Converting Aboriginal and Torres Strait Islander Land in Queensland into Ordinary Freehold

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Abstract

The *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014* (Qld) ('*Freehold Act*') is the latest in a series of government reforms to Indigenous land tenure in Australia. It is also the most radical reform yet, in that it enables areas of Indigenous land to be divided into smaller portions and converted to ordinary freehold. This article describes how the *Freehold Act* will operate and considers what it will mean for Indigenous landowners and communities. Through a comparison with township leasing in the Northern Territory, the article also identifies the way in which very different approaches are being taken to enabling economic development in communities on Indigenous land. Those differences have not been acknowledged previously, but are important to understanding the likely impact of each reform.

I Introduction

The biggest development with respect to Indigenous land rights in Australia over the last decade has been the widespread introduction of land tenure reform in communities on Indigenous land. The most well-known examples are five-year leases and township leases in the Northern Territory. There has been a recent development in Queensland that is significant for the different approach it takes to reform. To date, the effect of all other reforms has been to create a new system of leases and subleases over Indigenous land. In some cases, the leases are for a very long time — such as 99 years — however underlying landownership has not been altered. It continues to be Indigenous land that is owned communally under statutory schemes. The *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014* (Qld) ('*Freehold Act*'), which commenced on 1 January 2015, goes further. It enables the allotment of Indigenous land, whereby it is divided into smaller portions and converted to ordinary freehold. This is a more radical shift. The legislation affects up to 34

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communities on Aboriginal and Torres Strait Islander land in Queensland.[1] It is also voluntary and, as there are several steps required, it may be some time before the new provisions are used.

This article explains what the recent Queensland reforms do, the steps required for their implementation and what they mean for landowners and community residents. It also clarifies how they differ from other approaches to Indigenous land reform and considers the consequences of this. Part II sets the context. It describes the extent and nature of Indigenous landownership in Australia, the meaning and significance of terms such as 'traditional owner' and the relevance of this to landownership schemes. Part III sets out the key features of the *Freehold Act* and makes some suggestions about how the new provisions are likely to operate. In Part IV, the article compares the *Freehold Act* with township leasing in the Northern Territory, which is the Commonwealth Government's preferred land reform model. The comparison helps clarify some of the features that are particular to each reform. The two reforms take a very different approach to economic development and to resolving the tension between traditional ownership and residence, although the significance of this difference is mitigated by the fact that the *Freehold Act* will initially be restricted in terms of the areas of land it affects.

The reference to 'providing freehold' in the name of the *Freehold Act* is somewhat misleading, in that it suggests that the legislation enables freehold ownership in Aboriginal and Torres Strait Islander communities for the first time. In fact, some (but not all) Aboriginal and Torres Strait Islander land in Queensland is already owned as freehold. It is a communal and regulated freehold, which is important, but it is still a freehold, and not some lesser form of ownership. What the *Freehold Act* enables for the first time is the grant of *ordinary* freehold, which is legally identical to the freehold found elsewhere in Australia. This article uses the term 'allotment' to describe this process of converting the communally-owned title into ordinary freehold (it is sometimes also referred to as 'individuation' or 'individualisation'). While the *Freehold Act* is the first legislation to enable the allotment of Indigenous land in Australia, allotment has previously occurred in the United States and New Zealand. As has been noted,[2] in both cases it proved disastrous for Indigenous landowners. This suggests that the introduction of allotment in Australia ought to be approached with care, although as Part IV describes, the outcome in the United States and New Zealand was at least partly due to the circumstances in which allotment was introduced.

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1 For a list of those communities see Explanatory Notes, Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld) 4.

2 See, eg, Margaret Stephenson, '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 Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 100; Richard Boast, 'Individualization — An Idea Whose Time Came, and Went: The New Zealand Experience' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 145; J C Altman, C Linkhorn and J Clarke, 'Land Rights and Development Reform in Remote Australia' (Discussion Paper No 276/2005, Centre for Aboriginal Economic Policy Research, September 2005) 23–4; Samantha Hepburn, 'Transforming Customary Title to Individual Title: Revisiting the Cathedral' (2006) 11(1) *Deakin Law Review* 63, 70, 82–4.

II Background

A *Indigenous Land Ownership in Australia*

Until the 1960s, Australian law gave no recognition to prior ownership of land by Aboriginal people and Torres Strait Islanders. There were areas of land set aside for the benefit of Indigenous people, in the form of missions and reserves, however this arrangement conferred no ownership rights. Since the 1960s there has been a remarkable turnaround, as a result of which today Indigenous groups hold exclusive rights to around 22.4% of Australia.[3] This 'Indigenous repossession'[4] has come about in two ways. The first was through the introduction of statutory land rights schemes, beginning with the *Aboriginal Lands Trust Act 1966* (SA). Statutory schemes were ultimately introduced in the Northern Territory and every state except Western Australia, which retains a modified reserve system — although in many places reserve land is overlaid by leases that convey at least some ownership rights to Indigenous groups.[5] The coverage of statutory schemes varies considerably between jurisdictions. In the Northern Territory, which is remote and sparsely populated, more than 45% of land is Aboriginal land. In the more heavily populated states of Victoria and New South Wales, statutory schemes account for less than 1% of land.[6]

The second way in which this Indigenous repossession has occurred is through native title. In *Mabo v Queensland (No 2)*,[7] the High Court of Australia found that the common law of Australia does in fact recognise the prior ownership rights of Indigenous peoples. That recognition gives rise to ongoing property rights where those rights have not been extinguished. It quickly became apparent that the recognition of native title by the common law created a set of issues that required a legislative response, to address such matters as the validation of existing titles and the creation of a regime (the 'future acts regime') for regulating dealings on native title land. This led to the enactment of the *Native Title Act 1993* (Cth). Native title can only exist where it has not been extinguished through government action, and by the time it was recognised by the High Court, native title had already been extinguished over large parts of Australia. In common with statutory land rights, most native title land is found in remote and very remote areas.[8]

The grant of statutory land rights does not necessarily extinguish native title, which means that it is possible to have both native title and statutory land

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3 Jon Altman and Francis Markham, 'Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 126, 135. Descriptions of Indigenous landownership involve some level of estimation as there is no single or authoritative data source. Other publications take different approaches to classification, see, eg, Steering Committee for the Review of Government Service Provision ('SCRGSP'), *Overcoming Indigenous Disadvantage: Key Indicators 2011* (Productivity Commission, 2011) Table 9A.2.1.

4 Altman and Markham, above n 3, 136.

5 Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary and Materials* (Lawbook Co, 4th ed, 2009) 273.

6 *SCRGSP*, above n 3, Table 9A.2.1.

