12.0
Land tenure
The terms of reference for this inquiry ask the Commission to report on ways to achieve better outcomes in remote and discrete communities. This chapter discusses elements of the land administration system that could be improved to better facilitate service delivery and enable economic and community development.

**Key points**

- Aboriginal and Torres Strait Islander people in remote and discrete communities have large and growing land holdings—if communities are to move away from a reliance on externally provided services, they will need to be able to better and more easily use these land assets.

- History has left a patchwork of tenure arrangements and resource rights, particularly in Cape York, which has constrained economic activity and limited home ownership opportunities.

- Much progress has been made to remove these constraints and enable Aboriginal and Torres Strait Islander communities to use their land assets. However, significant work remains to be done:
  - Separate native title interests overlay tenure across most remote and discrete communities. The resolution of competing interests is critical to enable land use.
  - Indigenous councils remain trustees over township land in most discrete communities, which may cause conflicts of interest and constrain economic activity.
  - While capacity is emerging amongst Indigenous land holding bodies, they often lack the capability to effectively negotiate economic and/or community development opportunities.
  - Statutory planning schemes that overlook future development prospects can hinder communities taking advantage of economic and community development opportunities.

- Many of the issues raised by stakeholders are not the sole responsibility of the Queensland Government. Any solutions need to involve the State, local and Australian governments, together with Indigenous land holding bodies and their representative structures.

- Many of the issues relating to land tenure are beyond the scope of this inquiry. Further, there are range of technical and legal issues that require further consideration before definitive solutions can be developed.

- The Queensland Government should lead land tenure reform by working with stakeholders to develop a plan that sets out a desired land administration system, with an associated roadmap for reform and timeframes for completion.

- As part of any reform process, consideration should be given to whether any functions to support the land administration system should be moved to community control.
12.1 Current status

Why land tenure is important

The ability for individuals to use, transfer and borrow against land assets is a key feature of successful modern economies (Rodrik 2000). For much of the land controlled by Aboriginal and Torres Strait Islander people living in remote and discrete communities, this ability, until recently, has been absent:

*Governments continue to spend large amounts of taxpayer funds for extremely modest results. They are not addressing core problems. Until private property rights—private housing and private business—are introduced, governments will continue to spin their wheels.* (Hughes et al. 2010, p. 1)

*It is clear that a major reason why social and economic participation in remote and discrete Aboriginal and Torres Strait Islander communities is much lower, and government delivery levels are much higher and more difficult than on other parts of the Queensland is because of the failings of the land administration system in these communities. This dysfunction is also directly linked to what many Indigenous leaders have described as the 'structural disempowerment' of Indigenous people living in discrete communities.* (Cape York Land Council sub. 20, p. 3)

In most parts of the state, land tenure arrangements are relatively straightforward—freehold and leasehold crown land provides defined individual property rights, and allow these rights to be freely traded in an open market. In the main, property boundaries have been gazetted and ownership is clear. These arrangements establish secure individual property rights that facilitate economic activities such as grazing, cropping and tourism ventures, and encourage home ownership and a private rental market in remote areas.

In most remote and discrete Aboriginal and Torres Strait Islander communities, tenure arrangements have not been this clear—in discrete communities, up until 2008, there were no legal mechanisms to allow any form of individual property right, including the ability to own a home or establish a business (Limerick et al. 2012).

Land tenure is also important for service delivery. Under current Australian law, any permanent fixtures on land are the property of the landholder (Crabtree et al. 2012). In the discrete communities, land is owned collectively by residents, with Indigenous councils acting as trustee. Service providers and tenure holders both need tenure arrangements that provide surety for their ongoing activities and interests.

Current tenure arrangements

Most land held by Aboriginal and Torres Strait Islander people in remote and discrete communities is Aboriginal freehold or land held in trust.

The laws governing Aboriginal freehold land are established under the Queensland *Aboriginal Land Act 1991 (ALA)* and *Torres Strait Islander Land Act 1991 (TSILA)*. These Acts allow for the grant of inalienable freehold title to Land Trusts and Corporations that represent a broad Indigenous group—that is, land is held collectively and cannot be sold, mortgaged or transferred.

The ALA and TSILA allow land to be used for economic purposes; however, the resource rights associated with tenure vary from location to location.

As of 2017, the state has transferred almost six million hectares of land in remote areas—mostly on Cape York—to Aboriginal Freehold (DNRM 2017, see Figure 62, p. 271). The Commission understands from discussions with the Remote Indigenous Land and Infrastructure Program Office (RILPPO) and Cape York Land Council that most transfers of land were made to Land Trusts.

In the discrete townships, the predominant form of land tenure is a Deed of Grant in Trust (DOGIT) where the council holds land tenure on behalf of all residents. The ALA and TSILA provided a specific provision for the government to transfer DOGIT land to Aboriginal Freehold, but the Commission understands that this is yet to occur in most discrete communities.
The ALA and TSILA allow for the creation of 99-year leases in a simple, flexible framework without ministerial approval. These leases can only be granted or transferred to non-Indigenous people under certain circumstances. Leasing of DOGIT land is also governed by the ALA and TSILA.

