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# INDIGENOUS LAND REFORM:

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## AN ECONOMIC OR BUREAUCRATIC REFORM?

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*by Leon Terrill*

Self-employment and private enterprise initiatives are a major feature of the Australian economy, but Indigenous people appear to be greatly underrepresented. One contributor to this has been an inability to make effective private use of communal land. It is therefore welcome that initiatives are underway to address this.<sup>1</sup>

The above quote from Gary Banks, Chairman of the Productivity Commission, reflects in relatively considered language a widely held view in relation to Indigenous land reform. According to this view, low levels of commercial activity on Indigenous land are at least partly the result of communal land ownership<sup>2</sup> and, while recognising that some people are concerned about the cultural importance of these arrangements, recently Australian governments have initiated reforms to make Indigenous land more productive.

This article focuses on just one aspect of this consensus, the assumption that recent land reforms are designed to make Indigenous land more productive. The first part of the article describes the context in which recent reforms were introduced. The second part provides an overview of those reforms, with a focus on those of the Commonwealth Government. This overview demonstrates that Indigenous land reform in Australia has been dominated by a policy of acquiring 'secure tenure' for government bodies. The third part argues that this is a bureaucratic rather than economic reform, and draws attention to the urgent need for better informed discussion about what Indigenous land reform is intended to achieve.

### THE CONTEXT

#### LAND RIGHTS IN AUSTRALIA

There is no national Indigenous land rights scheme, and discussing Indigenous land reform is made difficult by the fact that Indigenous land ownership varies so considerably across Australia. Significant differences include the level of ownership, the identity of the owners and the degree of restrictions on use.

The level of ownership varies from full ownership as alienable or inalienable freehold, which accounts for

around 60% of 'Indigenous land', through to land that is owned by the government on behalf of Indigenous people, which accounts for around 20%.<sup>3</sup>

The membership of the landowning group is also varied. Some land is owned by 'traditional owners', that is, those people who are entitled to it under traditional law. Other land is owned collectively by Indigenous residents. These two groups often overlap however, for historical reasons, in many communities a large portion of the Indigenous residents will not be traditional owners for that country. This means that, where land is owned by Indigenous residents, there may be a group of native title holders who also have a separate interest in the land. Similarly, where it is owned by its traditional owners, there may be Indigenous residents with a separate interest in land matters.

In relation to restrictions on use, some land rights schemes have always allowed for the grant of long term leases with the consent of the owners, whereas other schemes have imposed significant restrictions on when a lease can be granted.

While this article focuses not on Indigenous land but on what is common about recent reforms, these significant differences need to be kept in mind.

#### HISTORICAL APPROACH TO INDIGENOUS LAND

To understand recent reforms to Indigenous land it is necessary to know a little about the practices of earlier governments, particularly with respect to infrastructure. In the past, governments commonly funded infrastructure on Indigenous land without making formal arrangements in relation to ownership. When governments fund, for example, the construction of social housing on non-Indigenous land, they generally check that it is owned (or leased) by the government or relevant housing organisation. This has often not been the case on Indigenous land.

It has been suggested that the reason for this distinct practice was out of deference to Indigenous collective

ownership.<sup>4</sup> This misrepresents the way in which infrastructure has been used and managed. It is more accurate to describe this practice as reflecting a reliance on *informal* ownership. When infrastructure was installed, provisions were made about who would be responsible for it but generally those arrangements were not legally formalised.<sup>5</sup> With respect to social housing, until recently most remote Indigenous housing has been managed by Indigenous community housing organisations ('IChOs'). While few IChOs had any formal rights in relation to housing, such as ownership of the land or a lease over the housing areas, they were nevertheless responsible for, and funded to, manage tenants, collect rents and provide repairs.

This practice has been widespread on Indigenous land across Australia, even in those places where leases could

be granted. One of the main reasons is that the granting of formal leases involves expense and, in most cases, the informal arrangements were regarded as adequate for what was required.<sup>6</sup>

## THE REFORMS

### THE NORTHERN TERRITORY

In 2005, the Commonwealth Government made a series of announcements in which it argued that reforms to Indigenous land were required to provide for 'private' or 'individual' ownership. Initially, the focus of the Commonwealth's attention was the Northern Territory. Whereas land reform is generally a matter for state governments, in the Northern Territory the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('the Land Rights Act') is federal legislation and enabled the Commonwealth to implement reform more directly.

