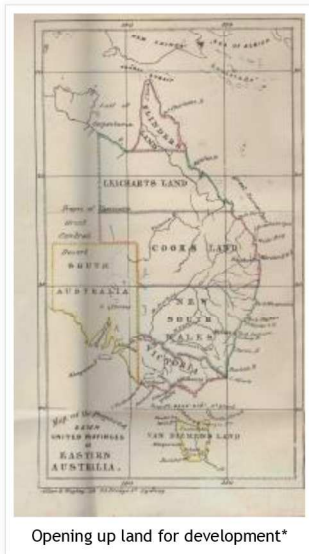


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Sunday, 5 October 2014

The cost of 'regular' freehold over Indigenous land in Queensland



There is perhaps a tension within the way we understand these communities as both an expression of Indigenous autonomy but also with a more oppressive colonial past. This tension is implicit in the complicated relationship between ideas of being treated the same - having a 'regular' freehold title - and recognising communal title and traditional ownership as prevailing norms within Indigenous communities.

The Queensland government has now passed the *Aboriginal and Torres Strait Islander Land (Providing Freehold) Act 2014*. The Act's primary purpose is to enable the freeholding of land in Aboriginal and Torres Strait Islander communities. Presently much of this land is held as Aboriginal or Torres Strait Islander freehold or on trust for the community. The current arrangements limit the grant of these interests to traditional owners or other Aboriginal or Torres Strait Islander inhabitants of the community. The existing freehold is therefore a

limited type of freehold.

The [aims of this reform](#) is to 'introduce the option of ordinary freehold title into Aboriginal and Torres Strait Islander communities'. [According to the government](#), this will 'provide greater economic development opportunities and remove barriers to home ownership in Aboriginal and Torres Strait Islander communities.' While this may well be the effect, it raises the question: at what cost?

Land rich, dirt poor

'Land rich and dirt poor' is how Noel Pearson has famously described Australia's Indigenous peoples. Land tenure is at the heart of the debate about economic empowerment of Indigenous communities and existing frameworks - Aboriginal and Torres Strait Islander freehold and DoGITs (deeds of grant in trust) in Queensland, the network of [land councils in the Northern Territory](#), and native title nationally - have been seen as limiting the opportunity for Indigenous communities to promote their own economic advancement.

Underpinning these systems of entitlements to land is both the tradition since colonisation of reserving land for Indigenous Australians, and a recognition of the landholding norm of communal title. The reserve system can be understood as an injunction on the extent of colonial entitlements to land. Common law title was subject to reservation; land was kept back for the original owners.

Reserves are also widely understood as a form of segregation, run by missionaries charged with implementing the policy du jour over Indigenous residents some of whom had been forcibly settled there. In Queensland, the new land tenure will apply to many Indigenous communities that were formerly reserves.

About Me



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Communal title is largely seen as anathema to the norm of individual Anglo-Australian land tenure. While the [common law has known communal title](#), as a concept it has receded into ancient tenures that no longer have currency in Australian legal thinking. Individual title - the freehold estate in fee simple - is now the gold standard in a market economy. It is part of a network of contemporary institutions - finance and securities, development planning, resource exploitation and markets in land itself - that together embody the capitalist imperative of growth.

But individual title is a cultural construct also. It embodies the construction of self as the autonomous, self-sufficient and independent citizen. Property in classical liberal theory is after all an extension of the self. This forms the basis of the Anglo-Australian system of property law. In contrast, communal title and its alternative customary foundation threatens the status quo of economic institutions as well as how the majority of Australian society conceives of the autonomous citizen.

The Queensland land tenure amendments

In Queensland under the new legislation, Indigenous communities are invited to develop a plan to extinguish native title and release DoGIT land in exchange for the grant of 'regular' freehold. They are to do so in accordance with the principles of privatisation, ie at their own cost. Apart from 'a pool of up to \$75,000' to be set aside for some pilot consultations in selected communities, the [government states](#) that there will be 'no additional cost to government.' Processes of consultation, advertising, negotiation with traditional owners, surveys, claim processes and costs of registration will therefore all be born by communities or their members.

In terms of thinking creatively about economic empowerment of Indigenous people and their communities, it is not clear that the grant of 'regular' freehold (which is 'just like that of every other citizen') will necessarily achieve that goal. The Queensland government says that 'the amendments will provide greater economic development opportunities' but it does not say for whom. It is very clear though that extinguishment of native title will help the proponents of development projects in these areas, as they will no longer need to negotiate with native title holders. This accords with the Queensland government's [clearly stated](#) development goals: 'this government is unashamedly pro-growth.' In this sentiment there is no commitment to enhancement of the rights of and opportunities for Indigenous communities.

