

By Leon Terrill

ABORIGINAL LAND REFORM

beyond the mystique

Since 2006, the Australian Government has been making a series of reforms to Aboriginal land tenure in the Northern Territory. There have also been steps towards the reform of Indigenous land tenure in other jurisdictions, particularly in Queensland. Public discussion of the reforms has frequently been characterised by optimistic statements about the potential benefits of land tenure reform, perhaps because we hope rather than believe those statements to be true.

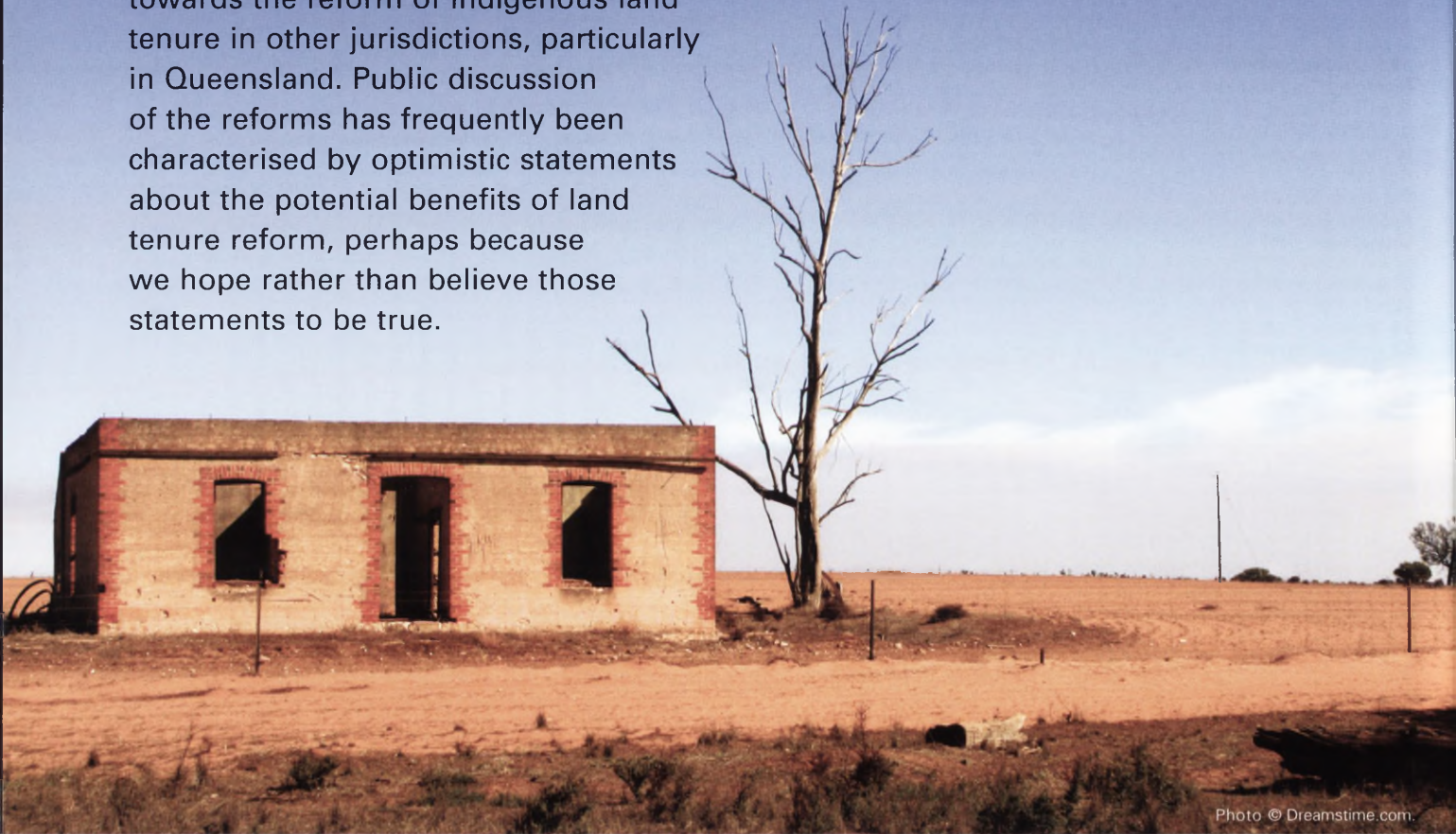


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It is often suggested that land tenure reform has an important role to play in lessening welfare dependence in communities on Aboriginal land. For example, earlier this year the Premier of Queensland announced that his government would 'sort out' tenure arrangements in Indigenous communities 'once and for all – so that people can buy a block of dirt, so they can establish a business and have a real life away from welfare'.¹ More recently, CSIRO group executive Andrew Johnson wrote that changes 'to land tenure regimes have the potential to transform Indigenous communities from welfare dependency to economic participation as well as create a more positive environment for investment'.²

