

## **‘THE AUSTRALIAN DREAM’: IS ORDINARY FREEHOLD THE LAST AND BEST HOME-OWNERSHIP OPTION FOR TORRES STRAIT ISLANDERS?**

JULIA MAURUS\*

### **I INTRODUCTION**

From 1 January 2015, trustees of Aboriginal and Torres Strait Islander land in Queensland have had the option of making available ordinary freehold land title (‘freehold option’). In order to grant freehold title in these remote communities, where land is held communally in trust, native title must be extinguished.

A key objective of introducing the freehold option in Queensland was to make ‘the Australian dream’ of home ownership possible for Indigenous Australians living on trust lands.<sup>1</sup> But, while a statutory model for the provision of ordinary freehold as an option in Indigenous communities is a Queensland first,<sup>2</sup> ordinary freehold is not the only way (or necessarily an effective way) to achieve home ownership and support economic development.

Introducing ordinary freehold into remote Indigenous communities is a significant legal, political and cultural step given that it requires the extinguishment of hard-won native title.<sup>3</sup> It is therefore important to consider whether Queensland’s freehold option is actually capable of delivering the home-ownership outcomes that Indigenous communities seek, and whether, considering

---

\* Julia Maurus LLB(Hons) BA(Media&Comm) LLM. The author pays her respects to Torres Strait Islander peoples and acknowledges elders past, present and emerging. The author thanks Marcelle Burns, Pre-Doctoral Fellow at the University of New England, for supervising an earlier version of this article; and Torres Strait Island Regional Council for its support and contributions to this research project. Opinions expressed in this article are the author’s personal opinions only.

1 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1432–6 (Andrew Cripps).

2 Explanatory Notes, Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld) 18. Ordinary freehold has previously been made available in part of Hope Vale, called Hope Valley Estate, prior to the introduction of the statutory ordinary freehold model discussed in this article: see Indigenous Business Australia, ‘On Solid Ground’ (2014) 13 *Inspire* <<http://www.iba.gov.au/article/solid-ground/>>; Department of Prime Minister and Cabinet (Cth), *First Homeowner in Hope Valley Estate* (18 Nov 2013) <<http://www.indigenous.gov.au/news-and-media/stories/first-homeowner-hope-valley-estate>>.

3 See Anthony Templeton, ‘Native Freehold Titles Hit the Wall’, *The Sunday Mail* (Brisbane), 28 August 2016, 33.

other options available, ordinary freehold is necessary or desirable.<sup>4</sup> That is the aim of this article.

Using the outer Torres Strait Islands as a case study, this article discusses the freehold model adopted in Queensland and its potential implications for traditional land owners ('TOs'),<sup>5</sup> trustees, government, registered native title bodies corporate ('RNTBCs'), those with other interests in land, and the Torres Strait Islander community at large. The freehold option is situated in the context of parallel policy directions at the State and Commonwealth government levels: the former aimed at reducing the economic dependence of Indigenous local governments on the State, and the latter (exemplified in the *White Paper on Developing Northern Australia*)<sup>6</sup> directed at alleviating the burden of social housing on the public purse by facilitating land tenure simplification and economic development of remote communities. As Galloway observes, the Australian government's promotion of tenure 'simplification' tends to favour economic efficiency over consideration of traditional rights and interests, while tenure normalisation necessitates the removal of Indigenous communal title and results in the loss of the cultural value attaching to the land in question.<sup>7</sup>

Recent consultations in the Torres Strait, and a history of home-ownership applications to local government, demonstrate a strong desire on the part of many Torres Strait Islanders to own their own homes.<sup>8</sup> To date, these aspirations have largely gone unfulfilled. This article considers the home-ownership options presently available in the Torres Strait and identifies the reasons some may favour freeholding land while others may oppose it. A central issue is the value that Indigenous persons place on the legal concept of 'native title' and whether retaining it is considered essential to achieving aspirations at an individual, community and regional level.

This article argues that, although the complexity of land law in the region poses barriers that may make the 'normalisation' of land tenure seem like the best (or only) option for private control of land, the freehold option faces administrative and legal hurdles of its own, and does not address the fundamental challenges of

4 See David Ross, *Opinion Piece: Communal Title No Obstacle for Aboriginal Home Ownership* (11 February 2013) Central Land Council <<http://www.clc.org.au/media-releases/article/opinion-piece-communal-title-no-obstacle-for-aboriginal-home-ownership>>.

5 The term 'traditional owner' is used in this article to mean the individual person who, under Torres Strait Islander customary law, has the right to be consulted and make decisions in matters concerning a particular area of land or water in the Torres Strait. As explained in Part II, the author's understanding is that the term 'traditional owner' has a culturally specific meaning in the Torres Strait which is used restrictively and can be distinguished from broader definitions adopted elsewhere.

6 Australian Government, 'Our North, Our Future: White Paper on Developing Northern Australia' (2015) <<http://northernaustralia.gov.au/files/files/NAWP-FullReport.pdf>> ('*White Paper*').

7 See Kate Galloway, 'Indigenous Dispossession in the 21<sup>st</sup> Century: The Northern Frontier' (2015) 40 *Alternative Law Journal* 28 ('Indigenous Dispossession in the 21<sup>st</sup> Century').

8 See the figures provided in Part III as to the number of applications made for home-ownership leases in the Torres Strait. The author acknowledges that argument exists over whether home ownership is a worthwhile objective in remote Indigenous communities, given the issues that these communities face (issues that are discussed in Part V). That question is outside the scope of this article, which assumes that it is desirable to increase home ownership in the Torres Strait, and consequently reduce the percentage of social housing. Both government policy and community sentiment appear to favour increasing private home ownership.

remote home ownership. It concludes that alternative mechanisms, such as holistic tenure resolution projects or 99-year home-ownership leases supported by subsidies and grants, could achieve desired outcomes while preserving native title rights and interests, provided sufficient support mechanisms are in place to ensure the sustainability of home-ownership tenure.

## II QUEENSLAND'S FREEHOLD OPTION

### A Statutory Model

The Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld) (*Freehold Bill*)<sup>9</sup> was introduced into Queensland's Parliament in May 2014. A parliamentary inquiry was undertaken and a report was subsequently tabled in August 2014.<sup>10</sup>

A key purpose of the *Freehold Bill* was to:

implement the Queensland Government's commitment to ensure that Aboriginal and Torres Strait Islander communities have the same access to freehold title as available throughout Queensland and to remove barriers to economic development in these communities.<sup>11</sup>

The Explanatory Notes state that communal tenure arrangements in Queensland's Aboriginal and Torres Strait Islander communities:

mean that ordinary freehold title is not available to Aboriginal people and Torres Strait Islanders wishing to own their own homes and pursue commercial interests in their communities.<sup>12</sup>

Thus, the government considered the *Freehold Bill* 'necessary to ensure that Aboriginal people and Torres Strait Islanders can own their own homes and pursue commercial interests in the same way as other citizens.'<sup>13</sup>

The *Freehold Bill* was adopted on 5 September 2014 and the freehold option provisions came into force on 1 January 2015.<sup>14</sup> The *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014 (Qld)* (*Freehold Act*) created a voluntary, trustee-driven process to make ordinary freehold available in Queensland's 34 Aboriginal and Torres Strait Islander trust communities, where the trustee for the relevant land is 'reasonably satisfied it is

---

9 The text of the Bill is available at <<https://www.legislation.qld.gov.au/view/html/bill.first/bill-2014-1770/lh>>.

10 Agriculture, Resources and Environment Committee, Queensland Parliament, *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014: Report No 44 (2014)* (*Committee Report*), available at <<https://www.parliament.qld.gov.au/work-of-committees/former-committees/AREC/inquiries/past-inquiries/23-ATSIOLA>>.

11 Explanatory Notes, *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld)* 2.

12 *Ibid.*

13 *Ibid.*

14 *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014 (Qld)* s 2(1).

appropriate' to do so.<sup>15</sup> Freehold would replace the existing (trust) tenure for the relevant part of the trust land.<sup>16</sup>

To make ordinary freehold available, the trustee must undertake consultation with the community of trust beneficiaries.<sup>17</sup> The trustee may then, by resolution, make a proposed Freehold Instrument,<sup>18</sup> which identifies the land that will be made available for ordinary freehold<sup>19</sup> and prescribes the community consultation process, allocation process, the eligibility criteria, the sale price of available land and the costs to be recovered from the sale price.<sup>20</sup> The Freehold Instrument must be approved by the Minister and must be included in the local government's planning scheme (following consultation by the local government)<sup>21</sup> in order to have effect.<sup>22</sup> The trustee may then seek applications in accordance with the Freehold Instrument.

The following persons are eligible to apply for a grant of ordinary freehold:

- (a) a Torres Strait Islander or Aboriginal person; or
- (b) the spouse or former spouse of—
  - (i) a person mentioned in paragraph (a); or
  - (ii) a Torres Strait Islander or Aboriginal person who is deceased.<sup>23</sup>

The trustee's Freehold Instrument may further restrict the eligibility criteria.

The *Freehold Act* provides for a 'model' process and a 'non-model' (or 'open') process. Under the 'non-model' process, the trustee must appoint an 'appropriately qualified and independent' probity advisor, to monitor the allocation process<sup>24</sup> and certify that the allocation process was undertaken correctly (whether by auction, ballot or tender).<sup>25</sup> The non-model process is open to any eligible person.

By contrast, the 'model' process further restricts eligibility to any person who is an 'interest holder' for the relevant freehold option land.<sup>26</sup> An interest holder is a person who holds a 'Katter' lease or Katter lease entitlement (discussed at Part III(A) below), a registered lease or sublease under the *Torres Strait Islander Land Act 1991* (Qld) ('*TSILA*') or *Land Act 1994* (Qld), or a residential tenancy agreement for a social house on the land.<sup>27</sup>

Freehold option land must have a lot on plan description and road access, and native title must be addressed before ordinary freehold can be granted.<sup>28</sup> Addressing native title requires either prior extinguishment of native title or the

---

15 *TSILA* ('*TSILA*') s 28I(2).

16 *TSILA* s 28ZI.

17 *TSILA* s 28I.

18 *TSILA* s 28D.

19 *TSILA* s 28D(2).

20 *TSILA* s 28D(6).

21 *TSILA* ss 28K, 28H(2).

22 *TSILA* ss 28J(2)(a), 28L.

23 *TSILA* s 28B (definition of 'eligible person').

24 *TSILA* s 28ZB.

25 *TSILA* ss 28C(4)(a)(iii), 28ZB, 28ZE, 28B (definition of 'allocation method').

26 *TSILA* ss 28D(4), 28Q; *Torres Strait Islander Land Regulation 2011* (Qld) s 35B.

27 *TSILA* s 28B (definition of 'interest holder'). The definition also includes the State or the Commonwealth where a right to occupy or use the land exists.

28 *TSILA* s 28C(4).

surrender of native title rights and interests through a negotiated Indigenous Land Use Agreement ('ILUA'). If there is a social housing dwelling on the relevant land, the application for ordinary freehold can only be approved if the housing chief executive consents and the trustee applies an agreed valuation methodology.<sup>29</sup>

Once the 'model' or 'non-model' process is completed in accordance with the Freehold Instrument, the trustee can apply to the chief executive for the relevant land to be granted in fee simple to the successful applicant.<sup>30</sup> Although eligibility for the initial grant of freehold is limited under the *Freehold Act*, once freehold title has been granted, that title has the same characteristics as ordinary freehold across Australia. In particular, it is alienable on the open market and can be used as collateral for a mortgage.

Notably, ordinary freehold can only be granted on 'urban' land, that is, land in the township area designated in the planning scheme for the relevant local government area.<sup>31</sup> This restriction was created to prevent large tracts of land outside communities from being converted to ordinary freehold title.<sup>32</sup>

## B Policy Choices

Several observations can be made of the adopted framework for the freehold option.

### 1 Limited Application

Firstly, as Terrill observes, the freehold option is structured in such a way that, in practice, the only land likely to be converted to ordinary freehold is current residential lots, making the freehold option a community-level alternative to 99-year home-ownership leases and the plagued Katter lease process (discussed at Part III below).<sup>33</sup> Given that most dwellings in the Torres Strait are social houses,<sup>34</sup> the 'interest holders' for any community are likely to be largely made up of those who hold residential tenancy agreements.

### 2 The Trustee's Role

Secondly, the freehold option process is driven by trustees and local governments, and the implementation of ordinary freehold therefore depends not only on the trustee's initiative and community appetite for ordinary freehold but also on the ability of trustees and local government bodies to navigate the statutory process.

---

29 *TSILA* s 28R.

30 *TSILA* ss 28ZF, 28C.

31 *TSILA* s 28B (definitions of 'freehold option land' and 'urban area').

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

33 Leon Terrill, 'Converting Aboriginal and Torres Strait Islander Land in Queensland into Ordinary Freehold' (2015) 37 *Sydney Law Review* 519, 529, 531.

