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Managing Exclusive Possession

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Abstract

This paper explores the experiences of WGAC in managing their exclusive native title rights and interests. These experiences have highlighted the opportunities and some of actual and perceived deficiencies of exclusive native title.

Part 1 of the papers will provide an overview of WGAC's strategy for managing exclusive possession native title post determination in order to provide a way of enjoying their land and waters including through the implementation of their Healthy Country Plan including Right Way Fire and Visitor Management.

Part 2 of the paper will focus on some of the legal issues obstacles relevant to the WGAC experience, including the rights asserted by the Crown in vacant land and difficulties in the application of the Non Extinguishment Principe.

Part 3 of the paper will look at the effect of the restriction on alienation of native title and possible legislation and other solutions including the use of layering of tenures and State Agreements:

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Background - Exclusive Native Title under Uunguu Native Title Determinations

WGAC represents the "Wunambal Gaambera people". The Wunambal Gaambera people are the native title holders recognised in the 'Uunguu' native title determinations (*Goonack v Sate of Western Australia* [2011] FCA 516 and *Peurmora v State of Western Australia* [2012] FCA 1334).

WGAC is a Related Corporation to the Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC (WWPBC). The WWPBC holds the native title recognised in the Uunguu, Dambimangari and Wilinggin determinations on trust on behalf of the Wanjina Wunggurr Community, which includes the Wunambal Gaambera people. While the WWPBC is ultimately responsible for making native title decisions, each of the three Related Corporations, including WGAC, have responsibility for the management of native title in respect of each of the determination areas.

According to the Uunguu native title determinations the Wanjina Wunggurr community have a right to possess, use, occupy and enjoy most of the determination area to the exclusion of all

others. Those exclusive rights and interests are said to be exercisable for personal, domestic and communal needs but not for commercial purposes.

Native title has been wholly extinguished in respect of part of the determination area, primarily in respect of the Reserve 27164 (Prince Regent Nature Reserve). Non-exclusive native title rights and interests were determined to exist in the intertidal zone and sea country, as well as in respect of some islands. A map of the Uungu native title determination areas showing the exclusive areas is attached.

The native title determination recognised a limited number of other rights and interests which were said to be subject to the Non-Extinguishment Principle, which means that those other rights and interests take priority over but do not extinguish the exclusive native title which otherwise exists.

The other mining interests were:

(a) Temporary Reserve 70/5610 which was managed by Rio Tinto on behalf of the Joint Venturers. The Temporary Reserve was granted under the *Alumina Refinery (Mitchell Plateau) Agreement Act* 1971 (WA) and covered an area known as the Mitchell Plateau.
(b) Mining Leases M8000047-60 which had previously been granted over the Bougainville Peninsula, an area of high conservation and cultural value, to the same Joint Venturers.

Aboriginal Reserves were also identified as other interests subject to the Non-Extinguishment Principle. There are two types of Aboriginal Reserves in the determination area, reserves vested in the Minister for Aboriginal Affairs (constituted as the Aboriginal Affairs Planning Authority) under Part III of the Aboriginal Affairs Planning Authority Act 1972 (WA) for the use and benefit of Aborigines (AAPA Part III Reserves) and reserves vested pursuant to section 33 of the Land Act 1933 (WA) in the Aboriginal Lands Trust for the purpose of the use and benefit of Aboriginal inhabitants (Aboriginal Land Reserves). While exclusive native title exists in respect of the reserve areas (47A Native Title Act 1993) it is subject to the interests held by the AAPA and the ALT created by the reserves.

There are 3 AAPA Pt III Reserves in the determination area:

1. Reserve 24705(**Cape Bougainville**)
2. Reserve 30643 (**Admiralty Gulf**)
3. Reserve 23079 (**Kunmunya**)

There is a lease from the ALT to WGAC over Cape Bougainville Reserve.

The determination makes specific provision in respect of the following conservation reserves:

1. Reserves 46231 (**Laterite Conservation Park**);
2. Reserves 46232 (**Mitchell River National Park**);
3. Reserves 46233(**Lawley River National Park**); and
4. Reserves 46234 (**Camp Creek Conservation Park**).

collectively “the Conservation Reserves”

These Conservation Reserves were declared by the State Government unilaterally in 2000 without consultation with Wunambal Gaambera people and without following any future act process under the Native Title Act 1993 (Cth). The native title determination expressly

provides that native title rights and interests continue to exist in their entirety over the reserve and will prevail over the Conservation Reserves "to the extent of inconsistency" and that native title prevails over any activity required or permitted in accordance with the Conservation Reserves.

While in a native title context such tenure is often described as 'invalid', this is not an entirely accurate description. In fact, according to the determination the Conservation Reserves are still effective according to their terms. The vesting of the reserves in the Conservation Commission prevents mining in the Reserves by the operation of Division 2 of the Mining Act 1978 (WA), and confers management powers on the CEO of what is now the Department of Biodiversity Conservation and Attractions (DBCA) under s 33 of the CALM Act. It is only ineffective to the extent the exercise of those powers is inconsistent with the exclusive possession native title. It is a situation in which the Non-Extinguishment Principle is effectively reversed.

Part 1 - Exclusive Possession Strategy

During the course of a workshop held on 17 and 18 April 2013 in Kalumburu WGAC directors and other Wunambal Gaambera participants identified the objectives they wished to achieve through the use and enjoyment of their exclusive native title rights and interests. These objectives took the form of an exclusive possession strategy paper which is summarised below.

As a general principle the participants wanted to use the determination as a means to inspire Wunambal Gaambera people to take active steps to manage, possess, use and enjoy their native title. They did not want WGAC to sit back on the native title and wait for other people to come forward with what they wanted to do on the determined area. They decided that the native title holders should take the lead in deciding what happens on the determination area and where it happens. At the workshop this was called a proactive approach to native title (and not a reactive approach).