7 (1992) 175 CLR 1.

8 *SCRGSP*, above n 3, Table 9A.2.4.

rights over the same land. It is described below how this occurs often on Indigenous land in Queensland.

B *Traditional Ownership*

Prior to colonisation, Indigenous groups occupied every part of mainland Australia and the offshore islands. Rules in relation to the use of land and resources were layered and complex, and while there were points of commonality, there was also variation between regions. Those rules have also evolved in the period since colonisation, further adding to the complexity, particularly as different groups have been impacted by colonisation in different ways. The term 'traditional ownership' is generally used to describe ownership of land under Aboriginal and Torres Strait Islander law as it is practised today, which is derived from pre-contact laws and customs, but has evolved in the period since.[9]

In most places, traditional ownership is based primarily on membership of descent groups, which is to say that it is something inherited. There are other factors that interact with this — including ritual knowledge, conception sites and adoption — however, living on an area of land does not automatically make a person a traditional owner. This means that in any residential community on Indigenous land, there are likely to be Indigenous people who are not the traditional owners of that particular country. Some may be traditional owners for another area of land. Some may have 'contingent' rather than 'core' rights to the land on which the community is situated.[10] Conversely, some traditional owners for the land on which the community is situated may now live elsewhere.

Published information about the Aboriginal community of Wurrumiyanga provides an example of this dynamic. Wurrumiyanga is situated on Bathurst Island in the Northern Territory, and has a population of between 1,265 and 1,582 people.[11] In 2007, the regional Aboriginal land council provided a list of the people who it regarded as being the traditional owners for the land on which the community is situated. That list contained 250 names.[12] This means that most of the Aboriginal people who live in Wurrumiyanga are not traditional owners for that land. This does vary considerably between communities, and in some places there will be a greater alignment between traditional ownership and residence.

When creating a statutory land rights scheme, one of the decisions faced by legislators is whether to grant ownership to traditional owners, to residents, to some combination of the two, or to some other group. Different schemes take different approaches to this. For example, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*') provides for effective ownership of land by the

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9 For a comprehensive overview see Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003).

10 Ibid 18–19.

11 Due to fluctuations and uncertainties about population information, the Coordinator-General for Remote Indigenous Services uses population ranges: see Office of the Coordinator-General for Remote Indigenous Services (Cth), *Six Monthly Report July-November 2009* (2009) 30.

12 The list was annexed to the Nguiu/Wurrumiyanga township lease, a copy of which was obtained by the author through a title search (lease number 662214).

'traditional Aboriginal owners'.[13] The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) is similar, although it takes a more inclusive approach to the definition of 'traditional owner'.[14] By contrast, Deed of Grant in Trust ('DOGIT') land in Queensland is owned by Aboriginal councils 'in trust for the benefit of Aboriginal inhabitants'.[15] A different approach again is taken by the *Aboriginal Lands Trust Act 2013* (SA), under which the Trust holds land 'for the ongoing benefit of Aboriginal South Australians'.[16] Statutory land rights can be owned by, or for the benefit of, very different groupings of Indigenous people.

Native title, on the other hand, is by its nature based on traditional ownership. It derives its content from 'the traditional laws acknowledged, and the traditional customs observed' by Aboriginal peoples and Torres Strait Islanders.[17] One consequence of this is that where native title continues to exist over statutory land rights land that is owned for the benefit of residents (such as DOGIT title), there are two groups of Indigenous people with an interest in the same land: the residential group, via the statutory scheme, and the traditional owners/native title holders, via native title. Relevantly to this article, there are several of areas of statutory land in Queensland where native title is claimed or has been found to exist, including in some of the 34 communities that are potentially affected by the *Freehold Act*.

The relationship, and in some cases tension, between the interests of residents and those of native title holders/traditional owners is of considerable importance to land reform in Indigenous communities. Any reform will alter the existing balance of interests between these two groups. As described below in Part IV, township leasing and the recent Queensland reforms alter this balance in very different ways.

III The *Freehold Act*

A *Indigenous Land Ownership in Queensland*

For historical reasons, Queensland has one of the most complex land rights systems in Australia.[18] It was during the 1970s and 1980s that most other Australian jurisdictions developed their land rights schemes. The most iconic of these was the *ALRA*, which is Commonwealth legislation applying only to the

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13 Section 3 (definition of 'traditional Aboriginal owners'). A wider range of Aboriginal people have the right to be consulted, but it is the traditional Aboriginal owners who enjoy primacy with respect to decision-making and the receipt of land-use payments: see, eg, ss 19(5)(a), 19A(2)(a), 35(4).

14 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 4 (definition of 'traditional owner').

15 Frank Brennan, *Land Rights Queensland Style: The Struggle for Aboriginal Self-Management* (University of Queensland Press, 1992) 90. For islands in the Torres Strait, DOGITs are granted to Torres Strait Islanders Councils to hold in trust for the benefit of Torres Strait Islander inhabitants.

16 Section 17.

17 *Native Title Act 1993* (Cth) s 223.

18 For an overview of the various Queensland schemes, see Garth Nettheim, Gary D Meyers and Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Aboriginal Studies Press, 2002) 271–81.

Northern Territory. In many respects, the *ALRA* is regarded as the high water mark of Australian land rights legislation. It gave Aboriginal people ownership of existing reserves, but also included a claims mechanism, whereby people who could demonstrate that they were the traditional Aboriginal owners could claim any area of 'unalienated Crown land'.[19] It provides Aboriginal landowners a strong set of ownership rights, including the right to prevent exploration and mining.[20] It also includes a set of funding arrangements that support ongoing management of the land that has been returned.[21]

During this period, Queensland had a conservative Government led by Premier Joh Bjelke-Petersen, who was opposed to establishing a Northern Territory-style land rights scheme in Queensland.[22] Instead, the Bjelke-Petersen Government introduced a series of more limited alternatives. In 1978, it granted 50-year leases over two communities to the local Indigenous shire council.[23] In the early 1980s, it created a new form of title called DOGIT title — which, as described above, is held by local or regional councils for the benefit of Aboriginal and Torres Strait Islander residents (and not for the traditional owners). DOGIT title is also subject to a greater degree of government control.[24] In the following years, most of the larger Aboriginal and Torres Strait Islander reserves were converted to DOGIT title.