34 *Committee Report*, above n 10, 3; Torres Strait Island Regional Council, 'Annual Report 2016–2017', 8.

Trustees are notoriously under-resourced,<sup>35</sup> yet the Government's policy is that the freehold process is self-directed and 'self-funding'.<sup>36</sup> The *Committee Report* recommended that the Department implement:

an education and engagement program [with elders, traditional owners, Native title bodies and councils] across all 34 [trust] communities ... to increase knowledge and understanding about the objectives of freehold and the freehold model ...<sup>37</sup>

This recommendation was not adopted,<sup>38</sup> meaning that, aside from the freehold pilot project (discussed below), trustees and Indigenous local governments are left to their own devices and some constituents may be completely unaware of the freehold option.

Engaging with the freehold model demands upfront investment by trustees to fund community consultation and sitting fees for formal consultations with RNTBCs, as well as the technical capacity to satisfy the legislative requirements.<sup>39</sup> The Freehold Policy adopted by the trustee must set a sale price and any cost recovery fee, without knowing how many applications will be made or how many freehold titles will be finalised.<sup>40</sup> For the non-model freehold process, the trustee must have the financial capacity to engage a probity advisor, recovering these costs from applicants. Trustees deciding whether to make freehold available should also consider whether the process is actually affordable for trust beneficiaries, and whether appropriate support mechanisms are in place to assist those who obtain freehold to understand and manage their new rights and obligations.<sup>41</sup> The trustee's role therefore includes elements of risk assessment.

Following the *Freehold Act's* entry into force, the Department of Natural Resources and Mines ('DNRM') administered a freehold pilot project. The purpose of the pilot project was to assist trustees of pilot communities (for example, through workshops, process planning and participation in community meetings) to undertake the process to assess whether it is appropriate to make freehold available in their communities. A funding pool of \$150 000 (increased

---

35 See *Committee Report*, above n 10, 12; Torres Strait Island Regional Council, Submission No 1 to Agriculture, Resources and Environment Committee, Queensland Parliament, *Inquiry into Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014*, 13 June 2014 ('*TSIRC Submission*'), available at <<https://www.parliament.qld.gov.au/documents/committees/AREC/2014/23-ATSILOLA/submissions/001-TSIRC.pdf>>, 3–4.

36 *Committee Report*, above n 10, 49 (Appendix C), cf 66; Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1432 (Andrew Cripps); see Terrill, 'Converting Land into Ordinary Freehold', above n 33, 529–30.

37 *Committee Report*, above n 10, vi (Recommendation 2).

38 Queensland, *Queensland Government Response to Agriculture, Resources and Environment Committee Report No 44 on the Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014*, Parl Paper No 5787 (2014) 1 ('*Queensland Government Response*').

39 Terrill, 'Converting Land into Ordinary Freehold', above n 33, 530; *TSIRC Submission*, above n 35, letter dated 28 February 2014, 2.

40 See Mark Geritz, Tosin Aro and Prue Harvey, *Freehold Title within Indigenous Communities: The Evolution of Native Title?* (15 May 2014) Clayton Utz <<https://www.claytonutz.com/knowledge/2014/may/freehold-title-within-indigenous-communities-the-evolution-of-native-title>>; *TSIRC Submission*, above n 35, letter dated 28 February 2014, 2.

41 Cf *TSILA* s 28D(6)(f)–(h).

from \$75 000) was made available for the purpose of the freehold pilot project.<sup>42</sup> Therefore, aside from pro forma guides and template ILUAs, trustees that did not participate in the pilot project do not receive any resource support or financial assistance to empower them to provide the freehold option to their communities.

### 3 *Traditional Owners Are Not ‘Interest Holders’*

Thirdly, the definition of ‘interest holder’ is significant because it does not include ‘traditional owners’ or ‘common law native title holders’.<sup>43</sup> This policy choice was made because of the legal and cultural difficulty of defining these terms.<sup>44</sup> Defining an ‘interest holder’ without reference to ‘traditional owners’ or ‘common law native title holders’ has significant ramifications in the Torres Strait context. This is discussed further at Part II(C) below.

### 4 *Indigenous Corporations Are Ineligible*

A final point to note is that Indigenous corporations are not eligible for the initial grant of ordinary freehold title. The *Committee Report* recommended that ‘community-based Indigenous-owned corporations ... be eligible for the grant of freehold ... where there are no interest holders’,<sup>45</sup> but this recommendation was not adopted because ‘[a] number of stakeholders rejected any entities other than individuals as being entitled to obtain freehold.’<sup>46</sup> Thus while a family or clan group could set up an Indigenous corporation for the purpose of holding the title to some portion of their traditional country, the initial grant would have to be to an eligible natural person (individually or jointly). Nor can any RNTBC apply for an initial grant.<sup>47</sup>

In practice, given the subdivision of townships, previous extinguishment for public works, and the freehold model being restricted to townships, it is unlikely that a family or clan group could gain legal title to the entirety of its traditional country through the freehold option. More likely, a TO could obtain ordinary freehold title over the block(s) where the TO and/or their immediate family lives, and would retain native title rights and interests over the rest of his traditional land where native title had not been extinguished.

---

42 Explanatory Notes, Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld) 11; *Queensland Government Response*, above n 38, 4.

43 See *Committee Report*, above n 10, 18.

44 See Evidence to Agriculture, Resources and Environment Committee, Queensland Parliament, Hammond Island, 25 July 2014, 7 (Ken Carse); *Queensland Government Response*, above n 38, 5–6.

45 *Committee Report*, above n 10, vi (Recommendation 4).

46 Explanatory Notes, Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld) 17; *Queensland Government Response*, above n 38, 2–3; Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1434 (Andrew Cripps).

47 An RNTBC can hold land in trust as Torres Strait Islander (inalienable, communal) freehold. This is discussed at Part II(C) below.

### C Torres Strait Context

Figure 1: Map of the Torres Strait Region<sup>48</sup>



*Ailan Lore* and *Ailan Kastom* (Torres Strait Islander customary law) delineates clan and individual ownership rights to the land and sea country of the Torres Strait.<sup>49</sup> The continuing operation of customary law is recognised (to an extent) as ‘native title’, although the region is subject to government authority and overlaid with Crown tenure grants such as reserves, trusts and leases.<sup>50</sup> Native title endures across almost all of the Torres Strait.<sup>51</sup>

The Torres Strait Island Regional Council (‘Council’) is the trustee of 13 Deeds of Grant in Trust (‘DOGIT’) across the outer Torres Strait Islands, all of which are subject to a separate native title determination or claim. The Council participated in the freehold pilot program to assess whether it is appropriate to make freehold available in three communities in its local government area.<sup>52</sup> Kiririri

48 Torres Strait Island Regional Council, *Geographical Location and Map* (2016) <<http://webarchive.nla.gov.au/gov/20160303040419/http://www.tsirc.qld.gov.au/our-region/torres-strait/geographical-location-and-map>>.

49 See Evidence to Agriculture, Resources and Environment Committee, Queensland Parliament, Hammond Island, 25 July 2014, 9 (Fred Gela, Mayor, Torres Strait Island Regional Council); *TSILA* s 6.

50 Torres Strait Island Regional Council, *Land Management* (2016) <<http://tsirc.qld.gov.au/our-work/land-management>>.

51 Torres Strait Island Regional Council, *Native Title* (2016) <<http://tsirc.qld.gov.au/our-work/native-title>>.

52 Torres Strait Island Regional Council, ‘Ordinary Meeting: Monday 29 June 2015–Tuesday 30 June 2015’ (Minutes, June 2015) 8–9 <[http://tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/june\\_2015\\_council\\_meeting\\_minutes\\_updated\\_29-09-2015.pdf](http://tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/june_2015_council_meeting_minutes_updated_29-09-2015.pdf)>.



(Hammond Island), the only community where there is an active native title claim;<sup>53</sup> Poruma (Coconut Island); and St Pauls Community at Moa (Banks Island).

There are two communities in outer Torres Strait that are not held in trust by the Council: Mer (Murray Island), which was converted under the *TSILA* from reserve to Torres Strait Islander (inalienable, communal) freehold in 2012, and Badu, which was converted from DOGIT to Torres Strait Islander freehold in 2014. At Mer and Badu, the land is held in trust by the RNTBC for the native title holders.

As Terrill points out, native title aligns to traditional land ownership, while the DOGIT land system in Queensland is a purposive trust held ‘for the benefit of Aboriginal inhabitants’ or ‘for the benefit of Islander inhabitants’ (as the case may be).<sup>54</sup> Thus, in Torres Strait Islander DOGIT communities, ‘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.’<sup>55</sup>

Terrill continues:

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.<sup>56</sup>

The ‘existing balance’ is often in fact a dichotomy of ‘*traditional v historical*’ (or ‘recent’) inhabitancy which leads to ‘heated conflict’.<sup>57</sup> Thus there also exists a tension between the role of the Council (as DOGIT trustee) and the role of an RNTBC, in that they represent differently defined groups of beneficiaries: ‘Islander inhabitants’ and ‘common law native title holders’.

From the parliamentary inquiry into the *Freehold Bill* it is clear that the RNTBC system raises concerns for at least some Torres Strait Islanders. While the *Freehold Act* promotes individuation of title, the native title determinations across the Torres Strait do not presently empower individual common law native title holders.<sup>58</sup> Rather, the Torres Strait determinations identify the Torres Strait Islander people, as a group, who are ‘[t]he persons holding the communal and group rights comprising the native title (“the common law holders”).’<sup>59</sup> Some determinations identify the apical ancestors of today’s common law native title

53 *Pearson Wigness & Ors on behalf of the Kaurareg People #3 v State of Queensland & Ors* FCA file number QUD362/2010 (known as the ‘Kaurareg People #3’ claim).

54 Terrill, ‘Converting Land into Ordinary Freehold’, above n 33, 523; see *TSILA* s 10(1).

55 Terrill, ‘Converting Land into Ordinary Freehold’, above n 33, 523.

56 *Ibid.*

57 Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008) 41 (emphasis in original).

58 See Greg McIntyre, ‘Native Title Is Property’ in Lisa Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 52, 56–7; cf *Native Title Act 1993* (Cth) s 223.

59 See, eg, *Poruma People v Queensland* [2000] FCA 1066 QG 6087, O 2 (Drummond J), which recognised that the Porumalgal (the Poruma people) hold native title in relation to the Poruma determination area. See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 75 (Brennan J).

holders.<sup>60</sup> The RNTBC represents all common law native title holders and is responsible for consulting with them in accordance with customary law.<sup>61</sup>

TOs, in contrast, are the individuals (often the male elder of each family group as determined under traditional laws of inheritance) among the group of common law native title holders who, under Torres Strait Islander customary law, have the right to be consulted and make decisions in matters concerning a particular area of land or water in the Torres Strait.<sup>62</sup>

The RNTBC can provide consent to a proposal that affects native title rights and interests, provided it has consulted and gained consent from the relevant TO.<sup>63</sup> The Australian legal system does not adjudicate matters of customary law, therefore the question of identifying TOs is left to the RNTBC and the common law native title holders. Thus, while the Queensland government acknowledges the importance of the TO system in the Torres Strait,<sup>64</sup> it is for RNTBCs to ensure that TOs are afforded rights consistent with customary law.

As the Council's Mayor, Cr Fred Gela, explained to the parliamentary inquiry, under customary law TOs in the Torres Strait have ultimate authority for their traditional country and complete power to choose to extinguish native title and obtain freehold title.<sup>65</sup> Mayor Gela argued that RNTBCs have a conflict of interest in that they may interpret their mandate to represent the rights and interests of native title holders as a duty to preserve native title by not providing the freehold option to TOs.<sup>66</sup>

On the other hand, some may argue that a TO's exclusive authority is inextricably linked to Torres Strait Islander customary law, and that it is appropriate that the decision-making process for the proposed extinguishment of native title should include all common law native title holders. From this perspective, a TO's decision-making authority would be subject to obligations to consider others with customary interests in the relevant land.<sup>67</sup>

60 See, eg, *Mualgal People v Queensland* [1999] FCA 157 QG 6035, O 2(a) (Drummond J), which defines the common law native title holders with reference to 'the apical Mualgal ancestors at the date of sovereignty in 1872'.

61 *Native Title Act 1993* (Cth) s 58; *Native Title (Prescribed Bodies Corporate) Regulations 1999* reg 8.

62 See generally Evidence to Agriculture, Resources and Environment Committee, Queensland Parliament, Hammond Island, 25 July 2014, 8 (Oliver Gilkerson), 9 (Fred Gela, Mayor, Torres Strait Island Regional Council). These principles were demonstrated in the Ugar Traditional Boundary Resolution Project, discussed in Part VI. It should be noted that there are distinct island groups in the Torres Strait, and that customary law may differ between island groups and individual islands. However, in the author's experience, the exclusive recognition of an individual TO's ultimate authority is consistent across the Torres Strait.