#### Bringing Home the Killer

Jody Broun

Acrylic on Belgian Linen, 1220mm x 910mm



The first of these reforms was introduced in 2006, when the Land Rights Act was amended to create 'township leasing' or 'section 19A leasing'. Under a township lease, the land on which a community is situated is leased to a government body, which is then able to sublease sections of that land.<sup>7</sup> To date, two township leases have been granted. Consistent with the 'secure tenure' policies which are described below, the overwhelming majority of subleases on township leases have gone to the three levels of government. In the Nguuu community, for example, two years after the grant of the township leases, approximately 240 houses have been subleased to the department of housing. Only seven have been subleased directly to Indigenous residents.<sup>8</sup>

Further reforms were introduced by the Commonwealth in August 2007 as part of the Northern Territory Emergency Response ('the NTER', also called 'the Intervention'). Among the several measures making up the NTER, three were concerned with land reform: the compulsory acquisition of 'five-year leases' over 64 communities on Aboriginal land, the creation of 'statutory rights'<sup>9</sup> and a new power to compulsorily acquire town camp land.<sup>10</sup>

During this same period, although less publicised at the time, the Commonwealth was also developing a new policy in relation to the ownership of remote Indigenous housing. In September 2007, it entered into a Memorandum of Understanding with the Northern Territory Government setting out a number of new rules. One of these required the formalisation of tenure arrangements through long term leases and, importantly, called for those leases to be granted to the department of housing (and not to a community housing body or to the occupants themselves).<sup>11</sup> This was effectively the first manifestation of a new 'secure tenure' policy.

While these policies were initiated under the former Coalition Government, they have been maintained by Labor and implemented with only minor modification.

#### BEYOND THE NORTHERN TERRITORY

Outside the Northern Territory, the Commonwealth Government is not able to make reforms to Indigenous land directly; instead, it relies on its role as funding provider to implement land reform policies. The funding of remote Indigenous housing has become the focus of the Commonwealth's land reform program.

Following the new housing agreement with the Northern Territory Government in September 2007, state governments were also advised that future housing

funding would be conditional on their attaining long term leases over housing areas. While the Coalition indicated that it would require leases of 99 years, the new Labor Government said it would accept a shorter period.<sup>12</sup>

These new funding conditions were formalised nationally following the November 2008 meeting of the Council of Australian Governments ('COAG'). After the meeting, the parties entered into the National Partnership Agreement on Remote Indigenous Housing ('the Agreement'), under which the Commonwealth agreed to provide \$4.78 billion over ten years for remote housing in Queensland, NSW, South Australia, Western Australia and the Northern Territory.<sup>13</sup> The Agreement states that the Commonwealth's obligation to provide funding is 'conditional on secure land tenure being settled'.<sup>14</sup>

The meaning of the term 'secure land tenure' was clarified in March 2009, when the Commonwealth wrote to the relevant housing ministers and set out three key conditions:<sup>15</sup>

First, the state or territory government must have access to and control over the land on which houses are to be built for a period of at least 40 years. Except for those communities where the government already has control over the land, this means attaining a lease over housing areas.<sup>16</sup>

Second, the terms of the lease must allow the state or territory government to implement tenancy management arrangements without requiring consent from Indigenous land owners. Land owners are therefore not able to use the terms of the lease to retain control over decision making, whether for themselves or for community members.

Third, where separate native title issues arise, they too must be resolved before housing funds will be made available.

Regardless of whether or not they live in the relevant community, land owners are not offered any rental payments 'in recognition of the significant government investment in housing set to follow' the grant of the lease.<sup>17</sup>

#### STATE GOVERNMENT LAND REFORM

While the new funding rules were only formalised in December 2008, states have been aware of the new requirements in general terms for some time. The impact on each state depended on their existing legal framework for Indigenous land ownership.