In 1989, there was a change of government in Queensland and the new Labor Government promised to introduce a more comprehensive land rights scheme.[25] The ultimate outcome — in the form of the *Aboriginal Land Act 1991* (Qld) ('*ALA*') and *Torres Strait Islander Land Act 1991* (Qld) ('*TSILA*') — was more modest than had originally been suggested. It provided for (communally owned) inalienable freehold title, but gave only limited scope for the making of further land claims and included no ongoing financing mechanism.[26] In the short term, it further complicates the situation by adding two new forms of Indigenous land into the mix, described here as '*ALA* land' and '*TSILA* land'. In the longer term, it has the potential to simplify matters by allowing other forms of land (reserve land, DOGIT title and shire leases) to be converted into these new forms of ownership.[27] Nearly 50 areas of land, mostly in the Cape York region, have now been converted to *ALA* land and *TSILA* land,[28] including the two shire leases.[29]

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19 *ALRA* s 50. Claims could also be made over alienated Crown land where 'all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals'. A sunset clause, which took effect on 5 June 1997, means that claims brought after that date cannot be heard: see s 50(2A).

20 Ibid pt IV.

21 Ibid pt VI.

22 Brennan, above n 15, 11–13.

23 Ibid 11.

24 McRae and Nettheim, above n 5, 265.

25 Brennan, above n 15, 121.

26 Nettheim, Meyers and Craig, above n 18, 274–6; McRae and Nettheim, above n 5, 266–7.

27 For a discussion, see Queensland Government, *Land Transfers* <https://www.qld.gov.au/atsi/environment-land-use-native-title/land-transfers/>; McRae and Nettheim, above n 5, 267.

28 See Queensland Government, *Transferred Land under the Aboriginal Land Act 1991 and the Torres Strait Islander Land Act 1991 as at 1 January 2013* <https://publications.qld.gov.au/storage/f/2014-05-30T04%3A53%3A16.202Z/transferred-land-map.pdf>.

29 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1435 (Andrew Cripps).

Until 2008, all *ALA* land and *TSILA* land was granted to representative bodies called 'land trusts' for the benefit of those Aboriginal people or Torres Strait Islanders 'particularly concerned with land', which captures both people with a traditional or customary connection *and* those who live on or use the land or neighbouring land.[30] In other words, it includes both traditional owners and residents. Amendments introduced in 2008 enable grants instead to be made to a native title body corporate, thereby aligning ownership under the statutory scheme with native title (and excluding people with only a residential or historical connection).[31] As this is only a recent development, most existing *ALA* land and *TSILA* land is owned by land trusts for the benefit of the broader group, both traditional owners and people with an historical connection.[32]

Most of the 34 communities that are potentially affected by the *Freehold Act* are situated on DOGIT title, with a much smaller number situated on *ALA* land and *TSILA* land.[33] It is consequently these three forms of landownership — and particularly DOGIT title — that are most relevant to this article.

B *Leasing Indigenous Land in Queensland*

The legislation regulating DOGIT title, *ALA* land and *TSILA* land has long allowed for the grant of leases. Historically, however, leasing has not been common. One reason is that leasing processes have been relatively complicated and restrictive. In recent years, there have been several attempts to simplify these processes through legislative amendment.[34] Combined with new government policies, the result is that the number of leases in communities on Indigenous land in Queensland is slowly increasing. Beginning in 2014, the updated leasing provisions have also been used to support home ownership through transferrable 99-year leases. This has often been described as a 'first',[35] however there had in fact previously been a home ownership scheme in several communities on Indigenous land in

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30 *ALA* s 3. For brevity, where the provisions with respect to Torres Strait Islander land are effectively the same, only the Aboriginal land provisions are cited here.

31 Pursuant to the *Aboriginal and Torres Strait Islander Land Amendment Act 2008* (Qld). See McRae and Nettheim, above n 5, 267; Tom Calma, Australian Human Rights Commission, *Native Title Report 2009* (2009) 167–8 ('*Native Title Report 2009*'); Paul Memmott and Peter Blackwood, 'Holding Title and Managing Land in Cape York — Two Case Studies' (Research Discussion Paper No 21, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2008) 13–15.

32 This is illustrated by a map showing how the majority of grants have been to land trusts: Queensland Government, *Entities Holding Aboriginal and Torres Strait Islander Land under the Aboriginal Land Act 1991 and the Torres Strait Islander Land Act 1991 as at 1 January 2013* <https://publications.qld.gov.au/storage/f/2014-05-30T04%3A53%3A59.483Z/land-trusts-map.pdf>.

33 Information about each community is available at: Queensland Government, *Aboriginal and Torres Strait Islander Community Histories* <https://www.qld.gov.au/atsi/cultural-awareness-heritage-arts/community-histories/>.

34 Reforms to 2009 are described in the *Native Title Report 2009*, above n 31, 166–8. There have been further amendments since then.

35 See, eg, Tim Mander, Glen Elmes and Nigel Scullion, 'Delivering Home Ownership for Yarrabah Families' (Joint Media Release of the Minister for Housing and Public Works (Qld), the Minister for Aboriginal and Torres Strait Islander and Multicultural Affairs (Qld), and the Minister for Indigenous Affairs (Cth), 8 October 2014).

Queensland, by way of what are commonly known as 'Katter leases'.[36] To date, the number of new home ownership grants has been very small,[37] but this may grow over time.

The amendments described in the next section, which enable the allotment of Indigenous land, operate in addition to, and as an alternative to, leasing. Allotment is not required to make home ownership possible — as the existing grants demonstrate, home ownership can also occur through transferable 99-year leases. It is necessary to be clear about this, because it has been said that the *Freehold Act* 'means that for the first time, Aboriginal and Torres Strait Islander people in their own communities will be able to apply individually to own their own land and home, and be able to live, buy, sell or borrow on the basis of their title'.[38] That is incorrect, or at the least highly misleading. Even prior to the *Freehold Act*, Aboriginal and Torres Strait Islanders could own land via long-term leasehold — which is the same form of ownership that operates in the Australian Capital Territory — and could buy, sell or borrow on the basis of that ownership. There are, of course, important differences between leasehold and freehold ownership, which are discussed further in Part IV.

C *The Process for Converting Land to Ordinary Freehold*

1 *Step One: A Freehold Instrument*

The *Freehold Act* amends the legislation that regulates DOGIT land, *ALA* land and *TSILA* land so as to make it possible for part of that land to be partitioned into smaller lots and converted to ordinary freehold. The new provisions only affect land in 'urban areas',[39] and not the larger areas of Indigenous land outside of residential communities. And as described below, in practice the provisions will be limited to sections of the community, rather than entire communities, at least initially.

