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Land Tenure and Development in Northern Australia

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Introduction

While principles of land ownership (predominantly freehold) under ‘common law’ have been relatively stable in large parts of Southern Australia, in the north there is limited freehold title and it is often clustered around major centres. Across the wider Northern Australian landscape, concepts of ownership on lands previously held by the Crown (and consequently land titles) have also changed significantly in the last 30 years, with pre-existing Indigenous rights (e.g. native title) now recognised in law and new statutory forms of land rights established. Further, in recent decades Commonwealth, state and territory regulation has placed restrictions on many of the tenure rights that would otherwise have accrued with land and natural resource ownership (e.g. the Commonwealth’s *Environment Protection and Biodiversity Conservation Act 1999* or Queensland’s *Vegetation Management Act 1999*).

Given this difference, land tenure is often touted by governments and industry alike as being one of the most significant barriers hindering development and investment in Northern Australia (Australian Government, 2014; Joint Select Committee on Northern Australia, 2014). Debates about land tenure in the north have been increasingly driven by economic development and, in particular, control of important resources such as minerals, prime agricultural land and conservation assets. These debates are not confined to Commonwealth, state and

territory policy circles; there has been a significant and long-standing academic interest in tenure as a policy tool and social institution (e.g. Holmes, 2011). This work has included interest in the reform of land tenure and administration systems, with calls for greater investment in and coherence of national spatial data infrastructures underpinning land administration, particularly in federated countries like Australia where land information is generally held across multiple agencies and levels of government (Bennett et al., 2012). For example, information systems that underpin land administration are argued to be critical public good infrastructure, rather than the property of particular land administration agencies (Bennett et al., 2013).

Internationally, there has also been a long focus on human rights dimensions of the rights, responsibilities and restrictions created by land tenure policies, institutions and systems of administration (Enemark et al., 2014). In the Australian context, for example, some authors have argued that key factors underpinning Indigenous disadvantage can be characterised as ‘market failure relating to the disjunction between the Indigenous land base and the broader market economy’ and low levels of public investment in infrastructure on the Indigenous estate (Altman & Dillon, 2005, p. 252). The focus has more recently turned to more specific issues of the relationship between secure tenures of home ownership and economic development on Indigenous-owned lands (Wensing & Taylor, 2012).

Finally, there are a number of themes in the literature that are important for understanding the evolution of tenure as a policy instrument (aimed at facilitating either development or conservation) in Northern Australia’s northern rangelands in particular. Holmes’ (2000, 2011, 2012, 2014) significant contribution, for example, highlights pastoral leasehold tenures and native title, emphasising that tenure instruments and the administrative architecture and policy goals that govern their use are not static. Instead, they have been responsive to changing political, economic and land management requirements over time. Indeed, Holmes’ work highlights how understanding tenure instruments as an evolving set of socio-legal institutions that are responsive to an ever-widening suite of public policy goals, rights and interests is central to designing appropriate interventions in contemporary landscapes. This requirement for a responsive system of tenure becomes more important when we consider economic development opportunities in broader

northern regional contexts. This is because regions in Australia's north are described as experiencing a multifunctional transition, where the mix and dominance of different values in a given landscape or region (e.g. amenity or consumptive values and conservation, Indigenous or pastoral values) are rapidly changing (Holmes, 2011, 2012). The Cape York region in particular provides stark evidence of such a rapid transition in recent decades where new regional and place identities are being formed as a result of changes to property rights, tenures and economic opportunities (Holmes, 2012).

Against this background, this chapter focuses on the relationship between tenure considerations and the broader policy concept of Northern Australian development.

The Importance of Land Tenure to Northern Australian Futures

Land tenure refers to the legal regime under which land is owned. In all states and territories of Australia there are statutory definitions of what is meant by 'land'. While the general principles of land ownership under common law have long been established, the extent of ownership has changed significantly in interpretation over the last 100 years. In particular, the rights and benefits entailed in land ownership have been interpreted, codified and, in some cases, restricted by statutory law. This has been particularly important in Northern Australia where freehold title is limited and the contention between development and conservation interests is so important. This has given rise to a concern that the potential for tenure rights to be diminished by policy and legal change has reduced the confidence of investors in the north.

