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

Ed Wensing and Jonathan Taylor

AIATSIS RESEARCH DISCUSSION PAPER NUMBER 31 August 2012

AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES
NATIVE TITLE RESEARCH UNIT

Wensing, E & Taylor, J 2012, *Secure tenure options for home ownership and economic development on land subject to native title*, AIATSIS research discussion paper no. 31, AIATSIS Research Publications, Canberra.

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

Ed Wensing and Jonathan Taylor

AIATSIS Research Discussion Paper No. 31

First published in 2012 by AIATSIS Research Publications

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
GPO Box 553, Canberra ACT 2601
Phone: (61 2) 6246 1111
Fax: (61 2) 6261 4285
Email: research@aiatsis.gov.au
Web: www.aiatsis.gov.au

National Library of Australia Cataloguing-in-Publication entry:

Author:	Wensing, Ed (Edward George)
Title:	Secure tenure for home ownership and economic development on land subject to Native Title / Ed Wensing & Jonathan Taylor.
ISBN:	9781922102041 (pbk.)
Series:	Research discussion paper (Australian Institute of Aboriginal and Torres Strait Islander Studies), no. 31
Subjects:	Aboriginal Lands Trust (W.A.)
	Aboriginal Australians--Land tenure--Western Australia.
	Aboriginal Australians--Housing--Western Australia Home ownership--Law and legislation--Western Australia.
Other Authors/ Contributors:	Taylor, Jonathan.
	Australian Institute of Aboriginal and Torres Strait Islander Studies.
Dewey Number:	333.208999150941

Cover photos: Mirima Garden Estate, Kununurra, June 2011; housing undergoing refurbishment, Mindi Rardi, Fitzroy Crossing, June 2011; Kurnangki, Fitzroy Crossing, June 2011. Photos by Ed Wensing.

Typeset in Arial and Calibri.

Printed by Blue Star Print Ltd

Contents

About the authors

Ed Wensing FPIA is currently an associate of SGS Economics and Planning and a visiting lecturer at the University of Canberra. As a land use planner and policy analyst, Ed has worked extensively with Aboriginal and Torres Strait Islander people and communities around Australia for over 15 years on a range of matters, including native title, cultural heritage and natural resource management. He is best known for his groundbreaking work on developing resources for local government on how to work with native title and how to develop agreements. His current research interests are on the just accommodation of customary land rights in conventional and contemporary land use planning systems.

Jonathan Taylor MPIA is an associate director within KPMG's social policy group, based at the firm's Perth office in Western Australia. Over the past 10 years he has worked on a wide range of advisory assignments for government and Aboriginal organisations in Australia, having previously worked as a UK based researcher and consultant for the International NGO Training and Research Centre and at the European Commission Directorate General for Development.

Acknowledgments

The authors acknowledge comments provided by colleagues Paul Howorth and Greg McIntyre SC on earlier drafts of this paper and the comments provided through the blind peer review process. These insights and suggestions are greatly appreciated. Any errors or omissions in this paper are the responsibility of the authors.

Introduction

In Australia the focus of the public policy debate on land rights has shifted from the struggle of Indigenous peoples to have their pre-colonial possession of land recognised to how reinstated rights and interests in land might be exercised to fulfil Indigenous peoples' own aspirations, including for economic development and home ownership. Those people who have had their native title rights and interests in land legally recognised are contemplating the implications for their future prosperity. They are pondering the types of investments they can make to develop their land for social and economic purposes, the use and development rights they might temporarily exchange for income, or, as a last resort, the rights and interests they are prepared to relinquish in return for compensation.

Western Australia (WA) presents a unique case in the Australian context because, unlike other states and the Northern Territory, WA does not have a statutory Aboriginal land rights system despite its large and remote Aboriginal population. What is termed 'Aboriginal land' in Western Australia covers approximately 12 per cent of the state but has generally been granted at the discretion of the Minister for Lands, or else is held in trust as a reserve for the 'use and benefit of Aboriginal inhabitants'.[1] This estate has not been transferred to Aboriginal ownership under state legislation on the basis of statutory rights conferred on Aboriginal people as the result of a formal claim based on their cultural connections to the land or waters. According to the former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma (AHRC 2005), this reflects 'protection' style legislation from the 19th century, which has been the basis of calls for reform of the system since the early 1980s (Seaman 1984; Bonner 1996; Casey 2007).

The 'reserve' nature of land tenure arrangements in most remote Aboriginal communities in WA, as well as the particular relationships that Aboriginal people have with their land and waters, presents some significant challenges to economic development and the introduction of private home ownership in these communities.

An objective of the National Partnership Agreement on Remote Indigenous Housing is the progressive resolution of land tenure on Aboriginal land in order to 'secure government and commercial investment, economic development opportunities and home ownership possibilities in economically sustainable communities' (COAG 2009: 5). Existing tenure arrangements in remote communities in WA are regarded by the Australian Government to be an obstacle to the expansion of government-backed home ownership programs.[2] This is because land subject to native title rights and interests and held in reserve by the state government is inalienable and lacks the necessary title individuation and fungibility so that prospective home owners may use their title, and the housing asset on it, as security against a loan, or so they can sell their land in the marketplace or bequeath their land to

1 The term for the 'use and benefit of Aboriginal inhabitants' arises from the proclamation of a reserve under s 25(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) or the vesting of a reserve under Part 4 of the *Land Administration Act 1997* (WA).

2 The authors acknowledge that the pursuit of individualised land title arrangements in remote Aboriginal communities is part of a wider policy agenda aimed at securing tenure so that governments can make investments in public infrastructure and also meet their obligations to housing tenants as their landlord.

their descendants. Although leasing arrangements have been negotiated by governments in pursuit of secure tenure outcomes for public investments, private and individuated property rights are ultimately seen as the only solution, particularly where project financing is required.

This paper begins by providing a brief overview of the 'reserve' form of land tenure prevalent in WA and the constraints it imposes on residents whom this form of tenure is intended to benefit. We discuss the Aboriginal land tenure reforms promoted by the Australian Government to facilitate private home ownership in remote Aboriginal communities, and the relationship between property ownership and the forms of social and economic development this reform agenda implies.

The relationships between land tenure and pathways to sustainable economic development are then explored further, and two schools of thought are investigated. The first stresses the importance of private property rights as a means of participating in the market economy. The second seeks to reinstate the significance of collective forms of land tenure security when considering the rights of Aboriginal peoples to pursue a development pathway of their choosing.

We then look at the constraints on dealing with land subject to native title rights and interests. We note that, under current statutes and case law, native title rights and interests must be surrendered and extinguished in order for such lands to be transferred into absolute fee simple (freehold) or leasehold title (where there is an intention that the new form of title is for the exclusive possession of the new title holder). The implication is that native title holders are unable to use their property rights to participate in the modern economy in the same way as other property holders. This means that different approaches within existing land tenure frameworks will be required to deliver more equitable opportunities for Aboriginal people to achieve home ownership and/or undertake other economic development of their lands while continuing to own and manage this property collectively.

Compensation for the loss of native title rights and interests may be in the form of a tenure swap, and the form of tenure on offer from the Crown may be freehold or leasehold title under exclusive possession. We look at the relative merits of these forms of tenure. While compensation for the extinguishment of native title rights and interests by the Crown is intended to reflect the loss in perpetuity to the native title holders of their native title rights and interests, unless appropriate tenure arrangements are instituted the prospect of that compensation flowing on to benefit future generations of former native title holders carries significant risks.

Finally, we explore a range of mechanisms for ensuring that former Aboriginal Lands Trust (ALT) land granted in compensation for the permanent loss of native title rights and interests will yield the best possible returns and benefits for the former native title holders and their descendants. The discussion has a particular emphasis on sustainable tenure outcomes in which the concept of 'subsidiarity' is applied. This concept implies that responsibility for making decisions about land and property assets rests with the smallest (or the lowest) entity capable of carrying the risks associated with housing and economic development.

The potential of common law trusts and community land trusts as vehicles for achieving sustainable tenure outcomes for Aboriginal people is also discussed.

We conclude that home ownership and economic development could possibly be facilitated on Aboriginal lands through appropriate leasing arrangements without the need to alienate the underlying customary title to land. In addition to tenure constraints, native title holders' inability to access private finance largely arises from the geographic isolation of their land and the various land use constraints that apply in the different jurisdictions. We therefore make the point that it is important to distinguish between tenure type and security value when considering the capital raising potential of land using mortgages.

In our postscript we postulate that, overall, leasehold systems have the capacity to respect customary and collective interests in land primarily because the land is never alienated from the traditional owners.[3] Leasehold also offers the greatest potential to adequately meet the needs of Aboriginal land interests. We identify the elements of a new tenure system that would respect Aboriginal peoples' inherent connections to and cultural responsibility for country, while also enabling economic participation on their terms.

Overview of the Aboriginal Lands Trust estate in Western Australia

The Aboriginal Lands Trust (ALT) in WA holds land in trust for Aboriginal people. The holdings comprise 329 parcels of land covering approximately 27 million hectares, or as much as 12 per cent of the state's total land area. As at March 2011,[4] this includes:

- 255 reserves (approximately 23,914,419 hectares) under the *Land Administration Act 1997* (WA), 84 of which are proclaimed under Part III of the *Aboriginal Affairs Planning Authority Act 1972* (WA)
- 6 pastoral leases (1,099,343 hectares)
- 9 general purpose leases (approximately 2,196,502 hectares)
- 59 freehold titles (approximately 834,390 hectares).

Under existing rules of transfer, the ALT may sell, lease or otherwise dispose of land it holds to any Aboriginal person provided the land will continue to be for 'the use and benefit of Aboriginal inhabitants'. However, Aboriginal communities living on the land generally do not have the power to lease or dispose of the land, or to use it as collateral for finance, without the relevant minister's prior approval. The particular constraints on economic development in each category of ALT holding are outlined on pages 8 and 9.

Reserves under Part 4 of the Land Administration Act 1997 *(WA)*

There are 171 properties classed as Crown reserve under the *Land Administration Act 1997* (WA). Under Part 4 of the Act, the WA Minister for Regional Development and Lands may issue a management order to the ALT under which the ALT is granted the authority to care for, control and manage the land for 'the use and benefit of Aboriginal inhabitants'. The rights and duties of the management body are set out in the management order, which is registered on a Certificate of Crown Land Title.

3 The authors have been guided by Edelman 2009 in the use of the term 'traditional owner'.

4 Details provided by correspondence with the WA Department of Indigenous Affairs.

The management orders generally give the ALT the power to lease (rent out) the reserve for a period not exceeding 99 years. Where there is a power to lease the reserve, any lease given by the ALT, as the management body, must be consistent with the purpose of the reserve—that is, for the use and benefit of Aboriginal inhabitants. Unlike with other ALT holdings, management orders cannot under any circumstances be used as security for a loan, although any leases issued under a management order can be used as security if the Minister for Regional Development and Lands and the Minister for Indigenous Affairs approve it.

To date, approximately 220 leases have been issued over these lands. Most are 99-year leases granted to incorporated Aboriginal organisations or individuals. Where a Land Administration Act reserve has been transferred to an Aboriginal organisation or entity, these entities also assume the authority to care for, control and manage the land for 'the use and benefit of Aboriginal inhabitants'. The entities may also assume the power to lease the reserve but they do not have 'ownership' of, or title to, the land in the ordinary sense. The holding remains a Crown reserve and dealings in the land remain restricted. Under s 18 of the *Land Administration Act 1997* (WA) any dealing in Crown land requires the prior approval of the Minister for Regional Development and Lands.

Reserves under Part III of the Aboriginal Affairs Planning Authority Act 1972 *(WA)*

The 84 Aboriginal reserves 'proclaimed' under Part III of the *Aboriginal Affairs Planning Authority Act 1972* (WA) make up the largest area of the ALT landholdings. These proclaimed reserves are protected through restricted entry for miners and the public, although access can be obtained by applying to the Minister for Indigenous Affairs and/or the ALT for an entry permit. Protection granted through Part III of the Aboriginal Affairs Planning Authority Act can be changed only by approval of both Houses of the WA Parliament, and the statutory protection accorded by the entry permit system is lost if the reserve passes out of control of the ALT or the Aboriginal Affairs Planning Authority (AAPA). The holdings cannot be leased, mortgaged or subleased without the consent of the AAPA.

Pastoral leases

As at March 2011, the ALT held six of the 56 Aboriginal-owned pastoral leases in WA. All pastoral leases will expire in 2015 but can be renewed subject to conditions regarding management and development of the land. A critical issue for Aboriginal-owned pastoral leases is increasing the capacity of landholders to manage and develop the land if these landholdings are not to be put at risk of forfeiture.