The *Aboriginal and Torres Strait Islander (providing Freehold) Amendment Act 2014* amended the ALA and the TSILA to provide for the conversion of town areas in discrete communities to ordinary freehold. Once granted, this would allow the land to be sold or transferred to any party, including non-Indigenous people. However, as noted by Terrill (2015), the conversion to freehold is likely to be challenging (and expensive), since it would involve extinguishing native title interests. The Commission understands that, to date, there has been little interest in pursuing conversion of land to ordinary freehold in most discrete communities.

There is a complex array of tenure types in remote and discrete Aboriginal and Torres Strait Islander communities, particularly in Cape York, where there are a wide range of tenure types and 90 per cent of the land area is subject to a native title claim (see Figure 63, p. 272). This appears to create unnecessary confusion and cost:

*Land tenures in ILGAs include Deed of Grant in Trust (DOGIT), Aboriginal freehold, Aboriginal freehold lease, Land Holding Act (‘Katter’) lease, Aboriginal reserve, Reserve for Departmental and Other purposes, USL, road reserve, and fee simple freehold. Each of these tenures includes a unique set of rights and interests, and are held by a variety of parties. The mix and proportion of tenures varies in every ILGA and is especially variable within town areas. The mix of rights and resources provided by the various tenures, quite often in adjoining or adjacent lots in a small community, creates confusion and uncertainty for people wanting to engage and invest in enterprise. Alternatively, because of land administration issues, the rights and interests associated with various tenures are ignored and the land is used for purposes inconsistent with the purpose of the tenure, which creates further confusion and conflict.* (Cape York Land Council sub. 20, attachment A)

There are also long-standing issues with leases arising under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (the 'Katter' leases). More than 400 lease applications were approved under the Act, with 232 granted and 198 remaining outstanding. In many cases the original applicant has since deceased, and resolution needs to occur with the beneficiaries of their estate. The introduction of the ALA in 1991 created issues for the Katter leases, effectively putting them in limbo (Queensland Government 2016). These technical issues were resolved with the passage of the *Land Holding Act 2013*, but many of the practical issues remain unresolved.

**Native title coexists with land tenure, a further complicating factor**

Native title confers certain rights to traditional owners of land, where these rights have not previously been extinguished and an ongoing connection to land can be established (Native Title Tribunal 2010). The rights conferred by native title vary and may include the right to possess and occupy an area to the exclusion of others (exclusive possession).

Native title coexists with land tenure and the interests may be held by different parties. For example, native title exists over most discrete townships, with the tenure held (as DOGIT) by council on behalf of all residents. The residents of discrete communities may have no traditional connection to the land, but are likely to be descended from people who had been settled there for historical reasons. The holders of native title are traditional owners, who may or may not reside in the community, and are represented by a prescribed body corporate (PBC).

Indigenous land and native title rights do not exclude economic development—there are many successful developments on Aboriginal land that coexist with native title interests (COAG 2015, p. 23). This is consistent with the view of stakeholders the Commission spoke with.

There is, however, an opportunity to do more to support land owners and native title holders in leveraging their respective interests. Enabling activity on jointly held land requires the negotiation of an Indigenous Land Use Agreement (ILUA), which sets out the conditions (including any compensation measures) by which native title holders will allow any future acts that may interfere with any rights conferred through their native title interests. However, the evidence suggests that these negotiations are often expensive and protracted.
The land administration system underpins land use

The land administration system (LAS) determines the ability of Aboriginal and Torres Strait Islander people to effectively use their land assets (Box 12.1). Currently, the land administration system is excessively complex making the resolution of land tenure issues a difficult and lengthy process.

Box 12.1 Land administration system (LAS)

The LAS allows for the creation of legally secure and certain interests in land and is essential for using and managing interests in land.

Land administration is a broad topic and involves the interaction of many interdependent parts—nevertheless, the LAS facing remote and discrete Aboriginal and Torres Strait Islander communities is more complicated than in the rest of the state.

Legislation covering land use is covered in at least seven separate State and Commonwealth Acts (four of which are Indigenous-specific):

- Land Act 1994
- Land Title Act 1994
- Planning Act 2016
- Aboriginal Land Act 1991
- Torres Strait Islander Land Act 1991
- Aboriginal and Torres Strait Islander Land Holding Act 2013
- Native Title Act 1993.

Much of the land under Aboriginal and Torres Strait Islander control is also subject to range of conservation and heritage controls, including provisions of the:

- Vegetation Management Act 1999
- Nature Conservation Act 1992
- Water Act 2000
- Mineral Resources Act 1989
- Aboriginal Cultural Heritage Act 2003
- Cape York Peninsula Heritage Act 2007
Considerable progress has been made

Until recently, land administration in the discrete communities was almost non-existent. Cadastral surveys had not been conducted, meaning it was impossible to identify individual land parcels in communities—as a result, public infrastructure, including roads and housing, were often constructed without thought for property boundaries (Moran 2016).