63 See generally Torres Strait Regional Authority, 'Native Title, Indigenous Land Use Agreements, Native Title Representative Bodies and Prescribed Bodies Corporate' (Information Sheet) <[http://www.tsra.gov.au/\\_\\_data/assets/pdf\\_file/0017/2492/Information-Sheet-Native-Title,-ILUAs,-NTRBs-and-PDOC11-204694.pdf](http://www.tsra.gov.au/__data/assets/pdf_file/0017/2492/Information-Sheet-Native-Title,-ILUAs,-NTRBs-and-PDOC11-204694.pdf)>.

64 Evidence to Agriculture, Resources and Environment Committee, Queensland Parliament, Hammond Island, 25 July 2014, 7 (Ken Carse); see also at 8 (Oliver Gilkerson).

65 Ibid 9–10.

66 Ibid.

67 On this point, see Edelman's discussion of the distinction between 'core' and 'contingent' rights, and evidence of 'a "ranking" or "hierarchy" of Indigenous associations to land': David Edelman, 'Broader Native Title Settlements and the Meaning of the Term "Traditional Owners"' (Paper presented at

In the Torres Strait, there is potential for conflict between the interests of individual TOs and common law native title holders as a group. Native title law requires that any such conflict be mediated by the RNTBC and resolved in accordance with customary law.

Equally important in the Torres Strait context is that, as noted above, a TO is not a *prima facie* 'interest holder' under the model freehold process. An interest holder who is not the TO of the relevant land can apply for freehold title but can only obtain freehold if native title has already been extinguished or the TO agrees to extinguish native title. The TO is unlikely to consent to the extinguishment of native title rights and interests in the absence of compensation, and may refuse outright the conversion to ordinary freehold.<sup>68</sup> As Terrill concludes, it is likely that the need to extinguish native title to convert trust land to ordinary freehold 'will be an obstacle to allotment in some communities.'<sup>69</sup>

A TO who is not an interest holder cannot obtain freehold unless the more complicated, non-model freehold process is activated, the TO wins the allocation process, and any interest holder of the relevant land surrenders that interest to enable the TO to obtain freehold.

The Council's Mayor argued that TOs should not be dependent on the collective will (and resource capacity) of the trustee RNTBC.<sup>70</sup> TOs who desire ordinary freehold title but do not have a prescribed legal interest in their own traditional land are disadvantaged in the sense that they must rely on the trustee of the land to make the non-model freehold process available to them. A trustee must choose between the model and non-model freehold processes because there cannot be overlapping Freehold Instruments in place.<sup>71</sup> Trustees are more likely to choose the model freehold process because it is more straightforward.

TOs would also rely on the trustee to adopt a Freehold Policy that limits eligibility for their traditional land<sup>72</sup> so that, under the open process, they would not have to compete with non-TOs to obtain ordinary freehold title for that land.

To address the fact that TOs are not deemed 'interest holders' for the purpose of the freehold option, a Departmental representative suggested that TOs could be identified by way of a registered ILUA, and that this identification could be included as an eligibility criterion for designated land made available for freehold grant.<sup>73</sup> This could perhaps be incorporated into a tenure resolution process (discussed at Part VI below), which would address any disputes over traditional

---

AIATSIS Native Title Conference, Melbourne, 4 June 2009) 5 ff <<http://aiatsis.gov.au/publications/products/broader-native-title-settlements-and-meaning-term-traditional-owners>>. Edelman does not explicitly consider the Torres Strait context, and further research is required to establish whether Edelman's conclusions regarding 'non-core rights holders' are applicable under Torres Strait Islander customary law.

68 *TSIRC Submission*, above n 35, 2–3.

69 Terrill, 'Converting Land into Ordinary Freehold', above n 33, 530.

70 Evidence to Agriculture, Resources and Environment Committee, Queensland Parliament, Hammond Island, 25 July 2014, 9–10 (Fred Gela, Mayor, Torres Strait Island Regional Council).

71 *TSILA* s 28E.

72 See *Queensland Government Response*, above n 38, 6.

73 Evidence to Agriculture, Resources and Environment Committee, Queensland Parliament, Hammond Island, 25 July 2014, 7 (Ken Carse).

ownership. However, at present, a TO whose traditional rights are not disputed has no way of activating the voluntary freehold option process, despite that TO's ultimate authority under customary law. The trustee has legal responsibility for the freehold option.

#### D Where to for Ordinary Freehold?

Although the freehold model is voluntary and highly regulated, it has the potential to bring about the conversion of native title lands (held in trust) to individuated, alienable title in Queensland's remote Indigenous townships.

The *White Paper* states equivocally that:

Long term, tradeable rights should be extended to Indigenous Australians who wish to own their own homes.

Ordinary freehold title is the most widely understood form of land tenure among individuals, business and lending institutions across Australia. Indigenous land should not be regarded as an obstacle to home ownership, especially when home ownership is consistent with community values, and where financing is available.<sup>74</sup>

The Australian government clearly supports the prospect of converting traditional land to ordinary freehold title, however it emphasises the voluntary nature of this process. Ordinary freehold may indeed be the Australian government's preference because this form of title already exists widely and is supported by an efficient legal framework. However, without comparing this model (and its perceived advantages and disadvantages) to other home-ownership options, it would be premature to assess whether ordinary freehold is the last and best home-ownership option for Torres Strait Islanders.<sup>75</sup> Existing home-ownership options already offer long-term, tradeable rights, but more is required to facilitate sustainable home ownership and economic development in remote communities.

### III EXISTING HOME-OWNERSHIP OPTIONS

Before the freehold option was introduced, legislative arrangements were already in place to provide Torres Strait Islanders with home-ownership options. The earliest model was the perpetual lease (created in 1985),<sup>76</sup> with the framework for 99-year home-ownership leases introduced in 2008.<sup>77</sup> This part explores existing home-ownership options.

First, however, it is critical to note that one of the major obstacles to home ownership in the Torres Strait has nothing to do with the nature of the land

---

<sup>74</sup> *White Paper*, above n 6, 29; see also at 27.

<sup>75</sup> See Terrill, 'Converting Land into Ordinary Freehold', above n 33, 535.

<sup>76</sup> *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld).

<sup>77</sup> For the current equivalent provisions, see *TSILA* ss 85–6. The original 99-year lease provisions were inserted by the *Aboriginal and Torres Strait Islander Land Amendment Act 2008* (Qld) s 85.

tenure in place but rather with land administration:<sup>78</sup> only in the last two years have cadastral surveys and planning schemes been developed for outer Torres Strait Island communities.<sup>79</sup> As the *White Paper* notes, land administration arrangements such as surveys and zoning maps ‘are fundamental to economic development.’<sup>80</sup> Previously, a single lot-on-plan description covered the vast majority of an island,<sup>81</sup> meaning that any trustee lease required investment in an allotment survey of the particular land in question, as well as a development application for reconfiguration of the lot into a subdivision. This is aside from the requirement to register an ILUA to validate the future act (the tenure grant).<sup>82</sup>

The Torres Strait Community Survey Program, run by the Department of Aboriginal and Torres Strait Islander Partnerships in partnership with the Council, has invested in surveying every existing allotment,<sup>83</sup> while the Council’s *Zenadth Kes Planning Scheme* has set township limits following consultation with each community.<sup>84</sup> Significantly, this removes a step and a substantial expense involved in obtaining any registrable interest in land, whether leasehold or freehold. Thus, it cannot be said that the lack of home ownership in the Torres Strait is entirely because of the historical land tenure arrangements. While there remain barriers to home ownership in remote communities (as discussed in Part V), it is promising to see that administrative impediments are being removed. These developments mean that home-ownership aspirations are several steps closer to being fulfilled.

## A Katter Leases

### 1 Legislative Background

As Moran et al explain, the species of perpetual lease created under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) (*LHA*) is ‘widely known as the “Katter leases”, after the Hon. Robert Katter who was the

78 See Kate Galloway, ‘The Cost of “Regular” Freehold over Indigenous Land in Queensland’ on Kate Galloway, *Curly* (5 October 2014) <<https://katgallow.blogspot.com.au/2014/10/>> (‘The Cost of “Regular” Freehold’).

79 See Torres Strait Island Regional Council, *Zenadth Kes Planning Scheme*, 11 July 2016; Torres Strait Island Regional Council, ‘Ordinary Meeting: Tuesday 28 June 2016–Wednesday 29 June 2016’ (Minutes, June 2016) 15 <[http://www.tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/minutes\\_of\\_the\\_june\\_2016\\_ordinary\\_meeting\\_kirriri\\_final.pdf](http://www.tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/minutes_of_the_june_2016_ordinary_meeting_kirriri_final.pdf)> (‘June Minutes’). The first Community Survey Plan (SP270859 for Warraber) was registered on 29 July 2016 (registered copy accessed with the permission of Torres Strait Island Regional Council); Torres Strait Island Regional Council, *Community Survey Program Database* (2017) (accessed with the permission of Torres Strait Island Regional Council).

80 *White Paper*, above n 6, 28; see also Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1434 (Andrew Cripps).

81 See *Land Act 1994* (Qld) s 41, cf s 34P. See, eg, *Dauan People v Queensland* [2000] FCA 1064 QG 6248 (1998), O 1 (Drummond J). The Dauan Community Survey Plan registered on 28 April 2017 replaced the lot that covered the majority of the island: see SP270872 ‘Plan of Lots 1–9 and 13–77 cancelling Lot 9 on Plan TS169’ (accessed with the permission of Torres Strait Island Regional Council).

82 *Native Title Act 1993* (Cth) s 24AA.

83 Department of Aboriginal and Torres Strait Islander Partnerships (Qld), ‘Annual Report 2014–2015’ (2015) 33–4 <[www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2015/5515T1216.pdf](http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2015/5515T1216.pdf)>.

84 See Torres Strait Island Regional Council, *Zenadth Kes Planning Scheme*, 11 July 2016; Torres Strait Island Regional Council, ‘June Minutes’, above n 79, 15.

Minister for Aboriginal and Islander Advancement in Queensland who conceptualised and implemented the policy and scheme.<sup>85</sup>

As the Queensland Government states:

[u]nder the then [*LHA*], residents of Indigenous deed of grant in trust and reserve communities could apply for the grant of perpetual leases for residential purposes or special leases for commercial purposes.<sup>86</sup>

This home-ownership option is considered first because it is the most 'active' option in the sense that there exist numerous lease applications and granted leases across Queensland's remote Indigenous communities. However, it is also a 'dead' option in the sense that no new applications can be made for Katter leases. In 1991, the *TSILA* was introduced, 'creat[ing] issues for existing lease applications and also mean[ing] that no new applications could be made.'<sup>87</sup> The *LHA* has seen a disastrous 30 years of administrative complexity, inefficacy and eventual legislative replacement.

Under the *LHA*, a 'qualified person'<sup>88</sup> (an adult Aboriginal or Torres Strait Islander resident of a trust community) could apply to the local trustee council for a perpetual lease of an identified area of land (unless that land was occupied by another qualified person or by the State or the Commonwealth).<sup>89</sup> The trustee was required to decide each application, having regard to community interests, social and economic development and security of tenure for qualified persons occupying land.<sup>90</sup>

An approved applicant was entitled to be granted a lease in perpetuity for the relevant land.<sup>91</sup> Peppercorn annual rent is payable for a Katter lease<sup>92</sup> and any dwelling or structural improvement on the land can be purchased by the lessee at a price agreed with the owner and approved by the Governor in Council<sup>93</sup> (in the Torres Strait, the house cost is a peppercorn).<sup>94</sup> A Katter lease can be transferred to another qualified person and can be mortgaged,<sup>95</sup> though a mortgagee who takes

85 Mark Moran et al, 'Indigenous Home Ownership and Community Title Land: A Preliminary Household Survey' (2002) 20 *Urban Policy and Research* 357, 360.

86 Queensland Government, *Land Holding Act Leases: Background to the Land Holding Act 2013* (16 December 2016) <<http://www.qld.gov.au/atsi/environment-land-use-native-title/background-land-holding-act/>>.

87 Ibid; Queensland Government, *Land Holding Act Leases: Old Leases and Applications 1985 to 1991* (25 September 2015) <<http://www.qld.gov.au/atsi/environment-land-use-native-title/old-leases-applications/>>; *LHA* s 33A; *Aboriginal and Torres Strait Islander Land Holding Act 2013* (Qld) s 9(2)(b).

88 *LHA* s 4 (definition of 'qualified person'); see also s 28.

89 *LHA* s 5.

90 *LHA* s 6(3).

91 *LHA* s 9.

92 *LHA* ss 12(1)(c), 16; *Aboriginal and Torres Strait Islander Land Holding Act 2013* (Qld) s 66(3).

93 *LHA* s 15(1).

