

**Getting Real About Indigenous Land Ownership, Administration and Use**

Submission by the Cape York Institute for Policy and Leadership and the Cape York Land Council to the Expert Indigenous Working Group for the COAG Investigation into Indigenous Land Administration and Use

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1. **Introduction**

The indigenous people of Cape York and Australia are critical to the future of Australia through their presence and identity, and increasingly through their enterprise and use of their land. The Cape York Partnership is pursuing a comprehensive reform and development model for Cape York Indigenous people through Cape York Welfare Reform, Empowered Communities and the Tribal Wealth Review. This development model is a prism through which all objectives and expenditure are considered, and includes an unwavering focus on rebuilding social norms, lifting education outcomes, engagement with the real economy, and productivity.

The use of land and its resources is fundamental to social development and wellbeing the world over. The ownership and use of non-indigenous land use in Queensland, and other Australian jurisdictions, is managed through a comprehensive and dynamic land administration system, consisting of legislative, regulatory, administrative and operational parts, which provide the certainty and security necessary to facilitate development. In Queensland, the benefits derived from the use and management of non-indigenous land has meant that holders of this tenure enjoy one of the highest levels of per capita wealth and living standards in the world.

Although the land administration system applied to Queensland’s indigenous land is the same in many ways as the system applied to non-indigenous land, the quality and completeness of legislative, regulatory, and administrative components applying to indigenous land are very poor and have caused the system to be dysfunctional and static in its operation. This dysfunction has existed for more than two decades and is therefore institutionalised in its culture of low expectations and its perverse strength in being able to withstand the very powerful case for reform.

A lack of clear vision and objectives and compounding underinvestment in most parts of the indigenous land administration system has directly held back the use of indigenous land to provide real opportunities for home ownership, economic development and employment.

This paper identifies core features that the Aboriginal land administration system in Cape York and Queensland requires to achieve the type of benefits that indigenous people so desperately need and want. Although the framework described here is based on the experience in Cape York and Queensland, the principles and ideas can easily be applied to the situation in other jurisdictions.

1. **Definition of Aboriginal land in Queensland and the Australia-wide challenge of settling Indigenous land ownership and property rights within the Crown tenure chain**

When Britain colonised Australia, on the assumption of terra nullius, the Crown acquired ultimate title to all land, known as ‘radical title’, and introduced the feudal land tenure system throughout Australia. The feudal land tenure system is expressed in the Doctrine of Tenures and the Doctrine of Estates.

The Doctrine of Tenures provides for a chain of title to land devolving from the Crown’s radical title. The Doctrine of Estates articulates the rights devolved to those who hold title to land, including their right to extend the title chain by further devolving their rights in land to another party.

Aboriginal land rights in Queensland are a link in the title chain devolving from the Crown’s radical title – rights devolved from the Crown, to the State of Queensland, to the trustee of the Aboriginal land. Critically, as a link in the tenure chain, the titles to Aboriginal land are recorded on the Queensland Government’s land titles register.

In Queensland, Aboriginal land is communally owned land held by a Trustee and is inalienable – it cannot be sold. Aboriginal land is granted under the *Land Act (Qld) 1994* as Deed of Grant in Trust (DOGIT) and Aboriginal Reserve tenures. DOGIT, Aboriginal Reserve and other tenures are transferable under the *Aboriginal Land Act (Qld) 1991* (ALA) to the tenure of Aboriginal freehold, which is also communally owned and inalienable land held by a Trustee. Although inalienable, the rights inherent in Aboriginal land tenures provide that the Trustee may create another link in the tenure chain by devolving land rights to individuals through the grant of a lease for home ownership, economic development and other purposes.

Aboriginal land is not native title and the two sets of rights and interests must not be confused. Unfortunately many people have and continue to confuse the two sets of rights and interests and believe they provide similar bundles of property rights and development opportunities. This is not the case. Aboriginal land and native title may coexist in the same piece of land but they are entirely different and separate forms of rights and interests in land.

Aboriginal land rights derive from a grant from the Crown recorded on the land title register, and can be used directly by Aboriginal people, or other people they devolve legal interests to, for land use and economic development. On the other hand, native title rights derive from traditional ownership, are recorded on the National Native Title Register, and may only be used directly by Aboriginal people for traditional purposes. Traditional owner consent for impacts on the enjoyment of their native title rights by other land users may result in benefits such as financial compensation and/or employment, but this is generally a reaction to development driven by other people rather than being driven by rights holders themselves.

The Cape York Land Council is working within the possibilities of the current legal framework on solutions to unify native title and Aboriginal land rights for the same piece of land. In Cape York and Queensland, this alignment will create a foundation for single entities to hold and use both sets of rights.

Australia-wide reform of native title to provide much stronger land use and economic advancement rights and opportunities for Indigenous people is clearly also required. The Cape York Institute is currently undertaking a *Tribal Wealth Review* that includes a focus on native title and options for reform. We propose to discuss these ideas with the Expert Group over the next few months as the review is finalised.

