



Cape York Institute For Policy and Leadership Joint submission in response to 'Home Ownership on Indigenous Communal Lands Discussion Paper'

31 May 2011

Creating opportunity and choice for viable and sustainable home ownership on Indigenous land

Introduction and overview

Cape York Partnerships and the Cape York Institute for Policy and Leadership are seeking to drive policy reforms for housing and land across Cape York Indigenous communities that will result in the creation of opportunity for individuals and families to take control of their housing situation and to be able to use their land for home ownership or other purposes.

Overall, the policy content and scope outlined in the Queensland Government Discussion Paper represents a sound starting point for the development of a Queensland Government Home Ownership Policy for Indigenous land. If this policy is to facilitate viable and sustainable home ownership on Indigenous land in Queensland, then critical policy elements need to be systematically addressed.

Perhaps the most challenging yet necessary underpinning change is the structural change in policy that must occur within all levels of government from the paradigm that has institutionalised welfare housing as the only housing option in Indigenous communities since the end of the mission era more than thirty years ago.

There is no doubt that the current social housing system in Cape York Indigenous communities remains a permanent destination that undermines and blocks positive incentives and latent individual motivation to exercise choice and control. In this regard, the Federal Government's current push to tie social housing investment to 40 (plus 40) year leases threatens to further crowd out incentives for housing choice and not make the necessary enabling investments in land administration. Fortunately, there is now an opportunity in Queensland to address this situation and to facilitate the operation of a rational continuum from social housing to home ownership.

It is critical that public expenditure on Indigenous land and housing in Queensland Indigenous communities is used to create a permanent platform of tenure and rights that can enable home ownership and other purposes. A land administration system must be designed and implemented in Cape York Indigenous communities that delivers equivalent level of land administration services as provided to non-Indigenous communities of a similar size and location. This means that land administration issues, including survey, reconfiguration, retrospective development approvals and native title, are resolved to the point that registered lots are created for all land in township areas and for leases that were previously created or were promised in townships and surrounding areas. Of equal importance is that there are local town and land planning schemes in place and governance arrangements that can regulate land use and development according to these planning schemes.

Cape York Partnerships and the Cape York Institute believe that there are a number of critical components that a new Queensland policy for home ownership on Indigenous land must address and incorporate:



1. A fair and reasonable approach for the valuation of houses and land for home ownership on Indigenous land.
2. Settlement of an automatic process for government to surrender 40 year social housing leases (where these are in place) and the creation of 99 home ownership leases.
3. All social housing tenants in Queensland Indigenous communities have an ‘as of right’ opportunity to buy their home.
4. Aspirant homeowners in Indigenous communities must only face the same transaction costs as any buyer in a non-Indigenous community.
5. The creation of permanent registered lots for all serviced land in Queensland Indigenous communities, and a legitimate town planning scheme consistent with the Sustainable Planning Act.
6. Support to develop local governance systems for Trustees to administer land administration, including leasing policy for home ownership.
7. Settlement of an ILUA approach to deliver necessary Native Title consents for 99 year home ownership leases.
8. The regularisation of existing Land Holding Act leases (or ‘Katter’ leases), including the recognition and statutory protection of these interests as a valuable property right.
9. Discussion and agreement on a roadmap for the transfer of whole DOGIT areas and the Aurukun Shire Lease and that these transfers occur as expeditiously as possible and with agreement between Land Trusts and Local Government Authorities.

This submission builds on policy research already articulated in previous work by the Cape York Institute in the two volumes of *From Hand Out to Hand Up* (CYI, May and November 2007) and the principles outlined in *The Cape York Agenda – “fundamental transformation through radical reform”* (CYI 2005). We look forward to continuing to work with the Queensland Government to address and achieve the objectives that it has set out in its Discussion Paper.

1 A fair and reasonable approach for the valuation of houses and land for home ownership on Indigenous land

The Discussion Paper advocates the use of a proxy market approach for the valuation of social housing for the purpose of individual houses being sold for home ownership. We believe that this approach is fair and reasonable provided proxy markets are used that share similar characteristics, including socio-economic indicators such as unemployment. A desktop survey of mainstream remote towns of similar size (for example, Mallee towns in Victoria) would indicate that the price range quoted in the Discussion Paper (\$80 000 to \$150 000) would be too high for most communities on Cape York given their size, location and socio-economic characteristics. A range from \$40 000 to \$100 000 would seem more likely to be fair and reasonable in most instances.