94 Correspondence between Torres Strait Island Regional Council, the Queensland Department of Housing and Public Works, and the Queensland Department of Natural Resources and Mines regarding 'Sale Price for Social Housing Subject to Lease Arrangements under the *Aborigines and Torres Strait Islander (Land Holding) Act 1985*', 16 February 2015 to 11 August 2015 (accessed with the permission of Torres Strait Island Regional Council).

95 *LHA* s 18.

possession can only dispose of the lease to another qualified person.<sup>96</sup> This means the land remains in a closed, Aboriginal and Torres Strait Islander market.

The *LHA* was repealed in 2014 by the *Aboriginal and Torres Strait Islander Land Holding Act 2013* (Qld) (*LHA 2013*),<sup>97</sup> which was introduced to ‘provid[e] the tools to seek to finalise leasing matters outstanding under the 1985 Land Holding Act.’<sup>98</sup> Current (granted) Katter leases continue in force<sup>99</sup> and all Katter lease land is vested in the trustee.<sup>100</sup>

The *LHA 2013* provides for ‘the identification of outstanding lease entitlements’; ‘consultation, negotiation and agreement aimed at resolving practical obstacles to satisfying lease entitlements’; and resolving boundary problems for some leases already granted.<sup>101</sup> The main objects of the *LHA 2013* provide inter alia that, where the grant of a Katter lease is delayed due to identified issues, the purpose of deferring a lease grant:

is not to diminish a *right* to the grant of the lease, but is intended–

- (a) to allow the resolution of the obstacles by agreement or a decision of the Land Court; and
- (b) to ensure the grant, *when made*, is not affected by the obstacles in a way that would otherwise happen ...<sup>102</sup>

This purposive language affirms the status of a Katter lease entitlement as a legal right and indicates a legislative intention that a Katter lease be granted to satisfy each entitlement.

If there are no ‘practical obstacles’ to the grant of a particular Katter lease, the Minister may grant a perpetual lease to satisfy the lease entitlement.<sup>103</sup> The definition of ‘practical obstacles’ is non-exhaustive and, in the Torres Strait context, disputed (as discussed below). Practical obstacles include any issue relating to clearly identifying the lease entitlement land, resolving ownership of improvements on the land, or competing interests in the land.<sup>104</sup> It is for the Minister to decide whether there are any practical obstacles to the granting of a Katter lease.<sup>105</sup> If the Minister decides that there are practical obstacles, this decision may be challenged, and the Minister must decide whether to reverse the decision.<sup>106</sup> If the Minister refuses to reverse the decision, an appeal can be brought before and determined by the Land Court.<sup>107</sup>

Likewise, a person with a lease entitlement may apply to the Minister to proceed immediately with the grant of the lease if no practical obstacles have been

96 *LHA* s 19.

97 See *LHA 2013* s 94, repealing *LHA*.

98 Queensland Government, *Land Holding Act Leases: Background to the Land Holding Act 2013*, above n 86; see also *LHA 2013* s 3.

99 *LHA 2013* s 12(3).

100 *LHA 2013* s 11; see also s 50(1).

101 *LHA 2013* s 4(1).

102 *LHA 2013* s 4(3) (emphasis added).

103 *LHA 2013* ss 34, 35(2)(a).

104 *LHA 2013* s 29.

105 *LHA 2013* s 31.

106 *LHA 2013* s 32(2).

107 *LHA 2013* s 33.

identified,<sup>108</sup> and there is an avenue of appeal to the Land Court.<sup>109</sup> Thus, a decision of the Land Court can override the Minister's general discretion in assessing whether practical obstacles exist and deciding when to grant Katter leases.

The *LHA 2013* also makes provision for Katter lease applicants (and their successors) who were given by the trustee to understand that their applications were approved but whose applications were not lawfully approved under the *LHA*. Those applicants (and their successors) who 'acted in reliance' on the purported approval may be given a 'hardship certificate', the effect of which is that, for the purpose of the applicant (or successor) obtaining a 99-year home-ownership lease, the value of the lease land is taken to be nil.<sup>110</sup>

## 2 Status of Katter Leases in the Torres Strait

In the Torres Strait, 354 Katter lease applications were made between 1986 and 1990.<sup>111</sup> The status of these applications is summarised in Table 1.

Of the 354 applications, to date 61 have been granted. There are 177 valid lease entitlements yet to be granted. The remaining 116 applications were found to be invalid because of non-compliance with *LHA* provisions.

To resolve the 177 outstanding lease entitlements, DNRM must first issue notices to identify the entitlement holders;<sup>112</sup> consult with individual entitlement holders (or their beneficiaries) to confirm the desire to obtain a Katter lease;<sup>113</sup> identify and address any practical obstacles;<sup>114</sup> ensure native title is addressed<sup>115</sup> and a survey plan is registered;<sup>116</sup> and (through the Department of Housing and Public Works (DHPW)) assess the condition of houses and undertake any repairs and upgrades to bring the houses to a 'fair condition'.<sup>117</sup> The lease may then be granted by the State. The leased land continues to form part of the relevant trust area. It is unclear how long it will take to resolve all Katter lease entitlements in the Torres Strait.

---

108 *LHA 2013* s 36.

109 *LHA 2013* s 38.

110 *LHA 2013* s 26; *TSILA* s 91(4).

111 Torres Strait Island Regional Council, 'LHA Lease Entitlements Register' (3 September 2014) (accessed with the permission of Torres Strait Island Regional Council); Email from Julie Brogan (Manager, Aboriginal and Torres Strait Islander Land Acts Branch, Aboriginal and Torres Strait Islander Land Services, Queensland Government Department of Natural Resources and Mines) to the author, 11 August 2016 (copy on file with author).

112 *LHA 2013* ss 15, 18, 19 and 21. Thus far, Trust Area Notices have been published for Badu, Dauan, Erub, Kubin Community at Moa, Iama, Kirriri, Mabuiag, Mer, and Saibai: see Queensland Government, *Trust Area Notices* (15 May 2017) Department of Natural Resources and Mines <<https://www.dnrm.qld.gov.au/qld/indigenous-land/notices>>.

113 *LHA 2013* s 43.

114 *LHA 2013* ss 30–1.

115 See discussion in Part III(A)(iii).

116 *LHA 2013* s 86.

117 Correspondence between Torres Strait Island Regional Council, the Queensland Department of Housing and Public Works, and the Queensland Department of Natural Resources and Mines regarding 'Sale Price for Social Housing Subject to Lease Arrangements under the *Aborigines and Torres Strait Islander (Land Holding) Act 1985*', 16 February 2015 to 11 August 2015 (accessed with the permission of Torres Strait Island Regional Council).



Table 1: Summary of Katter Leases for the Torres Strait<sup>118</sup>

Community	Perpetual Leases Granted	Lease Entitlements to Be Granted	Invalid Applications	Total
Badu	1	19	13	33
Boigu	0	48	12	60
Dauan	0	0	0	0
Erub (Damley)	0	0	0	0
Iama	0	0	33	33
Kiriri (Hammond)	2	20	31	53
Kubin Community, Moa	4	0	16	20
Mabuiag	1	15	0	16
Masig (Yorke)	26	13	0	39
Mer (Murray)	0	0	0	0
Poruma (Coconut)	25	1	1	27
Saibai	0	13	2	15
St Pauls Community, Moa	0	25	1	26
Ugar (Stephens)	0	6	7	13
Warraber (Sue)	2	17	0	19
<b>Total</b>	<b>61</b>	<b>177</b>	<b>116</b>	<b>354</b>

Given the number of irregularities, it may be presumed that the number of Katter leases that will ultimately be granted to Torres Strait Islanders is directly influenced by the capacity of each former island council at the time of dealing with the original applications, the effectiveness of the Queensland government in resolving outstanding applications, and the willingness of entitlement holders (and their successors) to proceed with lease applications that are now around 30 years old.

The Queensland government's policy is that the house on a Katter lease lot will be transferred for peppercorn consideration and, prior to transfer, will be upgraded at the State's expense to 'fair condition', which requires that the condition of the house meet building and safety regulations.<sup>119</sup> Thus, resolving Katter leases is likely to impose significant costs on government. In the meantime, houses subject to Katter lease entitlements have not been maintained to the same standard as other

118 Adapted from Email from Julie Brogan (Manager, Aboriginal and Torres Strait Islander Land Acts Branch, Aboriginal and Torres Strait Islander Land Services, Queensland Government Department of Natural Resources and Mines) to the author, 11 August 2016.

119 Ibid.

social houses,<sup>120</sup> so that entitlement holders are being charged rent for houses that have slowly deteriorated except for emergency repairs and maintenance.

As Moran et al explain, Kowanyama, a remote Aboriginal community settlement in Queensland, saw approximately 85 perpetual leases registered in the late 1980s.<sup>121</sup> Moran et al continue:

The existing houses on these properties were sold to leaseholders. Many of these houses were already close to the end of their life cycle, and most have subsequently deteriorated to an unacceptable standard. Kowanyama Aboriginal Community Council is in the process of taking over these leases in order to replace the houses. This process has been very drawn out and legally complicated. [As at 2001] home owners were being offered a new house on the condition that they sign their lease over to Council. Further complications and delays have also arisen from dealings with deceased estates.<sup>122</sup>

Consideration of the situation in the Torres Strait leads to a concerning probability that Torres Strait Islanders holding Katter leases (or Katter lease entitlements) may likewise eventually have to be 'bailed out' of their leases, with responsibility reverting to trustees. In the Torres Strait, one can readily observe that at least some Katter lease holders are struggling to maintain their houses,<sup>123</sup> a challenge associated with the high cost of living. Assistance is not being provided to lease holders to subsidise the substantial, long-term costs of repairs, maintenance, renovations and upgrades and militate against the risk of privately owned dwellings falling into disrepair.

Katter lease holders and those with unresolved Katter lease entitlements all face significant hardship (even a house in 'fair condition' may require considerable investment in repairs and maintenance).<sup>124</sup> In the absence of meaningful home-ownership support mechanisms, there is little to prevent a repeat of the Kowanyama debacle in outer Torres Strait. To reduce the risk of setting home owners up for failure, government policy must ease the burden on leaseholders through home-ownership subsidies, support and monitoring mechanisms, along with broader investment in economic development.

### 3 Addressing Native Title

Notably, the *LHA* preceded the *Mabo [No 2]* decision<sup>125</sup> which recognised the existence of native title rights and interests in Australia and, given that a perpetual lease creates an indefinite, exclusive right to land, Katter leases are inconsistent

120 Torres Strait Island Regional Council, 'Ordinary Meeting: Wednesday 24 August 2016–Thursday 25 August 2016' (Minutes August 2016) 23 (Cr Pearson) <<http://tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/Minutes%2024th%20%2025th%20August%202016%20Council%20Meeting%20Poruma%20Revised.pdf>> ('August Minutes').

121 Moran et al, above n 85, 360.

122 Ibid; see also Sara Hudson, 'From Rhetoric to Reality: Can 99-Year Leases Lead to Homeownership for Indigenous Communities?' (CIS Policy Monograph No 92, Centre for Independent Studies, 2009) 15.

123 See Torres Strait Island Regional Council, 'August Minutes', above n 120, 23 (Cr Pearson).

124 Shaneen Fantin, 'Housing Conditionality, Indigenous Lifeworlds and Policy Outcomes: Palm Island Case Study' (Report, Australian Housing and Urban Research Institute, March 2016) 22–23.

125 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

with the continued existence of native title rights and interests.<sup>126</sup> The full ramifications of this are now being felt acutely in the Torres Strait in the aftermath of the freehold pilot project and as the State seeks to resolve Katter lease entitlements. Disagreement arose between the State and the Council over how to address native title in order to grant Katter leases.<sup>127</sup>

Under the *Native Title Act 1993* (Cth) ('*NTA*'), the grant of a Katter lease can take place without an ILUA because it is a 'pre-existing right-based act' ('PERBA'). A PERBA is an act done:

- (a) in exercise of a legally enforceable right created by any act done on or before 23 December 1996 that is valid ... or
- (b) in good faith in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996 ... of which there is written evidence ...<sup>128</sup>

Clearly, Katter lease entitlements fall within the PERBA definition,<sup>129</sup> and a Katter lease has previously been granted in the Torres Strait under the PERBA principle.<sup>130</sup> The PERBA provisions require the State to notify (inter alia) RNTBCs of intended lease grants and give them an opportunity to comment,<sup>131</sup> but no right to negotiate applies.

Despite the PERBA principle, since the introduction of the *LHA 2013* the State has treated native title as a practical obstacle preventing the grant of Katter leases, and sought to address native title through a consent-based process,<sup>132</sup> although arguably the only ILUA outcome available to grant perpetual leases is the extinguishment of native title rights and interests on the relevant land. An ILUA process does offer the potential advantage of dealing with compensation for extinguishment of native title (whereas through the PERBA process, it would be for the RNTBC to bring a compensation claim).<sup>133</sup> However, the consent-based approach is unlikely to resolve Katter lease entitlements as efficiently as the PERBA avenue,<sup>134</sup> and therefore prolongs the delay (and increases costs) in the remaining 177 entitlements being realised, without any guarantee of success.