Progress has been made in improving land administration in the discrete communities, largely led by the work undertaken by the Remote Indigenous Land and Infrastructure Program Office (RILIPO). This work has addressed many of the impediments to development in Indigenous communities and enabled many communities to issue leases for home ownership and for other uses (Box 12.2).

Box 12.2 Remote Indigenous Land and Infrastructure Program Office

In 2009, the Queensland Government began a process to drive changes to land administration and town planning to enable long-term leases for home-ownership and economic investment. This process was managed by the Remote Indigenous Land and Infrastructure Program Office (RILIPO), an office of the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP). Unlike in other jurisdictions, RILIPO has been successful in moving the planning landscape in Queensland discrete communities towards normalcy (Forrest 2014). Actions include:

- undertaking cadastral surveys of the land to define property boundaries
- completing road encroachment surveys
- conducting lot surveys and state government asset surveys
- facilitating the implementation of town planning schemes in the discrete communities
- completing development applications and administrative work to enable the execution of long-term leases
- coordination of Queensland Government agencies’ compliance with native title requirements
- resolving outstanding title issues on blocks of land (although the ‘Katter Leases’ remain largely unresolved).

RILIPO also coordinates infrastructure development and native title compliance in the communities, including Indigenous Land Use Agreements (ILUAs) between native title holders and other parties.

12.2 Key issues and challenges

More work is required to improve land administration

Although there have been significant gains in resolving native title issues, completing surveys over townships and the transfer of land title to Aboriginal freehold, there remains a range of impediments to economic development and home ownership.

While there are a range of historical, cultural and geographic factors that may make economic development challenging, it is clear the current LAS also constrains development. This was a point raised by several stakeholders:

... the LAS is dysfunctional in Cape York ILGAs and other remote and discrete Aboriginal and Torres Strait Islander communities, and it lags far behind the standard of LAS services that the rest of Queensland enjoys and depends on to successfully enable social and economic participation. (Cape York Land Council sub. 20, p. 3)

Partly, these concerns relate to a lack of a clear plan for moving forward:

The LGAQ has resolutely advocated for an overarching plan for land tenure reform in Queensland’s Indigenous local government areas. The LGAQ, and its seventeen (17) Indigenous local government members, recognise that appropriate land tenure underpins and enables regional economic growth and community advancement.

Ultimately, without a certain and secure land administration framework, Queensland’s discrete Indigenous communities will continue to be reliant on grant funding and external service delivery. (LGAQ sub. 14, p. 35)

The concerns of stakeholders may be exacerbated by a perception that government action to reform land administration arrangements in communities has been driven by government rather than community priorities. For example, actions to conduct cadastral surveys in discrete communities were largely seen as being precipitated by a need to secure tenure and progress housing construction under the National Partnership Agreement on Remote Indigenous Housing (NPARIH) rather than as a response to long-standing complaints from community.

However, there were also concerns about slow progress and a lack of consultation by some agencies:

We already have complex land tenure arrangements in the Torres Strait, and history has shown (as with the unresolved ‘Katter’ Land Holding Act leases) that insufficient processes leave a divisive legacy which can have significant impacts on community wellbeing.

It is vital that departments, and their contractors, obtain all necessary Native Title approvals before bringing plant, equipment and supplies to sites. Too often this fails to occur, resulting in breaches of requirements under cultural heritage and Native Title legislation, and causes understandable anger and distress for affected community members (and adverse impacts on Council’s relationships) (TSIRC sub. 12, p. 30)

Stakeholders also said that, although significant progress has been made recently with surveying town areas in discrete communities, many land users still do not have a registered interest in land (that is, the lot is yet to be surveyed and registered).
Statutory plans have constrained land use

Stakeholders have raised concerns that recent statutory plans have been developed without sufficient consideration for land suitable for economic activity—as a result, much land has been zoned as being suitable for conservation and environmental management use purposes. This is evident in the Aurukun Planning Scheme (Figure 61), which shows that all land area in the community, apart from the immediate township, has been zoned as for conservation and environmental management.

Figure 61 Aurukun Planning Scheme

Source: Aurukun Shire Council 2014, p. 133.

Other planning regimes, such as those imposed through the Cape York Regional Plan, can add additional layers of land use regulation or restriction.

Aboriginal people tend to have land returned as large lots. They wish for these to be subdivided and allow community development. State planning policies restrict development because they place hazard layers over the entire lot (e.g. fire, flood etc.) that must be addressed even if development is only planned on a small section of that lot.

