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## **A Strategy for the Just Integration of Western and Customary Land Rights in Australia**

**Ric Small, University of Technology, Sydney,**  
e-mail: ric.small@uts.edu.au

### Abstract:

*This study analyses the essential aspects of pastoral leasehold land that underlie the resistance to recognition of customary title and recommends a strategy for integrating customary tenure into the structure of state leasehold land.*

*It is argued that a tradition of sub-market rents have produced an interest in the leaseholds that is extra-legal but has become part of the market for leasehold interests. It is this interest that is most threatened by customary title claims. As an unofficial privilege implicitly held against the rest of the community it is suggested that this interest should be amortized regardless of customary title claims.*

*Three interests are revealed in customary title leasehold land, the occupier, the customary owners and the state. It is argued that the occupier should be subject to market rentals, regardless of the ownership and that the rental should be shared between the customary owners and the state on the basis of need, title and contribution to the production of value. A special land tax is suggested over customary titled land to recoup that part of the productivity of the land that is socially produced. This would leave customary owners with the difference between rental income and land tax. Such an arrangement could eliminate indigenous people from welfare dependency and return to them a degree of self determination.*

*Control of land use is an important aspect of ownership, and one sorely missed by customary owners. The inclusion of indigenous peoples in the planning process with a right of veto, either formally or through their position as lessors, has the capacity to overcome this problem, without the need for them to become the occupiers on the land in the western sense.*

### **INTRODUCTION**

The purpose of this paper is to integrate cultural and economic factors pertinent to the co-existence of customary owners and western users of land within lands covered by state leasehold tenure with a view to recommending appropriate policy.

Several key fundamentals need to be explicitly considered in order to come to an appropriate integration strategy. These will be considered in turn:

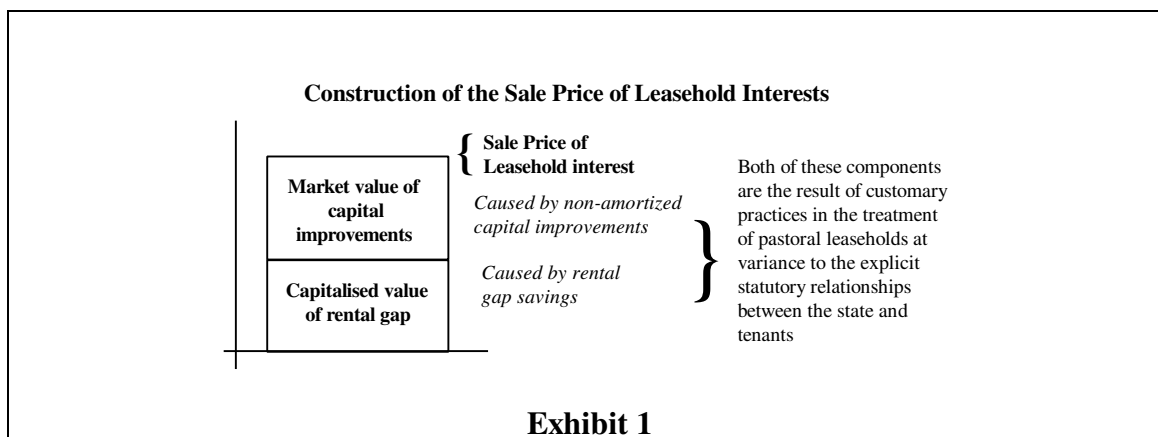
### **POSITION OF PASTORAL LEASEHOLDERS**

aspects of the land that are necessary for the efficient use of the land for explicitly delineated purposes. These are statutory rights the limits of which are set out in the terms of the lease agreement.

There have also arisen what may be referred to as customary rights attached to leasehold tenure. These consist of those rights beyond the limits of the lease that leaseholders have enjoyed by custom (note that the use of the term "customary" in this section refers to western extra-legal customs, as opposed to indigenous extra-legal customs as used in the rest of the paper). They originate predominantly as a result of the custom of charging rents that are below market levels, and from the confidence that has arisen that leases will be perpetually renewed. That is, they have arisen from practices and perceptions in the treatment of state leases at variance to the explicit legal terms of the rights conveyed in the lease itself. As such, they constitute a problem that deserves remedy regardless of the indigenous land rights issue.

The practice of setting rents below market levels has left leaseholders with an additional increment of income that is the difference between the underlying market rent and the actual rent charged by the state. This increment will be referred to as the "rental gap". It has created an interest in the land that has been capitalised as part of the sale prices that are charged for the transfer of pastoral leases. Despite having no statutory basis these prices have become a part of the customary practice. They appear to be the basis, of the claim by pastoral leaseholders for protection from the possibility of losing their leasehold interests.

Related to this is the implications of an expectation of perpetual renewal of leasehold tenures. When tenants perform capital improvements, normal commercial practice is to either amortize the improvement over the period of the lease, or for some compensatory provisions to be built into the reversion. Pastoralists are concerned that a customary expectation has developed that renewal would be automatic. This has led them to believe that their capital investments were secure and need not be amortized.



There appear to be good arguments in support of the recognition of the contribution of tenants to the capital value of their properties. Part of this is simply the recognition that the tenants are responsible for the provision of these improvements, but part is also the recognition that tenants have maintained the underlying capital value of the property. The recognition of this latter aspect is important because it forms an incentive for tenants to maintain best practice until the termination of leases, rather than seek exploitative use at the end of tenancy to the detriment of the property.

Combining these two aspects of the private value of pastoral leaseholds leads to a summation that is very close to the value in exchange of these properties as shown in Exhibit 1. The question that must be addressed is how to deal with these customary western interests in the event of some future structural change in the system of leasehold.

