Secure Tenure for Home Ownership on Native Title Lands

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14 May 2013

Photo: Nulleywah, Kununurra, WA.
Ed Wensing April 2011.
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.
Our hypothesis is that, ideally, leasehold forms of tenure offer the best economic and housing opportunities for Aboriginal people who are also seeking to protect their underlying traditional/communal/native title rights and interests in the land.
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3 ‘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.
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).

- Approximately 8,000 Aboriginal people inhabit the ALT in largely remote communities.
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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 (ATSISJC 2004 Native Title Report).
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.
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The characteristics of the ALT Estate in WA

Land proclaimed under the AAPA Act must 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.
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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.
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.
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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.
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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 culture and land is intimately linked to the well-being and identity of Aboriginal people.
- Having fought for their native title rights, Aboriginal people are reluctant to extinguish them.
- There is a desire to 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.
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.
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?
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The WA Land Tenure System

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

- Delayed freehold (Conditional Purchase LAA s.80)
- Individual ownership (Absolute Fee Simple LAA s.74)
- Registered leasehold (General lease – fixed term LAA s.79)
- 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).
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

### Table 2. Land Tenure Types in WA and Attributes for Aboriginal Ownership

<table>
<thead>
<tr>
<th>TENURE TYPES (in WA)</th>
<th>ATTRIBUTES</th>
</tr>
</thead>
<tbody>
<tr>
<td>This form of tenure ...</td>
<td>Does NOT require the making of a statutory title rights and interests (a &quot;no&quot; answer means that native title would need to be extinguished)?</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td>Individual Ownership (Absolute Free Simple) (LAA s. 74 Feehold)</td>
<td>No</td>
</tr>
<tr>
<td>Delayed Freehold (LAA s 80 Conditional Purchase, Freehold title issued when conditions met and premium paid)</td>
<td>No</td>
</tr>
<tr>
<td>Registered Leasehold (General issue for any purpose) (LAA s. 75 Fixed Term)</td>
<td>Yes</td>
</tr>
<tr>
<td>Registered Leasehold (General issue for any purpose) (LAA s. 76: Prepayment(s))</td>
<td>No</td>
</tr>
<tr>
<td>Individual Ownership (Conditional Free Simple) (LAA s. 75 for use and benefit of Aboriginal people only)</td>
<td>No, provided the title does not 'affect' the native title rights and interests</td>
</tr>
<tr>
<td>Communal Ownership (Conditional Free Simple) (LAA s. 75 for use and benefit of Aboriginal people only)</td>
<td>No, provided the title does not 'affect' the native title rights and interests</td>
</tr>
<tr>
<td>Registered Leasehold (Individual, Conditional, in Prepayment) (LAA s. 75: Fixed Term)</td>
<td>No, provided the title does not 'affect' the native title rights and interests</td>
</tr>
<tr>
<td>Registered Leasehold (Individual, Conditional, Fixed Term) (LAA s. 75: for use and benefit of Aboriginal people only)</td>
<td>No, provided the title does not 'affect' the native title rights and interests</td>
</tr>
<tr>
<td>Registered Leasehold (Communal, Conditional, in Prepayment) (LAA s. 75: for use and benefit of Aboriginal people only)</td>
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<td>No, provided the title does not 'affect' the native title rights and interests</td>
</tr>
<tr>
<td>Registered Farm (Fixed Term, maximum 50 years) (LAA s. 103)</td>
<td>No</td>
</tr>
<tr>
<td>Registered Farm (Perpetual) (a) (LAA to be amended)</td>
<td>No</td>
</tr>
<tr>
<td>Registered Farm (Perpetual) (b)</td>
<td>No</td>
</tr>
<tr>
<td>Registered Farm (Horizontal or vertical tenures through body corporate arrangement (STA s.5A Survey Data Scheme))</td>
<td>No</td>
</tr>
</tbody>
</table>

(0) Currently not state policy in WA. (1) Changes form handed down by the State Government. n/a = not available

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Only two forms of tenure in WA satisfy some of the principles and then only partly, to pass the acceptability test for Aboriginal people.

They include a general fixed term lease under s.79 of the LAA and Survey Strata Scheme under the STA, satisfying, partly, 8 out of 10 principles. However both these forms of tenure are not without their difficulties.
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Three Options for transfer to Aboriginal ownership

We examined three options for making native title land available for home ownership and/or commercial utilisation comparable to freehold tenure:

- Surrender and agree to the extinguishment of the native title rights and interests in exchange for freehold titles;
- Administratively transfer native title lands to the Crown for leasing to third parties; and
- Create a leasehold titling system on native title lands.

Each of these options involves some degree of compromise or risk.
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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 the 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 interests.
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 Aboriginal land holders, including 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.
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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.
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.
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-leaseing and sub-lease arrangements.
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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.
Thank you!
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Resources: AIATSIS Discussion Paper 31