There are several steps required before a conversion of land can occur. The landholding body must first enact an instrument called a 'freehold instrument', which comprises a 'freehold schedule' setting out the areas of land that will be available for grant (which might be in the form of a map),[40] and a 'freehold policy' setting out such matters as the eligibility criteria, the pricing policy and details of how the community will be consulted on the allocation process. The legislation

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[36] See M Moran et al, 'Indigenous Home Ownership and Community Title Land: A Preliminary Household Survey' (2002) 20(4) *Urban Policy and Research* 357, 361–9; *Native Title Report 2009*, above n 31, 171–2.

[37] As at October 2014, there were 25 grants of home ownership on Indigenous land across Australia: Indigenous Business Australia (Cth), 'Home Ownership on Indigenous Land Now a Reality in Yarrabah' (Media Release, 22 October 2014) <http://www.iba.gov.au/wp-content/uploads/20141022_MediaRelease_HomeownershiponIndigenouslandnowarealityinYarrabah.pdf>. Of these, less than 10 are situated in Queensland.

[38] MacDonnells Law, *New Era: Freehold Land in Indigenous Communities* (23 September 2014) 1 <http://www.macdonnells.com.au/assets/eAlerts/Sep-2014-New-Era-Freehold-Land.pdf>. There have been several other examples of similar statements.

[39] *ALA* s 32B (definitions of 'urban area' and 'urban purposes').

[40] Ibid s 32D.

includes a set of rules about how the landholding body must consult on the freehold instrument itself. It must first set down a consultation plan and then follow that plan, keeping records of its consultations.[41] There are also rules about what the consultation plan must contain, which includes consulting with the native title holders, notifying the community and allowing people sufficient opportunity to express their views.[42]

Once consultations are complete, and the landholder has created a freehold instrument, it must then have the instrument approved. The approval process depends on whether the instrument only covers land for which there is already an 'interest holder' — that is, over which there is a lease, lease entitlement, sublease, residential tenancy agreement or statutory occupancy right[43] — or includes land for which there is no existing interest holder.[44] The process is simpler where the instrument only covers land for which there is already an interest holder: the freehold instrument is sent directly to the State Government Minister for approval.[45] Where the instrument includes other areas there is also a planning process. The landholding body must ask the relevant local government to attach the freehold instrument to its planning scheme,[46] and the local government then issues a call for written submissions from the public, as a result of which it may make changes to the instrument. When this process is finalised, the local government sends a report to the Minister summarising the issues raised in public submissions and how it has responded to them.[47] Ultimately, all freehold instruments are received by the Minister for approval. The Minister is required to consider any information provided by the local government when making a decision. The Minister can approve or reject the instrument, or approve it subject to amendment.[48]

This is a long process, involving several rounds of consultation and approval, especially for land over which there is no existing interest holder. As such, it likely to be some time before the first freehold instrument is enacted.

2 *Step Two: Granting Freehold*

Once a freehold instrument is in place, people who are eligible can then start applying to the landholding body for a grant of ordinary freehold. Importantly, the only people who are eligible to apply are Aboriginal people and Torres Strait Islanders and their spouses and former spouses.[49] A grant cannot be made to the government, a community organisation or a corporation of any kind. It is also possible for a freehold instrument further to limit eligibility by imposing additional

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41 Ibid s 32I.
42 Ibid s 32I(3).
43 Ibid s 32B (definition of 'interest holder'). Statutory occupancy rights refer to the rights of governments to remain on land that they occupied when it was made Indigenous land: ibid s 199.
44 *Aboriginal Land Regulation 2011* (Qld) reg 50B.
45 *ALA* s 32J(2)(a).
46 Ibid s 32J(2)(b).
47 Ibid s 32K.
48 Ibid s 32L.
49 Ibid s 32B (definition of 'eligible person').

criteria.[50] For example, a landholding body might limit eligibility to those people who have lived in the community for a certain period of time, or people who have not previously received a grant. There are no set parameters or guidelines as to what the additional criteria might state. Of course, once a grant of freehold has been made, it can then be sold to any person, corporation or entity. It is only the initial grant that is restricted.

It might be unjust if people were able to apply for a grant of freehold over land in which someone else already has an interest. Consequently, the legislation again draws a distinction between land for which there is already an interest holder and other areas of land. Where there is an interest holder, they are the only ones who can apply for a grant of freehold.[51] This means that where the interest holder is the government, a community organisation or a corporate entity of any kind, no one can apply, as only individuals are eligible. This clearly limits the potential scope of the legislation as it relates to existing infrastructure. That is because — outside of social housing, which is discussed below — most, if not all, existing infrastructure in communities on Indigenous land is occupied by governments, local councils, community organisations and corporate entities.[52] In some cases, those community organisations and corporate entities are Indigenous-owned, however even Indigenous-owned bodies are ineligible for a grant of freehold. Outside of housing, it will be rare for an existing interest holder to be an Aboriginal person or Torres Strait Islander or their spouse or former spouse.

Where there is no interest holder, the landholding body must engage in a detailed process to ensure that the allocation process is fair and transparent. It must first publicise its intention to allocate the subject land and call for applications from eligible persons.[53] The publication notice must explain how the land will be allocated (with a choice of auction, ballot or tender)[54] and state the reserve or purchase price and the deposit, if any, that will be required to participate further. The landholding body must also appoint a probity advisor to monitor the allocation process and certify that it was undertaken correctly.[55] When applications are received, they are processed according to the allocation method and the successful applicant is then given the opportunity to go ahead and complete the purchase.

The legislation imposes an additional step with respect to social housing. Where an application relates to land upon which there is a dwelling of any kind, the landholding body must give notice to the housing department.[56] The housing department then advises whether the dwelling is social housing and, if it is social housing, whether it can be sold. If it can be sold, the landholding body must set the value of the house using a valuation methodology that has been agreed with the

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50 Ibid s 32D(6).

51 Ibid s 32Q.

52 Not all occupiers will fall within the definition of 'interest holder', as that definition does not capture all informal rights. However, it seems unlikely that the landholding body or the Minister would approve a freehold instrument that enabled land to be granted to an individual where that land contains infrastructure that was built by someone else.

53 *ALA* ss 32Z, 32ZA.

54 Ibid s 32B (definition of 'allocation method').

55 Ibid s 32ZB.

56 Ibid s 32R.

housing department.[57] It should be noted that these same rules apply where home ownership instead occurs by way of a 99-year lease,[58] which, as described above, has been the method to date for home ownership in communities on Indigenous land in Queensland.

It can be gleaned from this description that, if and when allotment does occur, it will most likely be confined to residential housing and vacant land. With respect to residential housing, freehold is effectively an alternative to home ownership through leasing, and the move to freehold might occur at the time of initial grant or by way of conversion of the leasehold at some later date (providing, of course, that there is a freehold instrument in place). With respect to vacant land, the process is more expensive and more involved: both at the point of creating the freehold instrument, where a further planning process is required, and at the point of allocation and grant, where a probity advisor must be appointed.