The Queensland Government through the Wet Tropics Management Authority limits development on significant areas of land held in trust by Aboriginal people. Because the landscape has been developed by settler communities, areas being returned to Aboriginal people have high conservation values. Aboriginal people are being forced to limit development on lands returned to them which can perpetuate the injustice. (Jim Turnour sub. DR 10, p. 3)

Stakeholders indicated that restrictive planning schemes, combined with the high cost of negotiating with native title interest holders, can make it prohibitively expensive to use land resources for economic development, effectively putting land out of reach of all but government and large corporations.
Congress seeks to establish a private home ownership market on three distinct areas of its land holdings [which sit outside of the Indigenous township of Hopevale]...Currently, the lands outside of the township are zoned Rural and provide for a limited range of development opportunities...Congress is prepared to develop land in accordance with the advice from the Land Valuers and the Banks, yet must make a development application to HVASC to do so. The Development Application is not only onerous in terms of the costs associated with preparing the application, but must also make application (and pay fees) to the state government for them to assess the application against a series of State Planning Policy overlays that are not reliably mapped outside of the major city boundaries. (Hope Vale Congress Aboriginal Corporation sub. DR17, p. 2)

As a result, some communities are seeking to change planning schemes—during consultation, a PBC told us it has had to seek funding to develop a master plan and seek amendments to the planning scheme only recently developed for Yarrabah.

Hope Vale Congress Aboriginal Corporation state that the current planning arrangements are not suitable for Indigenous land holdings and suggest that a parallel system of planning that allows native title and Aboriginal land holders to develop plans that are accorded statutory protection.

The Commission has not assessed the extent to which market opportunities may be available to Aboriginal and Torres Strait Islander land holders residing in remote discrete communities. However, a range of challenges exist, including:

- large distances to market
- insufficient infrastructure, including roads and telecommunications
- high costs of doing business
- difficulties recruiting specialist staff.

Despite these difficulties, the literature suggests that there are economic development opportunities that are not being harnessed (Altman 2001; Cape York Institute 2005; Forrest 2014). These might include eco-services and land management, customary or hybrid economy products, mining, forestry or other commercial ventures (SCRGSP 2016a).

What is clear is that market opportunities in remote locations are currently rare, so when new opportunities arise they need to be quickly harnessed by Indigenous organisations—this is hampered by slow and costly land approvals and tenure resolution processes.

Progress on conversion of DOGIT to Aboriginal Freehold has stopped

The ALA (section 91) requires the state to transfer DOGIT land to Aboriginal freehold ‘as soon as practicable’. While much DOGIT land has been transferred to Aboriginal freehold, the Commission understands that most of the land in the Indigenous townships remains as DOGIT held by the Indigenous councils.
There are concerns that allowing Indigenous Councils to hold land tenure places too much power in a single body:

> all entrepreneurial activity in the town area must occur via the Indigenous shire council, which is not the case in other towns. Council as trustees are effectively placed as the gatekeeper of the creation of any other rights and interests in land in the town, such as the creation of a lease needed for a business... Councils in many communities see themselves as in charge, and they are in the box seat when business opportunities arise to negotiate themselves into partnership relationships. The result is that those business opportunities that do exist in Indigenous communities tend to be dominated by council acting in partnership with non-Indigenous entrepreneurs and businesses. Council control and (structurally embedded) overreach crowds out the private sector... This is unlike the situation in any other town, and it can crowd out entrepreneurial opportunities for local small business, and lead to a concentration of power and opportunity in certain family groups. It also inevitably leads to allegations from those outside the ‘elite’ powerful circle of unfairness, favouritism and nepotism. (CYI sub DR15 p. 9)

The position of Indigenous councils on this matter is not clear, however, several councils indicated that they would like to be able to focus on their core responsibilities rather than being responsible for land tenure dealings. The Commission notes that the Torres Strait Islander Regional Council has deferred all trustee decision-making to individual island communities.

One reason the transfer of township land has not occurred is that there are unresolved issues related to the transfer of infrastructure constructed this land. Under Australian law, most permanent fixtures on land are considered the property of the tenure holder (Crabtree et al. 2012). This means that any transfer of DOGIT land to an Indigenous Corporation would also involve the transfer of these assets.

A range of government infrastructure is situated on DOGIT land without leasing arrangements (the exception is housing recently transferred to 40-year leases). This may make government hesitant to transfer land to Indigenous control, since they are afforded some comfort while councils remain the trustee of land assets.

Councils also own and manage a number of assets that would be transferred under any change of tenure to Aboriginal Freehold. They also stand to lose significant lease revenue—for example, the Queensland Government currently pays to Indigenous councils, in lieu of rates, annual fees of $2,800 per house for social housing on 40-year leases (pers. corr. DHPW officers).

The Commission understands that it is possible to address these issues by securing leases over land containing assets during the transfer process from DOGIT to aboriginal freehold. The process for reaching agreement over lease terms may need to be carefully managed, with particular attention given to ensuring that communities are able to continue to enjoy benefits from government and council assets.

Any transfer process will also have to resolve any impacts on council revenues from a loss of lease income, particularly those relating to social housing. As discussed in chapter 14, Indigenous Councils are already revenue constrained and, as a result, struggle to sustain the delivery of basic municipal services.