The government does say that the amendments will assist Indigenous home ownership. A long-standing policy issue for government, the lack of home ownership on Indigenous land has been [attributed to regulatory limitations](#), suggesting that reform is long overdue. Somewhat confusingly then, it seems that it was already possible to provide for home ownership. Before the enactment of the new legislation, [Hopevale in Queensland's far north](#) succeeded in opening up DoGIT land to home ownership. Communal title, it seems, is [not necessarily a barrier](#) to home ownership. But lack of tenure infrastructure (surveys, planning regulations) is. While tenure regulations could certainly be streamlined, it is unclear why they necessarily need to go as far as extinguishing traditional owner interests to achieve home ownership.

The shift from the present system to individualised land tenure may well be the logical next step in the devolution of land to Aboriginal and Torres Strait Islander interests. But in doing so, it may also see the last of title that explicitly recognises the norms of these communities. For while the legislation appears to empower individual ownership, it likewise opens up the land to be sold to or foreclosed by non-Indigenous owners. By necessity also, it precludes communal ownership.

There are other barriers too, not addressed in the Act's explanatory memorandum or its scheme of freeholding. These are structural issues, reflected in the reality of our networked society. For an individual to be part of the mainstream economy, they need to be included within the economy's social, cultural and economic institutions. For example, where Aboriginal and Torres Strait Islander people experience racism in employment or in borrowing to purchase their land, their capacity to get a loan and to service it will be affected. Without finance, the dream of home ownership - despite the tenure amendments - will remain just that. Individual title is an important institution in its own right, but the presumption of the individual autonomous owner is false. It is not true to say that an individual exists in isolation. Rather they are part of networked society.

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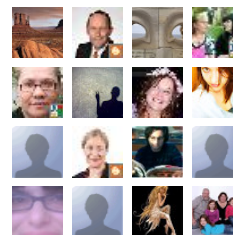
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An analogy can be drawn with the Married Womens' Property Acts. A major progressive reform of the late 19th century, the Acts gave married women legal standing and finally permitted them to own separate property. Before the Acts, a married woman's property became vested in her husband. She was invisible to the law. But without complementary changes in other institutions of society, women's capacity to purchase property is limited in comparison to men. Women earn less, have less superannuation, are expected to undertake the bulk of unpaid caring work and they are systematically discriminated against in the workplace. Opening up the promise of individual property ownership for women is a major reform but has not necessarily been the panacea hoped for.

Other consequences

There will be consequences for communities who choose take up the new land tenure. To the extent that it fails to recognise community norms - the customs by which people in communities actually use and deal with land - there may be disputes. This is perhaps inevitable in superimposing an individualist system where communal norms exist.

Communities will need to be educated about other aspects of property. Succession law, family law and securities law will all form part of the legal framework around a 'regular' freehold title that owners need to be mindful of. If the new owners of freehold do not make wills, for example, they need to be aware of what laws will apply to their estate. If they take out a mortgage, it needs to be clear that upon default, the bank is entitled to sell up the land to the exclusion of the owner.

In terms of financing, it will be interesting to see how banks deal with lending criteria and ancillary aspects such as life insurance. For Indigenous borrowers, are there implications of average lower life expectancy, for example? Where banks are cutting down on their metropolitan and rural branches, how will residents in remote communities access the funds that will enable them to finance their home ownership? What is the market for land in Indigenous townships, to support a land value as security? In these amendments, the premise of individualism and the limited conception of autonomy seem to preclude the institutional supports that in fact enable us to achieve our 'individual' status. This is particularly so in light of the government's privatisation approach to the new tenure.

Additional tenure infrastructure will also be required to enable the release of land as freehold. In particular, it will require surveying. It has been some time since I dealt with this issue in practice, but about 10 years ago I acted for a leaseholder in a community who wished to regularise their lease to obtain finance for their business. The bank was willing to lend once the lease was finalised. The trustee approved, all the processes were in place but my client needed a survey of the parcel to formalise the transaction. The cost of getting a surveyor to travel from Cairns for the survey was prohibitive.

Surveying is a central part of tenure regularisation, and is required under the Queensland amendments. But under the amendments, this seems to be the responsibility of councils or landholders. Based on my past experience, I will be interested to see how this essential part of the tenure process is achieved. I would have thought that this was a crucial part of government infrastructure that would need to be funded as such.

While there will be benefits that flow from the new tenure, there are also risks. Entering the paradigm of the atomistic individual is likely to involve at least some [loss of community](#). [Land rights are human rights](#) and I do not suggest that these reforms cannot bring benefits to communities that pursue them. I am conscious however that the standard imposed requires these communities to conform to the norms of the individualist market economy but without the institutional context that supports others. This may well be what some - or all - of these communities want. The shift however from communal to individual title means that it is possible that communities will be giving up their interests altogether, for the benefit of others.

*image via <http://www.qhatlas.com.au/content/secession-movements>

Posted by [Kate Galloway](#) at [09:04](#)

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