1. **Land administration systems are invisible yet essential infrastructure for development on Indigenous land**

Despite home ownership and economic development being a core focus of Cape York Welfare Reform for over five years the results have been abysmal - there has not been a single home ownership outcome on Aboriginal land. This is primarily because the leasing provisions of the ALA are constrained to the point of impracticality due to the dysfunction of the land administration system. In addition, there is also a lack of clarity about social housing divestment policies and ensuring that these will result in fair and reasonable sale prices. To be very clear, the main problem is not, and has never been, a lack of local aspiration for having viable and sustainable home ownership or economic development.

To address the historical lack of public investment in the land administration system as essential infrastructure, there have been some positive changes made by the Queensland Government through the Remote Indigenous Land and Infrastructure Program Office (RILIPO), and through new and amended legislation to improve leasing and allow for the creation of fee simple freehold title in town areas.

Leasing has some natural strengths as a development tool for Aboriginal land as it can be readily tailored to respect and maintain the traditional and contemporary Aboriginal values of communally held and inalienable interest in land, while also enabling the modern requirements of land based development which are secure, privately held and transferable interests. Under a lease, Aboriginal land is held by the Trustee on behalf of the community as an inalienable link in the tenure chain, whilst a lease of Aboriginal land is held by an individual or an organisation as the next, alienable, link in the tenure chain as a secondary interest. Leasing does not require the extinguishment of native title as is necessary for the creation of fee simple freehold title, although it does require native title consent where native title exists.

Although the potential for leasing of Aboriginal land in Queensland has recently improved, further reform and investment is required if leasing is to become a functional and potentially tradable layer of tenure. It is very important to recognise and understand that these reforms do not necessarily require significant additional funding. What is most needed at this stage is a clear and agreed set of guiding principles and objectives to resolve outstanding issues.

## Potential Reform Principles for Queensland and Cape York

Reforms need to achieve the following principles and objectives in Queensland and Cape York:

1. Under leasing, two tenure chain links - primary and secondary - are needed to respect and maintain traditional values and also facilitate development of Aboriginal land. The primary tenure link is Aboriginal (ALA) freehold where communal ownership and inalienability of land is maintained and native title continues to exist. The secondary tenure link is a lease of Aboriginal freehold which is a privately owned and transferrable interest in land, and the tenure where development, including home ownership, occurs.
2. Processes for lessees to acquire a lease of Aboriginal land must be no more difficult or expensive than processes to acquire an interest in fee simple freehold land.
3. Processes for trustees to grant a lease of Aboriginal land must be simple and inexpensive, including receipt of native title consent for the grant of a lease.
4. A lease of Aboriginal land for home ownership or economic development must confer benefits to the Lessee equivalent to the (fee simple) freehold benefits of:
   1. Security of Tenure;
   2. Autonomy of decision making about the land within the bounds of the lease;
   3. Potential to transfer the interest in land to any party; and
   4. Access to Equity in the property.
5. Development of Aboriginal land should satisfy standard statutory approval / consent requirements, including under the ALA, *Sustainable Planning Act (Qld) 2009*, *Native Title Act 1993* and the *Aboriginal Cultural Heritage Act (Qld) 2003*, and land arrangements must be conducive for these approvals.
6. Cultural heritage must be properly managed and protected through the relevant planning scheme under which the land and lease is controlled.
7. Mainstream financial institutions must be prepared to offer mainstream mortgages and other financial products for the purchase of a lease and investment in development. This is really an ‘acid’ test for the success of the application of these principles to Indigenous land ownership, administration and use.
8. Participants in leasing and development processes must have sufficient support and capability to efficiently and effectively engage in these processes.

## Potential Reform Actions

To achieve these principles, reform actions are required:

1. **Legislative amendment, including the ALA -** Amend the *Aboriginal Land Act (Qld) 1991* to provide that:
   1. Land may be transferred to a PBC regardless of whether native title has been determined over that area, and
   2. Any person is potentially eligible to be granted a home ownership lease, although Trustees may set local criteria for the classes of people eligible for a lease. This is to remove the current restriction that only Aboriginal people (or their spouse) may be granted a home ownership lease under the ALA. Otherwise the current home ownership lease should be removed and a standard template lease option introduced instead (for example, as currently used in the Australian Capital Territory for private residential leases).
2. **Reform Aboriginal land Trustee arrangements** - Reform arrangements so that all transferable land is transferred to a PBC. This will include transferring land for which an Aboriginal Shire Councils is the Trustee. Aboriginal land and native title rights being held by a PBC will significantly simplify leasing arrangements. It will also normalise the roles of Aboriginal Shire Councils to be local government service providers.
3. **Regularise existing mosaic of land tenures as Aboriginal freehold** - As part of the transfer process, all tenures, including reserves, are converted to Aboriginal freehold. Aboriginal freehold provides a single primary tenure foundation for development to grant leases for home ownership, economic development and other purposes.
4. **Complete the current work on the cadastral infrastructure and information layer** - Every parcel of land used, or planned to be used, for a discrete purpose is surveyed, subdivided and registered as a lot, and the party with an interest in that lot registered, on the land title register. Other issues such as encroachments and road alignments are also resolved so that the cadastre is normalised and completed.
5. **Functional statutory land use plans -** Improve statutory plans (local government planning schemes and regional plans) by reviewing these plans to identify suitable land uses, including land that has development potential and land with high conservation values, after adequate investment and research is made to identify baseline values and potentials. The planning schemes should adopt an approach of enabling sustainable development, what can be done, rather than simply identifying land use constraints or what can’t be done, as is currently the norm.
6. **Cultural heritage protection becomes a normal part of planning schemes regulating aboriginal land** - Many fundamental cultural heritage values in land have not been identified in planning schemes in Aboriginal towns to date despite considerable knowledge and information about these values. Values include sites of traditional cultural importance, unmarked graves and historical sites. The exclusion of this information from planning regulations has resulted in disputes about where development should occur in towns to avoid damage to important cultural heritage values. A planning scheme amendment process should commit to creating a complete layer of cultural heritage information within planning schemes.
7. **Settle native title consent for development** - Negotiate Indigenous Land Use Agreements to provide simplified native title consent processes for development, particularly for areas such as Aboriginal towns where development activity is needed and supported. If Aboriginal land and native title rights are both held by a PBC (as outlined in action 2 above) this will significantly improve processes for native title consent.
8. **Simple trust accounts to help attract and underwrite investment -** Establish simple trust accounts to underwrite investment in home ownership and commercial activity on Aboriginal land using cash from sales to help overcome uncertainty about the formation of secondary markets in land and property. Home ownership trust accounts and lease transferability (point 1 above) will improve:
   1. the preparedness of mainstream banks to provide mortgage lending with features that result in wealth creation, such as access to equity in property, and
   2. the ability of Trustees to act as a buyer of properties to support the formation and functioning of secondary markets. Separate commercial trust accounts could also be established to underwrite mainstream finance to support business enterprises.
9. **Invest in peoples’ capacity to participate in leasing and development processes** - Establish a Land Services Hub to ensure entities have adequate capacity to participate in development processes by coordinating support for local governments, land trustees, aspiring home owners and commercial operators, native title parties. Advice and support would be about land transactions (for example, how to acquire a lease), finances (for example, how to get a loan), property maintenance (for example, routine house repairs), insurance (for example, what is recommended and how to get it), engaging service providers (for example, Ergon and Telstra). This should be structured as a short to medium term public investment with hub support being able to be reduced over time as capacity is built and reaches a level where different elements become self-sustaining.
10. **The role of resource planning for enabling sustainable development on Aboriginal land**

The current environmental regulatory and planning measures over Aboriginal land on Cape York are at odds with the objectives of Cape York Welfare Reform, the Forrest Review of Indigenous Employment and Training, the Australian Government’s Northern Australia Green Paper, as well as the Queensland Government’s Indigenous Economic Participation Framework. The Queensland Government Indigenous Economic Participation Framework states that the Government will work to link emerging economic opportunities in the resources, tourism and agriculture sectors to ensure greater employment opportunities for Indigenous communities.

As outlined above, the legal property rights inherent in Queensland’s Aboriginal freehold and DOGIT land tenures confer the same bundle of property rights as fee simple freehold title. However, the imposition of the Regional Planning Interests regulation on Cape York means that opportunities to use private Aboriginal land for broadacre cropping and other purposes are restricted in an unreasonable and unjustified manner by the current land use regulatory system.

A simple desktop assessment of the agricultural potential of Cape York Aboriginal land using the Australian Government and Queensland Government mapping resources shows that the current Cape York Strategic Environmental Area has significant agricultural potential and water resources within its boundaries yet there has been no public process to justify or account for the restriction of the use of these resources. In stark contrast to the Cape York Regional Plan, the CSIRO-led Report Flinders and Gilbert River Agricultural Resource Assessment (FGARA) report released in early 2014, for catchments directly adjacent to Cape York, provides an excellent suite of information for planning and decision-making by landholders and government in adjacent catchments as the basis for ecologically sustainable development.

The focus of land use planning must be on identifying economic potential and attracting external investment to Cape York within an ecologically sustainable development framework. A comprehensive strategy by the Queensland and Australian Governments on resource assessment and planning for Cape York Aboriginal land and other indigenous land in northern Australia is essential.

The recently released Empowered Communities Design Report *Empowered Communities: Empowered Peoples*, and the forthcoming *Tribal Wealth Review* address this and other critical issues so that Indigenous people proactively drive development outcomes as the key actors in their own development. The Tribal Wealth Review is considering, amongst several measures, the creation of a Development Ombudsman to ensure that the indigenous right to development is upheld and that there is a simple framework and process by which projects of significance for indigenous development are prioritised, so that relevant governments commit and are accountable to facilitating these projects efficiently and effectively through the assessment and regulatory approval processes.