Wunambal Gaambera people recognised that getting native title was not an end in itself. It was seen as a step towards getting Wunambal Gaambera people back out on country and leading more fulfilling, productive and richer lives. They see the securing of full property rights to their country, like those held by freehold title holders, as a necessary condition to the achievement of this goals

The objectives of the exclusive possession strategy paper included the following matters.

Healthy Country

The participants wanted to ensure and protect the right for Wunambal Gaambera people to make decisions about the management of the determination area including in relation to the implementation of the Wunambal Gaambera Healthy Country Plan 2010-20.

WGAC has made an existing declaration of Indigenous Protected Area-category VI IUCN status – Managed Resource Area - for the AAPA Pt III Reserves, Unallocated Crown Land areas and more recently the Saltwater Country. The land IPA is listed on Australia's National reserve System. The registration requires WGAC to conserve at least 75% of the IPA to a Category VI standard and only permit other uses in the remaining 25%.

The workshop identified that there are some areas within the determination area that have a particularly high conservation value, or which were threatened by mining, where WGAC might consider a national park which is a Category II area under the IUCN Protected Areas Category System. It was recognised that a national park would provide additional protection to the area from mining as well as providing a tourist attraction and associated commercial opportunities. The participants identified the Mitchell Plateau and the mining leases (Bougainville Peninsula) as areas that need to be protected from mining in the future and where a national park may be appropriate.

A national park was also considered a potential restriction on the rights of Wunambal Gaambera people to make decisions about country. They believed that they could work together with what is now the Department of Biodiversity Conservation and Attractions (DBCA) but saw problems if DBCA wanted to act in competition with Wunambal Gaambera people for the right to be the manager of the country. The workshop participants acknowledged the importance of maintaining healthy dialogue and relations with DBCA staff on the ground while at the same time ensuring their rights were respected by the DBCA managers and CEO.

They agreed that they wanted to continue the on-ground activities and cooperation that had occurred to date (eg in relation to fire burning) but wanted to make sure that they were not legally compromising or giving away their rights to manage country. To address the problems posed by the 'invalid' Conservation Reserves, the participants discussed a proposal to licence DBCA to carry out its present activities. The licence would protect the exclusive native title but allow DBCA to carry out its day to day activities with the permission of the native title holders. This was regarded as good way of ensuring that there was no inconsistency between the rights and obligations created by the Conservation Reserves and the exercise of native title rights and interests.

Right Way Fire Program

As part of its Healthy Country Plan WGAC is engaged in a fire management program known as Right Way Fire. The program is also an eligible offsets project under the *Carbon Credits (Carbon Farming Initiative) Act* 2011 (CCFI Act) that is registered on the Emissions Reduction Fund Register.

RWF burning, in modern contexts, seeks to emulate the Wunambal Gaambera people's traditional fire practices. RWF includes traditional decision-making and rights to burn country as well as knowledge about the right season and conditions to burn for looking after animals and plants and cultural sites. WGAC's fire operations seek to achieve high levels of Traditional Owner participation as well as achieving environmental outcomes.

Aerial Prescribed Burning (APB), conducted between April and June [early dry season (EDS)] is presently the most efficient RWF cool-burn method to effectively cover the extent of the remote and inaccessible Wunambal Gaambera landscape, including the ALT Reserves. APB aims to provide fire mosaics and strategic breaks in the landscape to mitigate wildfires that occur predominantly from October to December when extreme fire weather conditions prevail.

On-ground EDS burning includes protection of cultural sites and assets/infrastructure, working with property holders to foster their installation of perimeter fire breaks and fuel load reduction.

APB and on-ground EDS burning activities are directed by WGAC's Annual Fire Plan developed by the Healthy Country Team, representative Graa Traditional Owners, neighbours and relevant regional agencies including the DBCA, Department of Fire and Emergency Services and the Shire of Wyndham East Kimberley, in a workshop each March. The Annual Fire Plan is the basis for obtaining the required statutory burning permits.

At the exclusive possession strategy workshop the potential for the State to restrict the ability of WGAC to carry out RWF was identified as a risk to the full enjoyment of Wunambal Gaambera native title rights and interests. The then State Government had been hostile to the CCFI regime which permits the holder of exclusive possession native title to register a project under the Act in respect of what is otherwise vacant crown land without the consent of the State: refer Part 3 Division 10, s 46 CCFI Act. It regarded this as an infringement on State rights to manage Crown land. The State has enacted its own carbon rights legislation which purports to enact an exclusive code for the creation and registration of carbon rights in land (*Carbon Rights Act 2003* (WA); s 8).

Visitors Pass

The workshop participants made it clear that they wanted to assert their rights of exclusive possession. They agreed they welcomed visitors and tourists but on the basis that they asked permission before going on to the determination area, were limited in where they could go and paid an appropriate fee for entry to assist with the costs of management.

The workshop endorsed the Uunguu Visitor Management Plan (UVMP) which had been developed by WGAC.

The UVMP is a five year plan which has as a first priority the installation of a permit system, called the Uunguu Visitor Pass (UVP), to authorise visitor entry to Wunambal Gaambera Country (exclusive possession land) and as a second priority building Wunambal Gaambera participation in tourism. The UVMP is a sub-plan of the Healthy Country Plan 2010-20 in which visitor management is an important objective and strategy.

Under the UVMP, Wunambal Gaambera People approve places open to visitors (Visitor Locations) and an online permit system, the UVP, to provide their collective consent for and benefit from visitor access to Visitor Locations. Our UVP is a one-stop, user-pays web-based product designed to be accessible and efficient for tour group visitors, independent visitors, tour operators and our administration and management.

Land for Commercial and Community Development and Infrastructure

As discussed above, the IUCN Guidelines permits up to 25% of IPA to be used for non-conservation purposes including community and commercial infrastructure development. Existing and proposed Wunambal Gaambera communities require secure tenure to enable investment in community infrastructure. They also require areas of land for future economic development and activities.