On the APY lands in South Australia, legislation already provided for the grant of long term leases to the State Government; the Department of Housing used those

existing provisions to obtain 50 year housing leases initially in Amata, Mimili and Pukatja.<sup>18</sup>

Prior to the formalisation of rules, the Queensland Government had already started making reforms to its own land rights legislation to allow long term leases to be granted more easily. It had only to ensure that those amendments would also provide for the grant of long term leases to government departments.<sup>19</sup>

In Western Australia, the legal circumstances are more complicated. On 5 May 2009, the State Government announced that it would introduce legislative reform in two stages. The first stage relates to land already effectively owned by the Government, but which requires new administrative arrangements. Those reforms will enable the Aboriginal Lands Trust to appoint the Department of Housing to manage housing on land under its care. The second stage of reform, 'over the longer term', will give the Department the power to manage housing on other Indigenous land tenures, and 'will also help facilitate home ownership and commercial use of Aboriginal land'.<sup>20</sup>

It should be noted that the state governments do not necessarily share the Commonwealth Government's focus on obtaining 'secure tenure'. While its policies were not particularly well developed, it appears that Queensland had more than government leases in mind when it amended its legislation in 2008.<sup>21</sup> It is clear, however, that with billions of dollars of funding at stake, the Commonwealth's new requirements are dominating the land reform programs of the states, often to the exclusion of other potential approaches.<sup>22</sup>

## THE EFFECT OF AND RATIONALE FOR REFORMS

### THE EFFECT OF THE REFORMS

As described above, recent reforms are being implemented against a background of widespread informal land use arrangements on Indigenous land. While these arrangements have proved workable, they are limiting and give rise to concerns about their inherent lack of clarity.

Recent reforms, however, go well beyond merely formalising land use arrangements. A feature common to all is that they require control over land to be transferred to governments. The NTER achieves this most directly, through the compulsory acquisition of Indigenous land. Under 'secure tenure' policies, states have achieved control by securing long term leases. Under a township lease, land in and around a community

is leased to a government entity and, as described above, the overwhelming majority of subleases are granted to governments.

Each of these reforms also involves the curtailment of local Indigenous input into decision making on affected land. Again, the NTER illustrates this most explicitly as land was acquired without consent and the Government is not required to consult in relation to its activities. Restrictions on Indigenous input into decision making are a key feature of the township leasing model<sup>23</sup> and, as described above, similar restrictions are also a requirement of the new remote Indigenous housing policy.

The net effect of these policies is the transfer of large areas of Indigenous land to government bodies. While it is unhelpful to simply describe this as a 'land grab', it is nevertheless important to be clear about its purpose. The purpose of this land transfer is not to make Indigenous land more productive. The large scale transfer of previously private land to the government, commonly without the payment of rent, is more consistent with the abandonment of any economic aims. The purpose of the transfer seems instead to facilitate bureaucratic reforms.

## THE RATIONALE FOR THE REFORMS

Despite its involvement in the area, the Commonwealth Government has never published an Indigenous land reform policy. It has instead provided brief explanations in the context of speeches and press releases.<sup>24</sup> These refer to the need for clearer lines of authority and responsibility. In relation to housing leases, the Minister has stated that the attainment of 'secure tenure' will make it clear that governments are 'accountable for the ongoing condition' of housing.<sup>25</sup> Such comments reflect the re-emergence of a centralist policy in Indigenous affairs, under which the Commonwealth, state and territory governments are acquiring more control over, and responsibility for, Indigenous communities. In this context, land reform is being used primarily to consolidate the authority of central governments. The Commonwealth argues that this will lead to improved housing outcomes.

The centralist policies themselves, and the use of land reform to implement such policies, both raise significant issues which have unfortunately attracted little attention.

## CONCLUSION

The quote by the Chairman of the Productivity Commission at the head of this article was provided as an

example of a widely held view in relation to Indigenous land reform, expressed in relatively considered language. This article has focussed on just one aspect of this consensus, the assumption that the purpose of recent reforms has been to make Indigenous land more productive. As the overview provided in this article demonstrates, this is overwhelmingly not the case.

It is not the intention of this article to direct particular criticism at the Productivity Commission. Nevertheless it is significant that a body such as the Commission, which is actively involved in assessing the impacts of Indigenous policy, would endorse the idea of land reform in general terms without enquiring into the detail.<sup>26</sup> If it had enquired further, it would have discovered that Indigenous land reform has predominantly been used to facilitate the acquisition of ‘secure tenure’ as a means of consolidating central government authority. It is unlikely that this is what the Commission intended to endorse.