In the context of Northern Australia, the focus on land tenure has been increasingly driven by matters that relate to clarifying the rights of economic and cultural development and, in particular, control over important resources such as minerals, prime agricultural and traditional lands. Consequently, Australia's land tenure systems are fundamental to several important policy domains including the resolution of historical social injustice; development planning and economic growth strategy;

welfare, housing and employment; economic development and property markets; and natural resource, environmental and cultural management (JCU & CSIRO, 2013).

Land ownership systems also underpin much of government policymaking and program delivery and functions such as taxation, land administration, administrative boundaries, regulation and land use management. One critical difference about the north, however, is that settlement, occupancy and land use patterns vary markedly from those in southern and eastern Australia. The Northern Australian system of land tenure was designed to expedite land settlement, secure investment in traditional agricultural development and reserve land for Indigenous and later conservation purposes (Holmes, 2000). The landscape scale consequence of this approach is that the vast majority of land (75.4 per cent) is Crown owned, two-thirds of which is pastoral leasehold (JCU & CSIRO, 2013). Another 18.5 per cent is Indigenous land (most previously held by the Crown). Native title resolution processes continue across many parts of the crown land estate. Privately owned land accounts for only 6.1 per cent of the total area. Clearly, the proportions of Indigenous land and leasehold land are significantly higher than in Southern Australia. Native title claims and mining and gas exploration permits also cover significant parts of the landscape.

In a major reform to the purpose of the original Northern Australian system of land tenure, over 40 years ago major new tenures emerged with innovations under the *Aboriginal Land Rights (Northern Territory) Act 1976*, followed by the *Aboriginal Land Act and Torres Strait Land Acts 1991* in Queensland. These statutes sought to provide measures of national social and land justice for Indigenous Australian and Torres Strait Islander peoples who were physically and/or legally dispossessed at the time of colonial acquisition (Hibbard et al., 2008).

As a consequence of this complexity, in recent decades, a wide range of diverse parties have advocated for change and reform to northern tenure arrangements. The more significant of these include:

- the pursuit of pastoral enterprise diversification, in some instances, via the development of irrigation, tourism or conservation on leasehold (Gleeson et al., 2012; van Etten, 2013)
- persistent interest in the expansion of agriculture in Northern Australia, particularly the expansion of irrigated cropping (Chilcott, 2009; Northern Australia Land and Water Taskforce Science Review, 2009)

- the Council of Australian Governments (COAG) National Water Reform Agenda changed the character of water rights and access, separating water from land title, thus providing for the establishment of water markets
- major growth in the mining and gas sectors and a boom in exploration has meant that these activities are operating across a range of tenures and entitlements. This growth has also led to increased frequency of tensions related to access on rural and Indigenous lands
- native title has delivered the prospect of social reparation and tenure security for Indigenous people, while also posing legal and practical challenges as to how traditional owners can leverage investment on native title lands and other tenures
- Indigenous water interests are an emerging policy area, with new interests such as cultural flows and Strategic Indigenous Reserves being defined (NAILSMA, 2013)
- growing recognition of conservation values in northern landscapes, both within the formal conservation estate, on other tenures, and new private and not-for-profit sector investors.

There has also been a growing interest among governments, landholders and investors to seek benefits from emerging ecosystem service-based markets, in particular for carbon. Here, opportunities are being explored for banking or mitigation services and market-related knowledge services (e.g. buyers, brokers, partners and information providers) (CSIRO, 2012; Whitten et al., 2008). Researchers have reported that the negotiation of conservation or biodiversity outcomes at landscape scale on pastoral lands, for example, requires better communication with and involvement of ‘new’ land managers such as mining companies—now major holders of pastoral leases in Western Australia (van Etten, 2013).

As a consequence of this history, there are several features of land tenure and its administration in the north that make it both complex and unique:

- there are multiple and often overlapping tenure types for the same area of land (e.g. the existence of non-exclusive native title rights over leasehold land)
- administrative arrangements for land tenure and classifications of similar tenure types vary across state and territory jurisdictions

- in regions like Cape York, tenure change is happening rapidly (Holmes, 2012)
- for potential investors, multiple interactions are often required with government to gather the information needed to assess sovereign risk and to seek tenure changes
- there are numerous implications arising from the ongoing task of identifying untested native title rights
- there are emergent tenures or changes to rights related to assets such as water, carbon and biodiversity, with uncertain and evolving tenure regimes (JCU & CSIRO, 2013).