The first part of the value, that accruing to the implicit rental gap income, appears to be the result of a fault in state policy with respect to a fair setting of rental. It has left in private hands what is the property of the community, the rental on the community's land. This is an implicit privilege that has been extended to tenants. The privilege is one that would have gradually and inconspicuously

normal profit is unstable and tends to give rise to one of a number of compensating mechanisms. Three deserve attention in this context as follows:

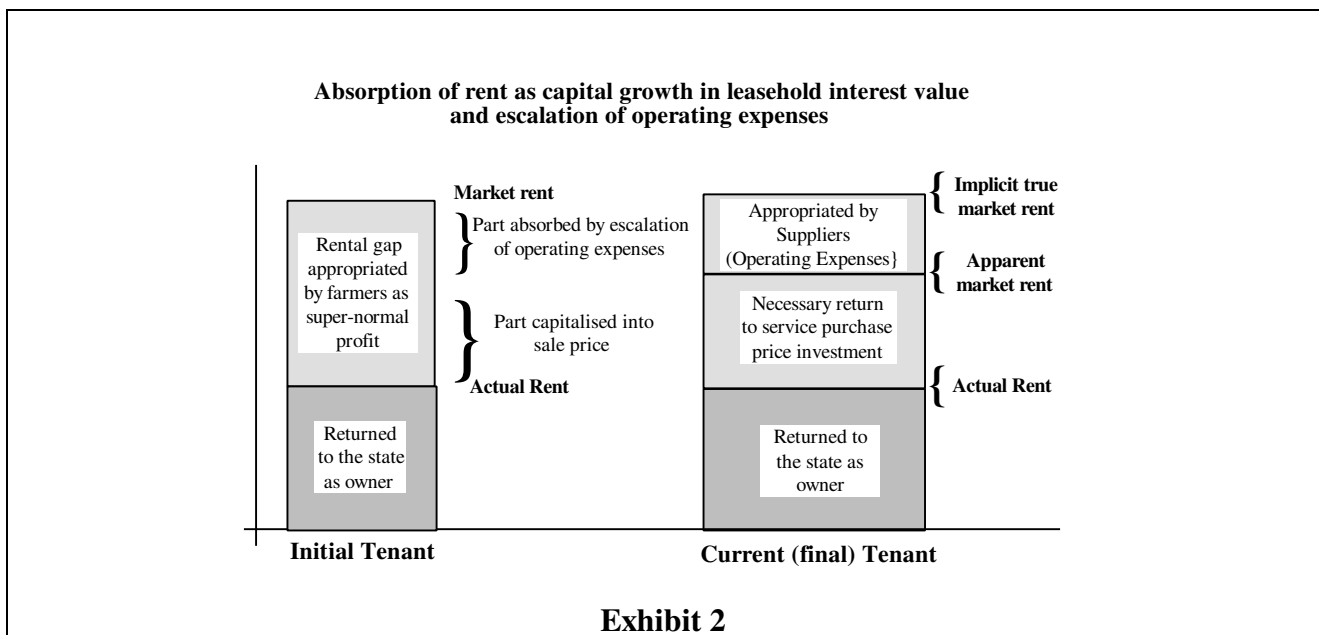
- (1) The best known mechanism is competition, where economic theory suggests that prices for farm produce should be bid down as a result of the surplus profits. However, because pastoral leaseholders do not influence the market sufficiently to influence prices, price movements have not been significantly bid down by this group, and it is well recognised that price falls are better explained by global influences. This effect will therefore be ignored.
- (2) Suppliers of those things required by pastoralists in the running of their properties may be able to escalate their prices, thereby taking a share of the farmers super-normal profits. Although competition theory suggests otherwise, there is strong evidence that the suppliers of all of those things that contribute to the contents of a farm's operating expenses (outgoings) have been permitted to escalate in price and thereby absorb part of the super-normal profit. These include higher interest rates, higher costs for capital equipment and higher charges by the suppliers of the operating needs of pastoralists and various agents and service providers.

These escalated charges (operating expenses) were able to be faced by pastoralists when rents were maintained below market levels, and result from the realities of the rural economy, where suppliers more closely resemble oligarchies than competitive providers. Because they have become the accepted norms of rural commerce, and have most probably themselves been subject to profit erosion in turn from their suppliers, these cost structures may be considered as relatively permanent. Although they have developed as a flow-on from the rental gap, their existence may be considered to have resulted in an apparent market rent that is actually below the implicit true market rent that may have been realisable in the absence of this effect..

- (3) The super-normal profits tend to be capitalised as part of the sale price of the leasehold interest. In this way the former owners have taken out the super-normal returns, leaving the present tenants with only normal incomes. This explains why many pastoralists believe that they have effectively purchased the freehold value of their farms. Their purchase price implicitly cost them the equivalent of the capitalised value of the rent saving that the earlier tenants enjoyed as super-normal profits. Their incomes have been reduced to marginal levels by the prices that they were prepared to pay to acquire their leaseholds. This makes correction all the more difficult because the beneficiaries of the anomaly are often not available.

The former tenants did not act in bad faith because they would not have analysed the origin of their strong returns and in any event they sold their leasehold interest in a free market situation to willing purchasers. They did however benefit doubly from the rental gap, once in terms of annual super-normal profits and again on sale, where they essentially took the future rental gap from the in-coming tenants as well.

Although the former tenants had no statutory right to the margin between actual and market rental, that customary enjoyment was understood to be on-going by the market for leasehold properties. Current tenants who have purchased leaseholds have in fact paid for something that the vendors did not own, a proportion of the rental rights that belonged to the community. While it is regrettable that the practice has been allowed to develop, it is essentially commerce in misappropriated goods.



## A STRATEGY FOR CORRECTING PASTORAL LEASES

Because the problem arose gradually over a long period of time, and because the benefits that justly belong to the state have been progressively taken by a combination of capital gains to out-going tenants and excess profits to suppliers, it may not be possible to effect a complete correction, and any correction should be introduced gradually. However, because the problem is one that is implicitly denying the community income that justly belongs to it, it deserves correction regardless of the current attention turned on it as a result of native title issues.

A second reason for attending to this problem relates to inter-generational equity, again unrelated to customary (native) title issues. As it has been described, the practice of setting sub-market rents only benefits those tenants who happen to be occupying the land at the time that the rent falls below market. This is because those tenants exact from future occupiers the capitalised benefit, thereby leaving future users no better off than if rents had been left at true market levels.