3 *Impact on Native Title*

It is noted above that, in some cases, land in the 34 communities potentially affected by the reforms is also subject to native title. This will not be the case everywhere. In some places, native title will have already been extinguished through government action, at least in parts of the community. It is often a complex and highly technical task to determine whether and where native title has been extinguished. It requires an investigation of existing and historic land use dealings, such as leases and road reserves, and depends on when the alleged act of extinguishment occurred as well as the nature of the dealing.[59] Where native title does still exist, converting the land to ordinary freehold will extinguish it permanently (somewhat curiously described by one law firm as providing 'greater native title certainty'[60]). This is one of the ways in which a conversion to ordinary freehold differs from the grant of a lease, even a long-term lease. A lease over Indigenous land also impacts on native title, but it can do so in a way that does not lead to its permanent extinguishment.[61]

In practical terms, this means that where a landholding body wishes to create ordinary freehold over land that is subject to native title, it will need to enter into an Indigenous Land Use Agreement ('ILUA') under which the native title holders consent to the extinguishment of their rights. Of course, native title holders may refuse to agree to this, or may only agree on the condition that they are compensated. The Queensland Government does not provide any funding for landholding bodies to compensate native title holders, describing the process as

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57 Any money that the landholding body receives for a social housing dwelling must be set aside and used only for housing services: ibid s 288.

58 Ibid s 128.

59 See Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) chs 19–22.

60 Mark Geritz, Tosin Aro and Prue Harvey, *Freehold Title within Indigenous Communities: The Evolution of Native Title?* (15 May 2014) Clayton Utz <http://www.claytonutz.com/publications/edition/15_may_2014/20140515/freehold_title_within_indigenous_communities_the_evolution_of_native_title.page>.

61 Where the lease is granted pursuant to an Indigenous Land Use Agreement, the non-extinguishment principle can apply: see *Native Title Act 1993* (Cth) s 24EB(3).

'self-funding'.[62] This means that they must find a way to provide compensation themselves, or that native title holders must be persuaded to forego their rights without compensation, or that alternative forms of recompense might be found. For example, Indigenous leader Noel Pearson has suggested that landholding bodies should set aside a certain number of lots just for the native title holders.[63] Other alternatives might also be considered. It is nevertheless likely that its impact on native title will be an obstacle to allotment in some communities.

IV Discussion

A *The Limited Scope of the Queensland Legislation*

The starting point for any discussion of the *Freehold Act* must be its limited scope. In some respects, it is the most radical of the recent Australian reforms to Indigenous land tenure in that it enables a complete transformation of landownership. However, the process created by the *Freehold Act* is both confined in its application and subject to several obstacles. The most significant obstacle is that the steps required for allotment are time-consuming and expensive. This is exacerbated by the fact that the Queensland Government has not agreed to provide any funding other than setting aside $75 000 to help 'pilot communities undertake community consultation'.[64] Beyond this, the Government states that 'any costs incurred by the [landholding body are] to be recovered through the freehold land purchase price'.[65] It helps that most infrastructure in Indigenous communities has now been surveyed,[66] however landholding bodies will need to: compensate native title holders; dedicate time and resources to complying with the formal requirements (drafting a freehold instrument, etc); pay the costs of consultation with native title holders and community residents (once the pilot program funds have been exhausted); and pay for the engagement of a probity advisor. Where there is no existing sealed road or there are no essential services, they will also need to find money for those expenses.[67] Without greater financial support from the Queensland Government, it seems unlikely that the new provisions will be utilised widely.[68]

Where the provisions are utilised, as explained above, they will not result in entire communities being converted to freehold. Initial grants can only be made to

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62 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1432 (Andrew Cripps).

63 Michael McKenna, 'Aboriginal Freehold to Generate Wealth', *The Australian* (Sydney), 8 May 2014, 1–2.

64 Explanatory Notes, Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld) 11.

65 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1432 (Andrew Cripps).

66 Evidence to Agriculture, Resources and Environment Subcommittee, Legislative Assembly, Parliament of Queensland, Cherbourg, 29 July 2014, 4 (Andrew Luttrell).

67 Ibid.

68 It has been reported that seven communities have signed up to the pilot program: see Michael McKenna, 'Communities Embrace New Property Frontier', *The Australian* (Sydney), 21 May 2015, 2. However, several practitioners have told the author that there is widespread concern about the introduction of ordinary freehold, particularly on land subject to native title, and that movement on the reforms is likely to be slow.

individuals and not to corporate entities (which includes Aboriginal and Torres Strait Islander corporations). Most, if not all, existing enterprises and service providers are either corporate entities or governments, and it is very unlikely that the infrastructure that they occupy will be available for grant. The only existing infrastructure likely to be affected is housing, in which case the new provisions are effectively an alternative to home ownership through 99-year leases. Once the landholding body has complied with the more onerous consultation and planning procedures, the provisions might also be used with respect to new areas of land, for which there is no existing interest holder.

B *Allotment: A Reform with a Troubled History*

1 *The United States and New Zealand*

It is nevertheless significant that the *Freehold Act* is the first Australian legislation to enable the allotment of Indigenous land. The risks of allotment are starkly illustrated by the outcome of historical reforms in the United States and New Zealand. The allotment of Indian land in the United States took place under the *General Allotment Act* of 1887 ('*Dawes Act*'),[69] which provided for Indian reserves to be divided among tribal members according to a formula, with each person receiving a set amount of land. Once allocations had been made, any remaining land was deemed 'surplus' and could then be purchased by the Secretary for the Interior to be on-sold to non-Indian settlers.[70] The impact was dramatic. Of the 138 million acres of reserve land that existed prior to 1887, only 48 million remained in Indian ownership in 1934, when the *Dawes Act* was repealed.[71] Of the land that passed out of Indian ownership, some two-thirds was lost through 'surplus' land programs,[72] while the remaining one-third had been allotted to individuals then sold, lost through mortgage default or acquired by governments for the non-payment of taxes.[73]

The process began a little earlier in New Zealand. In 1865, the colonial Government set up a body called the Native Land Court (later the Māori Land Court) to formally recognise the Māori owners of customary land. Those Māori who were found by the Court to be the customary owners were then eligible to apply to become collective owners of a freehold title as tenants-in-common.[74] Owners could then sell their individual shares or apply for the land to be divided according to their share. When the reforms began, the Crown had already acquired

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69 Chap No 119, 24 Stat 388 (1887). Ezra Rosser, 'Anticipating de Soto: Allotment of Indian Reservations and the Dangers of Land-Titling' in D Benjamin Barros (ed), *Hernando de Soto and Property in a Market Economy* (Ashgate, 2010) 61, 66.