Given the absence of secondary markets and the uncertainty about such markets forming in the future it would be prudent to develop a policy that quarantines a tranche of money from sales to be used to support any resale of properties for some



initial period. Uncertainty about secondary markets also supports a conservative approach to valuation.

The Cape York Institute made a submission to DERM in February 2011 regarding the valuation of land for home ownership. One of the main points of this submission was that the Cape York Institute supports DERM's proposal of setting a nominal value of \$4000 for serviced residential blocks up to 2000 square metres that are to be used by local people for home ownership. The scope of the approach, however, should be expanded so that the methodology can also apply to larger serviced residential blocks (ie. above 2000 square metres) that exist in some communities. We advocate a simple tapered scale for blocks up to 10 000 square metres with local caveats on subdivision (as will be identified in local planning schemes).

Implementing a nominal value for land has implications for the valuation of houses given that proxy market valuations will normally take into account the combined value of land and housing. For Indigenous communities where a nominal value approach for serviced land is applied, any house valuation will need to account for the difference between a nominal price and a market proxy price for land. For example, if the nominal price of a block of land is fixed at \$4000 and the land component of a market proxy valuation is \$20 000 then the valuation (house and land combined) will need to be adjusted downwards by \$16 000.

Of significant concern for the construction of new homes for home ownership is that vacant serviced land in communities is a scarce commodity and the Queensland Government is seeking to hoard existing serviced land for future social housing through the creation of 40 year social housing leases. This action will directly crowd out local people interested in building new homes for home ownership or developing land for other purposes. Therefore, a policy should be introduced that requires government to surrender any vacant land held under 40 year leases, where no works have commenced, to local people wanting to gain a 99 year lease to build a house for home ownership.

2 Settlement of an automatic process to surrender 40 year social housing leases (where these are in place) and the creation of 99 home ownership leases

It is critical that there is an automatic process for 40 year social housing leases (where these are in place) to be surrendered and for 99 year home ownership leases to be created when a home ownership lease is applied for. An automatic process is the only way to avoid lengthy delays due to slow processing or unnecessary and cumbersome steps in approval processes. A critical factor for achieving an automatic process is that the granting and creation of a 40 social housing lease also deals with all necessary steps to create a 99 year home ownership lease (sections 4 and 5 discuss transaction costs and land administration for home ownership on Indigenous land).



3 All social housing tenants in Queensland Indigenous communities have an ‘as of right’ opportunity to buy their home

We support a policy position that all tenants have an ‘as of right’ opportunity to buy the house that they currently rent. The only reason that a sale would not proceed is because the tenant does not meet the standard eligibility criteria to buy their home.

Page 8 of the Discussion Paper raises the issue that some houses may not be within scope for sale for home ownership, for example, due to newness or specialised design. It is unlikely that there would be few, if any, circumstances where this should reasonably apply to the sale of existing homes to current tenants. The powers of the Queensland Public Housing Minister, under the *Aboriginal Land Act 1991*, to approve or refuse sale of any houses should be defined and limited. The limitation of these powers should include reference to how old newly constructed houses need to be before they may be sold. We suggest a period of three years but with the option of offering a tenant access to a rent to buy scheme within this time.

4 Aspirant homeowners in Indigenous communities must only face the same transaction costs as a buyer in a non-Indigenous community

Efforts to progress home ownership as part of the Cape York Welfare Reform project have highlighted the inability of the land administration system in Cape York Indigenous communities to facilitate the creation of secure and formally registered interests in the land. Housing and other buildings have been built in Cape York Indigenous communities for thirty years or more without any lots being registered on the cadastre or built under local planning schemes that would normally be expected to regulate and guide such development.

An unintended consequence of the Australian Government’s current policy push on Indigenous social housing is that the Queensland Government has abandoned existing plans to holistically invest in the land administration system in Cape York Indigenous communities. This situation must be addressed.

With regard to home ownership, the operation of the land administration system is a primary determinant of the transaction costs faced by individuals and families. Without a significant shift in current policy focus and effort it is very unlikely that aspirant home or business owners in any Cape York Indigenous community will ever be able to meet the administrative and regulatory burden required to create a private interest in the land. High transaction costs and uncertainty have, and will continue to overwhelm individual enterprise and aspiration.

