s.42 Class A Reserve)	Depends on purpose	No	No	No	No	No	No	No	No	No
Reserve Lease (in accordance with the reserve purpose and may be mortgaged) (LAA s.47)	Depends on purpose	No	Yes, but only for purpose consistent with purpose of reserve and with Ministerial approval	No	No	Yes	No	Yes, but only at time of lease issue	No	No
Reserve Lease (may be for different purpose, must be compatible with reserve and cannot be mortgaged.) (LAA s.48)	Depends on purpose	No	No	No	No	No	No	No	No	No
Pastoral Lease (Fixed Term, maximum 50 years) (LAA s.101 Pastoral Lease, Pastoral purposes defined LAA s.93)	No	No	Yes, but only for purpose consistent with pastoral lease and with Ministerial approval	Yes, if issued to Aboriginal community	No	Yes	No	Yes, but only at time of lease issue	Maybe, with Ministerial approval	No
Pastoral Lease (Perpetual) (b) (LAA to be amended. Pastoral purposes defined LAA s.93)	No	No	Yes, but only for purpose consistent with pastoral lease and with Ministerial approval	Yes, if issued to Aboriginal community	No	Yes	No	n/a	Maybe, with Ministerial approval	No
Rangelands Lease (b) (LAA to be amended)	n/a	n/a	n/a	na/	n/a	n/a	n/a	n/a	n/a	n/a
Multiple individual (horizontal or vertical) titles through body corporate arrangement (STA s.5A Survey Strata Scheme)	No	Possibly	No	Possibly	Yes	Yes	Yes	Yes	Yes	Yes

16 Assessing land tenures in WA

None of the existing forms of tenure in WA satisfy the principles sufficiently enough to pass the acceptability test for Aboriginal people.

The only form of tenure that comes close is the Survey Strata Scheme, satisfying 8 out of 10, but this form of tenure requires a sound understanding of strata title body corporate arrangements for it to work successfully.

However, there are two possibilities within the existing land tenure system that offer some degree of compromise...

Options for securing and protecting long term Aboriginal ownership – Option 1

Option 1:

- **Surrender the native title to the Crown and agree to its extinguishment with compensation on just terms, in return for freehold or leasehold titles held in trust.**
 - **PROS:** receipt of a secure and registered title that can be used as security against a loan, may be encumbered by other interest and traded.
 - **CONS:** means permanent loss of native title rights with one off compensation, and long term risk of loss / alienation.

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Options for securing and protecting long term Aboriginal ownership – Option 2

Option 2:

- **Administrative transfer to the Crown for leasing (e.g. Fiji's native Land Trust Board) with powers to lease to third parties.**
 - PROS: potential for trade-able sub-leases and may appear more acceptable to investors.
 - CONS: interests are not registered/ recognised by the Torrens title system (so have limited economic value); decision making would be in the hands of the Board rather than local native title holders.

19 Another way: Option 3

Option 3:

- **Direct recognition by the Crown of the native title holder's fundamental property rights and the creation of a leasehold titling system particular to it.**
 - PROS: decision making would remain in the hands of the native title holders.
 - CONS: changes would be required to s.56(5) of the *Native Title Act* (Cth) and to s.18 of the *LAA* (WA). Legislative changes may also be required in other jurisdictions.

20 Discussion

Four points stand out:

1. Subject to the prevailing legislation, it is possible to secure a lease in which the interest may be transferred and therefore be used as security against a loan.
2. A lease avoids the potential for fragmentation of the estate associated with individual freehold titles while retaining the underlying estate management function for the native title holders.

21 Discussion

3. The effects of market failure on home ownership possibilities in remote communities can be mitigated through the innovative use of trusts or other vehicles established to manage collective interests in land.
4. Different corporate entities are suited to different local circumstances, depending on the composition of communities, their development potential and the aspirations of the owners and residents.

22 Discussion

Leasehold forms of tenure offer the greatest potential for Aboriginal people to realise economic development and homeownership opportunities on Aboriginal land and for Aboriginal people seeking to protect their underlying native title rights and interests in the land.

Corporate structures such as land trusts and community land trusts offer the greatest potential for Aboriginal people to collectively administer land through head-leasing and sub-leasing arrangements.

23 FURTHER RESEARCH

Further research is required to ascertain how customary rights can be more justly accommodated within conventional land tenure systems.

- To establish what kind of tenure and home ownership opportunities are currently being secured through Indigenous Land Use Agreements; and
- To establish administrative mechanisms and policy frameworks for a land administration system for lands subject to native title rights and interests, so that native title holders can exercise their property rights without having to surrender and extinguish their native title rights.



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Thank you!

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Resources: AIATSIS Discussion Paper 31

<http://www.aiatsis.gov.au/research/discussion.html>