WGAC has identified through a zoning process which is still ongoing some strategic wealth creation locations in the determination area where Wunambaal Gaambera people could develop themselves or in partnership with commercial operators, commercial infrastructure capable of generating revenue and employment for Wunambal Gaambera people. Due to the “inalienability” of native title, and the existence of the Aboriginal Reserves, it was acknowledged that such development would probably require the grant of tenure from the State Government (ie it could not be done using native title alone). This issue is the subject of the third part of this paper.

Part 2 - Outcomes and Obstacles

5 years after setting the strategy WGAC has achieved the many of its objectives relating to the Healthy Country Plan, including the continuation of the Right Way Fire Program and the implementation of the UVMP. The table below summaries those achievements.

Objective	Outcome
Healthy Country – National Park	In progress.
Healthy Country – Mining in Mitchell Plateau	Achieved (temporarily). The Temporary Reserve was surrendered under the Alumina Refinery (Mitchell Plateau) Agreement (Termination) Act 2015. Clause 5C of this Act temporarily suspends mining in the area pending the creation of a national park. Mining leases still in place on Bougainville Peninsula.
Right Way Fire Program	Achieved. WGAC has continued to carry out the Right Way Fire Program which remains registered under the CCFI Act.
Uunguu Visitors Pass	Achieved. WGAC is currently completing registration of tour operators for the 2018 tourism season.
Live in Communities	In progress. (Successful ILUA for lease to Kandiwal Community of Aboriginal Land Reserve)
Land for Commercial Developments and Commercial Infrastructure	In progress.

In achieving these outcomes WGAC overcame a number of obstacles and objections.

Some of the objections to WGAC's use of the exclusive possession native title area advanced directly or indirectly by the State included the following:

Rights of State in Vacant Crown Land

At an early stage, the State indicated that it may continue to assert management rights in the exclusive possession determination area.

It was suggested that DBCA had a right to carry out fire management and weed and pest control activities on vacant crown land pursuant to;

(a) a declaration under s 8C(2) of *the Conservation and Land Management Act* 1982 (WA) (CALM Act) which provides the power to the Governor to place vacant crown land under the management of DBCA; and
(b) the *Agriculture and Related Resources Protection Act* 1976 (WA) (ARRPA Act) which provides a statutory right to control declared animals and plants on public land under the control of a government department; and/or
(c) The Bushfires Act 1954 (WA) which empowers authorised officers to enter into any land to amongst other things "examine any things which he considers fire hazards" and "inspect fire precaution measures" taken on the land. Pursuant to s 34(1AC) an officer has the power to enter upon any Crown land to burn in order to reduce fire hazards.

Public land is defined in the ARRPA Act as land that is not private land. Private land is relevantly defined to include land held or used by a person who has a lawful right to occupy the land (which has no other owner).

The determination provides that native title is generally subject to any right held under legislation as well as the right of officers of the State to access the land in the exercise of any statutory or common law duties “where such access would be permitted to private land”.

The advice that WGAC received was that any powers of DBCA in relation to vacant crown land subject to exclusive native title could only be exercised with the consent or permission of the native title holders. Relevantly:

(A) land held under exclusive native title is likely to be regarded as private land under the *Agriculture and Related Resources Protection Act* 1976 and therefore an officer would not have the power to enter into exclusive native title land to control declared animals and plants;
(B) while an officer may have a statutory right to enter into vacant crown land to conduct burning activities, having regard to the terms of the determination which limits statutory rights of access to those that might exist on private land and the terms of the RDA, the *Bushfires Act* would not provide a right of access for burning activities to the exclusive determination area; and
(C) the declaration under s 33 (s 8C) of the CALM Act would not be effective to confer any management powers on DBCA (as the relevant statutes do not provide any management powers which could be conferred on DBCA).

Need for Licences (Commercial Limitation and ALT Reserve Land)

WGAC and other Related Corporations had a lengthy engagement with the State as to whether WGAC required a licence from the State under section 91 of the Land Administration Act 1991 (WA) (LAA) to operate the Right Way Fire Program.

In relation to the Right Way Fire Program it was suggested that:

(a) burning of Crown land was not permitted under the LAA and Land Administration Act Regulations (LAR) without a licence under the LAA for that purpose. Specifically, under s.267(2)(c) of the LAA, it is an offence to clear Crown land without either the permission of the Minister or reasonable excuse. Similarly, under Regulation 14 of the LAR, except in certain very limited circumstances, it is an offence to light or use fire on "regulated land"; and
(b) the fact that the CCFI permitted WGAC to obtain carbon credits in respect of the Right Way Fire Program meant that the program was contrary to the restriction on the exercise of native title rights and interests for commercial purposes.

In response WGAC:

(a) through the Kimberley Land Council (KLC) received advices from senior counsel to the effect that to the extent the LAA and LAR provisions applied to the carrying out of burning activities under exclusive possession native title, they were invalid by operation of the Racial Discrimination Act 1975 (Cth); and
(b) was firmly of the view that any commercial benefit derived from the sale of carbon credits was:
    a. purely incidental to the primary objective of the program which was to manage country in a manner consistent with the Healthy Country Plan; and
    b. for the purpose of meeting a communal need;

and that therefore the activities were not contrary to the commercial limitation imposed by the native title determination.

By way of compromise WGAC agreed to enter into a licence under s 91 of the LAA to carry out RWF for a peppercorn fee. In that licence WGAC expressly reserved its position as to whether such a licence was legally required. This licence has since lapsed and WGAC has recently been advised by the State that it is not required to renew the licence in order to carry out RWF.