Reform Foci from the Recent Past

There are efforts to improve tenure management arrangements within each of the north's four primary jurisdictions (see Table 13.1). For instance, each of the state and territory jurisdictions have over the last decade undertaken reviews of their own tenure arrangements, particularly with respect to pastoral leasehold lands. These recent and proposed changes aim to enable more diverse uses within tenures and to clarify access and use rights in circumstances where there are multiple entitlement holders. In addition to proposed pastoral land reforms, other recent work has focused on improving the secure allocation of water entitlements and clarifying Indigenous interests in land and water.

Reforms are also progressing in all jurisdictions in relation to land administration and land-related information management. In Western Australia, for example, progress is being made towards the creation of a Single Registration System for all Crown and freehold land (under the *Land Administration Act 1996*). There is also emerging national progress towards the establishment of a National Electronic Conveyancing system.

Table 13.1: Point in time tenure reform process during 2015.

	Mining	Pastoral and irrigated agriculture	Water	Conservation and ecosystem services	Indigenous land/native title
WA	<i>Reforming Environmental Regulation and Multiple Land Use Framework. Water in Mining Guide.</i>	<i>Rangelands Reform Program</i> proposes more flexible rangelands or perpetual leases and addresses 2015 lease renewal deadlines.	Water allocation plans in La Grange groundwater area, the Ord River area and the Pilbara groundwater allocation plan. Review of Broome Water Plan (2008).	Proposed permit of conservation uses and ecosystem service investment on rangelands leases. Progress on a major Kimberley Science and Conservation Strategy.	Investigating options for land tenure reform on the Aboriginal Lands Trust estate. Recent review of native title processes in major development.
NT	Exploration licences may be renewed indefinitely. Emerging consideration of codes for gas-sector land access arrangements.	Review of <i>Pastoral Land Act</i> 1992 considering non-pastoral use permits. Removal of time-bound renewal periods of permits provides registration to title, third-party involvement and transferability.	Water planning in Tindall Limestone Aquifer (Katherine) Water Resource Plan (2009). Mataranka, Ooloo, Howard East and Berry Springs areas in progress.	Proposed amendments to the <i>Pastoral Land Act</i> 1992 suggest approval required to carry out any activity likely to significantly modify landscape health.	Lease conversions underway and payment for leases. NT Government involved in Commonwealth review of <i>Aboriginal Land Rights Act</i> 1983 and native title.
Qld	Land Access Code (2010) introduced for the coal seam gas industry. Reforms to regional land use planning, major project assessment, state planning policies and one-stop shop approvals (also relevant to agriculture).	Amendments to the <i>Land Act</i> 1994, (2008) linking improved tenure security to land use condition. Report on Parliamentary Inquiry into pastoral tenures (2013). March 2013) to allow clearing for high value agriculture, removing high value regrowth regulations from freehold and Indigenous land.	Water Resource Plans for Gulf catchments (2011), Mitchell Basin (2012) and Wet Tropics. Wet Tropics and Gulf plans consider cultural flows and Strategic Indigenous Reserves.	Consideration under the <i>Land Act</i> 1994 to seek to improve for conservation-based investments. Amendment of state legislation to allow the transfer of carbon and forestry rights from the state to lessees (2011).	Pastoral Indigenous Land Use Agreement (ILUA) template and guide established. Amendments to <i>ATS/ Land Holding Act</i> to address sub-lease uncertainty. Discussion paper on tenure reform for home ownership. Queensland Government involved in Commonwealth native title reviews.