**Communal rights need to be balanced with individual property rights**

Most Indigenous land holdings in remote and discrete communities are held communally. Apart from some isolated pockets of freehold land, land holdings are predominantly Aboriginal freehold. This is a form of inalienable collective title, with tenure conferred to a corporation and held in trust for the benefit of an identified Indigenous group.

Lending and investment allows individuals and businesses to build the assets they own and enables the pursuit of economic opportunity, such as home ownership or start-up funds to initiate a small business. Loans with banks generally need to be secured with an asset so that if the borrower defaults, the bank can sell the asset and recoup its debt. The inalienability and communal nature of land interests including native title and Aboriginal land mean that these land interests are not readily ‘bankable’ (Crabtree et al. 2012).
Communal property rights can also impede economic development and wealth creation where they make it difficult to get things done and discourage individual entrepreneurship (Box 12.3). While communalism is widely regarded as a central tenet of Aboriginal and Torres Strait Islander culture, this needs to be balanced against the need for individuals to participate in the modern economy.

The creation of subleases on long-term head leases is the principal means of establishing tenure security for investment and to promote individual dealings on Indigenous land. This is possible under the ALA and TSILA, with long-term leases preserving underlying communal title, while creating a transferable interest which can be used as collateral for a loan (COAG 2015). However, to issue a transferable lease, the native title interests of traditional owners first need to be addressed.

Box 12.3 Are individual property rights important?

Hughes et al. 2010 argue that common land tenures and collective management have discouraged entrepreneurship and individual responsibility, and entrenched community dysfunction. They conclude that this has led to the low levels of productivity, economic activity and high levels of government dependence evident in discrete communities. The authors argue that individual property rights are key to kick-starting economic development and business activity. Home ownership is seen as a pathway to wealth creation, in combination with tenure reforms aimed at generating individual property rights.

Critiques of collective tenures have also argued that these systems constrain democracy. Ascribing leadership to only those able to prove an unbroken traditional use of their land excludes those from outside the group, even if they have a legitimate interest for historical reasons—this may be a real issue for the many residents of Queensland’s discrete communities who are not traditional owners of the land, but whose ancestors may have been forcibly settled in these communities.

Further, communal governance arrangements are more likely to suffer from partisanship or nepotism, and tend to distribute benefits to the select favourite clique. This is further exacerbated by collective decision-making restricting the scope for individual action and risk-taking.

Noel Pearson, a prominent advocate for private ownership rights, is clear in his support for land rights, stating that communalism is ‘the very basis of Aboriginal Culture’ (cited in Bradfield 2005).

However, Pearson is also clear that collectivist tenures need to work with modern economies:

\[
\text{Private ownership is a real issue for Indigenous reform and development. Communal land tenure works for hunter-gatherer economies but modern economies depend on property rights. There is a clash between the cultural imperatives of private tenure. (Pearson 2007)}
\]

\[
\text{The stultifying communalism of Aboriginal communities is the product of our bureaucratic dealings with the state rather than a true reflection of our ancient traditions. Until Aboriginal communities break out of the strictures of collectivism and free individuals and families to prosper and pursue a better life on their own right, we will continue to wallow in dysfunction and misery. (Pearson 2010)}
\]
Native title and tenure interests can be more easily resolved when interests are aligned

As discussed earlier, native title and tenure interests can be resolved through an ILUA which sets out agreed activities allowed on land holdings, including any compensation arrangements for future acts which impede native title interests (see Box 12.4). The ease by which an ILUA can be settled depends on the extent to which there is an alignment between the interests of the tenure holder and those of the native title holder.

**Box 12.4 Indigenous Land Use Agreements (ILUAs)**

An ILUA is a negotiated agreement between native title groups and other parties (such as governments, pastoralists and mining companies) about the use and management of land and waters. ILUAs may cover many different things, such as the conditions upon which activities effecting native title maybe carried out, arrangements for cultural heritage inspections and the avoidance of damage to cultural heritage, compensation to native title holders for the loss of native title rights, the way in which the exercise of native title rights may be carried out, and protocols for future negotiations concerning Future Acts.

Land councils and RILIPPO play a key role in facilitating ILUAs, including in settling the legal wording of the agreement, and facilitating and arranging meetings.

In its role as the Cape York native title representative body, Cape York Land Council (CYLC) facilitates the negotiation and registration of ILUAs. Some recent ILUA initiatives include:

**Mapoon Township Community Development ILUA (finalised 2015–16):**
- Anticipates the likely future development in the town area, including home ownership.
- Provides simplified processes and compensation formulas for native title consent for those acts.
- Enables development in Mapoon that is easier, quicker and less expensive for all parties.

**Peninsula Developmental Road (finalised 11 July 2017):**
- Significant benefits for traditional owners were negotiated as part of the ILUA, including employment and economic development opportunities.
- Allows the road works to proceed with validity in respects to native title.
- Provides for management of Aboriginal cultural heritage during the course of works.