This is an eloquent demonstration of the need for the debate around Indigenous land reform in Australia to move beyond the rhetorical and conceptual, towards a more considered discussion of what reform can and should achieve, and in what circumstances the benefits outweigh the costs and risks of reform. The common practice of simply weighing up the (assumed) economic benefits of land reform on the one hand, against the cultural importance of communal ownership on the other, does not begin to capture the complexity of Indigenous land reform, and has resulted in reforms being implemented without adequate scrutiny.

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1 Gary Banks, Chairman, Australian Productivity Commission, *Are We overcoming Indigenous Disadvantage?* (2009), 11 <[http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0013/90310/cs20090707.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0013/90310/cs20090707.pdf)>, at 13 April 2010.

2 Many other commentators have been far more critical of the role of communal land ownership – see for example Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth), House of Representatives, 19 June 2006 (Mal Brough, Minister for Indigenous Affairs).

3 This form of Indigenous land is described as ‘Aboriginal reserve’ and is particularly common in Western Australia – see table 8A.2.1 of the Australian Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* <<http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2009>>, at 13 April 2010). The remaining 20% is predominantly leasehold tenure.

4 See for example Mal Brough, above n. 2.

5 For a discussion of this in the Northern Territory context see Leon Terrill, ‘The Days of the Failed Collective: Communal Ownership, Individual Ownership and Township Leasing in Aboriginal Communities in the Northern Territory’ 32(3) *UNSW Law Journal* 814, 821-3.

6 Michael Dillon and Neil Westbury, *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (2007), 132. Dillon and Westbury describe this as the implicit rationale for the practice – they do not endorse the practice themselves.

7 Terrill, above n 5, 824-5.

8 Australian Human Rights Commission, *Native Title Report 2009*, 161. These statistics were provided to the Commission in August 2009.

9 The statutory rights provisions have not been used.

10 For a description of each of these provisions see Australian Human Rights Commission, above n 8, 151-8.

11 Australian Government and Northern Territory Government, *Memorandum of Understanding in Relation to Indigenous Housing, Accommodation and Related Services* (2007) <[http://www.aph.gov.au/senate/committee/indig\\_ctte/submissions/sub28\\_attachment\\_8.pdf](http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub28_attachment_8.pdf)> at 13 April 2010.

12 Mike Rann, ‘South Australia Welcomes Federal Commitment on Housing’ (Press Release, 27 February 2008).

13 Council of Australian Governments, *National Partnership on Remote Indigenous Housing*, cl. 28.

14 *Ibid*, cl 15(a).

15 Jenny Macklin, *Address to the NSW Aboriginal Land Council*, (Speech to the NSW Aboriginal Land Council, 5 March 2009).

16 See Coordinator-General for Remote Indigenous Services, *Six Monthly Report July to November 2009*, 86-87.

17 Jenny Macklin MP, quoted in Australian Human Rights Commission, above n 8, 139.

18 Anangu Pitjantjatjara Yankunytjatjara, Minutes of Special General Meeting, 20 August 2008, <<http://www.waru.org/organisations/ap/apymminutes/sgmmmins080820.pdf>> at 13 April 2010.

19 Explanatory Notes, *Aboriginal and Torres Strait Islander Land Amendment Bill 2008*, 1-2.

20 Troy Buswell and Kim Hames, ‘State Government Paves Way for Indigenous Housing Funding Boost’, (Press Release, 5 May 2009) <<http://www.mediastatements.wa.gov.au/Pages/WACabinetMinistersSearch.aspx?ItemId=131787&minister=Buswell&admin=Barnett>> at 13 April 2010.

21 Explanatory Notes, above n 19, 1.

22 Natasha Robinson, ‘Noel Pearson Slams Black Housing’, *The Weekend Australian* (Sydney) 26 December 2009, 4.

23 Terrill, above n 5, 825, 829-37.

24 Australian Human Rights Commission, above n 8, 126-30.

25 Macklin, above n 15.

26 The quote relates to the Productivity Commission’s *Overcoming Indigenous Disadvantage* report, which briefly describes some of the recent reforms but provides no detail about how they operate – see Chapter 8 of *Overcoming Indigenous Disadvantage: Key Indicators 2009*, above n 3.