70 Ibid, 66, 69–70; Judith V Royster, 'The Legacy of Allotment' (1995) 27(1) *Arizona State Law Journal* 1, 10 (n 34), 13–16.

71 Stephenson, above n 2, 108. Stephenson also notes that, of this land, 20 million acres were in arid or partially desert country.

72 Royster states that some 60 million acres were lost due to surplus lands programs: above n 70, 13.

73 Ibid 12; Rosser, above n 69, 68.

74 Boast, above n 2, 152, 156, 161; Hepburn, above n 2, 84.

99.7% of the South Island, but only 18.9% of the North Island.[75] Through a combination of land sales and government confiscation for unpaid costs (such as survey costs), the reforms led to the loss from Māori ownership of a further 68.4% of the North Island.[76]

In addition to this, the reforms in the United States and New Zealand led to highly 'fractionated' ownership of much of the remaining land.[77] The intersection between landownership structures and intestacy law meant that the number of landowners has multiplied over time in a way that makes it difficult for any single person or group to effectively exercise their ownership rights. Efforts to resolve this are ongoing in both countries.

2 *Relevance to Australia*

While the processes were slightly different, the outcome in both countries is remarkably similar: a massive loss of ownership combined with fractionated ownership of much of the remaining Indigenous land. It would be naïve to ignore these risks. I would, however, caution against drawing the conclusion that the same outcomes will necessarily eventuate in Australia. Fractionated ownership is not inevitable, it can be avoided through careful attention to inheritance law, and perhaps through participants receiving appropriate advice on, and assistance with, drafting a will. And while the risk of land loss is real, the different circumstances surrounding the introduction of allotment need to be considered. In both the United States and New Zealand, allotment was introduced at a time when non-Indigenous settlers were pressing hard to gain access to Indigenous land. Certain features of the allotment programs were clearly designed to achieve that end. The 'surplus' land programs are an example of this. Indeed, allotment was just one of several means by which Indigenous peoples were deprived of their land during this era.

While there is hostility to land rights in some sections of the Australian community, there is no evidence to suggest that the *Freehold Act* has been introduced as a means of divesting Aboriginal and Torres Strait Islander people of their landownership. There is evidence of other, troubling motivations — not least a poorly examined and problematic belief in the power of 'normalisation'[78] — but not of an attempt to appropriate land. Community norms have shifted since the 19th century. The troubled history of allotment does suggest a need for caution and that the implementation of reforms should be monitored. More broadly, there is need for far greater attention to be paid to the exact mechanism by which allotment is expected bring about the benefits that are predicted. It would, however, be going

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75 C Linkhorn, 'Māori Land and Development Finance' (Discussion Paper No 284/2006, Centre for Aboriginal Economic Policy Research, 2006) 3.

76 Ibid. Around 12% of the North Island remains Māori freehold. See also Boast, above n 2, 151.

77 Jessica A Shoemaker, 'Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem' [2003] *Wisconsin Law Review* 729; Stephenson, above n 2, 108; Linkhorn, above n 75, 3–4; Boast, above n 2, 156.

78 On use of the term 'normalisation' in the Northern Territory see Kirsty Howey, '"Normalising" What? A Qualitative Analysis of Aboriginal Land Tenure Reform in the Northern Territory' (2014–15) 18(1) *Australian Indigenous Law Review* 4.

too far to argue that historic reforms in the United States and New Zealand mean that allotment should never be considered.

C *Land Ownership as Territory*

Land rights and native title have always been about more than just property rights. They are also connected to the broader aspirations of Indigenous peoples for self-determination, jurisdiction, autonomy and political and economic empowerment. Those aspirations have only ever been partially realised in Australia. Neither statutory land rights nor native title convey any form of jurisdictional authority, in the way that reserve land in North America does. And yet, there are important ways in which Indigenous land is different from other areas of land. Native title and some statutory land rights schemes provide Indigenous owners with rights that do not follow from ordinary freehold, such as greater control over exploration and mining and additional protection from compulsory acquisition.[79] Those benefits cease when land is converted to ordinary freehold, though in a practical sense this will have little to no impact on land inside of residential communities. Perhaps more significant is the fact that Indigenous landownership is part of the political and cultural inheritance of Indigenous peoples. There will be some who would prefer to pass on that inheritance in its existing form, rather than convert it to a new and more mainstream form of property ownership.

D *Comparing the* Freehold Act *with Township Leasing*

To the lay observer, the introduction of reforms such as the *Freehold Act* in Queensland and township leasing in the Northern Territory[80] might appear to be similar developments, in that they both involve new tenure arrangements in Indigenous communities and have been connected to home ownership and economic development. There are, however, important differences between the two sets of reforms, and a closer look at those differences helps clarify some of the decisions that are being made by governments in the course of introducing land reforms. Here, it is described how there are three main differences between the two sets of reforms.

1 *Community-wide Transfer in Control*

Township leases are a reform particular to ALRA land in the Northern Territory. Their first distinguishing feature is that they involve a wholesale transfer of control from the landowners to a body called the 'Executive Director of Township Leasing' or 'EDTL'. A township lease is effectively a community-wide head lease that gives the EDTL responsibility for granting formal rights to occupiers by way

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[79] Brennan notes that some other landowners in Queensland do, in fact, enjoy greater protection from mining: above n 15, 52. DOGIT title does, nevertheless, provide greater control than most ordinary freehold in that the landholding body can withhold consent to mining unless overridden by the Governor-in-Council: Brennan, above n 15, 73. See also McRae and Nettheim, above n 5, 265–6.

[80] Township leasing is a reform particular to *ALRA* land.

of subleases. It is an alternative to the landowners granting leases directly to occupiers,[81] which is not only possible, but in recent years has become very common.[82] The Australian Government nevertheless argues that township leasing is a better model for formalising tenure arrangements, precisely because of the transfer of control. It argues that the EDTL is able to take a more streamlined approach to land administration.[83] The two major Aboriginal land councils, who have opposed the introduction of township leasing, have argued that this 'mischaracterise[s] the efficacy of existing ALRA provisions'[84] and expressed concern about the fact that township leases lead to a loss of landowner control.[85] In response to these concerns, the Australian Government has recently indicated that it is prepared to agree to township leases being held by 'a strong community entity' instead of the EDTL.[86]

This community-wide transfer of control over land use does not occur under the *Freehold Act* or under any of the other reforms that have been made to Indigenous land tenure in Queensland. Landholding bodies still grant leases (and may now grant freehold) directly to occupiers. There is no equivalent of the EDTL assuming control over the process. This is not because processes on Indigenous land in Queensland are already more streamlined than those on ALRA land in the Northern Territory. To the contrary, those processes are if anything more complicated, particularly on Indigenous land that is also subject to native title.[87] This is reflected in the fact that there are far more leases in communities on ALRA land without a township lease than there are in communities on Indigenous land in Queensland.