Pastoral leases are granted under the Land Administration Act for grazing stock and other purposes connected to this activity, under the conditions that rent is paid and the land is managed in an environmentally sound way. Pastoral lands are also subject to local government rates and charges for vermin control.

There is not a general right of exclusive possession for pastoral leases. Most have reservations allowing members of the public access to unenclosed, or enclosed but unimproved, areas

and allowing for Aboriginal persons to access such areas for customary purposes.[5] A pastoral lease may coexist with a native title interest.[6] Currently, four of the six pastoral leases are subject to exclusive possession native title determinations.

Pastoral leases not subject to native title can be sold, subleased or used as security for loans with the approval of the Minister for Regional Development and Lands and the Minister for Indigenous Affairs. Subject to permits granted by the Pastoral Lands Board, economic activities such as tourism, agriculture and horticulture can be undertaken on pastoral leases provided they are not the main use of the land.

The 56 pastoral leases that are Aboriginal owned or controlled (including the six that are currently held by the ALT) comprise approximately 12 million hectares, or slightly more than 10 per cent of the total pastoral lease area in Western Australia (approximately 91 million hectares or 36 per cent of the landmass of WA) (DIA 2005: 227).

General purpose leases

The nine general purpose leases held by the ALT were granted under the Land Administration Act for 'the use and benefit of Aboriginal people'. None have been granted in perpetuity, although they may be granted to Aboriginal people under the Land Administration Act. These leases can be transferred, mortgaged or sublet with the approval of the Minister for Indigenous Affairs and the Minister for Regional Development and Lands.

Freehold properties

Under the Aboriginal Affairs Planning Authority Act, the ALT has the authority to acquire and manage land for 'the use and benefit of Aboriginal inhabitants'. The ALT holds 59 freehold properties, which have been acquired on an ad hoc basis through a range of programs and initiatives.

Observations regarding the ALT estate

The Aboriginal Affairs Planning Authority Act provides for land to be placed under the ALT's authority. The ALT is required to ensure that the land it holds is used and managed for the benefit of persons of Aboriginal descent and that the use and management accords with the wishes of the Aboriginal inhabitants of the area so far as that can be ascertained and is practicable. In particular, land proclaimed under s 25(1) of the Aboriginal Affairs Planning Authority Act must be for 'the use and benefit of the Aboriginal inhabitants'.

Under existing rules of transfer, the ALT may sell, lease or otherwise dispose of land it holds to any Aboriginal person provided the land will continue to be for the use and benefit of Aboriginal people/inhabitants, but Aboriginal communities living on the land generally do not have the power to lease or dispose of the land without the relevant minister's prior approval. When ALT property is transferred in freehold, the ALT reserves the right to protect the land from being sold on or lost to the Aboriginal estate by placing the appropriate restrictions within the conditions of transfer.

Any dealings in ALT land must be approved by the Minister for Indigenous Affairs and/or the Minister for Regional Development and Lands in accordance with the 'use and benefit' clause.

5 *Land Administration Act 1997* (WA) s 104.

6 *Wik Peoples v Queensland* (1996) 187 CLR 1.

By restricting the possibilities for sale or transfer (including in the event of foreclosure), this lessens the attractiveness of ALT lands as security against a loan by a financial institution. The requirement for ministerial approval and the constraint on permitted uses therefore limits the land's facility as an economic asset, and the ALT's landholdings are widely considered to be constrained for economic development purposes.

It has been argued at various points during the ALT's history—most notably with the publication of the 1996 review of the ALT by Neville Bonner—that alternative strategies to facilitate social and economic development on the Aboriginal estate will be impeded while land is still held under the ALT (Bonner 1996). Bonner's conclusion echoed that of the 1994 *Report of the Task Force on Aboriginal Social Justice*, which suggested that 'lands currently held by the ALT could have considerable potential if used as the basis for a component of an economic development strategy designed to benefit the Aboriginal community' (Task Force on Aboriginal Social Justice 1994).

In her review of the Department of Indigenous Affairs (including the ALT) in 2007, Dawn Casey pointed out that Aboriginal corporations have found it difficult to access adequate funding for development when the ALT remains the land-holding body, while a lack of access to essential services on the ALT estate has caused disruptions to successful operations and community functioning. These impediments, in combination with deficiencies in management and governance mechanisms, have resulted in some leases reverting to the ALT (Casey 2007).

It is nevertheless the continued aim of the ALT to transfer its ownership of the Aboriginal estate to Aboriginal people (DIA 2010). While current land tenure reform initiatives are driven in part by the need to address Australian Government funding requirements for housing and related infrastructure, it is important to situate the reform agenda within a broader context and to recognise the continued relevance of previous reform suggestions, commencing with Seaman in 1984.

National Indigenous land tenure reforms and the private home ownership debate

The Australian Government's perspective on the importance of private home ownership on Indigenous land is clearly outlined in the *Indigenous home ownership issues paper*, published by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) in 2010. This document talks about 'the home ownership gap between Indigenous people and other Australians' and the importance of providing 'a pathway for those who want and are able to own their own homes'.

The issues paper acknowledges that a potential difference between Indigenous and non-Indigenous aspirations to home ownership is 'the opportunity to create wealth', in that for Indigenous people 'the economic benefits of home ownership, such as being able to sell the house for a profit, are generally seen as less important' (FaHCSIA 2010: 5). The perceived benefit of home ownership for Aboriginal people is, however, clearly stated as being a secure, safe and healthy home base over which owners can enjoy significant control and the option to transfer the asset to future generations (FaHCSIA 2010: 18).

The Australian Government regards existing tenure arrangements in remote Aboriginal communities to be an obstacle to the expansion of government-backed home ownership programs, since land subject to native title rights and interests (including reserve lands held by statutory agencies such as the ALT in Western Australia) lacks the title individuation and fungibility necessary for individual prospective home owners to transfer their land title or use it, and the house on it, as security against a loan. This is particularly so in regional and remote areas where an entity holds land on behalf of a group and is unable to dispose of or transfer its interest (and where the basic survey work required to prepare the land for subdivision has not been undertaken).

FaHCSIA (2010: 16) argues that these tenure arrangements in remote communities need to be changed, not only to enable home ownership but also to provide security of tenure for government and private investments in infrastructure and community facilities. Moreover, it believes removal of these impediments to public and private investment would clarify responsibilities for housing management in Aboriginal communities by giving housing authorities long-term access to and control over public housing assets.

To overcome constraints on sale or transfer, the Australian Government requires 40-year leases and has introduced leasing arrangements that enable the provider of a housing asset to secure an interest in the land. These conditions have cleared the way for government to negotiate long-term headleases on Aboriginal lands. In the case of 99-year leases in the Northern Territory instituted through the Executive Director of Township Leasing, this has arguably transferred control over land use decision making from local Aboriginal entities to centralised government agencies with the power to issue subleases.

In the Northern Territory and Queensland the creation of subleases on long-term headleases is seen as the principal means of achieving the security of tenure necessary for public and private investments and to promote individuated dealings in land, which facilitate private home ownership. The Australian Government's contributions to remote Aboriginal housing over the next 10 years therefore depend on the states reforming their land tenures to promote tenure security for public and private investments and to enable individual home ownership (as part of a solution to chronic housing shortages in many rural and remote Aboriginal communities).

Given the scale of public expenditure under the Remote Indigenous Housing National Partnership Agreement,[7] however, and the lack of private economic development opportunities in most remote communities (at least over the short to medium term) this emphasis on secure tenure is arguably more about protecting public investments in housing and related infrastructure and less about providing secure tenure for Aboriginal people on terms that will enable them to set and implement their own development goals, since the outcome of the tenure reform process rarely results in a stronger form of Aboriginal ownership and control over the land.

That is not to say that governments are not concerned about providing Aboriginal people with long-term social and economic development opportunities, but rather that the immediate objective of tenure reform is to provide funders with reassurance that public

7 A maximum of approximately $4.8 billion over 10 years, according to Part 5 of the agreement.

assets in Aboriginal communities can be legally controlled by government. In the Northern Territory, where tenure reform is most advanced, concerns about the direction of the policy and the limited extent of Aboriginal influence (particularly the limited ability of traditional owners to negotiate the terms of long-term leases) have prompted some commentators to question the equity of a 'secure tenure agenda' and its implications for the rights of Aboriginal people (Terrill 2009: 841 & 2010: 6; Tehan 2010: 363).

Security of tenure for government agencies, it is argued, is not tenure reform as such but an 'abnormalisation' of land tenure (Dalrymple 2007: 216), given what is understood to be the strong desire among diverse Aboriginal groups for 'models of land tenure that integrate economic and cultural aspirations' (Bonner 1996).

According to former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma, a common theme of tenure reform internationally is the objective of making it easier for indigenous landowners to make use of their land (including commercial use) in ways that are consistent with cultural aspirations—something that cannot be reduced to providing just a secure interest over land and its infrastructure. If the aim of tenure reform were simply to provide clarity of ownership, this could be achieved within existing tenures and legal frameworks 'by quickening processes for the return of land to Aboriginal people and by supporting them to pursue their right to development' (AHRC 2010: 125).

Calma goes on to propose that each of the four elements of the 'security of tenure agenda'—housing management by state housing authorities, encouraging public investment, encouraging private sector investment and encouraging home ownership—could be better delivered through improved forms of Aboriginal land ownership. That is not to say that providing clarity of ownership is not also a legitimate aim of tenure reform, but that a reform process should, crucially, aim to provide long-term clarity through changes that deliver improved forms of Aboriginal ownership and control and that support the development of local governance (rather than simply providing clear ownership for governments) (AHRC 2010: 134).

The phrase 'improved forms of Aboriginal ownership' necessarily raises the issue of the community's or traditional owners' capacity to govern and manage the development process on properties, including management of headleases or divestment responsibilities. Resolution of this issue would sensibly require the integration of any land reform agenda with programs that provide ongoing resources and support for these organisations—something governments have been slow to do for prescribed bodies corporate (PBC), which native title holders are required to establish following a positive determination of native title by the Federal Court (Bauman & Tran 2007; Attorney-General's Department 2007).

Limits to private home ownership on Aboriginal land

The policy objective of encouraging private home ownership on Aboriginal 'reserve' land in Western Australia is a complex and vexed issue, particularly in rural and remote areas where housing markets may be weak and where the mortgagee risks purchasing a high-cost, high maintenance yet depreciating asset (Altman, Linkhorn & Clarke 2005; Tehan 2010).

Several commentators have already questioned the cultural basis of the home ownership logic by investigating what Aboriginal people understand home ownership to mean and questioning whether home ownership and the right to trade and bequeath assets is a social and cultural objective for Aboriginal people in remote locations (Sanders 2008). Aboriginal people in remote Australia tend to view land not as 'individual property' but as part of an ethical–spiritual and legal matrix of rights, obligations and community relationships (Small & Sheehan 2008). These arguments make the point that viewing the absence of private home ownership as an indicator of Aboriginal disadvantage is a value laden concept and one that is also at odds with the growth and need for alternative affordable rental housing options.

There are also significant technical and legal obstacles to securing interests in housing assets on land that is leased, including the 'myth' that the 'acquisition of a lot with a house has the effect of making that family the legal owner' (Dalrymple 2007: 216). Fixtures constructed on property are part of that land and are vested in the owner;[8] therefore, a building constructed by a leaseholder becomes the property of the owner upon expiry of the lease. The leaseholder may have a right to compensation for the improvement, or even to trade or sublease the interest under certain terms, but this does not mean they remain the owner of the building in perpetuity.

Even in the case of long-term leases, therefore, it would be wrong to suggest that a property constructed on leasehold land could be passed on to family members indefinitely. In the case of 40-year leases, what is more likely is that the period of the lease simply reflects the potential longevity of the construction.

Land tenure reform and privatisation is considered by land tenure theorists and practitioners to be a particularly blunt social policy tool for affecting behavioural change among Aboriginal groups with a spiritual and communal understanding of land, as opposed to a sense of personal pride in individualised property. Modern land administration theory does not assume that land tenure change will drive behavioural change to ensure that individuals maintain private housing assets (Wallace 2010: 37).

Those who support a strong home ownership policy take a different view. Notwithstanding the lack of evidence specific to Aboriginal cultural groups, they cite the linkages between private home ownership and a broad range of social and economic outcomes at the household level (Hughes, Hughes & Hudson 2010). For these commentators, the creation of subleases designed to promote individualised dealings in land where the title is not held individually is the principal means for achieving the security of tenure necessary for individual home owners and essential to creating a market for subleases and the assets on them.

8 As noted by Crabtree et al. (2012b: 67), the current default position of Australian law is that an asset secured to the land is the property of the landowner, since the intention is for the asset to be a permanent fixture of the property. Portable and demountable homes such as caravans and prefabricated homes et cetera, which may be more readily removed by their owner, are exempt from this convention. Portable homes are not considered to give rise to an interest in land and are usually covered by the relevant caravan or residential park legislation in each jurisdiction and with different legislation covering retirement villages.