Several strategies could be considered in order to implement a transition from the present custom of below-market rents to true rents, such as the following:

- 1) Grant life tenures to current leaseholders at current rents, but with adjustment to market in the event of death or sale. This would not be recommended because the families of some tenants may be penalised if they have only recently purchased a leasehold and the holder dies. It is also complicated in the case of corporate ownership.
- 2) Provide extended lease terms on all existing leases during which some explicit programme of adjustment to market would be followed. An extension of 30 years is suggested, which would amortize the capitalised value at about 3% per year after the current term has expired. This would implicitly compensate tenants for their expenditure in buying their leaseholds, while providing a certain programme for the regularisation of the anomaly.
- 3) A general programme of adjustment, such as 20 more years at the current relative rental levels, followed by a 30 year adjustment programme (similar to (2) above). This would spread the correction over about two generations.
- 4) Longer terms, say 50 years on the same terms, followed by a 30 year transition
- 5) Combinations of the above for particular cases where leaseholds having short remaining terms have been recently acquired. For example the setting of a 30 year adjustment period to begin after the expiry of either the current lease, life tenancy, or 20 years, whichever is the longer.

While all of these programmes will have the effect of a long term erosion of the capital value of the leasehold interest, the rate of adjustment, less than 3%p.a. in most cases is well below the level of depreciation on any other productive capital asset, such as machinery, and on a par with the rate used

Years	Discount Rate		
	5%	10%	15%
15	48.10%	23.94%	12.29%
35	18.13%	3.56%	0.75%
85	1.58%	0.03%	0.00%

### **Exhibit 3**

The financial evaluation of the impact of such strategies reveals that they may have only a minimal impact on the current value of leasehold interests. For example, using a discount rate of 10% and a 30 year adjustment programme beginning in 20 years time, the impact on present values is only 3.56%. For other discount rates and time-frames Exhibit 3 shows the impact on current values. Note that the 'years' variable refers to the mid-point of the adjustment programme, hence a 30 adjustment beginning in 20 years time is shown as 35 years.

For either higher discount rates, or longer adjustment programmes the table shows the impact on present values as negligible.

The practical implication of such an adjustment will be the eventual return to the community, or the customary owners, of the rental that has been allowed to drift into private hands. By using a sufficient time-frame the negative impact on current leaseholders will be negligible. While there may even be grounds for compensating current leaseholders for the loss, its magnitude is likely to be so slight as to be below the practical precision of property valuation. In any case compensation in the order of 2-3% of the value of the capitalised rental gap may not be beyond the realms of what a government may be willing offer in compensation to leaseholders. It equates to possibly six months rental gap under the current conditions.

In practice, its long term effect will be little more severe than a reversal of the capital gains expectations. Careful analysis of the origin of capital gains for state leasehold reveals that they are the result of the escalation of the rental gap, that is, the exacerbation of the problem.

### **Introduction of compensation for residual value of capital improvements**

Concurrent with this programme it would appear just to set provisions for the valuation and compensation of tenants for the residual value of capital improvements. This would operate by paying out tenants for the difference between the value of the farm as it stands at the conclusion of the lease and its unimproved value. Once the rental anomaly has been removed, this price would simultaneously become the sale price of the property if the state chose to offer it to other tenants. Apart from compensating tenants for improvements made on the expectation of virtual perpetual tenancy, it would also provide an incentive to maintain best practice management to the end of tenancy, hence maximising the outgoing value of the property.

Because the marginal (private) rental income will have been eliminated, and outgoing tenants compensated for capital improvements, outgoing tenants should be economically indifferent at the termination of leases between moving off the land or staying. This would appear to be the ideal situation for the end of a lease, regardless of the impact of indigenous title claims.

It should be noted that such a situation is what is normally expected in a leasehold arrangement. If it were the case for pastoral leaseholds there would be little cause for concern over native title issues. The implicit concern held by Australian farmers is that a benefit that has become customarily expected may be lost. This benefit is actually held as a privilege against the wider community. It is therefore not centrally the issue of native title that has produced the opposition of leaseholders, but the prospect of losing a customary privilege.

The real difficulty is the fact that much of the privilege has now been absorbed by others, especially former leaseholders. However, a progressive adjustment programme would bring the adjustments within the normal depreciation range of other personal assets.

## **THE NATURE OF INDIGENOUS TITLE**

to mean a bundle of rights, which may be distributed between more than one party. Western ownership means permanent control over the majority of the rights pertaining to land, especially the right to derive income, rent, from the land. Several rights, such as the rights to specific minerals and the right to decide what activities or improvements may be carried out on the land are typically retained by the state.

Although they insist on ownership, they do not insist on exclusive occupation as it is practiced by western peoples. This relationship between ownership and occupation is one of the areas of misunderstanding between customary and western peoples. The argument for *terra nullius* was premised on the absence of ownership in western terms: exclusive and intensive occupancy. Aboriginal people understand ownership in terms that are more correctly understood as metaphysical. Ownership, or relationship to the land, is a part of what aboriginal people understand the land and people *are*.

In the west, this type of metaphysical understanding was eclipsed by the phenomenalism that followed from David Hume's empiricism, the beginnings of modern western philosophy. Western people put aside an interest in *what things were* in the eighteenth century in preference for *how they appeared*. This is why *terra nullius* could be claimed - the land did not *appear* to be occupied, at least in the manner familiar to Europeans, this is despite the fact that the land *was* owned by peoples who just did not happen to *use* it in the same way as the western visitors.

This subtle distinction is very important. It is also important because western peoples have not entirely lost their metaphysical understanding of ownership, despite their avowed distaste for formal metaphysics. Today there is a growing recognition of the need to accept metaphysics in the social sciences, our contact with indigenous peoples is but one of the more explicit promptings. The first step in this regard is to recognise the place of metaphysics in the western understanding of ownership.

To understand this in western terms, consider the case where someone was to drop their car keys and the keys were picked up by someone else. The fact that the keys were in another person's pocket would not be considered as proof that they had changed ownership, this is despite the *appearance* of ownership to the contrary. This would be further upheld if the finder of the keys tried to assert ownership of the car that belonged to the keys. This is despite the fact that the both keys and the car were spatially and temporally separated from the true owner and that the car was totally unoccupied and unused when the finder of the keys approached it.

Although motor cars have elaborate and explicit legal procedures protecting ownership, many items of value do not, yet occupation (active possession) is not considered proof of ownership.

Obviously possession and use, the apparent phenomena of ownership, have no bearing on the actual existence of particular ownership. A more relevant example is the case of rental, where occupation and use are transferred to a person recognised as not being the owner, even though they will appear to be the owner for practical purposes for some years.