**Sandstone East Aggregate ILUA (signed 2016):**
- It transferred 54,510 hectares of land as Aboriginal freehold to the ownership of its Traditional Owners.
- Some of the land will be declared as a jointly managed National Park.
- The remainder will be available for economic uses such as grazing, tourism and other uses as Traditional Owners see fit.

*Source: Native Title Tribunal 2016; North Queensland Land Council 2017.*
Creating incentives that align the interests and native title holders is likely to be a key to unlocking the potential of Queensland remote Indigenous land holdings—given the claims currently in progress, it is likely that native title will coexist with other interests for most of Cape York (National Native Title Tribunal 2017).

A Senior Officers Working Group report to COAG (COAG 2015) noted emerging concerns about land tenure resolution and suggested that a way forward was to invest both native title and tenure interests in the same body. This view was shared by some stakeholders; however, there were concerns that recent conversion of crown and DOGIT lands to Aboriginal freehold had not sufficiently considered how native title and tenure interests could be aligned.

Stakeholders expressed concerns that recent land transfer arrangements—where Aboriginal land tenures are being granted to Land Trusts, while native title interests are being determined by separate PBCs—are hindering development:

> Whilst native title determinations and tenure transfers to Aboriginal ownership in land trusts are strongly supported, issues have arisen in some ILGAs where separate Indigenous corporations have been established to hold different rights and interests in the same area of land. This arrangement is cause for further confusion and conflict in communities, and presents significant obstacles to social and economic participation and government service delivery. (Cape York Land Council, sub 11, attachment A)

> The dual role of council as local government, and Land Trustee, also contrains development by stifling local entrepreneurial effort by setting up the Council and the PBC for complex negotiations and conflicts over land. Where native title exists over land for the Council is Trustee, there are interests held in the same land managed by two separate Indigenous organisations—the PBC and the council—which inevitably leads to tension. (Cape York Institute, sub. 26, p. 16)

Ideally land trusts and native title should be held by the same entity to streamline the tenure development process. The DNRM land transfer process under the Aboriginal Land Act 1991 and Native title process funded through the Australian Government don’t always align. The DNRM process should have greater regard to native title process in decision making about land. Where PBC’s exist, they should be the first preference as land holding entities. (Jim Turnour sub. DR10, p. 4)

Where there is clarity on who holds tenure and native title, and interests can be aligned, stakeholders said that native title issues can be resolved:

> Burke Shire Council and the Gangalidda and Garawa Native Title Aboriginal Corp (NTAC) signed a ground-breaking Land Exchange Indigenous Land Agreement (ILUA) in 2014 following extensive consultation between the two parties. The ILUA dealt with over 22,000 hectares of land in Burketown with the result that both the Local Government and Traditional Owners now have access to land to meet various residential, commercial, conservation, community, cultural, civic and industrial needs. (Burke Shire Council sub. DR18 p. 4)

### 12.3 A way forward

Land tenure issues are much broader than the scope of this inquiry, and require a full consideration of a range of legal and technical issues. Because of these limitations, the Commission’s recommendations are reliant on the issues identified by key stakeholders, and, as such, may not consider all factors.

The Cape York Land Council submissions propose an ideal LAS (sub. 20 and sub. DR013). The Commission considers that the features in these submissions provide a sound basis for land use that respects various land interests, and addresses many of the land use issues raised by stakeholders. These features are outlined in Box 12.5.
Given its historical issues, the LAS is moving in the right direction. However, the LAS remains difficult and expensive to navigate—significant gains will be made by reducing transaction costs. In particular:

- Given the underlying inalienability of most Indigenous land holdings, leases will become the primary means through which individual and transferable property rights can be established. Indigenous and non-Indigenous interests must be able to easily and inexpensively acquire and register leases. Land trustees and other relevant parties must be supported in their role in granting leases.

- Native title interests need to be resolved through ILUAs. The development of broad-based or process ILUAs may require significant upfront resourcing, but will lower future transaction costs and enable land use.

- Multiple tenure types, with varying resource rights add complexity and make it difficult for tenure holders to navigate land administration.

- Improved statutory planning will make it easier for Indigenous land holders to navigate the LAS, reduce transaction costs and better enable economic and other development.

- Additional transaction costs arise where unnecessary planning permissions are required. Effective master planning can identify appropriate future land uses and establish investment-ready land that can be easily accessed for development.

- Aligning native title and tenure interests will significantly reduce transaction costs. Transaction costs can be minimised by ensuring that future allocations of Aboriginal freehold land are made with consideration for existing and future native title holders.

- The capacity of land holding bodies (both native title and land tenure) is an important factor in reducing transaction costs for those (Indigenous or non-Indigenous) parties wanting to use land on which Indigenous interests exist. Unlike fee simple freehold, the underlying decision-making powers are not transferable. How such capabilities are developed or provided will be important for future economic development.