Since there are alternative options that offer greater levels of Aboriginal ownership and control, these subleasing arrangements have been widely criticised as the 'thin end of the wedge' or as a first step along a pathway to individuated private ownership as distinct from communal and collective forms of ownership. In a recent study of Aboriginal housing options, Crabtree et al. (2012b: 43) concluded that, while increasing Aboriginal home ownership may be warranted as part of a mix of housing options to increase the supply of housing to Aboriginal communities, care must be taken not to unduly expose Aboriginal people to the risks of market-based ownership under individuated forms of tenure, especially in locations where demand is so low that effective housing markets will not operate. This appeal for caution is not ideological but, rather, a practical consideration of how affordable housing choices can be sustainably provided in locations where the costs of housing construction and maintenance are high and housing markets are weak.[9]

The immediate objectives of the current national reform agenda were made clear in a January 2009 communiqué written by the Minister for Families, Housing, Community Services and Indigenous Affairs to each of the state ministers responsible for public housing (Macklin 2009a & 2009b). The communiqué specified three key requirements for determining whether secure land tenure has been settled:

1. Government must have access to and control of the land on which construction will proceed for a minimum period of 40 years. A longer period has additional advantages
2. Tenure arrangements must support the implementation of tenancy management reforms including the issue of individual tenancy management agreements between the relevant State housing authority and the tenant without requiring further consent from the underlying land owner. This capacity must also permit replacement of the housing service provider if required.
3. Native title issues must also have been resolved, in that any applicable process required by the *Native Title Act 1993* (Cth) has been conducted (Macklin 2009a & 2009b).

The communiqué said these requirements ought to be resolved prior to the delivery of capital works programs funded by the Australian Government in remote Aboriginal communities. Enactment of these requirements and the formalisation of secure tenure arrangements are regarded as underpinning the long-term goals of raising service delivery standards, facilitating economic development and promoting home ownership.

The Western Australian Government's response to these requirements was to introduce the *Aboriginal Housing Legislation Amendment Act 2010* (WA) to establish a new framework for managing social housing on ALT land in WA. To obtain further Australian Government funding for remote Aboriginal housing delivery, the state of WA has therefore:

> …prioritised a resolution of the land tenure and management issues, and State Cabinet has endorsed as a first step, changing legislation to allow the Aboriginal Lands Trust to appoint the Department of Housing to manage housing on its behalf (Buswell & Hames 2009).

9 According to the Centre for Appropriate Technology (CAT 2007), an appropriately designed four bedroom, two bathroom house in a remote area will cost around $300,000 (in 2007 dollar values) in total to construct (excluding land values).

In Western Australia the situation is unique, as in addition to acquiring long-term leases the State Housing Authority[10] is able to gain access to and control over public housing assets on ALT land by negotiating housing management agreements (HMAs) with the relevant community. This has enabled the state to observe its obligations as the landlord of public housing assets without the State Housing Authority having to secure an interest in the land. Currently, the issue for the state is its statutory inability to negotiate HMAs on other tenures, such as freehold (absolute fee simple) land.

The second stage of the WA Government's land tenure reforms will enable the State Housing Authority to manage housing (with the agreement of communities) on other forms of land held for the benefit of Aboriginal people. This will include changes to 'help facilitate home ownership and commercial use of Aboriginal land'. As part of this, the WA Government has confirmed that it will review policies, administrative practices and other legislative impediments to the creation and transfer of individual title on Aboriginal held land, including land registration and planning (Western Australian Government 2009: 7–8).

In WA, therefore, individuated forms of tenure continue to be preferred over other forms of tenure that also have the potential to address impediments to economic development and home ownership. The implication of this approach is that the risks to individual home owners of individuated tenure (a particular tenure form) may not have been fully considered. Nor has there been piloting of alternative housing ownership and tenure models that have the potential to increase the level of Aboriginal ownership on terms consistent with cultural aspirations in relation to land while also being mindful of the presently limited financial, human and social capacity of households to manage the prevailing risks.

Land tenure reform and alternative pathways to development

National and international debate over the relationship between land tenure and Aboriginal development has historically revolved around two schools of thought: firstly, those who stress the importance of private property rights as a means of participating in the market economy (as the basis for alleviating poverty) and, secondly, those who seek to reinstate the significance of customary and collective forms of land tenure when considering the rights of Aboriginal peoples to pursue a development pathway of their choosing.

Land as a purely economic asset

The position of economists in favour of extending private property rights into Aboriginal communally held land is unequivocally put by Duncan (2003: 6) in his paper on economic development in Aboriginal communities, in which he states:

> The most widely accepted position among economists with respect to the relationship between land tenure, economic development, and environmental sustainability is that secure, individualised land tenure is essential for robust economic development and environmental sustainability.

10 This was established under s 6 of the *Housing Act 1980* (WA).

The economic justification for this statement is essentially threefold:

- Firstly, individual owners are likely to put land to its most economically efficient use, because the prospect of private benefits is an incentive for them to use resources in ways that maximise productivity, asset value and individual welfare.
- Secondly, individualised title to land may be used as collateral to provide security against a debt, which can be used to raise equity for further investments.
- Thirdly, individualised land assets may be openly traded—something an individual values 'less' can be traded for something they value 'more'—so that assets may be allocated to their 'highest and best use'.[11]

Based on these criteria, the most crucial mechanism for economic efficiency in land markets is the asset's 'fungibility'—that is, the ability of ownership rights in land to be traded like any other commodity, capable of being exchanged or replaced for another of like nature or kind.

Asset fungibility, combined with formal registration, is understood to be the principal defining characteristic of Western-style property systems, such as the Torrens system in Australia, whereby an individual's ability to hold rights to use the land for whatever purpose or purposes they choose (other than activities that compromise or attenuate the rights of others, including the state) is upheld as the pinnacle objective and the one most likely to produce optimal economic outcomes for individuals and society (Deininger 2004: 3).

Within this framework, in which land is viewed purely as an economic asset, Aboriginal lands are above all else a factor of production for which the most appropriate form of land tenure (if economic development is to be achieved) is some form of freehold and individuated title, with the intended long-term effect—through the changed relationship to the mainstream economy that necessarily follows—of integrating Aboriginal people into mainstream society.

Critique of customary and collective titles

In presenting the case for secure individualised title for economically disadvantaged groups, writers such as de Soto (2002) and Hughes (Hughes, Hughes & Hudson 2010) have argued that common property rights and management have historically failed to generate growth and productivity, while only individuated property can be used effectively as collateral for credit. In this analysis the absence of individual property rights to land is thought to lead to a 'tragedy of the commons' outcome whereby those with common access to the land but no individual land title will tend to exploit and deplete the resource through overuse, since they have no incentive to make investments (which would be appropriated by others) and are unable to use their right of common access as collateral for an investment loan or mortgage.

Since land cannot be sold or otherwise alienated (not even by the customary leadership), customary and collective forms of title are therefore considered inferior forms of tenure

11 A property valuation concept. Any proposed or theoretical use of a property must pass a series of tests, including being legally allowable, physically possible, financially feasible and maximally productive, before it can be the highest and best use of the property for valuation purposes.

(Johns 2007), incapable of optimising economic efficiency, that ultimately lead to land degradation and the perpetuation of poverty. This dynamic, it is thought, will over time result in increased demands for transformation to individual title, in order to avoid catastrophe, once population pressures have further stressed the land.

Critiques of customary and collective tenures have also argued that there are constraints on democracy under these systems. Consensus based decision making among a culturally ascribed leadership group is viewed as restricting the scope for individual action and entrepreneurship, while the granting of superior rights only to those able to prove an unbroken traditional use of their land is seen to have the potential to exclude those from outside the group, who may nevertheless have a legitimate interest in the land for historical reasons. By contrast, individuated, freehold title, and the individual rights it affords, is said to be founded on inherently democratic principles, with the social and political benefits in a symbiotic relationship with the economic.

Communal governance arrangements, it is argued, are more likely to suffer from partisanship, nepotism or corruption, since entities established to represent communal interests tend not to spread the benefits of land ownership throughout the community, resulting in classes of 'haves and have-nots' under this system.

Land as a means to securing human rights

Within a rights based framework for considering reforms to Aboriginal land tenure systems, access to land and security of tenure are regarded as a means to achieving human rights, including cultural rights to difference that may also encompass restrictions on the activities of individual members (Assies 2009). While putting land to economic use is not precluded within a rights based framework, the emphasis is on cultural continuity through tenure security rather than on economic efficiency per se. The focus is on protecting the group's land from transfer or appropriation so that it may be retained as a vehicle for the delivery of human rights, including shelter, food and sustainable livelihoods within a cultural framework, in perpetuity for the group.

There are recognised and significant differences in the way property is conceptualised by indigenous peoples compared to Western culture. Simply put, Western tenure systems view property as a set of material rights that are notionally comparable to other material values, whereas for the majority of indigenous peoples the relationship between the right to cultural difference and land tenure is inextricably linked and cannot be readily evaluated in material terms. Aboriginal people in remote Australia tend to view land or waters not as 'individual property' but rather as part of an ethical–spiritual and legal matrix of rights, obligations and community relationships (Small & Sheehan 2008: 106). In the words of Marcia Langton (2008: 76):

> Western property systems privilege ownership as a construct that bestows rights, such as the right to exclude and the right to alienate. By contrast, Aboriginal constructs illuminate a social world where the fundamental nature of the proprietary interest is a spiritual bequest linking with the sacred ancestral past where the duties and responsibilities are transmissible across generations.

Aboriginal people's customs are therefore intimately linked to property through the integral connection between customary land, group membership and spiritual value. A common theme in Aboriginal law is consequently the inalienability of lands so as to preserve culture through group maintenance of rights and obligations through land. Small and Sheehan (2008: 106) have gone on to assert that:

> ...the logical implications for land rights that follow from these beliefs must be respected as forming a far stronger claim on land ownership for those who do. The people, or tribe, are usually understood by them to be composed of all members—past, present, and future—and land rights belong to all of them. This means that the currently living members of the tribe represent only a tiny portion of the total membership, all of whom have equal ownership rights to the tribe's property. Since sale to foreigners can only compensate the tribe's people currently living, any alienation necessarily disadvantages a major portion of the tribe. It means disenfranchising ancestors and progeny of cultural and material rights without compensation commensurate with the loss.

Irrespective of the particular genesis of the beliefs, exponents of the rights based approach have therefore stressed the importance of understanding that the relationship Aboriginal people have with land and waters is primarily based on non-material, non-commercial foundations and its primary significance is usually cultural, which means that the alienation of these rights cannot be fully evaluated using material/commercial equivalences.

Critique of individuated titles

Proponents of the rights based approach to tenure reform and management contend that the classical economic critiques of customary and collective title are unfounded, on the grounds that the two concepts of land ownership are based on a 'different ontological perspective', meaning that the logical propositions of one cannot provide an adequate critique of the other (Hepburn 2006). It is therefore argued that the 'tragedy of the commons' critique is unwarranted because it mistakenly conflates customary and collective ownership and use (whereby land and group are spiritually bonded) with access rights to common property by individuals seeking to maximise their own welfare. In the former, the land and group are understood to be an indivisible entity wherein ownership is not perceived in terms of an individual entitlement. In the latter, land is an alienable commodity, separate to the people, who seek only to maximise their individual utility from its use. To paraphrase Hepburn (2006: 73), there is a distinction between 'joint property within the institution' and 'communitarian property recognised by the institution' which goes unnoticed by classical economic perspectives.

From a rights oriented perspective, two of the main benefits of secure and long-term tenure (as outlined by Duncan)—namely, the incentive to care for land so that it may increase in value and the ability of rights holders to benefit from any investments—can be fully achieved under customary and collective property rights within Aboriginal communal governance models (Altman, Linkhorn & Clarke 2005). This proposition has led to concern among advocates of the rights based approach that title individuation could dissolve the cultural integrity of the very group it is intended to benefit.

It is argued that a shift to private ownership would destroy the established order that regulates the management of land resources cooperatively and internally, and that individualised rights and self-preservation would displace cultural acknowledgment and collective benefit, with potentially devastating impacts on community relationships and cultural continuity. The fear is that, once land is made freehold and exclusive property, secondary, competing rights relating to culture may, by extension, be fenced out, or ownership and use rights could be sold on to individuals outside the cultural group.