Because they do not identify ownership with occupation, indigenous people have been able to allow western people to occupy land that the indigenous owners have never ceased to consider theirs. This probably facilitated the original occupation of indigenous land by western settlers, because the customary owners did not realise that such occupation was being understood by the western newcomers as ownership. This confusion would have been aided by the reasonable practice of many Westerners of continuing to allow indigenous owners to have access to their land for traditional purposes.

**Indigenous people believe that their ownership of the land cannot be sold.** Their understanding of their relationship with the land is such that the land cannot be separated from the tribe without violating fundamental tribal beliefs. This is not to say that it cannot be done, but when it is done it constitutes a betrayal of tribal values. Payment for such a betrayal could be compared to a bribe in western understanding more accurately than a just payment in exchange for title to some possession. This understanding is more fully explored in the Appendix.

**Indigenous people rely on the land as their principle source of material support.** Traditionally

the "most leisured people on earth" due to the relatively small daily requirement of labour required to support their life. The land was recognised as their principal material resource and was believed to belong equally to future members of the tribe and to provide the foundation of their material welfare also. The Appendix outlines in detail the operations of tribal ownership in land over time and stresses the inter-generational aspects that indigenous people are especially aware of. Indigenous people do not understand the labour basis of material welfare that has become the basis for the material welfare of western dispossessed persons.

**The apparently subsidiary interest in the land, evidenced by indigenous land use is erroneous.**

Western people have been tempted to construct their understanding of the nature of indigenous title by summing the apparent occupation and use practised by customary owners. The result has led some to conclude that indigenous title is in most cases best understood as a form of easement, or set of easements, over a subject parcel of land.

This is fundamentally erroneous. In western terms it is like having an audit done of one's use of one's possessions, with a view to limiting recognition of ownership only to those possessions that are actively and exclusively utilised. Some people have clothes they may only wear infrequently, or parts of their back yard that they never visit, but would be offended if this was taken to mean that they did not own these things. It is even more apparent with things of great value which are often placed well out of use, but still considered possessions.

Most offensive to customary owners is the prospect of customary title being no more than a vague limit, or blight, on western title. This view reverses the understanding of ownership, reducing the customary interest to a subsidiary and unpleasant complication to western ownership.

**The productivity of the land has been enhanced by the advent of European settlement.** Whereas before European settlement indigenous people required very large tracts of land to support a relatively small number of people, western settlement has greatly enhanced the productivity of the land. This is not simply the result of superior farming technologies, but is also the result of the location of rural production within western society.

Markets for rural production are such that persons using land are able to develop considerably greater incomes from land that would have been possible in the absence of western culture. Consider the hypothetical possibility of indigenous people, equipped with western farming technologies and producing any western rural produce in the absence of transport and marketing infrastructure and even the remote city markets which is the destination of most rural products. Obviously, most of the production would be in vain. Be it apples or wool, the value of rural production is in a very large measure the result of the modern western society itself.

## **AN EXAMINATION OF WESTERN TENURE, PRIVATE RIGHTS TO LAND AND STATE RIGHTS TO LAND**

In the Appendix it has been argued that customary tenure is best understood as a form of life interest leasehold. It is instructive to examine the differences between the essentials of this tenure and western freehold.

Freehold tenure has two distinctions from state leasehold. The first is that it does not incur a rent due to the community and secondly, it is perpetual.

Despite the perception that freehold does not entail rent, most states effectively charge partial rents in the form of land taxes or local government rates. Curiously, these are not perceived as rents, despite being derived from land values (or in some cases developed property values, for which this only applies only to the land component) which are themselves capitalised rents. The point here is that the state may levy rents, even if they are disguised under these tax-like titles.

A second misconception is that freehold, or even state leasehold, tenures convey the right to use the land in what ever way the owner deems most beneficial. Owners do not have this right. Decisions about the actual use of specific parcels are usually controlled by the community by way of planning instruments at various levels of government and by the need for development approval from local government.

There appears to be a certain amount of discussion at present regarding the relationship between customary title and planning decisions. Most of the discussion revolves around the concern by planners regarding the exemption of customary title land from planning control. This implies the question of who owns the more complete title to land, the state of the customary owners. Given the outcome of the Mabo case and the notions of freehold and radical titles to land being the titles available to the customary owners and the state respectively, it seems obvious that the customary owners have the older title to land use decision rights, tempered only by the validity of planning legislation as a form of valid sovereign act.

If planning legislation did indeed extinguish the customary owners' right to decide land use, an important aspect of customary title, as understood by indigenous people, has been lost. It appears that a recurrent claim by indigenous people is not for direct use of the land, but for a say, possibly a right of veto, over western uses of customary owned land. What is being claimed here is akin to a planning right, possibly not dissimilar to state planning rights.

### **JUST ALLOCATION OF THE PRODUCT FROM LAND**

A major background issue is the allocation of the product from occupying the land. Western occupants may argue that they have contributed to the productivity of the land and hence deserve compensation, while some indigenous people appear to believe that because they can establish their customary title, the full value of the land is theirs. These extreme views can be informed by reference to the fundamentals of productivity.

Indigenous people have been recognised as holding the prime title to land, even when this fundamental title has been lost as a result of various factors arising from western sovereignty. The material purpose in owning their land was to provide a basis for the realisation of their material needs. Indigenous people generally required access to large amounts of land to survive when using their customary practices.

European entry into Australia has had an impact on the productivity that has raised it considerably beyond its level under indigenous occupation. The extent of the indigenous interest in the material product of the land would appear to be proportioned to the land's material productivity before European occupation. This means that while land ownership, in the quasi-metaphysical sense required by indigenous people, is clearly the right of the customary inhabitants, the product from occupation of the land has a more complex ownership.

The changes to the productivity of the land that accrue to the effects of European settlement originate not with the indigenous owners, but with the Europeans. Hence that part should in justice be the possession of the Europeans who originated it, leaving the customary owners with the product that the land was capable of yielding prior to European occupation.

Calculation of the indigenous product, conceived in this way is difficult in view of the fact that the two forms of occupation are more or less mutually exclusive. Western occupation has forced out much of what formed the natural resources harvested by indigenous people - native fauna have been culled as pests and native flora eliminated as weeds.