Fixing 'Invalid' Conservation Reserves

A particular difficulty faced by WGAC in relation to the 'invalid' Conservation Reserves was the assumption that 'invalid' Conservation Reserves were a problem that needed to be fixed and that by definition the only way to fix an 'invalid' reserve was to validate it under an ILUA. Similarly there was an assumption that the application of what is benevolently described as the Non Extinguishment Principle would somehow protect native title rights and interests, rather than, as is in fact the case, reverse the position prescribed by the native title determination.

The ceding of title contemplated by this solution was of great concern to Wunambal Gaambera people. In circumstances where some of the areas covered by the 'invalid' Conservation Reserves are of immense cultural significance, Wunambal Gaambera people were and remain strongly of the view that under their traditional laws and customs they could never agree to put somebody else's name, in this case the Conservation Commission, on the title, even if that title, as set out below, was largely symbolic.

WGAC were also concerned that the effect of validation and the application of the Non Extinguishment Principle, irrespective of any joint management agreement or joint vesting, would be to permanently suppress their native title rights and interests. While an ILUA and joint management agreement would give certain contractual rights enforceable against the State, they did not want to lose their rights and powers to manage the whole of the Uunguu IPA, including the Conservation Reserves, as one landscape and regulate visitor access on a day to day basis.

Recent amendments that allow for joint vesting of the conservation estate in the Conservation and National Parks Commission and a native title prescribed body corporate (refer s 8AA CALM Act) provide for a vesting of title in name only. The responsibility and power to control the day to day operations of the park, are conferred on the CEO of DBCA under section 33 of the CALM Act. The role of the Commission and any joint responsible body is supervisory: ensuring that the powers of the CEO are exercised in a manner consistent with management plans prepared under Part V Division 1 of that Act: s 19 (f) and (g). Similarly, the role of any joint management body is reliant on the statutory powers conferred on the CEO for the implementation of any agreed management plan.

The diagrams below were used by WGAC to summarise the current relationship between the National Park and native title and the legal position that would follow from 'validation' and the application of the Non-Extinguishment Principle.

Diagram 1 – Invalid Parks (Non Extinguishment Principle does not apply)

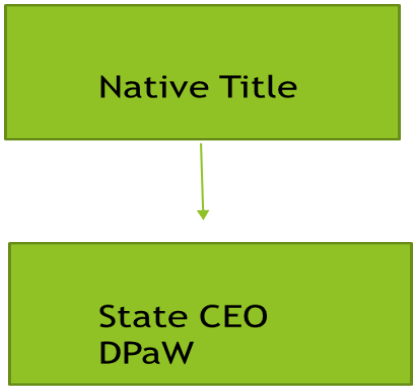
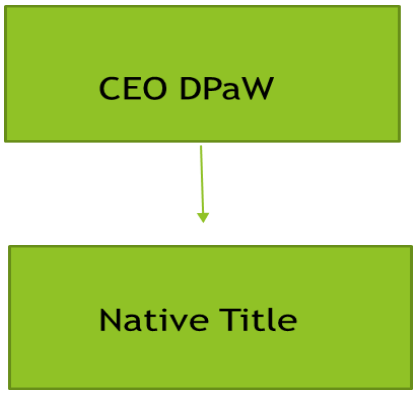


Diagram 2 – Valid Parks (Non Extinguishment Principle applies)



WGAC sought to find other solutions that avoided these win-lose scenarios. There are no restrictions on what can be agreed under an ILUA as to the relationship between native title and non-native title rights and interests by ss 24BB(c), 24CB(c), 24DB(c) of the Native Title Act. WGAC saw that this created the opportunity for an ILUA to set out an arrangement in which exclusive native title rights and interests would co-exist with and not be permanently suppressed by the CALM Act. WGAC believes that exclusive native title is an effective way of managing country and that these rights can be exercised alongside statutory rights exercised by the DBCA CEO and DBCA officers. Wunambal Gaambera people describe this as “Working Together”.

Part 3 - Identified Deficiencies in Exclusive Native Title Rights and Interests - Inalienability

Perhaps the most significant remaining challenge for WGAC in implementing its Exclusive Possession Strategy arises by reason of what is said to be the inalienability of native title. While native title holders can consent to a development by a third party within the exclusive

determination area, in order to carry out that development the third party requires a tenure or approval from the State Government.

Alienability of Native Title at Common law

The right to alienate a title is a usual incident not just of of freehold title but of any property right: *Milurrpum v Nabalc*o (1971) 141 FLR at 171. Pastoral lessees have the right, subject to Ministerial consent, to sub-let a pastoral lease: s 134 *Land Administration Act* 1997 (WA). Even a periodic tenant at common law have the right to assign, sub-let or otherwise dispose of an interest in a lease: *American Dairy Queen (Qld) Pty Ltd v Blue Roo Pty Ltd* [1981] HCA 60; 167 CLR 677 at 683 per Mason J. citing *Commonwealth Life (Amalgamated) v Anderson* (1945) SR NSW 47 at 51. In an international law context, the UN Declaration on the Rights of Indigenous People acknowledges the right to own, use, develop and control lands (Art 26(2)) and it could be argued that the right to alienate is an integral part of the right to own property guaranteed and protected by the International Convention on Racial Discrimination.

It was nevertheless accepted by a majority of the by the High Court in *Mabo v State of Queensland (No.2)* (1992) 175 CLR 1; [1992] HCA 23 that inalienability is an inherent characteristic of the form of native title recognised by the common law. It is said that, for this reason, it is a lesser form of property right than freehold title: *Northern Territory of Australia v Griffiths* (2017) 346 ALR 247; [2017] FCAFC 106 at [113] and [139] (issue on appeal to High Court).