Numerous international case studies provide empirical evidence for this argument and the prevailing risks. They demonstrate that, for indigenous groups at least, privatisation does not necessarily evolve towards economic efficiency. More commonly it has led to the dissipation of indigenous holdings as parcels of land are sold off or lost through foreclosure to non-indigenous owners. In these instances the removal of inalienability requirements has reduced the aggregate value of the land once segmented by multiple tenants (a process that increases exponentially with inheritance). This has affected individual plot values and productivity, resulting in stressed sales.[12] In particular, Stephenson (2010: 132) observes that the consequences of individuating indigenous title in the USA has resulted in the loss of traditional lands and that the impacts of the USA's allotment policy continued long after that policy was repudiated in 1934. Stephenson (2010: 133) concludes that 'future indigenous generations will be faced with the consequences of individualising indigenous title if free alienability is permitted' and 'preservation of the underlying communal/traditional title is vitally important'.

Implications for Aboriginal land tenure reform agendas

Wider recognition of the cultural rights of indigenous peoples[13] and respect for different conceptualisations of the value of land and waters has led some advocates of individual title to qualify their support. Extensive research by the World Bank has led it to conclude that tenure security is vital to economic development but that the nature of that security is not necessarily tied to formal individual title or management by government.

Even prior to the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (United Nations 2007), endorsed by the Australian Government in 2009, the World Bank had edged back from its previously unqualified support for individual freehold on indigenous lands by stating, in 2003, that 'eliminating or replacing customary tenure is often neither necessary nor desirable', on the basis that 'more sustainable economic development outcomes are likely to be achieved by working with, rather than potentially displacing, traditional systems of governance and collective ownership, decision-making and management' (Deininger 2004: 9).

The United Nations (UN-HABITAT) goes further, cautioning on the risks of freehold title for low-income groups and arguing that other options, such as long-term leasing from

12 By way of example, Hepburn (2006) and Stephenson (2006, 2010) cite the effects of the allotment policy (General Allotment Act of 1887) on native tribes in the USA, under which privatisation resulted in the segmentation and loss of native lands though sales, loan defaults or non-payments of property taxes. A subsequent amendment (Indian Reorganization Act of 1934) made the trust status of remaining allotments inalienable for an indefinite period.

13 Most notably, the UN September 2007 *Declaration on the Rights of Indigenous Peoples*.

customary owners, can offer the high levels of tenure security required without the debt risks associated with a freehold purchase. For low-income groups, the United Nations argues, protection against eviction and the ability to transfer use rights through inheritance are regarded as a higher priority—particularly for indigenous people—than the possibility of selling or using the property as collateral against a debt (Assies 2009: 583). A long-term lease, rather than freehold title, is considered a less risky and more appropriate form of tenure for the poor, since less capital is required to secure the property, flexible terms may be negotiated and tenants are buffered from depreciation or the prospect of distressed sales.

Long-term leasehold tenure, with transfer rights to sell, inherit or mortgage the lease while maintaining other rights of use (such as access for cultural or leisure purposes), could be a feature of such a system in the Indigenous Australian context, assuming the local economic conditions are right and individuals aspire to maximising their economic welfare independently of collective interests. This proposition looks to the possibility that an alternative system of tenure might be developed on Aboriginal held lands whereby a variety of property interests could be created and individual rights could be recognised without compromising the underlying collective or customary title.

Tehan (2010: 355) maintains that the debate has moved away from a 'simple and rigid emphasis on individual titling to a more nuanced and complex set of ideas encompassing local social and cultural dimensions of land tenure and recognition of the limitations of markets'. Privatisation, it seems, is no longer seen by land administration theorists and practitioners as the only model for delivering security of tenure. The suggestion that changes in tenure will necessarily drive economic development and behavioural change among Aboriginal people (in the absence of the necessary ancillary support and capacity building) is also now widely rejected (Wallace 2010).

The primary concern of land administration is no longer with economic development per se but with the broader concept of sustainability, encompassing the local social and cultural dimensions of land tenure as well as the economic. This has opened the way for a consideration of the relationship between Indigenous knowledge and belief systems, land tenure, cultural continuity and development if long-term sustainability is to be achieved (Tehan 2010). In practical terms, this will mean adopting a more flexible and context-dependent approach to determining the most appropriate tenure arrangements for Aboriginal people, given local circumstances, aspirations, cultural continuity and prospects for economic development. This presupposes a contingent role for market mechanisms and the need to take into account the potential drawbacks of individuation and land markets for the poor (Bradfield 2005). The arrangements most likely to succeed will be those that build on existing and traditional institutions, which bring with them crucial economic assets including traditional governance structures and Indigenous social and cultural capital.

Since changes to the titling of land will not address underlying governance issues, capacity building of existing assets and governance capabilities will be necessary elements of any land tenure reforms in which Indigenous organisations are to hold and manage land.

Success in these terms means the capacity to negotiate with government and third parties, the ability to prudently manage capital or income raised from mortgaging or leasing land, and the ability to take on the legal and financial obligations involved. This can only be achieved within an institutional and legal context that allows the group to set, implement and benefit from their development goals. How collective and individual interests are balanced in this framework is a matter for local consideration and debate, and not for imposition by government.

Aboriginal aspirations for stability and autonomy over land and housing, coupled with marginal market contexts and Aboriginal people's desire for ongoing recognition of the cultural significance of Aboriginal lands, suggest that hybrid tenure models that allow for collective or communal ownership of land as well as capital investment and development are relevant for Aboriginal people (Crabtree et al. 2012a: 43).

This brings us to Aboriginal aspirations for land currently held by the ALT in WA. Drawing on work we have undertaken in this field, including consultation with Aboriginal communities on the ALT estate, we make the following general observations:

- In almost every case there will be a range of different groups of Aboriginal people who will have a legitimate interest in particular areas and who may have differing aspirations with respect to land use and land tenure. Some will be native title holders for the area concerned, while others will not be native title holders but may have a cultural or historical connection to the land that ought to be considered.
- In communities over which a positive determination of native title rights and interests has been made, the native title holders are reluctant to surrender those rights and interests because they have invested considerable effort in obtaining recognition in law of those pre-existing rights and interests.[14] These rights and interests must be prioritised in law in accordance with the Native Title Act.
- There is widespread misunderstanding and confusion among Aboriginal people in remote areas about the opportunities and risks afforded by the range of tenures available in WA through the Land Administration Act. The use and ownership rights that are permitted and the distinction between freehold and leasehold property, for example, are little understood. Nor is there an understanding of what individual home ownership means in its basic form and the land tenure implications of becoming a home owner.
- Because of the history of dispossession, there is apprehension about the need for changes to land tenure and mistrust of government's intentions.

It would therefore be inappropriate and potentially discriminatory to consider land tenure reforms, including transfers of land to Aboriginal people, separately from the economic, social, political and cultural development of the very people that these reforms are intended to benefit in the long term. The crucial question, therefore, becomes: what forms of tenure

14 As French J said in his decision in *Sampi v State of Western Australia* (No 3) [2005] FCA 1716 (30 November 2005): 'The Bardi and Jawi People of the Dampier Peninsula have struggled long and hard for the recognition of their native title. Their application under the *Native Title Act 1993* (Cth) was lodged with the National Native Title Tribunal (the Tribunal) in 1995 [a decade before a positive determination was made].'

are available that would enable Aboriginal people (and native title holders in particular) to retain their collective responsibility for and decision making over land while also leveraging their land for social and economic development purposes, including to participate in the mainstream economy on their own terms?

Dealing with land subject to native title rights and interests

Land granted or reserved for the benefit of Aboriginal and Torres Strait Islander people under Australian, state or territory government land rights legislation is deemed by the Federal Court of Australia and by the Native Title Act not to have extinguished native title rights and interests. It is clear from the decision of the Full Federal Court in *Pareroultja v Tickner* (1993) 117 ALR 206 that a grant of land to a land trust, pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), does not affect native title.

As Lockhart J stated, with the agreement of the other two members of the Full Federal Court: 'In my opinion, when grants of land to which there is native title are made to Land Trusts under the Land Rights Act, the native title is not extinguished; and such grants are not inconsistent with the continued existence of native title to the land.' Therefore, any dealings in communally owned land or land reserved for the use and benefit of Aboriginal people must also take into account the native title rights and interests for the dealings to be valid.[15]

As with ALT property, land subject to native title rights and interests presents several difficulties for those seeking to lease or raise a mortgage against the land. Since under the Native Title Act the native title rights and interests can only be surrendered to the Crown, a native title determination does not give native title holders any power or authority to grant subsidiary interests, including leases.

Where land is subject to a positive determination of native title rights and interests and the state or territory wishes to issue a new form of Crown land title over all or any part of the land, such acts may constitute a 'future act' under s 233 of the Native Title Act. Under the future act provisions of the Act, native title holders and registered native title claimants are entitled to certain procedural rights that should be afforded as part of the procedures that are to be followed when it is proposed to do the act. Depending on the nature of the future act:

> …these rights include:
>
> - the right to be notified and
> - the opportunity to comment or
> - the right to be consulted or
> - the right to negotiate or
> - a right to object or
> - the same rights as an ordinary title holder (freeholder) (NNTT 2009: 15).[16]

15 'Valid' includes having full force and effect (*Native Title Act 1993* (Cth) s 253).

16 A fuller explanation of what these processes entail can be found in the Full Federal Court's decision in *Harris v the Great Barrier Reef Marine Park Authority* [2000] FCA 603.

The future act regime within the Native Title Act includes a number of categories for different types of future acts, and the provisions are hierarchical. According to the National Native Title Tribunal: 'To the extent that a future act is covered by a particular provision in the future act hierarchy in the Native Title Act, it will be made valid by that particular provision and will not be covered by any provisions relating to a category lower in the list' (NNTT 2009: 15).

If a future act is not covered by one of the provisions in the future act hierarchy, it can only be validly done by way of an Indigenous land use agreement (ILUA) or following compulsory acquisition. A future act must be covered by one of the provisions in the future act hierarchy, including by way of an ILUA, or it will be invalid to the extent that it affects native title rights and interests[17] (NNTT 2009: 10). In some circumstances the future act requirements of the Native Title Act can be satisfied by negotiating an ILUA, provided the relevant parties are willing to negotiate an agreement and have it registered under the Act (NNTT 2009: 16).

An ILUA is a voluntary agreement about the use and management of land and/or waters made between a native title group and other people, organisations or government agencies. It allows people to negotiate flexible, pragmatic agreements to suit their particular circumstances. The advantage of an ILUA is its flexibility, because ILUAs can be made at any time and can be tailored to meet the needs of the parties involved and their particular land use issues (NNTT 2009: 7). It should be noted, however, that for a variety of reasons ILUAs can be difficult and time consuming to negotiate. For example, there is a requirement that for the ILUA to be registered under the Act all the relevant native title holders must be party to the ILUA, and if the ILUA involves the extinguishment of native title rights and interests then the relevant state or territory must also be a party to the ILUA.

When assessing a proposal affecting native title rights and interests, therefore, including the issue of a new form of tenure, the state or territory and the native title holders must decide whether it is necessary for the native title rights and interests to be extinguished or whether the non-extinguishment principle under s 238 of the Native Title Act can be applied.

Under s 237A of the Native Title Act the word 'extinguish' 'means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.' When the native title rights are extinguished (whether surrendered by agreement or whether by compulsory acquisition) they are extinguished forever and cannot be revived at a later date. Issue of a freehold title or lease in perpetuity has this effect.

Under s 238 of the Native Title Act the term 'non-extinguishment' means that an act done over an area where native title exists will not, either wholly or partly, extinguish native title. However, the effect is that the native title rights and interests are suppressed by any acts that are inconsistent with them, and to which the non-extinguishment principle applies, until the inconsistent act ceases to have effect. When the inconsistent act ceases to have effect or is removed, the native title rights and interests will again have full effect. Mining tenements and pastoral leases are examples of these circumstances, as is a 40-year lease to a housing authority for the provision of public housing.

17 See *Native Title Act 1993* (Cth) s 240A.

The accepted interpretation of current native title law is that, where native title rights and interests continue to exist, the state or territory possesses only the radical title[18] to the land and therefore cannot issue a fee simple (freehold) or leasehold title with the intention that the form of tenure will grant exclusive possession. Should the state or territory wish to do so, it must become the full beneficial owner by extinguishing the native title rights and interests (Butt 2010: 976).

Upon the valid grant by the Crown of a freehold title following the extinguishment of the native title rights and interests, the freehold title holder can deal with the land in the usual way. If the intent of the freehold grant is to create a commercially viable commodity, this option would be appropriate because there would no longer be conditions limiting trade in the land, including leasing. The freehold title holder can sell the land to a third party or can mortgage the land, and the mortgagee may foreclose on the land should the mortgagor be unable to meet their commitments.