A more fruitful way of evaluating the balance is to focus on the material purpose of the land in indigenous societies. It provided, with a relatively minor addition of labour (less than four hours per day has been suggested) all that the community needed materially. Using the material needs of the customary owners, engaged in a traditional lifestyle, as a guide, the share of the modern material product that could be justly claimed by the customary owners can be reasonably computed. The excess would appear to accrue to the impact of European occupation.

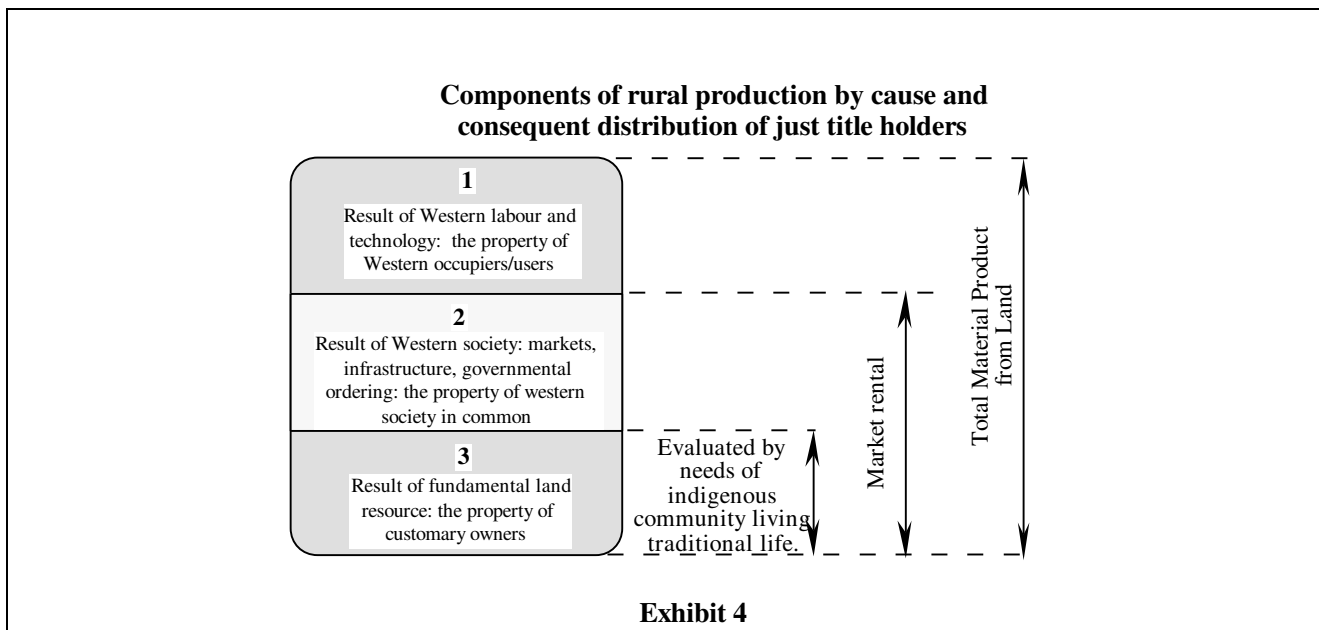
A similar deconstruction can be made of the European component. Two major divisions may be made between the causes of the enhanced productivity accruing to European occupation. The first is superior technology and management, and the second is the significance of the presence of European society itself. The two should not be confused.

Intensive management and advanced farming technologies have increased the product from the land considerably, especially with respect to traditional uses. Clearing improved pasture, fertilization and



they are not in themselves the whole cause of the increase in productivity resulting from European settlement.

If the indigenous owners were to have been able to use western farming management and technology they would face several difficulties in the absence of western society. In the absence of western society, supplies of fuels, fertilisers and other materials may be prohibitively difficult. Likewise, with no centres of urban population there would be no markets, and hence little point to the massive possible production. Finally, western farming is efficient because of an intricate matrix of public and private infrastructure and services that are available to farms.



Even the most remote property benefits as a result of its connection to western society, these connections are now largely taken for granted, but they make the difference between a given tract of land being tolerable and profitable or not.

A solution to the customary tenure problem in Australia should include some mechanism for returning to these three groups, customary owners, occupiers and western society, equitable shares in the total product from the land, proportioned to their contribution. Exhibit 4 demonstrates this tripartite interest. It can be seen that the component accruing to the occupiers of the land is the difference between the total product and the market rental. In purely western rent theory this is not contentious.

It has been argued that the component accruing to the customary owners (shown (3) in the Exhibit) can be deduced from their material needs when pursuing a traditional lifestyle. This leaves the component accruing to western society as the remainder once the other two interests have been subtracted.

If such a distribution were made it would implicitly mean that the users would be paying market rent and that the rent would be distributed between the two communities in proportion to their essential tenure and input to the wealth production effort. This is undeniably a just outcome and it is within reach in the present customary tenure debate.

It may be argued that indigenous people are already deriving their basic material support from the western community through various welfare payments. Perhaps as a society, the western occupants are already supplying indigenous people with the material welfare due to them in an implicit compensation for taking their land. If this is so then some portion of the implicit land debt which morally burdens western peoples in Australia is already being paid, and hence additional payments to indigenous peoples may be unjust if the total level of transfer to indigenous people exceeds what is reasonably due to them.

This fact must be recognised. Any return of customary land should therefore carry with it some balancing offset in direct state welfare payments. This issue cannot be fully developed without

an adequate gross level of material welfare (which is debatable), carries with it several serious *social* distortions.

Welfare payments are made at the decision of government, leaving indigenous people with little self-determination. Welfare payments are divorced from the land, its management and the sense of control that is due to genuine owners. Welfare payments have been recognised as causing a variety of cultural difficulties for the communities into which they are injected, due to the high likelihood of their distribution upsetting the internal authority and distribution structures that characterise the group.

For these reasons it would seem more appropriate for indigenous groups to be positioned so that their community's material livelihood was tied more directly to their land by enabling them to directly benefit from some proportion of the market rental of their land. The exact proportion would be set with consideration of the needs of the indigenous group as affected by their number, and an accepted level of material needs, recognising that in most cases their needs must compare not simply to those existing before contact with the west, but in some proportion to the adjacent western society.