We also note that some of these issues fall outside of the responsibility of the Queensland Government. For example, native title issues and funding for native title bodies is an Australian Government responsibility. Similarly, local government has a critical role to play, particularly the Indigenous councils in discrete communities.

All three levels of government need to work together with Indigenous land holders to develop solutions. The Commission recommends that the Queensland Government take a lead role in this regard. As the Cape York Land Council states:

*This is a challenge of leadership that the Queensland Government must embrace. (sub DR13, p. 5)*
Box 12.5 CYLC’s proposed Land Administration System

**Land Tenure and Property Rights.** The primary land tenure layer is inalienable and communally owned Aboriginal freehold, except for small areas where other tenures such as road reserves exist as appropriate. Aboriginal freehold property rights include rights to resources such as timber, gravel, carbon, water, vegetation, etc., and the right to grant legally secure and fully transferable leases and other interests in land to individuals or companies as a secondary tenure layer.

**Native Title.** A native title determination has been completed, and land where native title continues to exist has been confirmed.

**Holding of Interests in Land.** A single Indigenous Corporation performs the functions of (1) a Registered Native Title Body Corporate (RNTBC) to hold and manage native title rights and interests, and (2) a Land Trust to hold and manage Aboriginal freehold and other tenure rights and interests in land. The Corporation’s constitution identifies how it operates in the interests of native title holders and Indigenous parties with historical interests in land.

**Land Title Registration.** Each parcel of land used for (or planned to be used for) a discrete purpose (such as home ownership, business or service delivery) is surveyed and registered as a lot. Parties with an interest in each lot are recorded on the Land Title Register. This includes existing land users, such as the local government and service deliverers, having registered leases over the land they use.

**Native Title Consent.** A process ILUA provides simple, inexpensive and quick processes for the consideration of native title consent for a range of future acts, including leasing of land and associated development, and a cultural heritage management process for development.

**Land Use Planning and Management.** An assessment of land values and appropriate uses is performed and used to prepare a statutorily-compliant planning scheme that provides for appropriate development in the ILGA. Other legislation and plans do not constrain appropriate development. If the Indigenous Corporation agrees to manage some land for public good conservation outcomes then the Indigenous Corporation is appropriately resourced to achieve these agreed outcomes.

**Capacity for Social and Economic Participation.** Indigenous Corporations, home owners, development proponents, local governments, and other social and economic participants and service providers have adequate capacity and support to participate successfully. Significant legal, accounting, governance and other relevant advice and support is provided by a regional level organisation/s which has suitable capacity and relationships with Indigenous Corporations.

**Municipal Service Delivery.** Local government provides adequate municipal services to support home ownership and economic development, and annual State land valuations supports a local government rates system.

**Development Prospectus.** A Development Prospectus, based on outcomes of the land assessment and land use planning, is prepared for each Indigenous Corporation to identify opportunities for social and economic participation based on land use and development.

**Proactive Leasing.** The Indigenous Corporation proactively grant interests in land through the lease of lots for home ownership, commercial, service delivery and other purposes. Leases are proactively facilitated using: the Development Prospectus; leasing policies such as home ownership eligibility criteria and a price schedule; and a Trust Account to underpin home ownership and ensure finance options, equity and resale certainty.

*Source: Cape York Land Council Aboriginal Corporation sub. DR013.*
Moving forward, the Commission recommends that the Queensland Government progress land tenure reform by establishing a roadmap built upon wider engagement and a full technical and legal assessment.

The LGAQ has for some time advocated for an overarching plan for land tenure reform in Queensland’s Indigenous local government areas, recognising that appropriate land tenure underpins and enables regional economic growth and community advancement.

This is a very complicated matter with tensions or potential for real tensions forming between elected bodies and Prescribed Body Corporates (PBSs) over land use matters...It needs dedicated attention and resourcing to develop a blue print for moving forward in the cultural and economic interests of the community as a whole. (LGAQ sub DR12, p. 14)

Given our analysis and stakeholder views the Commission has identified the following key issues for consideration in the government’s roadmap.

The importance of the land tenure system needs to be better recognised

While the Commission acknowledges the work being done by RILIPO, a more strategic and cross-agency approach could be considered. For example, the government’s strategic policy for increasing economic participation—the Moving Ahead strategy (DATSIP 2016d)—makes no mention of land tenure issues or how the large Indigenous land holdings might facilitate economic development.

The capacity of Indigenous land-holding bodies needs to be supported

Unlike fee simple freehold, the arrangements for Aboriginal freehold land mean that the underlying decision-making powers are not transferable. This means that the capabilities of the Aboriginal Corporations that act as trustee of this land will be important in facilitating economic development.

Extensive legislative and technical expertise is required to maximise opportunities from land interests. While there is a recognition that this capacity is growing amongst Indigenous organisations, work remains to be done. Representative bodies need to be sufficiently resourced to provide technical, governance and other support for Indigenous organisations managing land interests. The Commission understands RILIPO has sought additional budget allocations to undertake this work. However, some consideration should be given to who is best placed to manage these functions. For example, it is possible that communities would be better served if some functions were under community control.