2 *Form of Tenure Granted to Occupiers*

(a) *Home Ownership*

The most obvious difference between township leasing and the *Freehold Act* is the form of tenure that occupiers are granted. Under township leasing, occupiers receive a sublease, whereas under the *Freehold Act* occupiers can be provided with freehold. There are four main differences between a township sublease and freehold: first, a sublease is for a set period of time while a freehold is perpetual;

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81 Under the *ALRA* s 19.

82 Central Land Council, *Land Reform in the Northern Territory: Evidence Not Ideology* (October 2013) 18. The Central Land Council states that in recent times it had processed 478 leases, including 23 40-year leases over housing areas to Territory Housing, and was in the process of consulting on a further 511 lease applications.

83 Department of the Prime Minister and Cabinet (Cth), *Township Leasing on Aboriginal Land in the Northern Territory* <http://www.dpmc.gov.au/indigenous-affairs/about/jobs-land-and-economy-programme/township-leasing-aboriginal-land-northern-territory>.

84 Central Land Council, above n 82, 6.

85 Ibid 12–13.

86 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7383 (Alan Tudge). See also Nigel Scullion, 'Gunyangara a Step Closer to Township Lease' (Media Release of the Minister for Indigenous Affairs (Cth), 31 July 2015).

87 As *ALRA* land is owned for the benefit of traditional owners, there is effectively an alignment between landownership and native title that means that no future act procedures are required on *ALRA* land. This is formally recognised in the *Native Title Act 1993* (Cth) ss 210, 233(3).

second, a sublease can be subject to ongoing rent; third, a sublease can include a variety of restrictions, including restrictions on to whom it can be transferred; and fourth, depending upon its terms, a sublease might be terminated for breach, which does not happen for a freehold.

A simple comparison between township leasing and the *Freehold Act* is made difficult by the fact that the terms of township subleases vary. A long-term sublease with no ongoing rent and few or no restrictions might be very similar to freehold, while a short-term and restrictive sublease that is subject to ongoing rent is clearly not. To make the comparison more valid, the discussion here is divided between home ownership and other types of land use, as in each case different approaches have been taken to sublease terms. On a township lease, home ownership has been provided for through a long-term sublease with no ongoing rent. There are 16 home ownership subleases in the township lease community of Wurrumiyanga, most of which run for just short of 99 years, with the option to renew for a further period if the township lease is extended.[88] In the short to medium term, the temporal difference between subleases and freehold will not be a factor, although this is something that will need to be addressed in the longer term.[89] It is also very unlikely that the EDTL would seek to terminate a home-ownership sublease for breach except in the most extreme of circumstances, as the community backlash would be considerable.

The most important difference between freehold and a home-ownership sublease is that the latter might contain restrictions on alienability, which means it can be used to create a closed or regulated home-ownership market. Home ownership through freehold will be always be an open market. It is very possible that some communities may prefer to have a closed or regulated market.[90] This is a complex, and potentially sensitive issue, that should be carefully addressed before a decision is made to introduce home ownership, whether by leasehold or freehold. It does not help, in my view, to characterise ordinary freehold ownership as mainstream and therefore preferable. There are both advantages and disadvantages to unregulated markets that need to be carefully weighed.

(b) *Beyond Home Ownership*

Not all existing township subleases are in a similar form to home-ownership subleases. In fact, home-ownership subleases are something of a special case. Other township subleases are for a shorter period, normally around 20 years, and

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88 Clause 30 of the Wurrumiyanga township lease provides that the parties will negotiate in good faith for the renewal of the term. This is not the equivalent of an automatic right of renewal. If the township lease is renewed, holders of a home ownership sublease do have an automatic right to renew their sublease provided they are not in breach. This author obtained a copy of the township lease and home ownership subleases through a title search.

89 There are many places where landownership occurs through leasehold, including the Australian Capital Territory, which provide examples as to how this issue might be dealt with.

90 See, eg, Evidence to Agriculture, Resources and Environment Committee, Legislative Assembly, Parliament of Queensland, Brisbane, 6 August 2014, 1 (Tim Wishart, Principal Legal Officer, Queensland South Native Title Services).

most are subject to ongoing rent.[91] The marked increase in rent has been one of the most significant outcomes of township leasing. Prior to the township lease in Wurrumiyanga, the Aboriginal landowners collected a total of $2000 per year in rent.[92] Now, the EDTL collects $715 822 per year.[93] After deduction of the EDTL's expenses, this rent is ultimately paid to the Aboriginal landowners.[94]

What is interesting about this is that it takes an opposite approach to economic development to that taken by the *Freehold Act*. The primary means by which township leasing is being used to support economic development is through the underlying *landowners* receiving an income stream for the use of their land, which conversely makes access to land more expensive for occupiers.[95] It is a rent-driven approach to economic development. The *Freehold Act* instead aims to 'drive economic development'[96] by providing *occupiers* with the broadest possible set of ownership rights, with no ongoing rental income stream for the (former) landowning group.

Each approach relies on certain assumptions as to the market circumstances of communities and on certain understandings (whether or not articulated) as to how economic development should occur. It might be considered a positive development that different approaches are being trialled. It is, however, concerning that the Australian and Queensland governments have never identified the fact that they are taking different approaches, let alone explained why they believe that their approach is best.

3 *Resolving the Tension between Residence and Traditional Ownership*

The third area in which township leasing and the *Freehold Act* differ is with respect to resolving the tension between traditional ownership and residence. Where there is a grant of ordinary freehold under the *Freehold Act*, the rights of the traditional owners (through native title) are extinguished. Noel Pearson, himself a prominent native title advocate, argues that this should not be considered an issue due to the relatively small size of the land in question. He points out that there are 'millions of hectares of Aboriginal land under native title which will not be affected at all', and argues that it is for the betterment of communities to have a 'mix of tenures', including freehold.[97] As noted earlier, he also suggests that some freehold land might be set aside specifically for native title holders. Others have argued that its lesser impact on native title is one advantage of instead using leases.

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91 The author obtained a title search of NT Portion 1640, which describes all registered subleases in Wurrumiyanga. The annual reports of the EDTL suggest the same practice is followed in other communities.