Because land recognised as having surviving customary ownership represents only a small portion of the total once owned by indigenous people, it could be expected that the proportions of the market rent that was considered just remuneration to the indigenous owners may be greater than that computed purely by analysis of the productivities of the specific sites before and after western occupation. This apparent excess would be an implicit compensation for those other properties from which income has been lost through extinguishment. Because the state is receiving incomes from those other properties, there will be an overall balance.

To balance the three interests it is proposed that lessees be charged, at least eventually, a fair market rent independent of customary title claims. This rent could go to the indigenous owners who would operate as a collective of some form and be directed by some form of customary administration composed of persons recognised as indigenous leaders. From this collective the state would levy a land tax. Careful guide-lines would have to be established for such a tax and it would be novel in that it would be based on collecting the excess over that needed by the customary owners for a reasonable standard of living.

## **PROPOSED LAND TAXATION OVER CUSTOMARY TITLE LAND**

The state land tax that is being proposed would itself have more of the nature of a rent. Rents tend to be set so as to collect of that product from the use of land that is excess to the needs (marginal profit and wages usually) of those who are engaged in the actual production. For this reason, such a tax is not as novel as it first appears, but in fact is identically what the state has always been supposed to collect from state leasehold land, only with the indigenous owners introduced between the occupiers and the state.

Given that the (western) users will be paying market rents regardless of whether they are leasing customarily owned or state owned land, they will become indifferent to the ownership.

Where the land is under customary title it has been argued that the indigenous owners have a right to sufficient income for an adequate standard of living, however that is understood. The excess rent received above this level has been argued to result not from the land as it was owned by its customary owners, but as a result of the existence of western society (supplying markets, infrastructure, etc.) and hence justly the property of the community. Although this margin above need is politically considered as a tax, its construction more accurately resembles a rent. By setting it by reference to production and needs it will have the capacity to respond to a range of social needs.

## **INCLUSION OF CUSTOMARY OWNERS IN LAND USE PLANNING**

Western tenure in all forms is subject to varying degrees of state control. While state control of land use may be most evident in state leasehold, is no less significant in the form of planning controls in urban freehold. The latter is recognised as a significant influence on land value.

Indigenous owners are seeking a level of input into the control of western land use. Their reasons fo

popular as 'sustainability'. The current shift towards environmental concern is founded on preserving our land for future generations, indigenous peoples have always operated according to this ethic, which is still only an awkward novelty in western societies. On this basis alone it would appear reasonable to include them in the planning process.

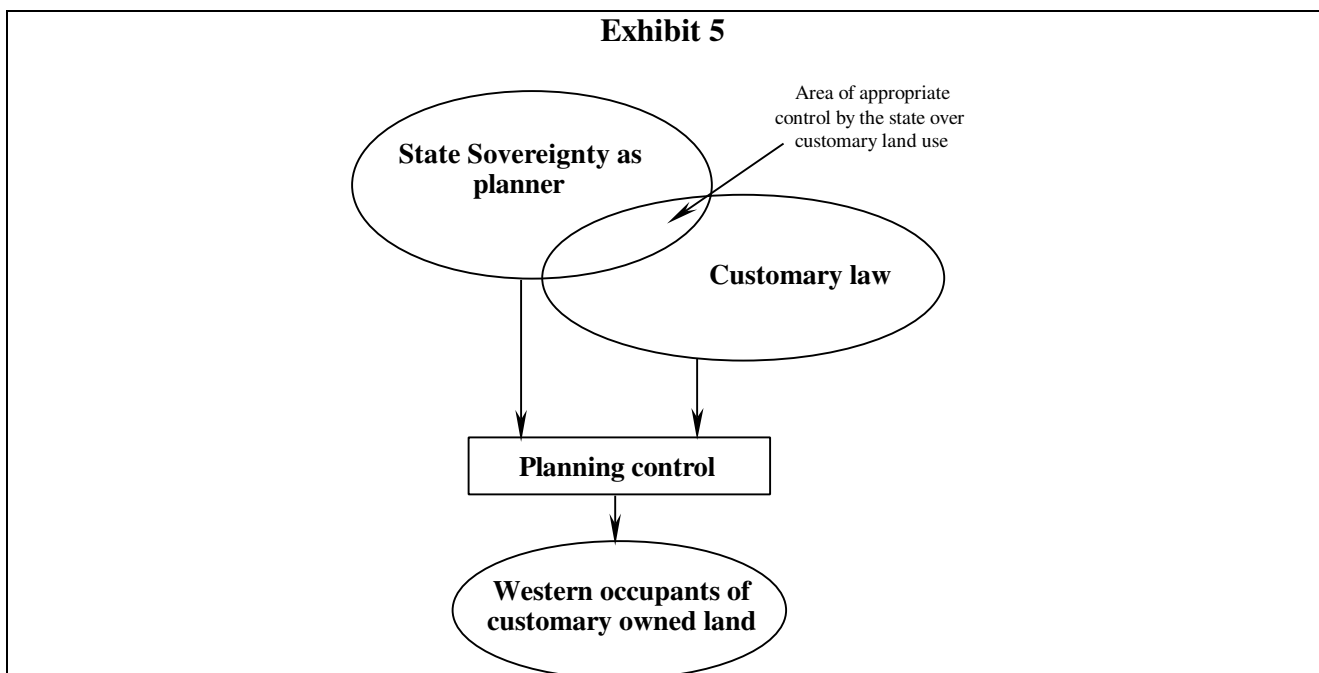
Much of the current debate regarding the interaction of customary title and state planning appears to centre on concerns regarding the legal force of planning controls over customary title land. I believe that this perspective is the reverse of the actual issue. It is not so much a matter of sovereignty over planning rights, but rather a recognition that indigenous peoples as prior owners of the land, seek rights that are equivalent to those of statutory planners. The issue does not seem to have been deeply considered from this perspective but seems to be the more valid relationship.

The issue pivots on the balance of rights distributed between the customary owners, with their legal system, and the state, with its western legal system with respect to the authority to order the use of land. It does appear that there is at least some overlap between these two with respect to state control over customary owners using the land, such as where traditional use poses a threat to national interest, but these would also appear to constitute only a tiny proportion of the restrictions routinely imposed by the state on western land users.