There are planners in the private sector that can undertake functions performed by the program office and funding PBCs/Land Trusts to undertake master planning would enable greater community control. The program office should be a service provider to a community and traditional owner driven agenda. (Jim Turnour sub. DR 10, p. 5)

The Commission notes that land councils are currently providing support for tenure resolution, even though this may be outside of their funded charter of operations. Stakeholders had mixed views about whether this was working effectively. Consideration should be given to whether land councils are best placed to provide this support or whether these functions could be consolidated into the authorising bodies discussed in Chapter 8.

Consolidate tenure arrangements

Government should ensure that work being done to undertake cadastral surveys in discrete communities is completed—this would mean that each parcel of land being used for, or planning to be used for, a discrete purpose is surveyed and registered as a lot, and the parties with an interest in each lot are recorded on the Land Title Register.

All stakeholders should consider whether benefits would result from merging native title and tenure interests, and, if so, what mechanisms might best encourage merging native title PBCs and land trusts into single entities where this would facilitate better and more efficient use of land.
Consideration needs to be given to how the interests of both native title holders and persons with an historical interest could be brought together—while there was general agreement amongst stakeholders that holding both native title and tenure interests in a single body would make it easier for land dealings to occur, there was no consensus on how this could be achieved or whether this was possible in practice.

**Consolidate efforts**

Broad-based ILUAs provide an opportunity to resolve native title:

> A process ILUA provides simple, inexpensive and quick processes for the consideration of native title consent for a range of future acts, including leasing of land and associated developments and a cultural heritage management process for development. (Cape York Land Council sub. 20, p. 4)

The Commission understands that RILIPO has been active in facilitating the development of town ILUAs, but that these are yet to be completed. Consideration should be given to whether there would be benefits from moving this function into community control.

The Commission also recommends that the government avoid the use of project-specific ILUAs wherever possible, as this will avoid duplication and waste—this may require projects working to community timeframes rather than those demanded by government processes.

**Complete conversion of DOGIT land to Aboriginal Freehold**

Government should commit to completing the conversion of DOGIT land to Aboriginal Freehold. A timeframe for this should be negotiated with key stakeholders.

**Ensure that communities can more easily proceed with development opportunities**

Government could work with communities to fully assess land values, determine appropriate uses and ensure these are captured properly in statutory-compliant planning schemes. The Commission commends current Queensland Government action to work with communities to develop forward-looking planning strategies (Queensland Government sub. 27, p. 13). However, this work may need to be driven more by Indigenous stakeholders, and may need statutory backing. Consideration should be given to what role authorising bodies may play in enabling better statutory planning under the broader reform agenda.

**Recognise pubic good activities**

Where Indigenous corporations agree to manage land for public-good environmental outcomes, consideration should be given to how these bodies are resourced to provide these outcomes.

**Ensure Indigenous involvement in implementing changes**

To achieve change, there will need to be cooperation between agencies, councils and Indigenous land holding entities. In the reform regions, authorising bodies could work with these parties to develop an action plan that outlines actions, responsibilities and timeframes.
Recommendation 15

The Queensland Government should develop a land tenure reform plan that sets out a desired land administration system, with an associated roadmap for reform and timeframes for completion. The plan should:

- facilitate the conversion of Deed of Grant in Trust (DOGIT) land in townships to Aboriginal Freehold
- better align future transfers of land tenure under the Aboriginal Land Act and Torres Strait Island Land Act with existing native title interests
- provide avenues for existing land tenure and native title interests to be consolidated or integrated to align those interests
- facilitate the use of broad-based Indigenous Land Use Agreements (ILUAs) to resolve land tenure and native title interests to allow future economic development
- support the use of master planning and statutory planning schemes to better facilitate economic development
- consider how Indigenous land holding bodies can be supported to allow better decision making
- determine where the functions to support reforms should be allocated—including whether any functions to support the land administration system should be moved to community control
- consider the changes required to sustain a functioning rates system for Indigenous councils.

The plan should be developed with stakeholders, including the Australian Government, Indigenous Councils and Indigenous land holding bodies.

The Queensland Government should also:

- complete the survey and registration of land parcels currently in use (or planned to be used) in discrete communities
- avoid the use of project-specific ILUAs
- resolve outstanding ‘Katter’ leases.
Figure 62 Land transferred to Aboriginal Freehold

MAP 3

Transferred Land under the Aboriginal Land Act 1991 and the Torres Strait Islander Land Act 1991 as at 1 February 2015

LEGEND

- Major Towns / Cities
- Local Government Areas
- Great Barrier Reef Marine Park
- Purser Island
- Torres Strait
- Major Roads

Queensland Productivity Commission
Figure 63 Native title claims - Cape York region

Source: National Native Title Tribunal, 2017