In *Mabo No 2* Deane and Gaudron JJ discussed the limitation in the following passage:

> *21. The first limitation relates to alienation. It is commonly expressed as a right of pre-emption in the Sovereign, sometimes said to flow from "discovery" (i.e. in the European sense of "discovery" by a European State)(208) See, e.g., Johnson v. McIntosh [1823] USSC 22; (1823) 8 Wheat 543, at p 592 (21 US 240, at p 261); Reg. v. Symonds (1847) NZPCC, at pp 389-391. The effect of such a right of pre-emption in the Crown is not to preclude changes to entitlement and enjoyment within the local native system. It is to preclude alienation outside that native system otherwise than by surrender to the Crown. The existence of any rule restricting alienation outside the native system has been subjected to some scholarly questioning and criticism (209) See, e.g., McNeil, op cit, pp 221ff. In our view, however, the rule must be accepted as firmly established (210) See, e.g., Nireaha Tamaki v. Baker (1901) AC, at p 579; Attorney-General for Quebec v. Attorney-General for Canada (1921) 1 AC, at pp 408, 411; Administration of Papua and New Guinea v. Daera Guba (1973) 130 CLR, at p 397.*

Brennan J said as follows:

> *65. First, unless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for the alienation of interests in land to strangers, the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived. If alienation of a right or interest in land is a mere matter of the custom observed by the indigenous inhabitants, not provided for by law enforced by a sovereign power, there is no machinery which can enforce the rights of the alienee. The common law cannot enforce as a proprietary interest the rights of a putative alienee whose title is not created either under a law which was enforceable against the putative alienor at the time of the alienation and thereafter until the change of sovereignty or under the common law. ….*

…

> *67. It follows that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired outside those laws and customs only by the Crown(127) This result has been reached in other jurisdictions, though for different reasons: see Reg. v. Symonds (1847) NZPCC , at p 390; Johnson v. McIntosh (1823) 8 wheat, at p 586 (21 US , at p 259); St. Catherine's Milling and Lumber Co. v. The Queen (1887) 13 SCR 577, at p 599. Once the Crown acquires sovereignty and the common law becomes the law of the territory, the Crown's sovereignty over all land in the territory carries the capacity to accept a surrender of native title. The native title may be surrendered on purchase or surrendered voluntarily, whereupon the Crown's radical title is expanded to absolute ownership, a plenum dominium, for there is then no other owner(128) St. Catherine's Milling and Lumber Co. v. The Queen (1888) 14 App Cas, at p 55.*

Toohey J was more cautious in adopting the proposition that native title is inalienable:

> *56. Another rationale for the special power of the Crown to extinguish traditional title appears to be that it is part of British colonial policy to protect the interests of indigenous inhabitants; that the Crown's power is the corollary of the general inalienability of title, which itself constituted a means of protecting aboriginal people from exploitation by settlers(593) See The Queen v. Symonds (1847) NZPCC , at pp 390-391; Guerin v. The Queen (1984) 2 SCR, at pp 383-384; (1984) 13 DLR (4th), at p 340, where reference is made to the Royal Proclamation of 1763, applicable to recently-acquired North American colonies; note also the Proclamation by Governor Bourke and comments by Lord Glenelg following John Batman's attempted purchases of land at Port Phillip in 1835, discussed in McNeil, pp 224-225. That traditional title is generally inalienable may itself be open to debate(594) Dicta referring to inalienability must be read in the light of ordinances and statutes precluding alienation except by surrender to the Crown. See for instance Nireaha Tamaki v. Baker (1901) AC 561, at p 579; Attorney-General for Quebec v. Attorney-General for Canada (1921) 1 AC 401, at pp 408, 411; Administration of Papua and New Guinea v. Daera Guba [1973] HCA 59; (1973) 130 CLR 353, at p 378. This is not the place for an examination of alienability of land in indigenous societies; no sufficient evidence was offered to the Court in that regard. But alienability itself is a relative concept and there was evidence in at least one of the claims made under the Land Rights Act of land being "given" by the few remaining survivors of one group to another group: see the Report by the Aboriginal Land Commissioner, Alligator Rivers Stage II land claim, (1981), pars 118, 119. But, in any event, a principle of protection is hardly a basis for a unilateral power in the Crown, exercisable without consent. Moreover, inalienability of the title says nothing of the Crown's power or the nature of the title. Rather, it describes rights, or restrictions on rights, of settlers or other potential purchasers(595) See The Queen v. Symonds (1847) NZPCC , at pp 389-391; McNeil, pp 230-235.*

Kent McNeil in the chapter referenced by Deane and Gaudron JJ and Toohey J argues that the restriction on alienation has its origins in statutes and ordinances designed to protect Indigenous inhabitants from exploitation by non-Indigenous settlers. Absent these statutes,

he argues that the common law is able to recognise title acquired by a non Indigenous person by reference to the relevant traditional law and custom.

As Toohey J was aware, traditional law and custom may recognise and respect the right of Aboriginal people to grant an interest in land to another group. Recent Federal Court decisions have dealt with situations in which the original Aboriginal inhabitants have given a licence or permission to other groups of Aboriginal people to occupy and use their lands.

In *AB (decd) (obh of Ngarla People) v State of Western Australia* (No 4) (2012) 300 ALR 193 [2012] FCA 1268 (Warrarn) the Federal Court made the following findings:

[260] Broadly speaking, the evidence from members of the Warrarn group, the Ngarla and the Njamal witnesses was consistent: that permission could be given to others to enter upon and carry out certain activities on country in the Pilbara,specifically Ngarla country. That is consistent with a licence or permission given under traditional law and custom. That is, in accordance with the traditional law and customs observed by the relevant normative society, a person could be given permission to live, camp, visit, hunt or fish, take resources and practise law in the country of a language group other than his or her own, or to look after the country.

[261] However, it should be noted that there were some specific ritual transactions associated with the giving of permission to permit strangers to a local area to reside in, and to carry out and participate in the practice of law in, that area. Dr Smith says that "[r]itual transactions concerning the granting of permission to 'outsiders' are not new, nor did they come about solely as a result of the social, cultural, and economic changes arising from the Aboriginal pastoral strike from 1946 onward". Dr Smith gives examples of strangers to a local area seeking permission from local leaders in accordance with traditional law to collect medicine on Ngarla country. He says that one reason why the Ngarla insist that outsiders must ask for permission to access an area is as a means of preventing spirit entities from being disturbed and strangers being injured.