	Mining	Pastoral and irrigated agriculture	Water	Conservation and ecosystem services	Indigenous land/native title
CTH	National Partnership on CSG and Large Coal Mining Development (2012). Current COAG process regarding delegation of assessment via <i>Environment & Biodiversity Conservation Act 1999</i> .	Investigation of mosaic agriculture development, including the North Queensland irrigated agricultural strategy and strategic development of beef industry.	<i>New Policy Guidelines for Water Planning and Management</i> 2011. Developing new policy guidance (NWC Northern Australian Position Statement).	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i> and <i>Carbon Credits (Carbon Farming Initiative) Regulations 2011</i> and <i>Clean Energy Act 2011</i> establishes basis for trading carbon equivalents. <i>Biodiversity Carbon Fund. National Wildlife Corridors Plan.</i>	Native Title Amendment Bill 2012 clarifies 'good faith', 'right to negotiate' and enables parties to disregard extinguishment in parks and reserves. Streamlines ILUAs. NIRA reforms. Reviews of Native Title Rep Bodies, Department of Families, Community Services and Indigenous Affairs (FACSIA) and Home Ownership (COAG).

Source: Updated from JCU and CSIRO (2013).

Opportunities for Tenure Reform and Barriers for Progression

The opportunity for reform in land tenure to drive diverse investment in the sustainable development of Northern Australia is significant. Such changes might serve to reduce conflict and encourage more optimal use and management of the north's natural resources, while also protecting the rights of interests of traditional owners. Potential new reforms could also enable land owners to manage and trade vital ecosystem services such as water, biodiversity and carbon while providing additional economic development opportunities. Based on wide discussion across key Northern Australian stakeholders, JCU and CSIRO's (2013) report to the Northern Australia Ministerial Forum (NAMEF) proposed a number of broad areas of focus for realising these opportunities in the short, medium and long terms. Table 13.2 provides a summary of the individual opportunity that might be actioned and the feasibility and benefit likely to be derived over time.

Table 13.2: Key opportunities for improving land tenure arrangements in Northern Australia.

Opportunity	Feasibility	Benefit	Timescale		
			1 yr	2–5 yrs	>5 yrs
Tenure improvements					
Harmonise key tenure-related practices across jurisdictions	H	H		✓	
Provide a single 'whole of government' point of contact for tenure resolution	M	M		✓	
Adopt consistent principles to improve flexibility and diversify land use especially on pastoral and Indigenous lands	H	H	✓		
Complete rollout of National Water Initiative principles and statutory water plans across the north	H	H			✓
Develop and implement a consistent approach to Indigenous water including rights to water for commercial purposes	H	H		✓	
Ensuring consistency of tenure arrangements for carbon/biodiversity in the landscape	H	M		✓	

Opportunity	Feasibility	Benefit	Timescale		
			1 yr	2–5 yrs	>5 yrs
Continuous improvement in progressing native title/statutory claims	M	H			✓
Provide more flexible means of transition from leasehold to freehold on small land parcels for intensive uses	M	H		✓	
Information, planning and major project assessment					
Develop a nationally-consistent and spatially explicit tenure (and registered interests) data system	H	M	✓		
Reduce project delays by improving development assessment practice	M	H		✓	
Initiate stable, regionally-scaled strategic land and resource use planning	M	M			✓

Note: H = High and M = Medium.

Source: Updated from JCU and CSIRO (2013).

While different sectors and interests across Northern Australia face distinct investment issues, stakeholder engagement undertaken in the development of JCU and CSIRO's (2013) report to the NAMF identified common and significant tenure-related barriers to investment (see Table 13.3). These include the underlying complexity of tenures and entitlements on a given area of land, the capacity for investors to manage across multiple tenures and jurisdictions and resolve disputes efficiently, and the limits of some types of tenure to allow owners to leverage land assets for capital and development purposes such as on some Indigenous tenures. It is also important to understand that while tenure is an important consideration, it is only one of a number of factors that may impede investment. Infrastructure, distance to market, land values and terms of trade all have significant weight in investment decisions.

Table 13.3: Tenure-related impediments to investment as they relate to different sectors and interests.