Land administration in non-Indigenous communities operates in stark contrast as a carefully managed and well resourced cornerstone of economy designed to facilitate simple transactions that empower and protect individual and family rights. The following simple table highlights some obvious problems when comparing typical transaction costs for home ownership in Cairns with what is known to be the situation in Cape York Indigenous Deed of Grant in Trust (DOGIT) communities. Similar types of transactions costs and problems also exist in Aurukun under the Aurukun Shire Leases arrangements.

Table 1: Home ownership in Cairns and on DOGIT land

<i>Home ownership in Cairns</i>	<i>Home ownership on DOGIT land</i>
<p>Houses, with local council development approval, are built on ordinary freehold lots that are held in the name of the homeowner or developer.</p> <p>Individual parcels of land are surveyed and described on the town plan and can be identified by a Registered Plan number.</p> <p>All easements and reserves (such as for roads, water and power) are known and accounted for.</p>	<p>Aspirant homeowners must apply to their local council for a 99 year Indigenous home ownership lease to be issued to them to buy an existing house.</p> <p>If a 40 year social housing lease has been issued then this lease will first need to be surrendered before a 99 year lease can be granted.</p> <p>DOGIT lots are not registered on any plan (and 40 year leases do not currently address this issue).</p> <p>DOGIT houses do not usually have development approvals in place as private dwellings to meet State regulations.</p> <p>Many lots are not properly surveyed (ie. no survey pegs).</p> <p>A gazetted road reserve may exist over a piece of land (ie. requiring a lot reconfiguration).</p> <p>Native Title consent will be required in most cases for a home ownership lease to be able to be granted.</p>
<p>Purchaser negotiates price with seller (usually via an agent) or buys at auction.</p>	<p>Purchaser offered sale price by State with consent of Council with no scope for negotiation.</p> <p>Land component may be separate to house valuation component and there may be a separate process to acquire each part.</p>
<p>Home owner chooses lender.</p>	<p>IBA the only lender.</p>
<p>Owner can resell property to any Australian citizen or overseas citizen subject to Australian foreign investment rules.</p>	<p>Owner can only resell to another Indigenous person (as defined by the ALA).</p> <p>Some communities have indicated that resale will be limited to local Indigenous people. Local regulations and processes do not currently exist and will need to be established.</p>



5 The creation of permanent registered lots for all serviced land in Queensland Indigenous communities, and a legitimate town planning scheme consistent with the Sustainable Planning Act

A new Queensland policy on home ownership on Indigenous land should set the policy commitment that all necessary steps be taken to achieve a cadastral footprint for Indigenous communities that is equivalent to a mainstream township of comparable size.

The most fundamental building block of the cadastral map that exists in all mainstream communities in Queensland is permanent registered lots. Registered lots are listed in the Queensland Government land register and confirm the configuration and land area of a lot, ownership and any easements that may exist over the land, such as for water, power and roads. This information is vital for local government decision makers as well as owners and prospective future owners.

In Indigenous communities, the creation of registered lots would mean that the various steps and processes that are currently necessary to create a 99 year lease for home ownership would be greatly simplified. A registered lot would ensure that an individual parcel of land has:

- a valid and current survey plan;
- the block is configured and the land area is known;
- any easements or reserves either within or adjacent to the lot are known and marked;
- all necessary native title consents are in place to allow the lot to be registered and used for a particular purpose, such as home ownership.

Once created, all registered lots in Indigenous communities would be held by the local trustee. To facilitate home ownership, it is then a simple process for a 99 year lease to be applied for and granted over the registered lot. The underlying lot would not need to be transferred and would remain with the trustee. The significant benefits of creating registered lots for transactions concerned with the land also makes a very strong case that this should be a condition of the granting of any 40 year social housing leases to government by trustees.

Of equal importance to the creation of registered lots is that these interests are regulated through a legitimate local town planning scheme that deals effectively with both residential and commercial land uses and manages locally significant values. The necessity for town and development planning must not be misread by government as a green light to apply an ‘off the shelf’ planning scheme. Town plans must capture and articulate the vision that local people have for their communities. What is critical for the longevity and ultimate success of planning schemes is that there is ‘buy in from those who really care about the village, the residents who live, work and raise their families there’ (From Hand Out to Hand Up: vol.2, 2007, p. 168).