126 See *Native Title Act 1993* (Cth) s 24ID(1)(b); Ed Wensing and Jonathan Taylor, 'Secure Tenure for Home Ownership and Economic Development on Land Subject to Native Title' (AIATSIS Research Discussion Paper No 31, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 2012) 23 <[https://aiatsis.gov.au/sites/default/files/products/discussion\\_paper/secure-tenure-options-home-ownership.pdf](https://aiatsis.gov.au/sites/default/files/products/discussion_paper/secure-tenure-options-home-ownership.pdf)>.

127 See Torres Strait Island Regional Council, 'Queensland Government Deputations July 2016' (27 July 2016) (accessed with the permission of Torres Strait Island Regional Council) 10–12 ('Queensland Government Deputations'); Torres Strait Island Regional Council, 'Ordinary Meeting: Tuesday 17 and Wednesday 18 November 2015' (Minutes, November 2015) 8 <[http://www.tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/november\\_minutes\\_-\\_v4\\_aceo\\_approved.pdf](http://www.tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/november_minutes_-_v4_aceo_approved.pdf)>.

128 *NTA* s 24IB.

129 *Dorante v Minister for Natural Resources and Mines* [2017] QLC 15 (discussed below).

130 Trustee Lease No. 715642234, a perpetual lease of the whole of lot 92 on SP248095 commencing 12 November 2013: title search of lot 92 on SP248095, title reference 21296132 (Kubin Community, Moa), 25 February 2016 (accessed with the permission of Torres Strait Island Regional Council). There are no registered ILUAs concerning Katter leases in the Torres Strait.

131 *NTA* s 24ID(3).

132 Torres Strait Island Regional Council, 'Queensland Government Deputations', above n 127, 11.

133 *NTA* s 24ID(1)(d), (2).

134 See Torres Strait Island Regional Council, 'Queensland Government Deputations', above n 127, 11.

Negotiating an ILUA to resolve outstanding entitlements may also place pressure on those with rights to Katter leases because, under these circumstances, entitlement holders may be expected to accept lesser legal rights. For example, a party seeking to preserve native title may propose that Katter lease entitlements be surrendered<sup>135</sup> in exchange for peppercorn 99-year home-ownership leases. This alternative, by conserving native title, would restrict the lessee's ability to obtain ordinary freehold if the trustee made it available, because a further ILUA would be required to permit the conversion of DOGIT land to ordinary freehold. While it is understandable that common law native title holders may wish to preserve native title rights and interests, it is clear from the *LHA 2013* that entitlement holders have a right to receive perpetual leases, and the *NTA* recognises this right. There is no guarantee that Katter lease entitlement holders would have the benefit of independent legal advice while their entitlements are being resolved through an ILUA negotiation process.

In April 2017, the Land Court of Queensland decided an application made by two Katter lease entitlement holders from Hammond Island on the question of whether native title was a practical obstacle to the grant of a Katter lease.<sup>136</sup> The Court found that the *LHA 2013* did not intend that native title would be a 'practical obstacle', and that each Katter lease could be granted as a PERBA.<sup>137</sup> A subsequent application for judicial review of the matter was dismissed by the Supreme Court of Queensland in February 2018.<sup>138</sup>

Katter leases illustrate all the complexity of home-ownership options in the Torres Strait and, while the time is ripe to resolve them, the grant of Katter leases highlights the need to ensure sustainable regional frameworks are in place to support long-term home ownership. This is discussed further in Parts V and VI.

## B 99-Year Home-Ownership Leases

As noted in the Explanatory Notes to the *Freehold Bill*, '[u]ntil 2008 a lease granted by the trustee of [communal] trust lands was generally limited to a 30 year term and required the approval of the Minister.'<sup>139</sup>

In 2008, the *TSILA* was amended to introduce up to 99-year lease terms for particular purposes.<sup>140</sup> The amendments allowed for 99-year home-ownership leases from the trustee to an Aboriginal or Torres Strait Islander individual (or individuals) for home-ownership purposes. The lease is an encumbrance upon the DOGIT, may include an option to renew<sup>141</sup> and may be mortgaged,<sup>142</sup> but may only be transferred to another person eligible for a 99-year home-ownership lease.<sup>143</sup>

---

135 See *LHA 2013* s 27.

136 *Dorante v Minister for Natural Resources and Mines* [2017] QLC 15.

137 *Ibid* [150] (Kingham P).

138 *Wigness v Kingham, President of the Land Court of Queensland* [2018] QSC 020.

139 Explanatory Notes, Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld) 2.

140 *Ibid*; see *TSILA* s 85.

141 *TSILA* s 88.

142 *TSILA* s 87(3).

143 *TSILA* s 89.

Eligibility is limited to Aboriginal and Torres Strait Islander persons, their spouses or former spouses (including surviving spouses and former spouses), and the holder of an existing lease within the relevant community.<sup>144</sup>

Unlike Katter leases, home-ownership leases are future acts which are not perpetual grants of exclusive possession. Therefore, the native title non-extinguishment principle applies: that is, to the extent that native title rights and interests are inconsistent with the rights created under the lease, those native title rights and interests are suppressed for the term of the lease, but revive when the lease ends.<sup>145</sup> To validate the grant of a home-ownership lease, an ILUA is required.<sup>146</sup>

Hudson notes the requirements to pay ‘an upfront lump sum payment equal to the value of the land’, purchase any dwelling on the land (which, for social houses, requires the housing department’s consent) or (where there is no dwelling) build a house within eight years, and argues that these are ‘elaborate bureaucratic measures [that] are likely to make the process of acquiring individual title over land unnecessarily difficult.’<sup>147</sup>

To date, the Council has received 21 Expressions of Interest for 99-year home-ownership leases.<sup>148</sup> No home-ownership leases have been granted in the Torres Strait to date. The vast majority of the applications concern land at Kirriri and St Pauls Community. It is notable that:

1. St Pauls and Kirriri are the second and third highest (after Boigu) in terms of the number of outstanding Katter lease entitlements per community; and
2. These are the only two communities that are made up of predominantly ‘historical’ residents rather than common law native title holders whose ancestry is recognised under a native title determination.<sup>149</sup>

It is difficult to assess whether there is an overlap between home-ownership lease applications and Katter lease entitlements because the beneficiaries of Katter lease entitlements have not all been confirmed, nor are lot numbers clearly identified in every case. It is possible that Kirriri and St Pauls residents have been more proactive in seeking home-ownership opportunities because they have a greater interest in establishing property rights in the absence of native title rights and interests, or that they are better informed about home-ownership options because of consultations that have already occurred regarding Katter leases and the ordinary freehold option. The third pilot community, Poruma, already has 25 granted Katter leases (compared to two at Kirriri and none at St Pauls) and only

---

144 *TSILA* ss 85(2), 86(2).

145 *NTA* s 238.

146 *NTA* s 24AA.

147 Hudson, above n 122, 13.

148 Torres Strait Island Regional Council, ‘Expressions of Interest (EOI) Register – 99 Year Leases’, (11 August 2016) (accessed with the permission of Torres Strait Island Regional Council). Note that this discussion is confined to leases for home-ownership purposes and does not include commercial leases.

149 See Torres Strait Island Regional Council, *Kirriri* (2016) <<http://tsirc.qld.gov.au/communities/kirriri>>; Queensland Government, *St Pauls (Moa)* (2 March 2017) <<https://www.qld.gov.au/atsi/cultural-awareness-heritage-arts/community-histories-st-pauls>>; State Library of Queensland, *Torres Strait Island Communities* (2016) <<http://www.slq.qld.gov.au/resources/atsi/community-history/missions/tsi-communities>>.

one outstanding Katter lease entitlement (compared to 20 at Kirriri and 25 at St Pauls).

Any Katter lease entitlement holder who decided to take out a 99-year home-ownership lease instead would have to surrender the perpetual lease entitlement (subject to State compensation for diminution of rights) in exchange for tenure that is subject to native title. Thus, the State's approach to resolving Katter lease entitlements may influence the home-ownership decision-making of those with a stake in the native title outcome.

Commentators and the media have readily declared that the freehold option has for the first time made individual home ownership possible, disregarding the option of home-ownership leases.<sup>150</sup> Yet it appears the option of home-ownership leases has failed to deliver real results in the Torres Strait not because trustee leasing is inherently defective or incapable of achieving community aspirations, but because of a lack of resource commitments and requisite land administration arrangements such as cadastral surveying. Rather than communal title being to blame as 'a structural impediment'<sup>151</sup> to home ownership in remote Indigenous communities, it is more likely that 'the "complex and time consuming processes" for obtaining a lease have meant that few persons have attempted to do so.'<sup>152</sup> Torres Strait Islanders intent on home ownership are required to navigate what is arguably the most complex land law system in Australia, as well as contending with additional barriers to home ownership (discussed at Part V).<sup>153</sup>

The delays in processing applications for home-ownership leases are due to the need to survey the subject land, assess the condition of any dwelling on the land, set the sale price for dwellings affixed to the land, and the time and expense required to negotiate and register an ILUA. Queensland's Crown Law has prepared a template Agreement to Lease and 99-year Home-Ownership Lease, which are designed to simplify the process for trustees and reduce the legal costs associated with home ownership.<sup>154</sup>

Setting sale prices for social housing was a live issue from at least 2012. In the absence of a housing market, sale price methodologies considered to be affordable have been set by the DHPW in consultation with Queensland's Indigenous local

---

150 The misrepresentation of the freehold option as the first opportunity for home ownership is pointed out by Terrill, 'Converting Land into Ordinary Freehold', above n 33, 526. See, eg, Geritz, Aro and Harvey, above n 40: '[Indigenous communal title] means that Indigenous people cannot gain the same benefits from such land as other citizens can from ordinary freehold land (for example, they cannot individually own their homes or commercially own land for a business).'

151 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 *University of New South Wales Law Journal* 814, 824 ('The Days of the Failed Collective').

152 Ibid 822, quoting as an example the Office of Indigenous Policy Coordination, Department of Families, Community Services and Indigenous Affairs, Submission No 1 to Senate Community Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, July 2006, 4–5; see also Terrill, 'Converting Land into Ordinary Freehold', above n 33, 525.

153 See Terrill, 'Converting Land into Ordinary Freehold', above n 33, 523; see also Evidence to Agriculture, Resources and Environment Committee, Queensland Parliament, Hammond Island, 25 July 2014, 9 (Oliver Gilkerson).

154 The templates were supplied to Torres Strait Island Regional Council on 18 November 2015.

governments. The price range proposed by the DHPW for the Torres Strait was developed based on the market value of houses and land in the closest communities (Horn Island and Thursday Island, which have ordinary freehold), the condition of the house (subject to the condition that houses in ‘poor condition’ would not be sold), the number of bedrooms, and other improvements on the land.<sup>155</sup>

For home-ownership leases, the price methodology is made up of a house price component and a (nominal) land price component.<sup>156</sup> While the house price component would also apply to social houses on land converted to ordinary freehold,<sup>157</sup> there is no statutory land price payable to obtain ordinary freehold.

In February 2018, the Council passed a resolution endorsing a house price methodology (shown in Table 2).<sup>158</sup>

Table 2: House Price Methodology

House Type	New Condition	Good Condition	Fair Condition
2-bedroom detached house	\$65 000	\$50 000	\$35 000
3-bedroom detached house	\$75 000	\$60 000	\$45 000
4-bedroom detached house	\$90 000	\$75 000	\$60 000
5-bedroom detached house	\$100 000	\$85 000	\$67 000
6-bedroom detached house	\$110 000	\$95 000	\$75 000

Pricing is subject to review every three years based on the consumer price index.

The house prices endorsed by the Council are half of what was proposed by the DHPW. The Council rejected the DHPW’s proposed methodology on the basis that it was not affordable.<sup>159</sup>

The Council has not yet decided whether to adopt the DHPW’s land price proposal, which is as follows:

155 Correspondence between Torres Strait Island Regional Council and Queensland Department of Housing and Public Works regarding ‘Sale of Social Housing on the Torres Strait Island Deed of Grant in Trust Lands’, 1 July 2014 to 11 August 2015 (accessed with the permission of Torres Strait Island Regional Council).

156 *TSILA* ss 91(1)(b), 93(3). See Queensland Government, *Home Ownership Leases – Residential Use for 99-Years* (9 January 2017) <<http://www.qld.gov.au/atsi/environment-land-use-native-title/99-year-home-ownership-leases/index.html>>.

157 *TSILA* s 28R(5).