Moreover, upon the valid grant by the Crown of a Crown lease (also following the extinguishment of the native title rights and interests) the lessee can sublease the land (subject to the land administration statutes in the relevant jurisdiction), charge rent and generally use the land according to the terms of the lease. In order for a lease over land subject to native title to be valid, it must be preceded by either a compulsory acquisition or surrender of the native title rights and interests, which extinguishes all the native title rights and interests (*Native Title Act 1993* (Cth) ss 24MD(2) and 24MD(2A)).

When the native title rights and interests are compulsorily acquired, they must be acquired on just terms for any loss, diminution, impairment or other effect of that act on the native title rights and interests (*Native Title Act 1993* (Cth) s 51). The just terms may comprise compensation in a form other than money (*Native Title Act 1993* (Cth) s 24MD(2)(d)). When the native title rights and interests are surrendered by an agreement that includes a statement that the surrender is intended to extinguish the native title rights and interests in whole or in part, those native title rights and interests are surrendered without any right to compensation (other than what may be included in the agreement by negotiation).

In the case of a fee simple (*Fejo v Northern Territory* (1998) 195 CLR 96) or lease (*Western Australia v Ward* (2002) 213 CLR 1), which at common law extinguishes the whole of any native title rights and interests, there can be no partial extinguishment. However, s 24MD(3) of the Native Title Act provides that:

18 'In *Mabo (No. 2)* (at 48 per Brennan J; at 122 per Deane and Gaudron JJ), the High Court of Australia held that, on acquiring sovereignty, the Crown acquired the "radical" ("ultimate" or "final") title, and that this title empowered the Crown to deal with the land, but did not confer full beneficial ownership to the exclusion of native title rights and interests…it follows that all land in Australia is held either by the Crown (under radical title or as beneficial owner), by native title holders as a burden on the Crown's title, or as a result of a Crown grant.' (Butt 2010: 976)

> In the case of any future act to which this Subdivision applies[19] that is not covered by subsection (2) or (2A): (a) the non-extinguishment principle applies to the act;

The juxtaposition of those provisions in the Native Title Act has led some stakeholders involved in native title matters to consider that this was intended to leave open the possibility of entering into an agreement to surrender native title, without the requirement to include a statement that the surrender is intended to extinguish native title (or is not intended to extinguish native title). The consequence of this proposition would be that section 24MD(3) operates to apply the non-extinguishment principle to the act of surrender followed by a grant—that is, the provisions would overcome the extinguishing effect of a grant arising from the operation of the common law.

If this argument has any cogency (which in our view is doubtful given the existing case law to the contrary), the non-extinguishment principle may apply by agreement to a grant of fee simple or the grant of a lease. The application of the non-extinguishment principle means the native title holders are unable to exercise their native title rights and interests during the currency of a Crown lease or fee simple title, but when the Crown lease expires or the fee simple is surrendered the native title rights and interests could again revive.

Although native title rights and interests are suppressed, this may make it difficult for the fee simple title holder, lessee or a sublessee to gain access to finance, and may inhibit the sale of any such interests. The person or entity holding or purchasing the interest, aware that the land remains subject to native title rights and interests, would probably require additional reassurance that this has no impact on the rights being transferred. This would potentially be in the form of higher rates of interest or a discount on the value of the land.

Land subject to native title rights and interests (because they are inalienable) is also statutorily protected from debt recovery processes. It is therefore unusable as security against a loan. The extent to which a prescribed body corporate is able to assign leases over land still subject to native title rights and interests may be constrained by s 56(5) of the Native Title Act, which states that the native title rights and interests held by a body corporate 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', including 'any act done by the body corporate'.

Section 56(5) of the Act is effectively a detailed reflection of what is regarded as the common law position on native title set out in *Mabo [No 2]*. It provides that since native title is a form of property that exists subject to the Crown's radical title it cannot be given by native title holders to anybody but the Crown. If that is the position, at common law a native title cannot subsist with the creation of a freehold title, lease or any sublease exercised pursuant to a lease (by native title holders or otherwise).

19 The subdivision applies to a future act if 'the act could be done in relation to the land concerned if the native title holders instead held ordinary title to it' and 'a law of the Commonwealth, a State or a Territory makes provision in relation to the preservation or protection of areas, or sites, that may be: (i) in the area to which the act relates; and (ii) of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions' (*Native Title Act 1993* (Cth) s 24MB). Those preconditions are likely to apply in the circumstances being discussed.

While it may be arguable that the Native Title Act alters the common law by enacting the non-extinguishment principle and applying it to specified future acts, the reality is that s 56(5) of the Act is a significant impediment to development by Aboriginal people who hold native title rights.

In order to facilitate home ownership and economic development on lands subject to native title rights and interests, the native title rights and interests must first be surrendered and extinguished, or otherwise compulsorily acquired by the Crown, before a freehold title or a leasehold title can be granted.[20] In short, native title holders are not able to use their property rights to participate in the modern economy in the same way as other property holders. As a consequence, different approaches within existing land tenure frameworks are required so that Aboriginal people will have more equitable opportunities for home ownership and other economic development on their lands.

Compensation in freehold or leasehold?

While compensation for the extinguishment of native title rights and interests is intended to reflect the loss in perpetuity to the native title holders of those rights and interests, the reality is that compensation flowing on to benefit future generations of native title holders carries significant risks. While a package of benefits may be available, compensation is likely to include a tenure swap, and the form of tenure may be freehold or leasehold.

The merits of granting freehold or leasehold tenure will depend to a large degree on the statutory regime in the relevant jurisdiction and the extent to which the recipients of the land transfer are able to maximise the long-term benefits of holding the land. In Western Australia, s 18 of the Land Administration Act does not permit the subleasing of Crown leases made under s 79 of the Act without the prior approval of the Minister for Regional Development and Lands. This restriction is a feature of the WA legislation that is not shared by some other states and territories and would need to be amended if lessees were to have greater discretion to sublet the land.

Freehold title(s) may present the potential for Aboriginal people to gain from the development of the land, since the land may be sold, mortgaged or leased by the relevant land-holding entity in order to generate capital or rents. As a means of compensation, however, the freehold value of the land at the time of development will not necessarily reflect the value of the land into the future for future generations. As discussed at length, freehold title also presents the significant risk that former native title holders will not realise future benefits if the estate is lost through imprudent sales or foreclosure.

If the native title rights and interests are surrendered to the Crown on condition that they are replaced by a fee simple title, a loss to future generations may occur if (a) the land has some intrinsic cultural value to future generations of (former) native title holders that is put at risk by the potential for future development, or (b) the economic value of the land is diminished or lost to future generations either because of a decline in its intrinsic value or because an imprudent sale or other transaction means the opportunity costs from any increase in value fail to be recouped.

20 Section 53 of the *Native Title Act 1993* (Cth) provides that where native title rights and interests are compulsorily acquired native title holders are entitled to compensation on just terms.

As one would expect, only if the land is of some intrinsic economic value can the potential for increasing capital value be realised, either through (increasing) rents from leases, through borrowing against the asset to invest in other commercial opportunities or through some alternative investment of the funds obtained from the land's sale. Upon sale it may be that the funds are invested in alternative real estate or otherwise invested in a broad ranging portfolio with similar or greater returns to that of real estate.

Leasehold title(s) also present the potential for financial gain, since the land may be leased. Depending on the type of leasehold title issued, however, subsidiary dealings in land may continue to be constrained by the requirement to obtain prior ministerial approval under s 18 of the Land Administration Act, unless otherwise provided for in the ILUA agreeing to the surrender and extinguishment of the native title rights and interests. If this matter cannot be satisfactorily resolved in the ILUA, it may adversely affect the market for sub-leases and hence land values. However, a Crown lease presents the potential to gain from the development and subleasing of the land by the former native title holders without the risk that the land may be alienated or the economic benefits otherwise diminished (as may be the case with a grant of absolute fee simple).

Under the leasehold option, assuming the land has an intrinsic economic value, future generations of (former) native title holders can expect secure and ongoing benefits in the form of rents that will increase in line with the future economy of the region. Subleases issued on a Crown lease under the Land Administration Act can be registered under the *Transfer of Land Act 1897* (WA) and should therefore have the potential to be traded as well as the potential to be used as security against a loan. This means that, subject to conditions set by the holders of the head lease, the property may be traded on commercial terms similar to those of freehold title.

Ideally, native title holders and traditional owners should be able to lease their land and trade in subleases on commercial terms secure in the knowledge that it cannot be alienated from their custody and control.

Aboriginal land ownership: securing and protecting long-term interests

What mechanisms can be used, therefore, to ensure that ALT land granted in compensation for the permanent loss of native title rights and interests will yield the best possible returns and benefits for the (former) native title holders and their descendants? The way in which land continues to be held is crucial to the native title holding group's ability to benefit sustainably from the grant.

Once the land is no longer subject to native title rights and interests and is held in the estate of fee simple (freehold) or a Crown lease, the beneficiaries are then free to 'deal' with the land to the extent described in the previous section. The registered native title body corporate (RNTBC) may be required by the former native title holders to continue holding the land indefinitely for present and future generations in accordance with their economic and/or cultural aspirations.

A fundamental principle in developing an appropriate form of Aboriginal land ownership and control is to have a structure that respects the underlying collective and communal nature of Aboriginal relationships to land and thereby ensures that control over decision making remains with the collective or communal land-holding entity. A key consideration is the concept of 'subsidiarity'[21]—that is, the institutional and organisational level at which decision making over dealings in land rests and the associated risks are managed.

The following examples explore how these objectives could be achieved in the context of transferring land out of the ALT estate in WA to an Aboriginal land-holding entity constituted by the former native title holders.

A common law trust

There is a prima facie case for the use of a 'common law trust', which could hold land on behalf of the trust's beneficiaries. This kind of structure is readily available in Australia and has the potential to retain the communal elements of property ownership and land use decision making valued by Aboriginal people. Although not without administrative challenges, this mechanism is being applied by some recently formed registered native title bodies corporate following successful native title determinations.[22]

A 'trust' is a relationship whereby property (real or personal, tangible or intangible) is held by one party for the benefit of another. In every form of trust there are four essential elements present, and these make trusts distinguishable from other legal institutions: the trustee, the trust property, the beneficiary or charitable purpose and the personal obligation attached to the property (Meagher & Gummow 1997: 4).

Trusts can be classified according to:

- the intent to create a trust (whether express or declared, presumed or implied, or by operation of law)
- the objects of the trust (private, public or charitable)
- the nature of the duties imposed upon the trustee (either simple or special)
- the form of the declaration of the trust (executed or executor) (Meagher & Gummow 1997: 4).

In the trust's operations, firstly there must be one or more trustees who will hold a legal or equitable interest in the trust and in whom there will be an obligation to deal with the trust property in the terms of the trust. Secondly, there should be property 'capable of being

21 Subsidiarity is an organisational and democratic principle stating that matters ought to be handled by the smallest (or the lowest) entity capable of carrying out the function. The principle relates to organisational efficiency but also concerns the sharing of power between stakeholders. The principle of subsidiarity also relates to the use and support of local capacity where such capacity exists. Devolution to the lowest viable level often allows for more responsive and efficient services that are better suited to the local context. Due to initial limits to local resources and capacity in Indigenous communities, the degree to which subsidiarity might be achieved in the short term may also be limited. This does not mean abandoning the principle, however; instead, it means investing in strategies that will increasingly deliver the principle over time.

22 For example, the Yawoorroong Miriuwung Gajerrong Yirrgeb Noong Dawang Aboriginal Corporation in Kununurra, WA.

held on trust' and there must be certainty in identification of the property bound by the trust (Meagher & Gummow 1997: 5). Thirdly, there must be a beneficiary or beneficiaries, and, while the trustee may be one of the beneficiaries, the trustee cannot be the sole beneficiary. Fourthly, the trustee must be under a personal obligation to deal with the trust property for the benefit of the beneficiaries, and the obligation must also be annexed to the trust property (Meagher & Gummow 1997: 4–6).

While the concept of common law trusts is by no means as simple as this delineation suggests, for the purposes of this paper we draw the following observations:

- Trusts are governed by the terms under which they are created and, in Australia, under the relevant state or territory law.
- The terms of a trust are usually written down in a trust instrument or deed.
- The trust instrument or deed must specify what property is to be transferred into the trust.
- The beneficiaries must be clearly identified or at least ascertainable[23] and may include people not born at the date of the trust's creation.
- The trust instrument or deed must also set out the detailed powers and duties of the trustee, such as powers of investment, powers to vary the interests of the beneficiaries and powers to appoint new trustees.
- The trustee is obliged to administer the trust in accordance with both the terms of the trust and the governing law.