Of greater importance is the inter-relationship between the state and customary owners in the ordering of land use by western occupiers of land. This may be paralleled to tenants in private leasehold who are restricted both by state laws and also by the restrictions within their leases. This analogy seems especially relevant. It respects both the sovereign rights of the state and the customary land rights of the indigenous owners. It would appear to be the appropriate model for the administration of state pastoral leasehold land.

This interpretation also appears to be consistent with the very nature of planning control, as a necessarily restrictive influence on land use: both the state and indigenous owners have interests that are only protected when they each have the power of veto over proposed western land uses.

There appears to be considerable resistance by many western parties to the idea of giving indigenous owners the right of veto over land use proposals. This resistance reflects a fear that indigenous owners are *necessarily* opposed to western land use and development which is not well supported in fact. It also has overtones of a rejection of the fundamentals of ownership - ownership without control is meaningless.



If it is accepted that ownership in both western and indigenous understandings does not depend on

implicitly rejecting the reality of ownership. This leads back to the erroneous suggestion that customary ownership is more like an easement, subsidiary to actual ownership.

Exhibit 4 illustrates a proposed structure for the relationships between the players engaged in ownership, planning and use. The small area of influence of the state over customary activities is shown as the overlap between the state and the customary owners. It proposes a model for the joint participation by the state and indigenous owners in the development of planning controls, based on both parties holding a right of veto over any particular western land use.

Obviously, the details of the joint relationship will need careful additional planning, especially with respect to mechanisms for resolution of cases where either the state or the customary owners consciously hold the belief that a particular land use should proceed contrary to the veto of the other party, but as a general model this appears to be close to what is necessary.

Because planning deals predominantly with future land uses, it would be possible to admit indigenous people into the planning process very quickly, allowing them an input into future land use decisions. This would constitute a prompt recognition of their relationship with the land, without any economic impact on current land prices as these are a function of existing planning controls.

## **A SUGGESTED INTEGRATED TENURE STRUCTURE**

I believe that a just outcome is possible that will respect the rights and needs of all parties. I believe that such an outcome would be best phased in over a time-frame of some decades, but that this progressive introduction could be structured so as to give a high proportion of the necessary recognitions (such as formal title transfers and admission of indigenous people into the planning process) very early in the process, with the remainder of the programme devoted to a gradual re-balancing of the economic relationships involved. The component parts of the proposed programme as follows:

### **Regularisation of existing leases.**

The first step towards a just resolution does not directly involve indigenous people at all, but rather the regularisation of existing leases. This would entail three processes:

- 1) A schedule for progressive raising of the rentals on state leaseholds to market levels. As discussed, this could be done so as to amortize the interest at depreciation rates comparable with other long term personal assets (no more than 3%pa). This materially aligns leasehold assets with other personal assets as it is legally understood.
- 2) The introduction of clauses for the compensation of leaseholders for the closing market value of capital improvements at the end of the lease. This compensation could be tied to the actual resale of the leasehold at the end of the lease term.
- 3) A formalisation of the rights that are actually involved in the leases. These may need to be sensitive to the realities of land use that have been adopted by lessees, apparently in good faith. In some cases they will need to be broader than the original lease. In all cases they will need to explicitly exclude any rights that were not conveyed in the original leases that impede the customary rights and practices of the indigenous owners. As has been observed, these customary activities usually involve little interruption to western land use.

### **Introduction of the indigenous owners as the lessors.**

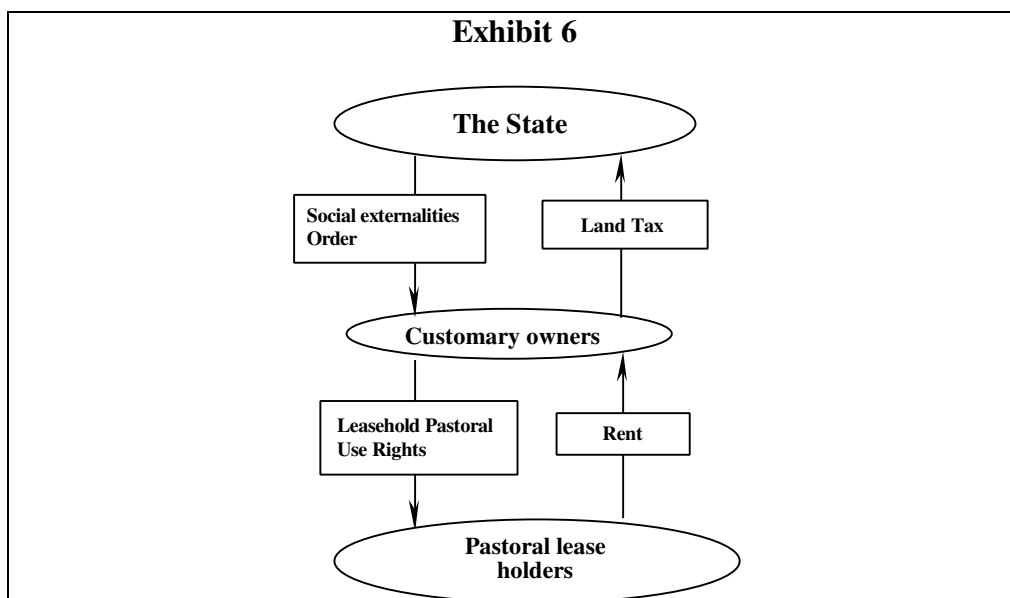
The second step would consist of the formal transfer of title from the Crown to the customary owners. This would transfer to the indigenous owners the existing leases, with the obligation that they be upheld at least until the completion of their (extended) term and include compensation for non-amortized capital improvements, as outlined in (2) immediately above.

They would become the beneficiaries of the rental income, but would not be able to immediately raise it beyond what is agreed in (1) immediately above. Exhibit 6 shows how the introduction of the indigenous owners between the state and the occupiers, coupled with a land tax, would achieve an equitable outcome for all parties:

Recognition of customary title as described would enable indigenous owners to once again have the opportunity for some level of material self-determination. They would have an income, albeit at a corporate level, and like other citizens be expected to play a part in the funding of the state. It has been argued that part of the product from the land actually accrues to the existence and order of western society. These arguments make the introduction of what I am dubbing a "State Customary Land Tax" (SCLT) most appropriate.