158 Torres Strait Island Regional Council, ‘Ordinary Meeting: Tuesday 20 February 2018–Wednesday 21 February 2018’ (Minutes, February 2018) (forthcoming) <<http://tsirc.qld.gov.au/your-council/planning-decision-making/meetings/ordinary-meeting>>. Cf Torres Strait Island Regional Council, ‘Freehold Option Pilot Project’ (PowerPoint Presentation presented at Hammond Island and Poruma, November 2015) (copy on file with author). It is noted that there is no house price category for a duplex, although there are duplexes in the Torres Strait.

159 Torres Strait Island Regional Council, ‘Ordinary Meeting: Tuesday 21 November 2017–Wednesday 22 November 2017’ (Minutes, November 2017) 8 <<http://www.tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/November%20Ordinary%20meeting%20minutes%20%202017.pdf>>.

The upfront price of the land is \$4000 for land up to and including 2000 square metres, plus \$100 for each additional 100 square metres (pricing subject to review every three years based on the consumer price index).<sup>160</sup>

The house prices adopted by the Council appear to be affordable. However, to be viable, home-ownership models must be holistic and take into account all aspects of home ownership (transaction costs, up-front costs, ongoing costs, socio-economic factors and the local cost of living). These various elements are discussed further in Part V.

### C Land Occupation without Individuated Tenure

Given the complexity of property law in the Torres Strait, it is not surprising that there are instances of 'private' homes being built on Torres Strait Islander land without statutory compliance. For example, TOs or other community members may have self-built a home without the requisite development approval or native title future act validation. The number of anomalies is unclear because these 'private' dwellings are unreported and therefore effectively ignored. However, the *NTA* preserves native title in cases where there was no future act validation, and creates a statutory right to compensation for the impact on native title arising from the invalid act.<sup>161</sup>

Of course, if the development was sanctioned under customary law it is unlikely that a compensation claim would be made. However, the construction and occupation of a home under these circumstances raises community safety and public liability issues if the structure is not compliant with relevant building codes, and the development may not be permissible under the local government's Planning Scheme, particularly if it is located outside the township area. Moreover, a TO who relies on informal occupation has no legal security for that home, and legal issues could arise if there is a dispute over traditional ownership.<sup>162</sup> Home-ownership tenure, supported by an ILUA recognising the person's entitlement to occupy certain land, would provide certainty under customary law, secure investment and confirm legal rights and obligations.

Invalid future acts are like the proverbial elephant in the room and only serve to add to confusion about land tenure options. Government must work with trustees and RNTBCs to ensure that 'private' homes become legally compliant. This will support the integrity of the home-ownership regime. Simplifying the process of obtaining home-ownership tenure would reduce the likelihood of issues arising in relation to informal land occupation in the future.

---

<sup>160</sup> Queensland Government, *Leasing Information for Trustees: Land Valuations for 99-Year Home Ownership Leases* (9 January 2017) <<https://www.qld.gov.au/atsi/environment-land-use-native-title/land-valuations-99-year-leases>>.

<sup>161</sup> See *NTA* ss 24OA, 24AA(6).

<sup>162</sup> *Land Act 1994* (Qld) s 404; see also s 28.



#### IV EVALUATING THE OPTIONS

The analysis thus far has demonstrated the legal and practical complexity of obtaining home ownership in the Torres Strait, and shown that acquiring ordinary freehold title is at least as difficult as the alternative home-ownership options (99-year leases and Katter leases). The next section critically evaluates and compares the different forms of tenure for home ownership.

As Terrill concludes, ‘there has been a tendency to conflate the two issues of a lack of formal tenure and the existence of communal title. Separating the two issues is important for assessing the appropriateness of any response.’<sup>163</sup> For their part, Wensing and Taylor ‘conclude that home ownership and economic development could possibly be facilitated on Aboriginal lands through appropriate leasing arrangements without the need to alienate the underlying customary title to land.’<sup>164</sup> This article demonstrates that the same is true for the Torres Strait.

As this discussion has shown, home-ownership options have long been present in the Torres Strait region, but they have not been effectively enabled. It is overly simplistic (and technically incorrect) to blame the present lack of home ownership on the inability to trade or mortgage title.<sup>165</sup> Moreover, the introduction of different tenure arrangements over time only ‘reinforces community perceptions of revolving door policy without real outcomes.’<sup>166</sup> Thus it is false to call the freehold option the first opportunity for Torres Strait Islanders to purchase their own homes, just as it was false to label the Northern Territory’s township leasing model in the same way.<sup>167</sup> Indeed, township leasing – involving long-term community-scale leases to government, which then subleases individual lots for residential or commercial purposes – only serves to demonstrate that an effective tenure model with government support can deliver home ownership. Home ownership does not, however, have to be based on any specific form of tenure.

Indeed, Terrill concludes ‘that Commonwealth Government policies as a whole reflect only a superficial commitment to home ownership in Aboriginal communities’.<sup>168</sup> Given the limited commitment to supporting trustees in making the freehold option available, the same could be said for the Queensland government. On the other hand, the Commonwealth government’s more recent injection of funds into tenure projects under the *White Paper* promises a greater depth of attention to the breadth of issues discussed in this article.

During community consultations, the Council presented and elaborated upon a non-exhaustive list of advantages and disadvantages of converting land to ordinary freehold, noting that, depending on an individual’s interests, some ‘advantages’ may be considered ‘disadvantages’ and vice versa. This list,

---

163 Terrill, ‘The Days of the Failed Collective’, above n 151, 819.

164 Wensing and Taylor, above n 126, 7.

165 *Contra* Department of Prime Minister and Cabinet (Cth), *The Forrest Review: Creating Parity* (2014) 210–11 <<https://indigenousjobsandtrainingreview.dpmc.gov.au/barriers-home-ownership>>.

166 See Torres Strait Island Regional Council, ‘Queensland Government Deputations’, above n 127, 16.

167 See Terrill, ‘The Days of the Failed Collective’, above n 151, 847.

168 *Ibid* 848–9.

reproduced in Table 3, is useful in summarising the issues associated with the freehold option, and with home ownership more broadly.

Table 3: Advantages and Disadvantages of Ordinary Freehold

<p><b>Pros</b><sup>169</sup></p> <ol style="list-style-type: none"> <li>1. Native Title and Trustee approval not required for future development or leasing (planning approval may be required).</li> <li>2. Legal certainty of land ownership (no native title disputes).</li> <li>3. Can be used as a tool to 'cement' traditional boundaries via formal Survey to avoid future boundary dispute.</li> <li>4. Exclusive control of your own land (as long as you comply with the law).</li> <li>5. Potential for economic independence (leasing and mortgaging land available).</li> <li>6. Land/house becomes an asset with a market value on the property market: potential for investment income or to make money from selling the land to anyone.</li> <li>7. Ability to transfer freehold title to loved ones (e.g. to your children) under a Will.</li> <li>8. Ability to hold land with others as co-owners, and decide who will own the land when the registered owner dies.</li> </ol>
<p><b>Cons</b><sup>170</sup></p> <ol style="list-style-type: none"> <li>1. Up-front purchase cost (land price, house price, legal fees, registration fees, stamp duty, survey if necessary).</li> <li>2. Ongoing costs of home ownership (mortgage repayments, rates, insurance, bills, repairs &amp; maintenance).</li> <li>3. Legally responsible for use of the land (and misuse).</li> <li>4. Traditional rights no longer legally recognised over the land.</li> <li>5. Could weaken Traditional Law and Ailan Kastom in the community (dependent on the owner).</li> <li>6. Potential sale to non-community members (loss of traditional land).</li> <li>7. Risk of losing traditional land if unable to afford ongoing costs of home ownership (mortgagee sale).</li> <li>8. Could make land management in the Torres Strait more complicated by adding another type of land holding [of limited application].</li> </ol>

It is worthwhile considering how many of the listed 'advantages' may also be achieved (and the same 'disadvantages' experienced) under Katter leases and home-ownership leases. In particular, research indicates that amongst Aboriginal communities there is usually a predominant interest in being able to transfer land tenure to loved ones (eg via testamentary bequest), with limited interest in the prospect of selling the home and land and therefore little interest in establishing an

169 Torres Strait Island Regional Council, 'Freehold Option Pilot Project' (PowerPoint Presentation presented at Hammond Island, St Pauls (Moa) and Poruma, September 2015) (copy on file with author) slide 12.

170 Ibid slide 13.

effective, open housing market.<sup>171</sup> Moran et al especially highlight the importance of considering the reasons behind home-ownership aspirations.<sup>172</sup>

Exclusive control of a home and lot is achievable through any home-ownership tenure option, while native title disputes can be resolved and prevented other than through overwriting customary ownership with ordinary freehold (as was demonstrated in the Ugar traditional boundary resolution project, discussed in Part VI). Galloway warns that ‘superimposing an individualist system where communal norms exist’ may itself cause disputes.<sup>173</sup>

As to economic independence, perpetual leases and 99-year home-ownership leases may be mortgaged. However, they may only be transferred (or, where permitted, subleased) within a closed (Aboriginal and Torres Strait Islander) market, which is not the case for ordinary freehold title. Only freehold creates an open housing market, though (as discussed below) this is no miracle cure for the high cost of owning a home in a remote community.<sup>174</sup> Up-front and ongoing home-ownership costs and owner’s liability apply to all home-ownership options.<sup>175</sup>

Home-ownership tenure options offer the opportunity for individual TOs to obtain legal recognition at an individual level. Freehold in particular does away with the RNTBC as intermediary because it nullifies native title. For individual TOs who are dissatisfied with the current system, freehold may be seen as a ‘way out’ of the native title system, providing greater executive power over land than native title allows.

Freedom from the native title regime can be achieved through a PERBA-validated Katter lease or through ordinary freehold. Katter leases and home-ownership leases are subject to the terms of the lease, whereas a freehold title owner can lease the land without requiring a trustee’s consent. The native title implications of the different home-ownership options are summarised in Table 4.

The potential for freehold to weaken customary law in the community is significant, given that individuation of tenure encourages a cultural shift away from a mentality of communal land-holding: ‘individual title is a cultural construct [that] embodies the construction of self as the autonomous, self-sufficient and independent citizen.’<sup>176</sup> For the purpose of Australian law, ordinary freehold title strips all common law native title holders (including the new registered proprietor) of any rights and interests they held under customary law. The landholding having been legally removed from its cultural context, the subsequent tenure over that land will never replicate what existed when native title was recognised.<sup>177</sup> Thus Terrill argues that introducing freehold, and even subdividing land and allocating social

171 See Wensing and Taylor, above n 126, 10, quoting Australian Government, ‘Indigenous Home Ownership Issues Paper’ (2010) 5, 18 <<http://apo.org.au/node/21408>> (‘Indigenous Home Ownership’); Moran et al, above n 85, 362–4.

172 See Moran et al, above n 85, 358–9.

173 Galloway, ‘The Cost of “Regular” Freehold’, above n 78.

174 Terrill, ‘Converting Land into Ordinary Freehold’, above n 33, 535.

175 But note *TSILA* s 111: home-ownership leases are exempt from registration fees; and *TSILA* s 91(1)(b): a statutory land price applies only to 99-year home-ownership leases.

176 Galloway, ‘The Cost of “Regular” Freehold’, above n 78.

177 The author is indebted to an anonymous reviewer for raising this point.

housing without regard to traditional ownership, is a catalyst in the 'normalisation' of land tenure in Indigenous communities.<sup>178</sup>

Table 4: Summary of Native Title Implications of Home-Ownership Options

Tenure Option	Impact on Native Title	Validation Process
Katter (LHA) Lease	Extinguished? (currently in dispute)	PERBA (NTA) Consent (ILUA)
99-year home-ownership lease	Preserved but suspended	Consent (ILUA)
Ordinary freehold title	Extinguished	Consent (ILUA) unless native title already extinguished
No tenure (traditional land occupation)	Preserved (non-extinguishment principle)	Invalid future act

The introduction of ratings valuations for land in trust communities, included in the *Freehold Act*,<sup>179</sup> represents a further step in the process of 'normalising' Aboriginal and Torres Strait Islander lands in Queensland. Through this change – which will apply to land used for commercial or residential purposes<sup>180</sup> but does not affect social housing tenants – the State is requiring Indigenous local governments to raise revenue through a rates base<sup>181</sup> rather than depending largely on grants of public funds. Significantly, once land is rateable, outstanding rates can be recovered as a charge on the land.<sup>182</sup> While transitioning Indigenous local governments to self-sufficiency is desirable, rates are an additional expense to community, added to the already high cost of living and doing business in remote communities.<sup>183</sup> Government policy must be realistic and take account of ongoing socio-economic disadvantage.

The process of 'mainstreaming' titles threatens the ability of Indigenous communities to maintain their unique cultural identities and continue to practise their cultural traditions.<sup>184</sup> As Wensing and Taylor argue, 'title individuation could dissolve the cultural integrity of the very group it is intended to benefit.'<sup>185</sup> Home-

178 Terrill, 'The Days of the Failed Collective', above n 151, especially at 844; Terrill, 'Converting Land into Ordinary Freehold', above n 33, 532.