Impediments		Frequency	Impact
Mining	Delays converting and establishing extraction permits	H	M
	Negotiation of native title agreements and access	H	M
	Inconsistent water pricing regimes and securing water access	H	M
	Negotiating single projects across complex multiple tenures	M	M
	The non-tax-exempt status of native title payments	M	M
Pastoral and agriculture	Poor flexibility to diversify and realign boundaries	H	H
	Uncertainty with lease renewal processes/term security	H	H
	Lease rental policy not aligned to land productivity	M	H
	Native title 'Future Act' triggers are unclear/ third-party respondent funding	H	H
	Multiple tenures and limitations on who can hold a lease	M	M
	Insecurity due to exploration and mining rights	M	M
	Limited system of vendor disclosure of government land interests	L	L
Conservation and ecosystem services	Some pastoral lease conditions inhibit conservation	H	M
	Costs, restrictions and uncertainties to change lease conditions	M	M
	Legislative inconsistency on carbon rights between jurisdictions	L	M
	Resumption of rights and issuing of third party rights on Nature Refuges	L	H
Water	Nascent status of National Water Initiative–compliant water plans	H	L
	Unresolved Indigenous rights with respect to water	M	L
	Cross-basin trading can be inconsistent with Indigenous values	L	L
	Inadequate water data and mapping	M	M

Impediments	Frequency	Impact	
Traditional owners and Indigenous home ownership	Unresolved native title and other land and sea claims	H	H
	Lack of finance leveraging capacity on tenures	H	H
	Lack of guarantee for mortgaging associated with inalienability	H	H
	Uncertain process for government-leasing of native title lands	M	H
	Insufficient or crude registration of Indigenous tenures	L	L

Note: H = High, M = Medium and L = Low.

Source: JCU and CSIRO (2013).

New Directions in Tenure Management

The case for improving tenure arrangements in Northern Australia is compelling, but the challenge in doing so is substantial, requiring significant cross-jurisdictional cooperation and national investment in research and development. It will not happen quickly. JCU and CSIRO's (2013) report to the NAMF proposed that efforts to reduce impediments to investment and development in Northern Australia might be pursued in three distinct ways. The first is attending to tenure complexity through administrative or legislative reform. This could involve supporting collaborative research and policy development partnerships on critical issues of investment and financing on Indigenous tenures, developing consistent principles to guide tenure reviews in the different jurisdictions and improving the quality and accessibility of tenure-related data for northern regions. The second main pathway involves improving the efficiency of development assessment and regulation, including clarifying major project assessment responsibilities between jurisdictions, better resourced negotiation and streamlined administration of assessment processes and resources to assist with tenure-resolution processes that arise following project approval. The third main pathway could focus on actions to improve the effectiveness of land and resource (including water) planning so that broader 'regional' - or 'landscape' - level signals exist about the preferred infrastructure and resource use futures for different northern regions. Such planning would provide the broader context in which local-level conflicts over tenure can be resolved.

Tenure reform in the north, however, must preserve the rights of and create opportunities for the north's traditional owners. Tenure is implicated in the ongoing social and economic disadvantage suffered by Indigenous people. Indigenous-led tenure reform on Indigenous tenures, therefore, has a role to play in ameliorating this situation. Finding the means by which traditional owners can leverage their land assets to raise capital for social and economic development offers great national and local benefit. However, this needs to be able to accommodate informed consent and the inalienability of title. In considering these issues (see also NAILSMA, 2013), support is required to progress policy options which will have general applicability to traditional owners across Northern Australia. Such work could focus on:

- progressively resolving ongoing native title/land claim issues and water rights
- supporting and resourcing the capacity of traditional owners to develop country-based/land use planning across their estate, township-based land use planning and wealth generation strategies
- exploring further the most appropriate tenure and financial mechanisms for facilitating investment leverage (within Indigenous land estates)
- supporting traditional owners to explore new and innovative governance models for managing aspirational/country-based planning and 'wealth funds' emerging from economic development
- exploring some form of Northern Australian 'guarantee or trust fund' to support traditional owners with sound business investment projects to secure commercial finance, funded either from amendment to existing or new government funds, private sector investment or innovative investment of local traditional owner-based sovereign wealth funds at the local scale
- pan-northern partnering with lending institutions to build investment confidence.

Given the complexity and diversity that exists within land tenure arrangements in Northern Australia described above, it would be understandable to presume the goals of efficiency and consistency are paramount in the quest for improving opportunities for investment. However, many of the most significant gains in terms of improving investor certainty and improving development outcomes for northern enterprises and communities will come from engaging with this complexity in constructive and more informed ways that recognise the unique mix of land uses, resources, rights and interests in northern lands.

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