The form of the SCLT would resemble a rent and would collect that part of the market rent in excess of the needs of the customary owners. While this may be the source of some objection, on the basis that it leaves customary owners vulnerable to the taxation decisions of the state, such an objection ignores the realities. All Australians are engaged in such tensions between the taxing inclinations of various levels of government. More importantly, indigenous people are currently subject to the greater insecurity of having to rely on welfare payments from the state. The move to having an actual income flowing from recognised corporate assets would have to be more conducive to a sense of independence and security, even if such an income were subject to a level of taxation.

Conversely, I believe that there is a good case for exempting indigenous people from income tax accruing to their land income. The reason for this is that the traditional culture is based on communal (corporate) income, not individual income. The practice of paying welfare to individual indigenous people has caused many recognised problems, and the levying of tax on an individual basis similarly misunderstands traditional indigenous society. Because customary title is closely related to the pursuit of traditional indigenous culture and a respect for its laws and customs, it is appropriate that the interface with western public funding (taxation) likewise respect, and integrate into, that customary culture.



This would mean that for indigenous people, the income that they would enjoy from their land would come after the SCLT, it would be exempt from income tax and the personal complications that income taxation involves. Income taxation would of course still apply to incomes earned either through wages of commerce in the western economy, for those indigenous people who choose such employment. It would be likely that a careful articulation with income taxation be developed for indigenous people choosing to pursue additional income, so as to make such additional income subject to an equitable level of taxation. This could be done by adding the person's share of customary income to his or her other taxable income, computing a tax rate but then deducting the tax payable on the customary income from the total amount of income taxation payable.

The magnitude of the income that would accrue to the customary owners may not initially be sufficient to support them, especially considering the limited extent of recognised customary title over state pastoral leaseholds and the low rents that appear to be currently charged. For this reason the inclusion of state welfare payments would have to be continued on the level of state

guiding factor is the maintenance of the overall level of material support to each indigenous community.

It may be appropriate to consider a preliminary transition of state welfare support payments from to individual recipients to tribal groups, at least where such groups follow indentifiably traditional life styles. Such a transition itself is surrounded by complex issues regarding respect for customary culture, structure and law which may not be appropriate to attempt to address adequately here. The difficulty is for western people and administrators to overcome inter-cultural misunderstandings in the provision of welfare. However, such a transition in welfare provision is not central to the issues being discussed and is not held up in this submission as a fundamental component of dealing with the land issue.

## **SUMMARY AND CONCLUSION**

Much of the heat in the debate over customary title has been generated over an issue that is not directly connected with the rights of indigenous people at all. It is a real concern over the likely loss of a privilege that has progressively accrued to pastoral leaseholders over a long period of time. This customary privilege amounts to a benefit in favour of a selected few who have been permitted to pay less for a benefit from the state than was contracted and is therefore best understood as a privilege held at the expense of the remainder of the community. Unfortunately, the privilege has been perceived as permanent and has allowed outgoing leaseholders to charge prices for their interest that implicitly include the expectation of the privilege continuing. This privilege deserves regularisation, regardless of the claims of indigenous Australians.

When combined with a strategy for amortizing this privilege and the introduction of a State Customary Land Tax, the insertion of customary owners between the state and the western leaseholders has the capacity to overcome all of the difficulties of the various parties and return an equitable outcome that would not comprise the use of the land. It would also return to indigenous owners the high level of material self-determination that has been denied them for so long.

### **SUMMARY OF POLICY RECOMMENDATIONS**

- 1: That rents payable on all pastoral leaseholds be returned to fair market levels through a programme that amortizes the interest at a rate of no more than 3%pa.
- 2: That the customary owners of state pastoral leasehold land be permitted to take over the leases to their land, subject to the revised provisions necessary for the execution of the amortization in (1) above. In particular that customary title be recognised as the more fundamental title than leasehold tenure, from which the leasehold tenure is referenced.
- 3: That customary owners be included in the land use control process, either at the statutory level in the case of disputed customary title, or as land lords in the case of recognised customary title.
- 4: That a land tax be levied over customary title land, which would be the only tax paid by indigenous people who have no other income. Such a tax should be levied on the indigenous people as a group and proportioned to the productivity of the land and the needs of the indigenous people themselves.

**Exhibit 7:**

**Comparison of the natural rights and responsibilities of the parties and their realisation in the proposed solution strategy**

Natural Right/Responsibility	Realisation in Proposed Strategy
<p><b>Necessary Qualities of Ownership of Land</b></p> <ul style="list-style-type: none"> <li>Right to Occupy</li> <li>Right to control use by others</li> <li>Right to transfer rights of ownership to others</li> <li>Right to share of wealth produced</li> </ul>	<p><b>Manner in which Customary Owners would exercise ownership</b></p> <ul style="list-style-type: none"> <li>Right to visit for tribal purposes excluded from rights transferred to lessee</li> <li>Right to participate in the planning process, especially the right to prevent uses contrary to customary law and practice</li> <li>Absolute sale not possible within customary law; however leasing is a valid bridge between customary owners and western users</li> <li>Right to rental income</li> </ul>
<p><b>Responsibilities attached to being a part of a community</b></p> <ul style="list-style-type: none"> <li>Acceptance of the prevailing legal system</li> <li>Contribution towards public finance</li> </ul>	<p><b>Responsibilities of customary land owners to the Australian community</b></p> <ul style="list-style-type: none"> <li>Acceptance of existing western leases and laws, except when these unnecessarily conflict with traditional law</li> <li>Payment of that part of rental income that accrues to western society as 'tax'</li> </ul>
<p><b>Equitable rights of lessees</b></p> <ul style="list-style-type: none"> <li>Right to value of non-amortized capital investment in leasehold interests</li> <li>Just treatment of leasehold purchase price</li> </ul>	<p><b>Mechanisms for equitable treatment of lessees</b></p> <ul style="list-style-type: none"> <li>Just compensation for non-amortized capital improvements</li> <li>Depreciation of the leasehold interest equivalent to other personal assets</li> </ul>