The process by which these licences or permissions were granted demonstrate the flexibility, sophistication and adaptability of Aboriginal lore and custom. An analogy in the Kimberley context may be the reciprocal rights created by "Wunan" or the hunting rights that are created reciprocally between local Graa or estates. The Federal Court has not however recognised the licence or permission as itself conferring on the holder of the licence a native title right and interest. This is said to be because the interest is in the nature of a reciprocal based right and not in relation to land and waters.

Reciprocal based rights persist only as long as the personal relationship continues. An occupation based holder accesses and uses land as of right, whereas a reciprocal rights holder has no right to engage in any activity without "permission" or some form of "license" from a particular person with whom he or she has a personal relationship.

Commonwealth v Akiba (2012) 204 FCR 260 (Akiba (FC)) Keane CJ and Dowsett J at [132]. Adopted by Bennett J in *Warrarn* at [551]/:

Consistent with the reasoning of Kent McNeil, if this permission can be given to another Aboriginal Group (who do not by definition hold in common the same body of traditional laws and customs) there is no reason in theory why such a licence could not be granted to third parties, The UVP could be seen as a modern-day adaptation of such a right ie a form of alienation of native title.

This type of interest, although not a native title right, is nevertheless a property right, in the form of a personal equity or interest. Such a licence could be raised as a defence to any action by the native title holders to arbitrarily exclude the holder of the licence or permission from the determined area, in a manner inconsistent with the permission given.

The holder of the interest would however remain subject to the statutory restrictions which apply to any development on vacant crown land, or reserve land. As noted above these restrictions do not apply to native title holders by reason of the RDA. A third party holding a lease or licence from the native title holders, would not be entitled to the protection otherwise conferred by the RDA, as the right conferred is not a native title right or interest. The holder of the lease or licence may therefore also be required to hold a tenure from the State. By way of example, the holders of a UVP may also be required to hold complementary licences and permits under the AAPA Act and CALM Act in respect of reserve land.

In summary:

(a) the right to alienate conferred by most common law and statutory titles is an important incident of the inherent right of all peoples to own and enjoy property;

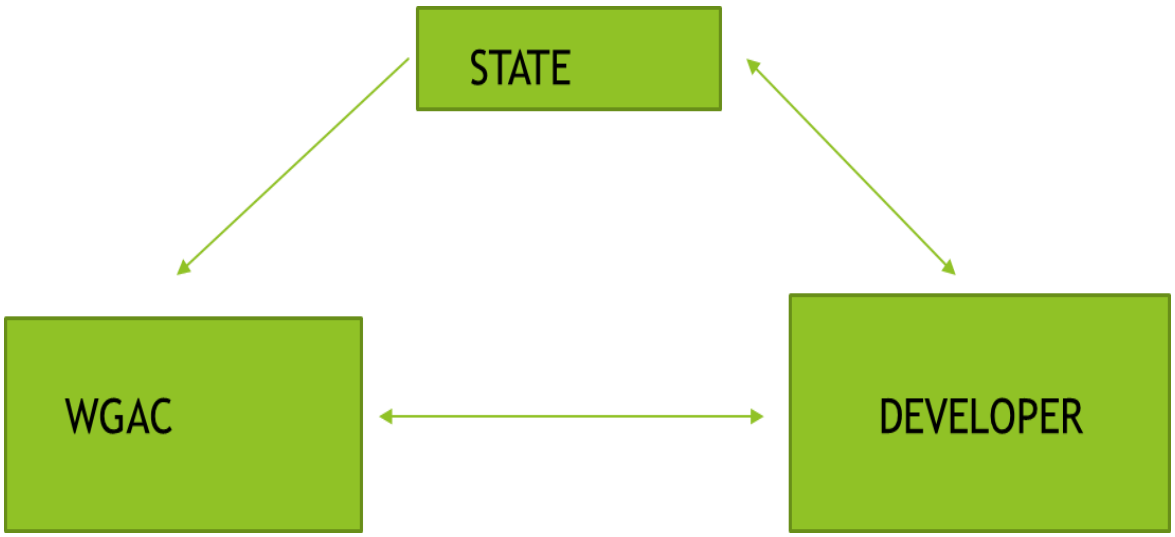
(b) the restriction imposed on the alienation of native title by the common law as reflected in the Mabo decision is not reflected in Aboriginal law and custom;

(c) the common law restriction has its origins in paternalistic legislation concerned with the protection of Aboriginal people; and

(d) while native title holders can grant limited permissions or licences to third parties, the holder of that interest does not have the same rights as native title holders as against the State or third parties in respect of its use of the land.

This has resulted in a situation in which the State is a necessary party to any development within the exclusive native title determination area. The diagram below summarises this tripartite arrangement, common to most native title agreements, in which the State is the central player and has privity of contract with the developer in relation to its lease or licence arrangement.

Diagram 3 – Grant of Tenure where Native Title Inalienable



WGAC believe that in respect of exclusive native title land, this arrangement diminishes the native title rights and interests held by WWPBC. It expands the right of the State to manage the land (including as the holder of a reversionary interest in the lease or licence) and imposes a corresponding burden on native title held by Wunambal Gaambera people.

Under this arrangement in the native title agreement or ILUA native title holders receive contractual rights as against the lessee in return for a consent to the grant of tenure under an ILUA. Unlike a lessor, the native title holder cannot exercise a right of forfeiture and re-enter for breach, those rights are reserved for the State as lessor. It therefore creates the potential for Wunambal Gaambera to lose effective control of the management of their land.