179 Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld) cls 63–5; Queensland, *Parliamentary Debates*, Legislative Assembly, 8 May 2014, 1435 (Andrew Cripps).

180 *Local Government Act 2009* (Qld) s 93.

181 See Jenny Humphris et al, 'New Era: Freehold Land in Indigenous Communities' (eAlert, MacDonnells Law, 23 September 2014) 1 <<http://macdonnells.com.au/new-era-freehold-land-in-indigenous-communities>>.

182 *Local Government Act 2009* (Qld) s 95.

183 See Jack Wilkie-Jans, 'Noel Pearson's "Social Experiments" in North Queensland Are Failing', *The Sydney Morning Herald* (online), 24 November 2015 <<http://www.smh.com.au/comment/noel-pearsons-social-experiments-in-north-queensland-are-failing-20151124-gl6u89.html>>.

184 See Galloway, 'Indigenous Dispossession in the 21<sup>st</sup> Century', above n 7.

185 Wensing and Taylor, above n 126, 18.

ownership leases, at least, are less likely to dissolve the cultural integrity of Torres Strait Islander communities because, although they are held by individuals, they do not extinguish native title and do not allow alienation of traditional lands. The risk of alienation through forfeiture is a key aspect of the freehold option whereas the other home-ownership options can remove or control this risk through a closed market.

As Terrill argues, '[i]t is very possible that some communities may prefer to have a closed or regulated market. ... It does not help ... to characterise ordinary freehold ownership as mainstream and therefore preferable.'<sup>186</sup> The question of whether to continue to restrict who can hold land in Indigenous communities is significant for self-determination, given the principles of intergenerational equity that often pervade Indigenous cultures.<sup>187</sup> Customary law often recognises the rights and duties of past, present and *future* members of the group in relation to country, which means that ownership of land is vital to preserving culture and respecting the land rights of all traditional owners across time.<sup>188</sup> Any compensation payable for ordinary freehold's extinguishment of native title may be insufficient to compensate future generations for the irreversible loss of inalienable and culturally grounded land rights.<sup>189</sup>

From a comparative perspective, there is evidence that converting traditional land to ordinary freehold can lead to 'highly "fractionated" ownership of much of the remaining land', where '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.'<sup>190</sup> The risk of dilution to traditional land-ownership systems highlights the importance of considering whether ordinary freehold truly addresses the goals of remote Indigenous communities.<sup>191</sup> The freehold model certainly does not provide a simple 'solution' to the multifaceted issues involved.

For this reason, communities may be resistant or opposed to sacrificing the hard-won native title determinations that are the only legal recognition that Australian law has afforded to customary laws governing traditional land ownership.<sup>192</sup> What will become of RNTBCs as pieces of land are cut from the country for which they have legal rights to speak? While cultural heritage may survive, native title is the best 'standing' that common law native title holders have in influencing how traditional lands are used, regardless of legal tenure. Thus, even if ordinary freehold is granted to TOs, the surrender of native title represents a

---

186 Terrill, 'Converting Land into Ordinary Freehold', above n 33, 535; see also Helen Davidson, 'Northern Australia White Paper: Native Title Proposals Met with Distrust', *The Guardian* (online), 19 June 2015 <<https://www.theguardian.com/australia-news/2015/jun/19/northern-australia-white-paper-native-title-proposals-met-with-distrust>>.

187 Wensing and Taylor, above n 126, 17–18.

188 *Ibid.*

189 *Ibid.* 26.

190 Terrill, 'Converting Land into Ordinary Freehold', above n 33, 532; see also Samantha Hepburn, 'Transforming Customary Title to Individual Title: Revisiting the Cathedral' (2006) 11(1) *Deakin Law Review* 63, 80.

191 Terrill, 'Converting Land into Ordinary Freehold', above n 33, 532.

192 Wensing and Taylor, above n 126, 21.

'buying-in' to Australia's common law legal system, without the back-up of native title. In other words, ordinary freehold would (perhaps fatally) weaken the already imperfect legal pluralism present in the Torres Strait, in favour of the introduced legal system: the extinguishment of native title rights and interests results in the Crown holding (for the first time) 'full beneficial ownership' of the land rather than just 'radical title'.<sup>193</sup>

Considering the issues involved in the home-ownership options presently available, the complexity of land law in the Torres Strait region poses barriers that may make ordinary freehold (tenure normalisation) seem like the best (or only) option for private control of land. Yet the freehold model process is just as complicated; it does not overcome the challenges for aspiring home owners. Indigenous rights and interests in land and waters may be recognised, but to date the Australian legal system has failed to offer land-holding frameworks that empower Torres Strait Islanders to realise their individual and shared aspirations.

## V ADDITIONAL BARRIERS TO HOME OWNERSHIP

There exists a body of research into the barriers to home ownership in Indigenous communities. This part provides a brief overview of those challenges to demonstrate the importance of complementary support mechanisms to make home ownership a reality in outer Torres Strait.

### A The Tyranny of Distance

Many of the barriers to home ownership stem from the nature of the challenges that small, remote economies face regardless of the property law system under which they operate. The experience in the Torres Strait, as elsewhere, demonstrates how 'homeownership rates are connected to people's socio-economic status'.<sup>194</sup> Torres Strait Islanders face a high cost of everyday living, limited vocational, employment and housing opportunities, and restricted access to key community services.<sup>195</sup> In addition, they suffer the disadvantage of being in a cultural minority locked in an intergenerational cycle of higher rates of health issues and unemployment and lower life expectancies than other Australians.<sup>196</sup> Home ownership is therefore linked to human rights issues of self-determination and the social justice principle of ensuring that equal opportunity is afforded to all Australians.<sup>197</sup>

Facilitating economic independence in remote communities is not as simple as granting home-ownership tenure. Current estimates place the cost of building a new house in remote Indigenous communities at between \$400 000 and \$900 000

---

193 See *ibid* 24.

194 Hudson, above n 122, 8.

195 Torres Strait Island Regional Council, 'Annual Report 2014–2015' (2015) 4–5.

196 See generally Australian Government, 'Indigenous Home Ownership', above n 171.

197 See Galloway, 'The Cost of "Regular" Freehold', above n 78.

but, as Hudson notes, ‘the market value of these houses is much lower.’<sup>198</sup> At this rate, paying rent to live in newly built social housing is financially preferable to borrowing large sums of money to build a home worth less than the cost to build.<sup>199</sup> And while ‘the deficiencies of communal title land’ have been blamed for the lack of privately financed home loans to Indigenous clients due to the ‘closed market, with limited resale opportunities’,<sup>200</sup> the main issue is instead likely to be ‘the risk of negative equity’.<sup>201</sup>

The cost of housing, and of maintenance, is heavily impacted by freight expenses<sup>202</sup> and the shortage of skilled tradespeople in remote communities. This issue is entrenched because the limited accommodation ‘acts as a barrier to building capacity in the region by preventing highly skilled Torres Strait Islanders returning home, and forcing people to leave due to overcrowding.’<sup>203</sup> Thus, housing ‘will have to be heavily subsidised to be an affordable option.’<sup>204</sup> Indeed, while house prices for home-ownership options seem affordable, the story does not end with up-front costs. Construction and maintenance must also be subsidised or ‘the Australian dream’ will be out of reach. Remote assistance grants could cut the cost of building a home, and it may be appropriate for the Council to remain responsible for repairs and maintenance once tenure is privatised.<sup>205</sup>

Research should also be undertaken into cheaper, alternative methods of house construction, such as ‘modular or kit housing systems’, use of local building materials,<sup>206</sup> or a community building program run through a partnership between the Council’s building team and participants in the Community Development Programme (the Torres Strait’s current work-for-the-dole scheme).<sup>207</sup>

At present, the vast majority of accommodation in the region is social housing, and overcrowding is a persistent issue.<sup>208</sup> The Commonwealth government has been investing in new housing through its 2008 National Partnership Agreement on Remote Indigenous Housing (‘NPARIH’),<sup>209</sup> and in exchange for the investment requires security of tenure in the form of 40-year trustee leases.<sup>210</sup>

198 Hudson, above n 122, vii; see also Ross, above n 4, and Leon Terrill, ‘What Price to Pay? Home Ownership on Aboriginal Land in the Northern Territory’ (2013) 8(9) *Indigenous Law Bulletin* 12.

199 Hudson, above n 122, vii, 16.

200 Ibid 10.

201 Ross, above n 4.

202 See generally Torres Strait Island Regional Council, ‘Annual Report 2014–2015’, above n 195, 4–5.

203 Torres Strait Island Regional Council, ‘Queensland Government Deputations’, above n 127, 20.

204 Hudson, above n 122, vii; see also Moran et al, above n 85, 366–7.

205 See Moran et al, above n 85, 369.

206 Hudson, above n 122, 17.

207 Department of the Prime Minister and Cabinet (Cth), *The Community Development Programme (CDP)* (2016) <<http://www.dpmc.gov.au/indigenous-affairs/employment/community-development-programme-cdp>>.

208 See *Committee Report*, above n 10, 24; Council of Australian Governments, ‘National Partnership Agreement on Remote Indigenous Housing’ (February 2009) <[http://www.federalfinancialrelations.gov.au/content/npa/housing/national-partnership/past/remote\\_indigenous\\_housing\\_NP.pdf](http://www.federalfinancialrelations.gov.au/content/npa/housing/national-partnership/past/remote_indigenous_housing_NP.pdf)>.

209 See generally Department of the Prime Minister and Cabinet (Cth), *National Partnership Agreements* (18 March 2016) <<https://www.pmc.gov.au/indigenous-affairs/housing/national-partnership-agreements>>.

210 See Australian Government, ‘Indigenous Home Ownership’, above n 171, 14.

Where previously governments exerted a level of control over social housing through funding agreements, the existence of NPARIH leases allows the government to place conditions and standards on the delivery of housing services (including repairs, upgrades and maintenance) in remote Indigenous communities.<sup>211</sup> But as long as barriers to private home ownership remain, long-term government investments will continue to be necessary, and communities will never achieve the economic opportunities and security espoused by the idea of 'the Australian dream'. Thus, a focus on making home ownership feasible in remote communities is in the long-term interests of all Australians.

While social housing should continue to be available for low-income families, attention must be paid to the parallel issue of subsidising private home ownership.<sup>212</sup> Wensing and Taylor suggest that the term of a NPARIH lease 'simply reflects the potential longevity of the construction',<sup>213</sup> and it is unclear whether the government is willing to surrender NPARIH leases to facilitate home ownership.<sup>214</sup> These 40-year leases, together with the DHPW's power to decide whether a dwelling may be sold, give government an effective veto power over the trustee's ability to grant home ownership of newly built housing. As Ross puts it, '[g]iven governments are effectively the landlords for the next 40 years, it is government policy that will determine whether home ownership is possible and achievable.'<sup>215</sup>

## B Capital Finance

The *White Paper* observes that:

Indigenous Australians should be able to use their exclusive native title to attract capital necessary for economic development. But banks do not lend against native title because native title is not transferable in the event of a default. Even though they have native title rights, Indigenous people cannot use them as financial security.<sup>216</sup>

There is broad recognition of the need to facilitate grants of 'transferable interests that can be used as collateral for commercial loans, without extinguishing native title.'<sup>217</sup> Ross suggests a housing rent-to-buy scheme,<sup>218</sup> while others propose common law trusts,<sup>219</sup> community land trusts<sup>220</sup> and various 'subsidised finance and valuation models' such as creating 'a controlled housing market, based on some predetermined valuation formula.'<sup>221</sup>

The *White Paper* highlights that the:

---

211 See Terrill, 'The Days of the Failed Collective', above n 151, 848 n 158.

212 Hudson, above n 122, vii.

213 Wensing and Taylor, above n 126, 13.

214 But see Australian Government, 'Indigenous Home Ownership', above n 171, 15.

215 Ross, above n 4.

216 *White Paper*, above n 6, 25.

217 *Ibid.*

218 Ross, above n 4; cf Hudson, above n 122, 4.

219 Wensing and Taylor, above n 126, 30.

220 *Ibid.* 31.

221 Moran et al, above n 85, 6, 363, 366.



Indigenous Home Ownership Programme (IHOP), administered by Indigenous Business Australia, provides concessional and low deposit home loans to Indigenous Australians who have difficulty obtaining finance from a mainstream lender. In some remote areas ... extra support is available [including] help to pay for upfront costs, such as conveyancing, and with sustaining home loans, such as paying for repairs, maintenance and insurance.<sup>222</sup>

At present, the Torres Strait Regional Authority's Economic Development Programme, through an arrangement with Indigenous Business Australia, 'offers home loans at concessional interest rates to eligible Torres Strait Islander and Aboriginal people living in the Torres Strait region'.<sup>223</sup> Given the legal obstacles holding back home ownership in the Torres Strait, it is not surprising that home-ownership support providers are not actively engaging with communities or stakeholders at present. Rather, it is for community members to seek out services relevant to them.