6 Support to develop local governance systems for Trustees to administer land administration, including leasing policy for home ownership

The Discussion Paper raises many local regulatory and governance issues but makes limited comment about how these issues can be addressed. Significant support is already being provided to improve local governance by local Indigenous councils. This support needs to expand in scope so that local trustees are able to develop local governance arrangements that are needed to facilitate fair and timely transactions for the use of land for home ownership and other purposes. The viability and sustainability of home ownership will depend on resolving several local governance issues, including:

- Confirming that local people are able to apply to buy the house that they currently rent and be granted a 99 year home ownership lease over the land.
- Timely processing of home ownership applications.
- Having a policy to guide how the proceeds of sale should be used. This should include some tranche of money that can be used in the future to support the secondary market if no local buyers can be found if individuals or families want to sell their house. The design and establishment of a trust structure could be useful for this purpose.
- Development of a system of rates and charges that can be used by local councils to levy rates and charges for land that is used for home ownership or other purposes.

7 Settlement of an ILUA approach to deliver necessary Native Title consents for 99 year home ownership leases

The issue of Native Title consent and how to achieve it is critical to facilitating land use in Indigenous communities. To achieve the necessary consents for home ownership, social housing leases, and other land uses, the regional organisations of Cape York have proposed a two part solution that was sent to the Australian and Queensland Governments on 11 March 2011:

- 1 Proceed with an Alternative Procedures ILUA (negotiated by the Cape York Land Council) that would authorise the first phase of scheduled works for new social housing and obtain a broad consent for home ownership leases to be granted in the future where applications were made by local people.
- 2 Proceed with Area (community by community) ILUA agreements for home ownership and other land uses once progress has been made by the Queensland Government on addressing core home ownership and land policy issues.

The regional organisations want to achieve a negotiated outcome for consents that will create a comprehensive local agreement for future land use in each community. Recent amendments to the *Native Title Act 1994 (Cwlth)* s. 24 JAA are intended by



the Australian Government to be used as a last resort to achieve social housing leases. The use of this type of amendment will drive a permanent wedge between traditional owners, historical people and Indigenous councils acting as trustees, and thereby threatens all future land use negotiations, agreement making and consents between these groups.

8 The regularisation of existing *Land Holding Act* leases (or ‘Katter’ leases), including the recognition and statutory protection of these interests as a valuable property right

Many indigenous people from Cape York already hold perpetual leasehold titles that could enable home ownership. The leases are held in the form of ‘Katter’ leases – perpetual leases that were granted in the mid to late 1980’s by the Hon Bob Katter MP in his role as a Queensland Government Minister.

There are several hundred ‘Katter’ leases on Cape York with a high concentration of these leases in Kowanyama, Pompuraaw and Lockhart River town areas. These leases include vacant serviced land and serviced land with housing. Katter leases are a valuable property right, but have never been given the necessary institutional or legal support to enable the realisation of the rights and benefits that they were intended to proffer.

Cape York Partnerships and the Cape York Institute support the submission made by the Cape York Land Council on 28 February 2011 to the Department of Environment and Resource Management Discussion Paper on the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Qld)*. CYLC’s submission made several important points in relation to the ‘Katter’ perpetual leases that are regulated by this Act:

- A critical enabling mechanism for Katter leases to become a valuable property right is for these leases to become permanent registered lots (the same as proposed in section 5 for 99 year Indigenous home ownership leases).
- Katter leases should be regularised as leases under the ALA on the terms as originally granted. Katter leases should be continuing interests over Aboriginal land, rather than leases of unallocated State land.
- Katter leases should be subject to informal administration provisions similar to those available under the *Land Title Act 1994 (Qld)* s. 111 and *Land Act 1994 (Qld)* s. 377 (which allow transmission without probate in specified circumstances).
- There should be no surrender of Katter leases – only transfers of regularised interests. The removal and restoration from underlying tenure, a feature of the *Land Holding Act*, should be removed.



9 Discussion and agreement on a roadmap for the transfer of whole DOGIT areas and the Aurukun Shire Lease and that these transfers occur as expeditiously as possible and with agreement between Land Trusts and Local Government Authorities.

It is important that any policy discussion about home ownership does not abstract from the governance arrangements currently in place in DOGIT communities. These lands, held in trust by local Indigenous councils, need to be transferred in their entirety to Prescribed Body Corporates (representing traditional owners) but that a workable governance solution is reached that serves the best interest of all parties. For home ownership this means that local individuals and families, whether traditional owners or historical people, have the right to take up home ownership opportunities.