In administering the trust there are certain things a trustee *must* do, or must refrain from doing, and there are things the trustee *may* do, exercising some discretion over when and how they are done. However, 'a trustee's most important duty is to obey the terms of the trust' (Meagher & Gummow 1997: 406). The trustee or trustees must administer the trust's affairs, and this may include:

- investing the assets of the trust
- ensuring that trust property is preserved and productive for the beneficiaries
- accounting for and periodically reporting to the beneficiaries concerning all transactions associated with trust property
- filing tax returns on behalf of the trust
- any other duties (Meagher & Gummow 1997: 406–413, 417–462).

A trust deed may specify how trustee decisions must be made and can even prescribe dispute resolution alternatives, such as mediation, conciliation and arbitration. However, common law trusts are subject to trust legislation and the common law, so ultimately actions to enforce the terms of a trust may be brought before a court of law by the beneficiaries of the trust and, in some cases, other interested parties, such as the state (Meagher & Gummow 1997: 689–704).

23 The full set of beneficiaries under traditional understanding includes all future generations of native title holders as well as the present generation.

The critical issue in the context of this paper is the role of common law trusts in owning, controlling and managing land that has been passed to the (former) common law native title holders as part of the settlement of a native title claim and an Indigenous land use agreement involving the surrender and extinguishment of native title rights and interests on the land in question.

Provided the Torrens titles for the land received as compensation for loss of native title rights and interests are held by a common law trust for the benefit of the (former) common law native title holders, the estate in question can be collectively managed over the long term and a range of dealings in land may take place. Where land is granted in freehold to the trust, the trust may mortgage, lease or sell the property in accordance with the wishes of its beneficiaries. Should economic circumstances at the household level and collective social aspirations allow, this may include individual freeholding of all or parts of the estate and the subsequent negotiation of private mortgages (recognising the actual loss to the estate from individuation and the potential loss to the individual from foreclosure on the loan).

Depending on the purpose of the trust and the economic and financial opportunities available, the question to ask in designing an appropriate structure is: where should such risks reside—at the institutional level or the individual level? The trust instrument or deed should provide a resolution of this issue. If desirable, protections that prevent the alienation and individual freeholding of all or part of the estate can be provided for within the trust's constitution (as opposed to statutorily, given the economic constraints this imposes)—although any land subject to a mortgage would of course be exposed to the usual risks from default, irrespective of whether the mortgage is at the collective or individual level—and according to the wishes of the trust's beneficiaries.

As an alternative to having an individual freeholding, a trust beneficiary may obtain a registerable lease over all or part of the trust's property and, subject to its intrinsic economic value, may subsequently use this interest as security for a housing loan. In the event of foreclosure in these circumstances the loss to the estate would be for the period of the lease only. To offer greater protection for low-income households the land-holding entity (or housing partner) may also, in principle, act as mortgage guarantor or otherwise provide assurance to a lender that an alternative (household) is in place to take up the lease and repay a loan. These protections may occur within either a closed or an open market system, depending on the social aspirations of the beneficiaries and the impact on the economic value of the leases or caveats on transfers to households outside the group.

Where land is held by the trust as a Crown lease, the same powers to deal in land exist, in that all or parts of the estate may be mortgaged or leased, although not on-sold. A trade in subleases may, however, be instituted with the same implications as the dealings in subleases just described.

In our view, moving land that was formerly subject to native title rights and interests into a new form of tenure under a Torrens title arrangement, and into a common law trust in any jurisdiction in Australia, should be in legal terms a relatively straightforward process.

There should be no complex legal or structural issues but rather issues of process and due diligence in making sure the terms of the trust deed or instrument are carefully drafted, especially if the long-term intent is to preserve the Aboriginal interests in the land. The more complex questions to address are how economic and financial risks can be managed so that individual and collective interests can be sustainably resolved.

With respect to the application of common law trusts in circumstances where the native title rights and interests continue to exist, we believe there is an urgent and growing need for further extensive research in this area.

An affordable housing community land trust

Where the land transfer explicitly involves taking on the responsibility for providing affordable housing, it may be possible to establish an affordable housing community land trust. As FaHCSIA's *Indigenous home ownership issues paper* suggests, community land trusts (CLT) are a means by which Aboriginal and Torres Strait Islander people on lower incomes can access some of the benefits of home ownership, including tenure security, the right to transfer ownership and the potential to realise a proportion of any increase in the value of the asset (FaHCSIA 2010: 16).

CLTs are 'a form of common land ownership where land is usually held by a private non-profit organisation and leased on a long term basis to members of the community or other organisations'. CLTs are not regarded as property trusts as defined by Australian trust law (Crabtree et al. 2012a: 1).

More specifically, a CLT is an entity whose purpose is to hold land for the provision of affordable housing by subleasing trust land to home purchasers or a rental housing provider at nominal rents so that the cost of land is discounted from the total direct costs of housing delivery. Trust land is held in perpetuity for affordable housing purposes through conditions on resale specified within the ground lease (or sublease), which—in the case of home owners—means that a vendor retains only a proportion of the appreciated value of their interest in the lease, thereby retaining the effective subsidy in trust for future beneficiaries.[24] An additional benefit derived from membership of the trust includes long-term tenure security: subleases are generally set at 99 years and can be renewed and passed on through inheritance.

CLTs have operated in the USA for over 40 years, where the security of tenure they provide has been successfully used to negotiate leasehold mortgages (Shelter NSW 2009). Under these arrangements borrowers use their interest in the sublease and the dwelling as security against a home loan. Should a home owner wish to move, they must sell the property and their interest in the sublease according to the terms of the ground lease, often with a right of first purchase being retained by the trust. In the event of foreclosure,

24 Under circumstances where the lease value exceeds the depreciated value of the property, the retention of a proportion of the resale value by the vendor will result in higher costs for the purchaser, which may affect affordability. Checks would need to be put in place to either retain a greater proportion of any increase in the value of the lease or ensure that the dwelling remains well maintained and that capital upgrades occur.

the trust retains the land but allows the lender to make a claim on the borrower's dwelling and leasehold interest. To recoup their finance a lender may resell the property to a new member of the trust or else sell back to the trust itself. Without a corporate guarantor, this closed market arrangement may put downward pressure on dwelling values and increase borrowing rates, but, depending on group aspirations, it can provide some reassurance to trust members that leases will remain within its membership.

According to a 'classic' CLT model, as exists in the USA, a CLT will not generally own buildings on the land, and ownership of the land is separated from ownership of the dwelling as a means of structuring the allocation of equity and risk between the household and housing partner. Since the separation of the title to the land from the title to the dwelling is not currently a convention under Australian property law, specific legislation would be required to establish such an arrangement in any Australian jurisdiction. There is potential for this issue to be sidestepped in Australia, however, through long-term leasing arrangements, which enable a secure interest in the land to be held by the leaseholder and for the leaseholder to use their interest in the land as security for a housing loan.

Despite the inability under Australian law to separate land ownership from dwelling ownership, the main principles and objectives of a CLT can be provided for through any ordinary freehold or leasehold title (in the case of WA, where land has been excised from the ALT and native title is extinguished), so long as this allows for secure long-term leasing or subleasing, mortgaging of leases, and transfer of leases through resale and inheritance. In this scenario a common law trust, as described earlier, could be used to good effect as the underlying landholding entity. Although the underlying title to both the house and land would remain with the land trust (housing partner organisation), the buyer could purchase a lease on a vacant lot and borrow to construct a dwelling, or else purchase a lease on a lot with a dwelling on it.

However, the current legal position in WA (and other jurisdictions) is that any long-term leasing arrangements that attempt to elevate the interest of the leaseholder must continue to take the *Residential Tenancies Act 1987* (WA) into consideration. Under that Act, the owner shall bear all rates, taxes or charges imposed in respect of the premises under the *Local Government Act 1995* (WA), the *Land Tax Act 2002* (WA) and a rate, tax or charge that is imposed for 'water services'[25] (other than a charge for water consumed) (*Residential Tenancies Act 1987* (WA) s 48). It is the owner's responsibility to provide and maintain the premises in a reasonable state of cleanliness and repair (having regard to the age, character and respective life of the premises) and to comply with all building health and safety requirements (*Residential Tenancies Act 1987* (WA) s 42). Furthermore, the owner is not permitted to require or receive from a tenant or a prospective tenant any monetary consideration for entering into, renewing, extending or continuing a residential tenancy agreement other than rent and a security bond (*Residential Tenancies Act 1987* (WA) s 27). These restrictions may require the creation of an exemption category under the Residential Tenancies Act to remove the lease from that legislation so that the full benefits of long-term leasing arrangements for Aboriginal housing under a CLT model can be realised.[26]

25 As defined in the *Water Agencies (Powers) Act 1984* (WA).

26 Crabtree, 2012, personal comments.

As described on page 26, in WA, where this arrangement is structured through a Crown lease, any dealing in the Crown lease under the Land Administration Act would be subject to the requirement for the Minister for Regional Development and Lands' prior approval under s 18 of the Act. Absolute fee simple (freehold) title is free of such constraints but may risk loss to the estate on foreclosure. Nevertheless, recent research by Crabtree (et al. 2012a: 39) concludes that the viability of core CLT principles in the Australian context warrant further exploration, in particular:

- the legal parameters under which a CLT-type model would operate in the different Australian jurisdictions, including the generation of model documents, the creation of a national CLT definition for the purposes of affordable housing and community benefit, and raising familiarity among legal practitioners
- modelling of the activities, business plans and performance of various CLT-type models across a range of contexts, including modelling to identify the scale and parameters for maintaining viability and financial autonomy and modelling of the actual mechanisms for achieving the CLT's objectives and principles
- the ability and willingness of the major banks and other financial institutions in Australia to engage and create an appropriate mortgage product on leasehold land, including whether mortgage financing arrangements will need to include a long-term, fixed rate instrument in which the lease or sublease is accepted as security and CLTs are informed of arrears and defaults
- the governance capabilities required to foster strong community participation and development with outcomes in community building as well as housing affordability, and the efforts required to engage and retain members and to train board members (whether residents, community or business) to ensure effective and collaborative governance
- the scale and context that differentiate CLT activities from other housing providers. CLTs need not be confined to a uniform model, as their advantage lies in being flexible and responsive, tailoring their programs and activities in response to local need, capacity and objectives (Crabtree et al. 2012a: 34).

Crabtree et al. (2012a: 39) conclude that the core principles of CLTs centre on stewardship of the resources they hold—that is, an ongoing and responsible concern for the community, the community's assets (the land and/or housing stock) and the individual or household—and that these concerns shape the CLT's operations, implementation and governance. 'As such, CLTs represent an approach to housing shaped by certain principles in response to local conditions, rather than a particular tenure model rolled out homogeneously' (Crabtree et al. 2012a: 39).

That said, Crabtree et al. (2012b: 83) caution against creating a CLT product for sale in remote areas where little or no market exists, since CLT models will work best where a submarket means of purchase can be offered at a price point that is less than market value but nevertheless stable as a consequence of equilibrium demand[27] (albeit in closed market form). Although the circumstances of many remote communities (where the

27 A situation in which supply is exactly equal to demand for particular goods or services and, since there is neither surplus nor shortage in the market, price tends to remain stable.

market value of land is in any case low) remove a principal rationale for the creation of CLTs—namely to keep prices low—community land trusts nevertheless offer a means of managing securitised landholding interests for housing purposes within a corporatised legal framework under Aboriginal control.

Conclusion

The two examples canvassed in the previous section show that home ownership and economic development potential can be facilitated on Aboriginal lands through leasing arrangements that are to a greater extent controlled by the traditional owners and/or those with historical ties to the land. Corporate structures, including various forms of land trusts and incorporated entities, have the potential to be utilised successfully to administer land through headleasing and subleasing arrangements for a variety of public, residential and commercial uses. This may be achieved without the need to alienate the underlying collective title to land (albeit under existing native title law, following the extinguishment of the native title rights and interests).

The existence of these examples discredits the simplistic notion that only individual and private property rights are capable of providing the security of tenure and rights of transfer necessary for using land as security against a housing loan. The options discussed in the previous section support the contention (in cases where secure tenure is in place) that factors other than land tenure, such as survey and other transaction costs, underdeveloped human and social capital, together with the sheer paucity of the land in remote areas, offer a more credible explanation for the lack of private lending on Aboriginal lands.

While none of the leasing systems discussed in this paper seek to alienate the underlying collective title, it is important to identify the distinguishing features of the different systems and the contexts within which they have been adopted or proposed. A number of crucial points can be made:

- Firstly, subject to the prevailing legislation, it is possible to create secure leasing arrangements in which the leasehold interest may be transferred and therefore used, along with the dwelling itself, as security against a loan. This can be achieved across a spectrum of group and individual models. Land leased individually in this way may be the subject of a direct Crown lease (as with residential leases in the Australian Capital Territory), may be offered as a subsidiary interest through an intermediary trust or other incorporated entity, or, in cases where a communal Aboriginal interest is recognised by the state, may be a direct lease from a land-holding body.
- Secondly, a lease arrangement avoids the potential for fragmentation of the estate associated with grants of individual freehold titles while retaining the underlying estate management function for the community or native title holders. The lease title retains for the lessee the power to regulate more specifically the uses to which the land or waters may be put (subject to the normal statutory planning and environmental controls). Furthermore, for the purposes of securitisation, a secure lease is equal to a grant of restricted freehold: both are potentially tradable yet provide for restrictions on rights of transfer outside the group, with equivalent economic consequences.