In a home-ownership survey conducted in four Indigenous communities in Queensland, Moran et al found that most community members recognised that an applicant's rental history would be relevant in that person's application for a home loan.<sup>224</sup> The Council has a low rent collection rate (which is beginning to improve as a result of increased human resources in its housing department),<sup>225</sup> with the result that many social housing tenants have poor rent records. Social housing providers and organisations such as IHOME<sup>226</sup> could play a role in building community capacity in financial management and assisting families aspiring towards home ownership.

At present, the combination of obstacles to obtaining home ownership and challenges of owning a home in the Torres Strait make any form of home ownership a risky proposition for Torres Strait Islanders in their home region.

## VI ALTERNATIVE MODELS

In this complex context, what is the best way to proceed with making home ownership realistic, practical and successful for Torres Strait Islanders? The preceding sections have demonstrated that tenure is a necessary but insufficient element in securing home ownership.<sup>227</sup> This part highlights the need for mechanisms complementary to the current, segmented tenure frameworks.

Converting community land title from reserve or DOGIT to Torres Strait Islander (inalienable) freehold can streamline the process of granting home ownership tenure to individuals where the new holder of legal title (the trustee) and the representative of the native title holders are one and the same. It is intended

---

<sup>222</sup> *White Paper*, above n 6, 30.

<sup>223</sup> Torres Strait Regional Authority, *Home Ownership* (2017) <<http://www.tsra.gov.au/the-tsra/programmes/economic-development/home-ownership>>.

<sup>224</sup> Moran et al, above n 85, 366.

<sup>225</sup> See Torres Strait Island Regional Council, 'Strait Talk' (Edition 2, 2015) 17 <<http://www.tsirc.qld.gov.au/your-council/publications/strait-talk>>.

<sup>226</sup> *White Paper*, above n 6, 29.

<sup>227</sup> See Ross, above n 4.

that each DOGIT in the Torres Strait will be converted to Indigenous ownership.<sup>228</sup> However, the process of vesting land as communal freehold takes years and involves significant work by government and the incoming trustee, as demonstrated at Mer, Badu and Hope Vale.<sup>229</sup> And providing viable pathways to home ownership requires more than changing the trustee of the land.

One topical idea is of funded tenure resolution projects, which draw together and seek to address the various issues relating to land tenure, native title, home ownership and economic development. As stated in the *White Paper*, '[s]impler land administration arrangements will ... make home ownership for Indigenous Australians on Indigenous land more realistic.'<sup>230</sup> So it is promising that the Commonwealth government is investing \$10.6 million to support community-driven pilot land projects aimed at land tenure reform.<sup>231</sup> Funded projects are focussed on economic development and home ownership, including 'supporting home ownership on communal land', 'investigating options for long lease arrangements for exclusive native title' and 'providing better information for business and Indigenous land holders.'<sup>232</sup>

One such project is the Moa ILUA project in the Torres Strait.<sup>233</sup> One of the two DOGIT communities on Moa (Banks Island) is St Pauls, which was a participant in the freehold pilot project. The 12-month *White Paper* pilot funding has allowed the community to expand initial community consultations to a whole-island consideration of land tenure aspirations.<sup>234</sup> The timing is advantageous because it allows the residents and TOs of Moa to consider the freehold option, and existing home-ownership options, in the context of a broader discussion about land governance. However, while the Commonwealth government is clearly open to 'innovative changes to the arrangements governing

228 See Evidence to Agriculture, Resources and Environment Committee, Queensland Parliament, Hammond Island, 25 July 2014, 8 (Oliver Gilkerson). Council has sought the conversion of the Poruma DOGIT, St Pauls DOGIT and Hammond Island DOGIT to communal freehold since April 2014: see Torres Strait Island Regional Council, 'Ordinary Meeting: Monday 14 April–Tuesday 15 April 2014' (Minutes, April 2014) 9 <[http://tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/minutes\\_14\\_-15\\_april\\_2014\\_d.pdf](http://tsirc.qld.gov.au/sites/default/files/Ordinary%20Meeting/minutes_14_-15_april_2014_d.pdf)>.

229 In relation to Mer, see Letter from Andrew Cripps (Minister for Natural Resources and Mines) to John Scarce (Chief Executive Officer, Torres Strait Island Regional Council), 18 June 2013 (accessed with the permission of Torres Strait Island Regional Council). In relation to Badu, see Peo Ahmat, Charlotte Tamwoy and Manuel Nomoa, *The Handover* (4 June 2014) Australian Institute of Aboriginal and Torres Strait Islander Studies <<http://aiatsis.gov.au/publications/presentations/handover>>. In relation to Hope Vale, see Rachel Nolan, Natural Resources Minister, 'Handover of Land Supports Traditional Ownership on Remote Aboriginal Community' (Media Release, 15 December 2011) <<http://statements.qld.gov.au/Statement/Id/78181>>.

230 *White Paper*, above n 6, 19.

231 *Ibid.* 18.

232 *Ibid.*

233 See Torres Strait Island Regional Council, '2016–2017 Annual Operational Plan' (December 2016) 27 <<http://www.tsirc.qld.gov.au/sites/default/files/PDFs/Annual%20Operational%20Plan%202016-2017%20Amended%20Dec%202016.pdf>>; Torres Strait Island Regional Council, '2015–2016 Annual Operational Plan' (November 2015) 64 <[http://www.tsirc.qld.gov.au/sites/default/files/PDFs/Plans/corporate\\_services\\_-\\_ordinary\\_council\\_meeting\\_nove.pdf](http://www.tsirc.qld.gov.au/sites/default/files/PDFs/Plans/corporate_services_-_ordinary_council_meeting_nove.pdf)>.

234 Department of the Prime Minister and Cabinet (Cth), *Northern Australia White Paper: Pilot Reforms to Land Tenure* (2016) <<https://www.dpmc.gov.au/indigenous-affairs/land/northern-australia-white-paper-pilot-reforms-land-tenure>>.

land use to simplify these arrangements and attract more investment in the north',<sup>235</sup> land use in the Torres Strait is governed by Queensland law and any tenure innovations would likely require legislative reform in the Queensland Parliament.

The *White Paper* generally expounds the proposition that '[p]rivate rights ... are the basis of economic development'<sup>236</sup> and repeatedly highlights the barriers that communal land-holding poses to investment and economic opportunities, emphasising that '[m]ore certainty over rights gives businesses greater clarity around what land is subject to native title and who they should be negotiating or consulting with.'<sup>237</sup> However, it must be remembered that a native title determination only establishes the body that *represents* the common law native title holders. The determination does not identify the individual TOs for any given portion of land<sup>238</sup> – those whom the representative body must consult in order to verify consent to an ILUA. Intra-Indigenous disputation over traditional ownership can prolong consent-based processes and delay the construction of new housing in the Torres Strait.<sup>239</sup>

The Ugar traditional boundary resolution project brought TOs together to resolve boundary issues and map traditional land boundaries, providing certainty for proponents in the future.<sup>240</sup> This 12-month project was considered a success, demonstrating that extinguishing native title is not necessary to progress community development. The model may be adopted as part of the Moa tenure resolution project. While the Ugar project's timeframe of 12 months was relatively efficient, it is unclear how long it will take to achieve outcomes in the Moa ILUA project, which has a much broader scope.

Given the need for greater resourcing and capacity-building of RNTBCs, it is promising to see the Australian Government committing '\$20.4 million to better support native title holders to effectively engage with potential investors', 'to improve the long term capacity of the bodies', 'lower transaction costs and expedite agreement making.'<sup>241</sup> Such funding may provide a way to ensure that 'communities have access to the best available information' on which to make land tenure decisions best suited to their needs.<sup>242</sup>

The Australian Government's position is to encourage 'consideration of different options that could facilitate the tradability and bankability of rights and

---

235 *White Paper*, above n 6, 18.

236 *Ibid* 37.

237 *Ibid* 22.

238 See Hepburn, above n 190, 69, 74.

239 See generally Torres Strait Island Regional Council, 'Strait Talk' (Edition 1, 2015) 7 <<http://www.tsirc.qld.gov.au/your-council/publications/strait-talk>>.

240 Torres Strait Regional Authority, 'Traditional Land Boundaries of Ugar Identified through Innovative Approach' (Media Release, No 662, 10 August 2015) <[http://www.tsra.gov.au/\\_data/assets/pdf\\_file/0005/9689/Media-Release-MR-662-Torres-Strait-First-in-Next-Generation-of-Native-Title-Outcomes-10-August-2015.pdf](http://www.tsra.gov.au/_data/assets/pdf_file/0005/9689/Media-Release-MR-662-Torres-Strait-First-in-Next-Generation-of-Native-Title-Outcomes-10-August-2015.pdf)>; Seriako Stephen and James McNamara, 'Ugar Traditional Boundaries Project: After the Determination Comes Innovation!' (Paper presented at National Native Title Conference, Darwin, June 2016) <[http://aiatsis.gov.au/sites/default/files/docs/presentations/presentation\\_17.pdf](http://aiatsis.gov.au/sites/default/files/docs/presentations/presentation_17.pdf)>.

241 *White Paper*, above n 6, 24.

242 Terrill, 'Converting Land into Ordinary Freehold', above n 33, 538.

interests in Aboriginal land.<sup>243</sup> As Terrill has highlighted through the example of township leasing in the Northern Territory,<sup>244</sup> a state or territory's policies relevant to prioritising and supporting (funding) one home-ownership option over another could have the effect of influencing perception of and preference for one option over others. For this reason, in the Queensland context, a holistic tenure resolution program is preferable; it does not involve the State directing discrete funding towards (politically) preferred solutions.

A final point to note is that holistic approaches to tenure and economic development issues can be used to acknowledge the impact of dispossession and discrimination that Indigenous Australians have suffered at the hands of the State. Although native title has been recognised in many instances, there are many outstanding compensation entitlements arising from previous acts of the State. Land tenure issues offer the State the opportunity to address the issue of compensation by settling claims on a voluntary, and perhaps community-wide, basis.<sup>245</sup> Viewed from a different perspective, compensation entitlements provide native title holders with leverage to obtain a greater level of government support for home ownership and economic development models sought by communities. Of course, the value to be gained by leveraging the Crown's obligation to 'square the ledger' depends on native title groups having sufficient resources for legal representation to initiate the process and ensure bargaining is equitable.

## VII CONCLUSION

The Torres Strait, like many Aboriginal DOGIT communities, has a troubled history of attempts to make home ownership available. This article has explained the history of Katter leases and 99-year home-ownership leases in the Torres Strait, and the factors that have prevented widespread, straightforward implementation of these options. Yet as administrative barriers are broken down, the time is ripe for enabling viable home ownership in the Torres Strait.

The freehold option must be viewed in this context and not treated as the preferred option simply because the alternative tenure options for home ownership have faced obstacles. Indeed, the freehold option presents significant hurdles of its own, being dependent on the willingness and capacity of trustees to advance it and on the extinguishment of native title at the risk of alienating traditional lands.

It would be misconceived to treat the freehold option as a 'silver bullet' for the achievement of economic independence in remote Indigenous communities, or as the last and best home-ownership option for Torres Strait Islanders. Ordinary freehold title is neither a necessary nor a sufficient precondition to achieving such goals. This case study has demonstrated that home owners will be set up for failure if a robust institutional framework of support mechanisms is not in place.

---

243 *White Paper*, above n 6, 31.

244 Terrill, 'The Days of the Failed Collective', above n 151.

245 Moran et al, above n 85, 366–7.

Rather than assuming that the solution lies in mainstreaming tenure through title individuation, governments must work with trust communities to break down the legal, administrative and economic barriers that have stymied the possibility of home ownership on remote Indigenous lands. If policy approaches fail to address the complexities of delivering home-ownership outcomes, Torres Strait Islanders may continue to be let down, no matter which tenure models are adopted.

As Moran et al observe, '[h]ome ownership [and ordinary freehold] for Indigenous people living on community title could profoundly alter the economic and social fabric of Indigenous community settlements in Queensland'.<sup>246</sup> Reversing the cycle of disadvantage, and making 'the Australian dream' possible in remote communities, rests on policy development that creates a holistic framework for sustainable long-term home ownership.

#### List of Acronyms

DHPW	Queensland Government Department of Housing and Public Works
DNRM	Queensland Government Department of Natural Resources and Mines
DOGIT	Deed of Grant in Trust
ILUA	Indigenous Land Use Agreement
LHA	<i>Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Qld)</i>
LHA 2013	<i>Aboriginal and Torres Strait Islander Land Holding Act 2013 (Qld)</i>
NTA	<i>Native Title Act 1993 (Cth)</i>
PERBA	Pre-Existing Right-Based Act
RNTBC	Registered Native Title Body Corporate
TO	Traditional owner
TSILA	<i>Torres Strait Islander Land Act 1991 (Qld)</i>