The tripartite approach also involves high transaction costs. It requires the negotiation of at least three legal agreements at least one of which needs to be agreed by all three parties:

(a) An ILUA between the three parties;

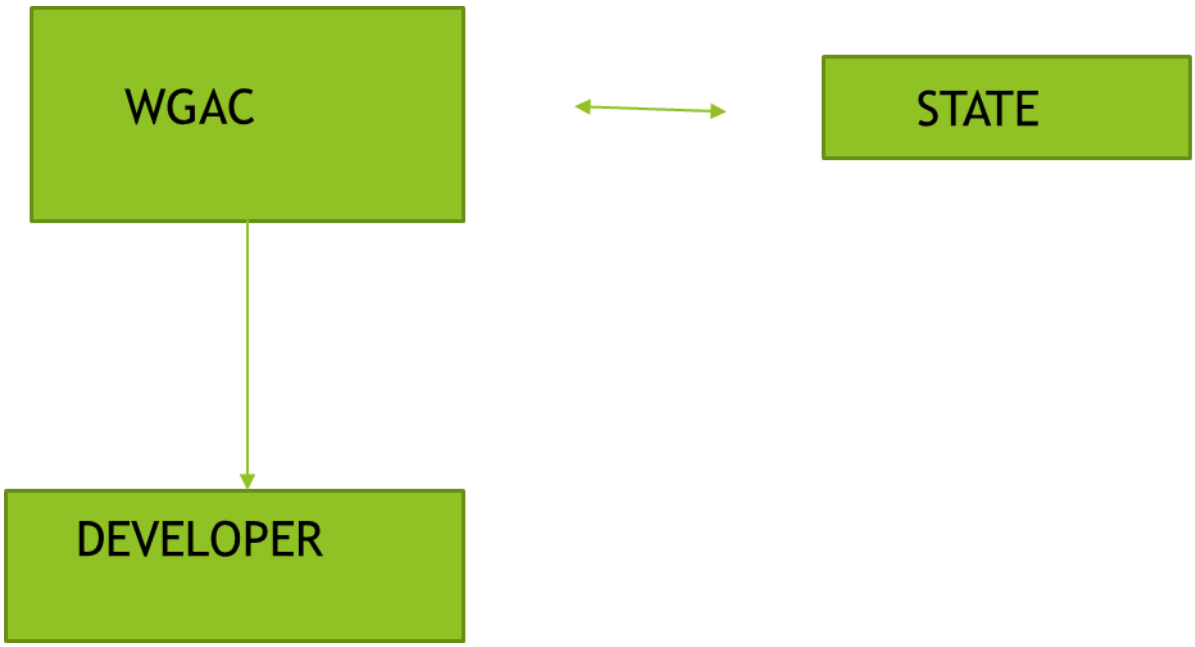
(b) A lease between the State and developer; and

(c) A native title or ancillary agreement between the developer and the native title party.

WGAC believes that for Wunambal Gaambera people to have the ability to fully use and enjoy the determination area, including for the purpose of meeting communal needs, there needs to be a modification of the common law restriction on alienation to allow WGAC, with authority of the WWPBC, to issue tenures to directly third parties.

The diagram below sets out WGAC's preferred alternative tenure arrangement whereby a developer receives both native title consent and the relevant tenure or interest from WGAC (WWPBC). The involvement of the State is only required to the extent necessary to perfect what has been described as the inalienability of native title and allow WGAC (WWPBC) to issue tenures to third parties.

Diagram 4 – Grant of Tenure where Native Title Alienable



In many cases the developer will be a corporation formed by Wunambal Gaambera people, either alone or jointly with a third party, seeking to establish communities or economic enterprises within their Graa or estate.

Under this model the State, through mechanisms proposed below, perfects the native title held by the WWPBC by providing a power to lease. The initial grant of the power to lease may require an ILUA. It is anticipated that the subsequent exercise of the power to lease would not require a further ILUA, provided its exercise was consistent with zoning requirements under the Healthy Country Plan and IPA, and was subject to a process of internal authorisation by the relevant Graa following the Uunguu Land Administration Process which is being developed by WGAC.

The advantages of this model include:

(a) The certainty of being able to transact when necessary. This certainty will help to inspire Wunambal Gaambera people to develop social and economic opportunities for themselves within their traditional countries.

(b) It does not involve any ceding of underlying title to the State.

(c) It has low transaction costs for both the negotiation and drafting of the agreement (which could be in the form of a standard lease).

(d) It creates rights that can be enforced by the exercise of a right of re-entry and not just by legal proceedings.

Alternative Tenures

It follows from the above analysis that, from a policy perspective at least, native title holders should have the right to alienate all or part of their lands in a manner consistent with their laws and customs. In most cases due to the communal nature of native title, it might be assumed that the relevant laws and customs would not allow the grant of a perpetual interest, such as freehold title, to a third party that would result in a permanent loss of the underlying communal title. Any alienation is likely to be in the nature of a lease or licence issued for a defined term.

The common law restriction on alienation could be corrected by State legislation, similar to the *Carbon Rights Act 2003* (WA), that recognises an interest in land conferred by a native title agreement. There would need to be consequential amendments to the Transfer of Land Act, to allow registration of this interest, as well as to other legislation to ensure that land subject to such an interest was classified as private land for the purpose of the LAA and Mining Act 1978.

WGAC in the course of discussions with the State has explored various other mechanisms by which to obtain the necessary interests to meet communal needs within the determination area in same way as other property owners, without significant legislative reform. They all involve, to some degree, what WGAC described as a layering of additional tenures on top of the exclusive possession native title; not to suppress it but to strengthen or perfect the underlying title.

The additional ‘layering tenures’ considered included:

(a) leases of remaining Pt III AAPA reserves;
(b) the creation of a management order in favour of WGAC in respect of the Pt III AAPA reserves under s 46 of the LAA;

(c) the creation of new reserves over UCL under s 41 of the LAA with the management orders for those reserves in favour of WGAC with the power to lease; and
(d) the grant of Aboriginal Freehold or Leasehold under s 83 of the LAA.