Although leases may be traded on the open market, a 'closed market' system may be created so that the sale of an interest in a lease or freehold is restricted to eligible members. This may limit opportunities for capital growth, but—assuming there is sufficient local demand to maintain price stability—provides some level of assurance to a lender while maintaining use rights within the cultural group.

- Thirdly, 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. In these examples, land is vested with a land trust or leased to a housing organisation in order to corporatise the relationship between the resident users of the land, its owners and those who may have an interest in the property, such as a lending institution. In addition to managing (or delegating responsibility for) the allocation and transfer of residential subleases or rental housing, such entities have the potential to provide an essential intermediary function to their clients, such as being a guarantor and adviser to home owners in their dealings with a bank. In the event of a foreclosure, the corporate entity may honour a guarantee to lenders while corporatising the management of any debt through resale of the interest to an alternative member. In short, the corporate Aboriginal landholding unit or housing provider may assume a proportion of the risk of defaulting lenders on the basis that its own risk may be mitigated by resale within the membership and is limited to the extent of the lease. This model is likely to be particularly effective in locations where the low economic value of land discourages lending on an individuated basis or gives rise to premium lending rates to compensate the lender for the greater risks involved. Under a corporatised system, the risk to a bank or financier lies not entirely with the underlying value of the land but with the governance capacity of those holding the land.
- Fourthly, it is clear that different corporate entities are suited to different local circumstances, depending on the composition of communities, their development potential and the aspirations of owners and residents. Whereas a CLT may be an appropriate vehicle for managing residential leases, some form of development corporation or community council may be warranted to manage and develop commercial lands. This could be done independently, on a localised self-governed basis, or under a joint management arrangement. Recent examples include the town development corporation proposal for Wadeye in the Northern Territory and the proposal for the resolution of the Gunggandji native title claim in Far North Queensland, where the Yarrabah Aboriginal Shire Council holds a 99-year headlease over the Yarrabah township in trust for the traditional owners, while managing 99-year subleases for Yarrabah residents and businesses (AHRC 2007: 53, 147–58). These two examples also provide clues to the potential of CLTs in cases where, notwithstanding the special status of native title holders or traditional owners, the broad extent of development needs, together with the existence of residents with historical ties, justifies the creation of an entity with responsibility for broad economic development functions beyond the scope of the continuing custodial objectives of a land trust. A CLT has the potential to perform this function or could partner with an organisation that

specialises in economic development to offer leases to commercial/community enterprises. In both of the examples just mentioned, it has been necessary to broaden the basis of local governance to include residents with historical ties in decision making over specified land uses for a prescribed period of time. The subleasing arrangements proposed under these systems are generally achieved through an ILUA to which the native title holders and the corporation would be parties. This enables subsidiary interests in the land to be raised without affecting the underlying communal statutory form of tenure granted as compensation for the loss of native title rights and interests.

In some jurisdictions where residents want to raise finance for purposes such as home ownership, existing land tenure systems already provide for leases and mortgages to be registered against a Crown land title or subsidiary Crown land title for individual portions. The requirement for ministerial consent to mortgaging and continuing use of land for the benefit of Aboriginal people can be overcome by changing the tenure of the land to a general lease from which subleases can be created. The effects on native title would be managed in one of two ways: either through compulsory acquisition of the land to enable the general Crown lease (which would involve the extinguishment of native title rights and interests and payment of compensation) or through the negotiation of an ILUA (which may seek to apply the non-extinguishment principle if this can be agreed between the parties, as discussed on page 23).

In the absence of a suitable Aboriginal entity to accept transfer of ownership rights (or else a Crown headlease) in the first instance, direct transfer or lease on an individual basis is one possible solution to enable individual home ownership. However, notwithstanding the potential to invoke suitable caveats within the terms of sublease agreements, this risks the land being lost to the Aboriginal estate upon expiry or transfer of the interest. Our analysis demonstrates that this is avoidable and that retention of land for the use and benefit of Aboriginal people is not necessarily a constraint to mortgage finance when tenure is secure, governance is strong and interests may be transferred without the ongoing requirement for ministerial consent.

Where Crown land is to be retained, it is indeed possible for an Aboriginal corporation or trust holding a headlease to underwrite a loan by providing the land through a sublease at nominal cost and then by caveating that interest through its offer to the corporation's membership. As long as tenure is secure, the success of this system is more contingent on the incomes and employment of the membership and the quality of the corporation's governance.

Access to finance

Much of the difficulty Aboriginal landholders have in accessing finance markets is due to the location of the land, its intrinsic economic value and the various land use constraints that apply in the different jurisdictions. The constraints that apply to most forms of Aboriginal land are that the land is inalienable and that it must continue to be used for the benefit of the Aboriginal people concerned. These constraints are just like any other planning constraint and certainly affect land value. The underlying question is: what intrinsic value does the Aboriginal held land have? Its value may be enhanced by transforming the

tenure, which is tantamount to the relaxation of planning restrictions, but this may not be in the best interests of the Aboriginal people concerned, even though it may improve their apparent current wealth.

Overall, the value of Aboriginal held land is circumscribed by its status as Aboriginal land and the restrictions on use and transfer that such status confers. The suggestion that a change in tenure from Aboriginal land to absolute fee simple (freehold) would improve access to mortgage financing can arguably be reduced to merely recognising that softening the constraints to freehold will implicitly create a capital gain. This is analogous to the capital gain that results from the relaxation of any other conditions attached to the use of land, such as those resulting from a planning rezoning to a higher order use. However, as is widely recognised by economic geographers and planners, optimising the 'highest and best use' of specific land is not necessarily in the best interests of the community when a range of interests must be balanced. That is precisely why planning restrictions apply.

It needs to be recognised that much Aboriginal held land has little value simply because it is in a remote location where land values are low or because the community with a priority interest in it does not want the land to be used in certain ways that would otherwise increase its highest and best use. The latter consideration is effectively a community land use restriction analogous to a planning control, which should be respected in the same as any other planning controls.

The examples in the previous section illustrate that leasehold tenure in itself does not prevent property being used as security for borrowing. The critical issue for Aboriginal owners is that providing leasehold titles for debt security does not threaten long-term ownership, whereas freehold title, in the event of foreclosure, is permanently lost.

For these reasons it is important to distinguish between tenure type and security value when considering the capital raising potential of land using mortgages. The value of Aboriginal-owned land will in most cases be lower so long as it includes restrictions on use, but this is an entirely independent matter from the question of tenure type. Where there is potential for improving access to debt finance, it needs to be pursued in a manner that does not threaten Aboriginal cultural values and imperatives.

Postscript

Our view is that in order to respect Aboriginal people's inherent connections to and cultural responsibility for country any new tenure system for Aboriginal land should have the following elements:

- It must be inalienable from Aboriginal ownership.
- It should combine the elements of customary connections to country and the Crown's Torrens titling system, which provides a guarantee of security of title and priority of interests in the land.
- It should enable the Aboriginal landholders to retain their underlying cultural connections to and collective responsibilities for land while at the same time enabling them to exercise their proprietary rights of ownership to meet their aspirations for economic development.

- It should enable collective ownership, management and control according to local circumstances and be respectful of Aboriginal decision-making authority.
- It should be capable of being assigned to individual Aboriginal people, to governments for infrastructure or other public purposes, or to other third parties in the form of secure non-perpetual subsidiary interests, such as subleases.
- It should include provisions to minimise the exposure of disadvantaged Aboriginal households to undue financial risk.
- It should enable rental incomes from third parties to flow back to the Aboriginal owner or ownership group.
- Reversionary interests should always be to the ultimate Aboriginal owner or ownership group.
- It should enable the subsidiary titles to be used as security for mortgage loans.
- The opportunity for individual or household home ownership should be a matter for the group to determine.

Overall, leasehold tenure systems offer the greatest potential for adequately meeting the needs of Aboriginal land interests. As a result of the High Court's decision in *Mabo [No 2]*, Aboriginal rights and interests in land prior to European settlement have been recognised to pre-date Western forms of tenure derived from the Crown. This pre-existing right is also implicit in dealings over customary lands by indigenous peoples in many other Commonwealth countries, where indigenous rights were recognised at the time of settlement (Canada and New Zealand, for example). Conceivably, that recognition could have provided for Indigenous owners to lease land to the Crown rather than for outright sale or possession.

Generally, ownership infers the right of the owner to lend a possession to another for a fee. This is uncontentious for most classes of property, including personal property (for example, equipment hire), intellectual property (for example, fees for the use of patented ideas) and even money (for example, bank lending). As Aboriginal property rights represent allodial ownership (independent of any superior landlord), the right of Aboriginal property owners to lend their property assets for a fee is a consistent extension of this natural aspect of ownership, but one that common law countries such as Australia, New Zealand, Canada and the USA have failed to realise.

This failure may be explained by the fact that it relates to real property and, since English property law is grounded in feudal conceptions of the root of title, all land under the Crown's law is ultimately owned by the Crown. Feudal property systems base all property title on the superior title of the Crown, with all private titles being constructed as positive conventions defined by the Crown. Within this legal conception, property is a construct of the Crown and the rights associated with property all come from the Crown. If the Crown has not included a right within the bundle of rights and interests associated with a particular title, those rights and interests simply do not exist.

Ownership of land under traditional law and custom was recognised by this system of property law through the High Court of Australia in *Mabo [No 2]* in 1992; however, since the High Court also determined that native title rights and interests are inalienable and can only be surrendered to the Crown or compulsorily acquired by the Crown, this precludes the right to lend land subject to native title rights and interests for a fee.

The fundamental title innovation required for (former) ALT lands in WA is therefore the development of a form of lease over Aboriginal-owned land that does not require the permanent extinguishment of customary rights and, if possible, is capable of being applied to third parties. This would bring WA into closer alignment with jurisdictions elsewhere in Australia where land granted by statute, such as under the Aboriginal Land Rights (Northern Territory) Act, may be the subject of a lease without disrupting the underlying title within which customary and collective rights and interests are recognised. We would go further, in suggesting that such provisions should apply to all lands subject to native title rights and interests under common law, and not only to land granted by acts of 'grace and favour' through legislation.

Despite being conceptually possible, such direct leasing is not widespread. Even in countries that recognise indigenous interests in land, leasing to third parties tends to be via the government as an intermediary.[28] Leasing of Aboriginal-owned land to third parties would undoubtedly represent the 'use of the land by Aboriginal people', albeit in a financial rather than a direct sense. It would also release land to non-Aboriginal tenants who may be better suited to realising its optimum economic potential for a fixed period. Western land use systems frequently utilise leasehold relationships between land owners and land occupiers for optimum economic efficiency (to the extent that much capital city CBD space is occupied by tenants and not property owners).

Overall, leasehold systems have the capacity to respect customary interests in land because the land is never alienated from the Aboriginal owners. If Aboriginal landowners were given the tools to act as landlords, their land could be opened up for optimum economic use in ways consistent with local aspirations, by Aboriginal people, by third parties or by government, without the need to relinquish Aboriginal control or to forfeit their native title rights and interests.

28 In Fiji, for example, the indigenous owners lease their land to third parties via the Native Land Trust Board (NLTB), which manages the land on behalf of the indigenous owners by leasing it to third parties and paying rent back to the indigenous owners.

References

Legal authorities

Fejo v Northern Territory (1998) 195 CLR 96; [1998] HCA 34
Harris v the Great Barrier Reef Marine Park Authority [2000] FCA 603
Mabo v the State of Queensland [No 2] (1992) 175 CLR 1
Pareroultja v Tickner (1993) 117 ALR 206
Sampi v State of Western Australia (No 3) [2005] FCA 1716 [30/11/2005
Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28

Legislation

Aboriginal Affairs Planning Authority Act 1972 (WA)
Aboriginal Housing Legislation Amendment Act 2010 (WA)
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
Aboriginal Land Rights (Northern Territory) Amendment Act 2006 (Cth)
Land Administration Act 1997 (WA)
Land Tax Act 2002 (WA)
Local Government Act 1995 (WA)
Native Title Act 1993 (Cth)
Residential Tenancies Act 1987 (WA)
Transfer of Land Act 1897 (WA)
Water Agencies (Powers) Act 1984 (WA)

Books, reports, journals et cetera

AHRC—*see* Australian Human Rights Commission.