92 Office of Executive Director Township Leasing (Cth), *Annual Report 2010–2011* (2011) 3.

93 Office of Executive Director Township Leasing (Cth), *Annual Report 2013–2014* (2014) 23.

94 During the first 15 years, the traditional owners must first repay the up-front payment they received on the grant of the lease: see Leon Terrill, 'The Days of the Failed Collective: Communal Ownership, Individual Ownership and Township Leasing in Aboriginal Communities in the Northern Territory' (2009) 32(3) *University of New South Wales Law Journal* 814, 832.

95 Leon Terrill, 'The Language We Use to Debate Aboriginal Land Reform in Australia' (2014–15) 18(1) *Australian Indigenous Law Review* 24, 35.

96 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1432 (Andrew Cripps).

97 Quoted in McKenna, above n 63.

For example, the Principle Legal Officer for one native title representative body told the Parliamentary inquiry into the *Freehold Act*:

> The benefit of the 99-year homeownership lease is that the underlying tenure and any native title that exists in relation to that land is preserved. The homeownership leases offer the benefits of freehold without destroying native title rights.[98]

It is too early to gauge which is the more widespread view. The point for present purposes is that, if and when it is utilised, the *Freehold Act* effects a complete shift in ownership away from native title holders towards those residents who obtain the freehold.

The impact of township leasing has instead been to shift the balance away from residents and towards traditional owners.[99] This outcome is a little paradoxical, as in a strict legal sense the effect of a township leases is to shift control over land from the traditional owners to the EDTL. However, the implementation of township leasing has been accompanied by a new approach to land use. One element of this is the increase in the amount of rent being paid by occupiers. The ultimate beneficiaries of that rent are the traditional owners and *not* community residents as a whole.[100] There are indications that traditional owners are using this rent to further enhance their position. In Wurrumiyanga, the first community with a township lease, the traditional owners have used their rent to establish and acquire ownership of several new businesses.[101] In the past, it is more likely that such collectively-owned businesses would have been owned by the entire community, rather than just the traditional owners. In addition, to the extent that the EDTL is required to consult when making decisions under a township lease, he or she consults through a body that represents traditional owners rather than all community residents.[102] Traditional owners have used the introduction of township leasing to establish a greater role for themselves in the community. As the Chief Executive Officer of the local Aboriginal land council puts it, through the leasing process they 'have written themselves into the script'.[103]

The Australian Government has never explained the rationale for introducing this shift in the balance of power away from non-traditional owner residents towards the traditional owners. In the few public statements it has made on the topic, which were made when township leasing was first introduced, the Government suggested that the effect would be the opposite: that township leasing would enable non-traditional owner residents to escape the 'feudal' control of

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98 Evidence to Agriculture, Resources and Environment Committee, Legislative Assembly, Parliament of Queensland, Brisbane, 6 August 2014, 1 (Tim Wishart, Principal Legal Officer, Queensland South Native Title Services).

99 Leon Terrill, 'Five Years On: Confusion, Illusion and Township Leasing on Aboriginal Land' (2011) 1(3) *Property Law Review* 160, 173.

100 After deducting expenses, the EDTL pays the rent to the relevant Aboriginal Land Council who must then pass it on to the traditional Aboriginal owners: see *ALRA* s 35(4B).

101 Office of Executive Director Township Leasing (Cth), *Annual Report 2009–2010* (2010) 13; Office of Executive Director Township Leasing (Cth), *Annual Report 2012–2013* (2013) 14.

102 Terrill, above n 99, 173.

103 John Hicks, quoted in Paul Toohey, 'A New Lease of Life', *The Weekend Australian Magazine* (Sydney), 10 January 2009, 14, 17.

traditional owners.[104] This disparity between public statements and the true impact of the reforms suggests that this outcome is not the result of some carefully thought-through policy, and perhaps even that this aspect of the township leasing model is not well understood by the people responsible for its introduction.

V Conclusion

The *Freehold Act* is the latest in a series of government reforms to the land tenure arrangements in communities on Indigenous land. In some respects it is the most radical, in that it is the first legislation to enable the allotment of Indigenous land in Australia. Given the outcome of historic allotment programs on Indigenous land in the United States and New Zealand, this is a development that requires careful attention.

This article has explained how the *Freehold Act* works, and the steps required before land can be converted to ordinary freehold. The article has also drawn attention to some of the decisions that are being made in the course of introducing land reform in Indigenous communities by comparing the *Freehold Act* with township leasing. It has explained how the two reforms take very different approaches to economic development and to resolving the tension between residence and traditional ownership. It is significant that governments themselves have not acknowledged these differences in their public statements, let alone explained why they believe their approach is preferable or how the different approaches might be reconciled. These are issues that would clearly benefit from greater discussion, so that communities have access to the best available information on which approach to land tenure reform is best suited to their needs. What are the risks and benefits of open and closed markets? Is it better to encourage economic development through providing landholding bodies with rent or through providing occupiers with marketable rights? In what circumstances might the answer be different? And are there other options? These are complex questions, and it is better that they are addressed transparently before land reforms are introduced, rather than reflected upon after reforms have been implemented.

The significance of the *Freehold Act*'s standing as the first Australian legislation to enable the allotment of Indigenous land is lessened by the fact that, at least initially, it will be confined in its operation. It is suggested here that take-up is likely to be slow as the steps required are several and expensive, and due to the impact on native title. This might change if the Queensland Government decided to provide greater financial support, including compensation for native title holders. It has also been argued here that the *Freehold Act* will, in practice, only affect housing and vacant land, and with respect to housing it is best considered as an

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[104] Amanda Vanstone, 'Beyond Conspicuous Compassion: Indigenous Australians Deserve More Than Good Intentions' (Speech delivered at the Australia and New Zealand School of Government, Australian National University, Canberra, 7 December 2005); see also Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 5 (Mal Brough). As Dodson and McCarthy point out, the Ministers' statements misrepresent the nature of earlier arrangements: Michael Dodson and Diana McCarthy, 'Communal Land and the Amendments to the Aboriginal Land Rights Act (NT)' (Research Discussion Paper No 19, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2006) 7.

alternative to home ownership through 99-year leases. This too may change. It remains open to later governments to amend the *Freehold Act* to expand its scope. It appears that the decisions to limit the Act to urban areas and to restrict grants to natural persons (rather than corporations) were made as a result of feedback received during the consultation process.[105] These and other decisions might be reversed in the future, expanding the scope of the legislation. Whether or not this occurs, the *Freehold Act* is a significant new development in the introduction of Indigenous land reform in Australia, one that other jurisdictions are likely to be watching with interest.

[105] Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1434 (Andrew Cripps).