The current State government policy seems to favour the transfer of the management of Pt III AAPA Reserves and the grant of reserves with management orders and the power to lease. WGAC has some concerns in relation to the quality and security of these forms of tenure, however it has formed the view that this policy represents an immediate and practical solution to the common law restriction on alienation of native title and that its concerns could be addressed to the extent necessary by way of a State Agreement.

WGAC acknowledges that there are pragmatic reasons for the State's preference for the grant of a reserve with power to lease. Section 41 reserves are not private land for the purposes of the Mining Act. In Western Australia any new tenure proposal, will be closely scrutinised by the Minister for Mines and may be opposed by the mining industry to the extent that the new tenure is private land for the purpose of the Mining Act 1978 (WA) and therefore subject to the restrictions on mining imposed by Division 3, including the requirement for the miner to obtain the consent of the private land holder.

Under the LAA and the Mining Act, it is the classification given to the reserves that restricts mining activity. Approval to mine in certain class A reserves, which include National Parks, requires the consent of both houses of Parliament. WGAC believes that class A reserves are required for high value areas within the determination area identified as Category II areas under the IUCN Protected Areas Category System, such as the Uunguu IPA Protected Area.

A lease of a reserve is likely to provide sufficient security, at least initially, for family corporations to establish communities and engage in economic activity. The actual areas over which WGAC may wish to issue leases are likely to be quite small compared to the size of the determination area consistent with the requirement for WGAC to conserve at least 75% of the Uunguu IPA to a Category VI standard and only permit other uses in the remaining 25%. The creation of a reserve with the power to lease allows WGAC time to identify those areas for other uses, while providing the certainty that it will be able to do so if and when the need arises. It is acknowledged that high value economic infrastructure will require a more secure form of tenure than a reserve lease and some lease areas would need to be upgraded to a form of Aboriginal leasehold or freehold over time.

WGAC was concerned that the transfer of management of the Pt III AAPA Reserves was undesirable due to risk of losing the protection otherwise conferred by Part III of AAPA Act in relation to mining and the issue of permits. The advice WGAC has received however from Senior Counsel is to the effect that the management order would provide rights in addition to, and not in substitution for, the legislative powers and restrictions on mining conferred on the AAPA under the Act and Regulations. According to that advice:

(a) the protections under Pt III of AAPA apply to Aboriginal reserves the subject of a declaration under that Act or the repealed Land Act 1933 (s 26) and are not contingent on the vesting of reserves in the Authority; and
(b) in any event the effect of the grant of a management order under the LAA over the reserve does not alter this vesting.

The principal issue or concern that WGAC has with the creation of new Aboriginal reserves is that the State retains the power to cancel or change the purpose of the reserve (s 51 LAA) and to cancel the management orders where it is in the public interest to do so: s 50 (2) LAA;

Bropho v State of Western Australia [2008] FCAFC 100; 169 FCR 59; 249 ALR 121 at [83]. This could affect the certainty and security of the tenure that WGAC would be able to grant to third parties, including Wunambal Gaambera families.

These concerns could be addressed in part by the terms of any ILUA dealing with the creation of the new reserves. There are however limits on the extent to which the State could contractually restrict the exercise in the future of discretions to cancel a reserve or management order under powers conferred by the LAA: *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* [1977] HCA 71; (1977) 139 CLR 54; although see criticism in *NSW Rifle Association Inc v The Commonwealth of Australia* [2012] NSWSC 818.

The principal manner in which the State has dealt with the need for greater certainty in tenure arrangements is to reach agreements under the *Government Agreements Act* 1971 (WA) that are ratified by legislation (State Agreements). The agreements are generally attached as Schedules to ratifying legislation passed by both houses of Parliament.

Relevantly that Act provides that the provisions of such agreements:

(a) shall operate and take effect, and shall be deemed to have operated and taken effect from its inception, according to its terms notwithstanding any other Act or law; and

(b) any purported modification of any other Act or law contained, or provided for, in such a provision shall operate and take effect so as to modify that other Act or law for the purposes of the Government agreement, and shall be deemed to have so operated and taken effect from its inception, according to its terms notwithstanding any other Act or law.

Some of the criteria the Minister will apply in determining whether to enter into a State Agreement include:

- the lifespan of the project;
- the requirement for long-term certainty for the proponents;
- the existence of extensive or complex land tenure issues;
- whether the project is located in a relatively remote area of the State, thus requiring significant infrastructure development,…; and
- the significance of the project to the economic development of the State.

(See Department of State Development Website)

WGAC has therefore raised the possibility of entering into a State Agreement which could ensure the effective operation of contractually agreed provisions which restrict the ability of the Minister to cancel the reserve and management orders and ensure Pt III protection continues to apply to the existing Aboriginal reserves. If and to extent necessary, it could also modify the operation of the AAPA and the LAA in relation to reserve lands within the determination area and address issues such as planning and environmental approvals and Shire rates. Perhaps most importantly it would signify State recognition of titles issued by the native title holders and confirmation of their ability to participate in the economy.

Summary

1. Wunambal Gaambera people have been able to use and enjoy the determination of exclusive possession native title through its UVMP and RWF under its Healthy Country Plan.
2. For Wunambal Gaambera people to obtain the full benefits of national parks for high value areas requiring special protection, the State government needs to look beyond joint vesting and the Non Extinguishment Principle and consider the scope for co-existing rights.
3. In order to inspire and enable Wunambal Gaambera people to be pro-active in the use and development of the Uunguu Determination area within the overall context of the Healthy Country Plan, the State needs to ensure that Wunambal Gaambera people have the right to issue leases.
4. There are immediate and practical steps open to the State under existing legislation and policy to address this need and ensure that the native title holders have the same ability to use their determination area as other landholders.