Australian Human Rights Commission 2005, *Native title report 2004*, accessed 4 March 2011, <http://www.hreoc.gov.au/social_justice/nt_report/ntreport04/index.html>.

——2006, *Native title report 2005*, accessed 4 March 2011, <http://www.hreoc.gov.au/social_justice/nt_report/ntreport05/index.html>.

——2007, *Native title report 2006*, accessed 4 March 2011, <http://www.hreoc.gov.au/social_justice/nt_report/ntreport06/index.html>.

——2010, *Native title report 2009*, accessed 4 March 2011, <http://www.hreoc.gov.au/social_justice/nt_report/ntreport09/index.html>

Altman, J, Linkhorn, C & Clarke, J 2005, *Land rights and development reform in remote Australia,* discussion paper no. 276, September, CAEPR, ANU Canberra, accessed 4 March 2011, <http://caepr.anu.edu.au/sites/default/files/Publications/DP/2005_DP276.pdf>

Assies, W 2009, 'Land tenure, land law and development: some thoughts on recent debates', *Journal of Peasant Studies*, vol.36, no.3, July 2009, London, pp. 573–89.

Attorney-General's Department 2007, *Structures and processes of prescribed bodies corporate*, 27 October, accessed 4 March 2011, <http://www.ag.gov.au/Documents/Report%20to%20Government%20-%20Native%20Title%20Prescribed%20Bodies%20Corporate.pdf>.

Bauman, T & Tran, T 2007, *First national prescribed bodies corporate meeting: issues and outcomes Canberra 11–13 April 2007*, Native Title Research Report No. 3/2007, AIATSIS, Canberra, accessed 4 March 2011, <http://aiatsis.gov.au/ntru/documents/PBCWorkshopReport11-13April2007final.pdf>.

Bonner, NT 1996, *Report of the Review of the Aboriginal Lands Trust*, Government of Western Australia, cited in (1997) 2 AILR 110, accessed 4 March 2011, <http://www.austlii.edu.au/au/journals/AILR/1997/18.html>.

Bradfield, S 2005, 'White picket fence or Trojan horse? The debate over communal ownership of Indigenous land and individual wealth creation', *Land, Rights, Law: Issues of Native Title*, vol.3, no.3, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Research (AIATSIS), Canberra.

Buswell, T & Hames, K 2009, *State Government paves way for Indigenous housing funding boost*, media statement, Tuesday, 5 May, accessed 4 March 2011, <http://www.mediastatements.wa.gov.au/Pages/ByPortfolio.aspx?ItemId=131787&search=&admin=&minister=&portfolio=Indigenous+Affairs&region=>

Butt, P 2010, *Land law*, 6th edn, The Law Book Company, Sydney.

CAT—*see* Centre for Appropriate Technology.

Casey, D 2007, *Report of the Review of the Department of Indigenous Affairs*, <http://www.dampierrockart.net/Aboriginal%20Department%20Review%20Report.pdf>

Centre for Appropriate Technology 2007, *The cost of housing in remote Indigenous communities: views from the Northern Territory construction industry*, <http://www.icat.org.au/media/Research/housing/Cost-of-housing-construction-industry-views.pdf>.

COAG—*see* Council of Australian Governments.

Council of Australian Governments 2008a, *National Indigenous Reform Agreement (Closing the Gap)*, accessed 4 March 2011, <http://www.federalfinancialrelations.gov.au/content/national_agreements/downloads/IGA_FFR_ScheduleF_National_Indigenous_Reform_Agreement_Feb_2011.pdf.>

——2008b, *National Partnership Agreement on Remote Service Delivery*, accessed 4 March 2011, <http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf>

——2009, *National Partnership Agreement on Remote Indigenous Housing*, accessed 4 March 2011, <http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf>

Crabtree, L, Phibbs, P, Milligan, V & Blunden, H 2012a, *Principles and practices of an affordable housing community land trust model*, Australian Housing and Urban Research Institute, accessed 26 April 2012, <http://www.ahuri.edu.au/publications/p70639>.

Crabtree, L, Blunden, H, Milligan, V, Phibbs, P & Sappideen, C 2012b, *Community land trusts and Indigenous housing options*, AHURI Final Report No. 185, Australian Housing and Urban Research Institute, accessed 26 April 2012, <http://www.ahuri.edu.au/publications/p70639>.

Dalrymple, D 2007, 'The abnormalisation of land tenure', in J Altman & M Hinkson (eds), *Coercive reconciliation*, Arena Publications Association, Melbourne.

Deininger, K 2004, 'Land policies for growth and poverty reduction: key issues and challenges ahead', address to the UN Inter-regional Special Forum on the Building of Land Information Policies in the Americas, October 2004, Aguascalientes, Mexico.

DIA—*see* Department of Indigenous Affairs.

Department of Families, Housing, Community Services and Indigenous Affairs 2010, *Indigenous home ownership issues paper*, accessed 4 March 2011, <http://www.fahcsia.gov.au/sa/indigenous/pubs/housing/indig_home_ownership/Pages/default.aspx>.

Department of Indigenous Affairs 2005, *Overcoming Indigenous disadvantage in Western Australia*, Part B, Chapter 8, pp. 226–53, accessed 5 March 2011, <http://www.dia.wa.gov.au/Documents/ReportsPublications/OvercomingIndigenousDisadvantage/pg226-253PartBChapter8.pdf>.

——2010, *Annual Report 2009–10,* Government of Western Australia, accessed 6 March 2011, <http://www.dia.wa.gov.au/Documents/ReportsPublications/DIA_AnnualReport2010_web.pdf>.

de Soto, H 2002, 'Listening to the barking dogs: property law against poverty in the non-West' *Focaal: Journal of Global and Historical Anthropology*, vol. 44, pp. 179–85.

Dodson, M, Allen, D & Goodwin, T 2008, *The role of the Central Land Council in Aboriginal land dealings*, in AusAID 2008, *Making land work, volume two: case studies on customary land and development in the Pacific*, AusAID, Canberra, accessed 6 March 2011, <http://www.ausaid.gov.au/Publications/Pages/3363_9223_6836_1452_8140.aspx>.

Duncan, R 2003, 'Agricultural and resource economics and economic development in Aboriginal communities, presidential address to the 47th Annual Conference of the Australian Agricultural and Resource Economics Society, 12–14 February 2003, Fremantle.

Edelmen, D 2009, *Native title settlements and the meaning of the term 'traditional owners'*, paper delivered to the AIATSIS Native Title Conference, Melbourne, 4 June, accessed 21 April 2011, <http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2009/papers/DavidEdelman.pdf>.

FaHCSIA 2010—*see* Department of Families, Housing, Community Services and Indigenous Affairs.

Hepburn, S 2006, 'Transforming customary title to individual title: revisiting the cathedral', *Deakin Law Review*, vol. 11, no. 1.

Howard, the Hon. J 2005, address to the National Reconciliation Planning Workshop, 30 May 2005, Old Parliament House, Canberra, cited in AHRC 2006, accessed 19 August 2005 <http://www.pm.gov.au/news/speeches/speech1406.html>.

Hughes, H, Hughes, M & Hudson, S 2010, *Private housing on Indigenous lands*, policy monograph 113, Centre for Independent Studies, Sydney, accessed 6 March 2011, <http://www.cis.org.au/images/stories/policy-monographs/pm-113.pdf>.

Johns, G. (2007) *Making Land Rights Work,* Occasional Paper: March 2007, Bennelong Society, NSW

Langton, M 2008, 'The estate as duration: "being in place" and Aboriginal property relations in areas of Cape York Peninsula in North Australia', in L Godden & M Tehan (eds), *Comparative perspectives on communal lands and individual ownership: sustainable futures,* Routledge, London.

Macklin, J 2009a, address to the NSW Aboriginal Land Council, Cessnock, 5 March 2009.

Macklin, J 2009b, correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 18 August 2009, cited in AHRC 2010, p. 132.

Meagher RP & Gummow, WMC 1997, *Jacob's law of trusts in Australia*, 6th edn, Butterworths, Sydney.

Mundine, W (2005) *"Aboriginal Governance and Economic Development",* Presentation to 2005 Native Title Conference, accessed 4 March 2011, <http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2005/papers/MundineW.pdf>

National Native Title Tribunal 2009, *Working with native title: linking native title and local government processes*, 3rd edn, accessed 6 March 2011, <http://www.nntt.gov.au/News-and-Communications/Publications/Documents/Booklets/Working%20with%20native%20title.pdf>.

NNTT—*see* National Native Title Tribunal.

Sanders, W 2008, 'Is home ownership the answer? Housing tenure and Indigenous Australians in remote (and settled) areas'*, Housing Studies*, vol. 23, no.3, pp. 443–60, May.

Seaman, P 1984, *The Aboriginal Land Inquiry*, Government of Western Australia, Government Printer, Perth.

Shelter NSW 2009, *Community land trusts: what are they?*, Shelter Brief 39, accessed 4 March 2011, <http://www.shelternsw.org.au/index.php?option=com_docman&Itemid=177&limitstart=10>.

Small, G & Sheehan, J 2008, 'The metaphysics of Indigenous ownership: why Indigenous ownership is incomparable to Western conceptions of property value', in R Simons, R Malmgren & R Small (eds), *Indigenous peoples and real estate valuation*, Springer Science and Business Media and the American Real Estate Society, pp. 103–19.

Stephenson, M 2010, 'You can't always get what you want—economic development on Indigenous individual and collective titles in North America: which land tenure models are relevant to Australia?', in L Godden & M Tehan (eds), *Comparative perspectives on communal lands and individual ownership: sustainable futures,* Routledge, London.

Task Force on Aboriginal Social Justice 1994, *Report of the Task Force on Aboriginal Social Justice,* Chair, Michael M Daube, Government of Western Australia, Perth.

Tehan, M 2010, 'Customary land tenure, communal titles and sustainability', in L Godden & M Tehan (eds), *Comparative perspectives on communal lands and individual ownership: sustainable futures,* Routledge, London.

Terrill, L 2009, 'The days of the failed collective: communal ownership, individual ownership and township leasing in Aboriginal communities in the Northern Territory', *UNSW Law Journal*, vol. 32, no. 3, pp. 814–51.

—— 2010, 'Indigenous land reform: an economic or bureaucratic reform?', *Indigenous Law Bulletin*, April 2010, vol. 7, issue 17.

United Nations 2007, *Declaration on the Rights of Indigenous Peoples*, adopted by General Assembly Resolution 61/295 on 13 September 2007, accessed 4 March 2011, <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

Vanstone, Senator the Hon. A., Minister for Immigration and Multicultural and Indigenous Affairs (2005) *Address to the National Press Club*, 23 February 2005. <http://www.atsia.gov.au/media/speeches/23_02_2005_pressclub.htm>

(accessed 31 August 2005) (cited in Aboriginal and Torres Strait Islander Social Justice Commissioner 2006:8)

Wallace, J 2010, 'Managing social tenures', in L Godden & M Tehan (eds), *Comparative perspectives on communal lands and individual ownership: sustainable futures*, Routledge, London.

Western Australian Government 2009, *National Partnership Agreement on Remote Service Delivery: Bilateral implementation plan 2009–2014*, accessed 4 March 2011, <http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/indigenous/remote_service_delivery/WA.pdf>

In what is a complex technical–legal environment, sometimes without precedence, the full range of land tenure possibilities open to native title holders are often not fully explored. At the heart of the national debate there continues to be an ideological disjuncture between the relative merits of exercising individual over collective property rights in the pursuit of economic development.

This paper discusses alternative approaches to enabling economic development and home ownership possibilities to be realised in Aboriginal communities, with particular reference to Aboriginal Lands Trust reserve lands in Western Australia. The impediments to private home ownership on ALT reserve lands that are also subject to native title rights and interests are examined. Specifically, the paper explores two options for achieving secure tenure outcomes and facilitating commercial lending for housing while also retaining the communal elements of property ownership and land use decision making that are valued by Aboriginal people. The possibility of implementing these options without having to surrender and extinguish the underlying native title rights and interests is also explored.

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
GPO Box 553, Canberra ACT 2601

Phone: (61 2) 6246 1111
Fax: (61 2) 6261 4285
Email: research@aiatsis.gov.au
Web: www.aiatsis.gov.au

AIATSIS RESEARCH DISCUSSION PAPERS

This series is produced by AIATSIS Research Publications to contribute to a wide range of discussions about contemporary issues and policy relating to Aboriginal and Torres Strait Islander peoples. We welcome your responses to these papers. If you would like to contribute to the series please contact us.

To view or download the full range of AIATSIS discussion papers, visit www.aiatsis.gov.au.

AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES
NATIVE TITLE RESEARCH UNIT

AIATSIS Research Publications

ISSN 1323-9422
ISBN 978-1-922102-05-8