This article argues that such claims should be treated with caution. It does so by considering the impact of the Australian Government's reforms to Aboriginal land tenure in the Northern Territory. It is argued that those reforms have not had the transformative impact that has sometimes been suggested in the course of public commentary. It is not that nothing has happened – to the contrary, a great deal has been done – but the outcomes are more modest, and also different, to what has been suggested. For example, while it has often been suggested that land tenure reform will lead to ownership of land *by individuals*, the far more widespread outcome has been the grant of long-term leases *to governments*.

THE DEBATE ABOUT COMMUNAL AND INDIVIDUAL OWNERSHIP OF ABORIGINAL LAND

It is useful to recall how the reforms to Aboriginal land in the Northern Territory came about. In late 2004 there emerged a widespread public debate about communal and individual ownership of Aboriginal land. It was argued that communal ownership of land was holding Aboriginal people back; for example, Warren Mundine said that 'we need to move away from communal land ownership and non-profit community-based businesses and take up home ownership, economic land development and profit-making businesses'.³

This argument struck a chord with the Australian Government. Prime Minister John Howard described it as an advance on the concept of 'everything being owned by the community and not enough encouragement being given to individuals and families to own their own properties'.⁴

The government then began work on designing a set of reforms to Aboriginal land in the Northern Territory that would enable 'Aboriginal people to own their own homes and to develop businesses in townships' on Aboriginal land.⁵ The outcome was a new form of lease called a 'township lease'. Legislation to enable township leases was introduced in 2006.⁶ Then Minister for Indigenous Affairs, Mal Brough, told Parliament that the legislation would make possible 'a new tenure system for townships on Aboriginal land that will allow individuals to have property rights. It is individual property rights that drive economic development. The days of the failed collective are over'.⁷

Township leasing was the first of three sets of reforms introduced by the Howard government, all of which were continued by the Labor government following its election in November 2007. The second set of reforms was introduced in mid-2007 as part of the Northern Territory Emergency Response, or Intervention. The most notable of these reforms was the acquisition of 'five-year leases' over communities on Aboriginal land. Most of this set of reforms, including the five-year leases, ceased in August 2012 when the Intervention came to an end. The Intervention itself was replaced with a set of measures known as Stronger Futures. Stronger Futures contains one additional land reform measure, which is yet to be implemented.⁸

The third set of reforms was also introduced in 2007, but received much less attention at the time. In September of that year, the Australian Government set down a new set of rules in relation to the funding and ownership of housing in Aboriginal communities.⁹ A key requirement was that houses be leased to Territory Housing, the NT Government's public housing body.¹⁰ It later came to refer to this as requiring 'secure tenure'.¹¹ Over time, the requirement for 'secure tenure' has spread beyond housing to other government-funded infrastructure, as part of what are broadly known as 'secure tenure' policies.¹²

This article concentrates on township leases and 'secure tenure' policies, as they are the most widespread and enduring of the recent reforms, as well as the most relevant to other jurisdictions.

THE REFORM CONTEXT: COMMUNITIES ON ABORIGINAL LAND

Nearly half of all land in the Northern Territory is Aboriginal land, which is by far the highest proportion of any jurisdiction in Australia. Most of that land is unaffected by the reforms introduced since 2006. The reforms affect only the land in and immediately around larger residential communities on Aboriginal land. And what the reforms do is to formalise tenure arrangements that were previously informal.

To clarify what that means, it is necessary to consider the arrangements that were in place before the reforms. In the past, governments have installed and funded the installation of infrastructure in communities on Aboriginal land – such as houses, offices, schools and workshops – without arranging for, or insisting on, a lease. This practice has been widespread, and appears to have occurred not just in the Northern Territory but also in many other communities on Indigenous land around Australia. Consequently, communities developed a set of *informal tenure arrangements* under which land and infrastructure were allocated to particular individuals and organisations.

This meant that for infrastructure such as childcare centres, police stations or council buildings, there was a recognised occupier (the childcare provider, the police, the council) but they had no formal occupancy rights and paid no rent to the Aboriginal landowners. The situation with respect to housing for Aboriginal residents was slightly more involved. The organisations responsible for housing – known as Indigenous Community Housing Organisations, or ICHOs – maintained houses and charged a type of 'rent' from occupiers. In most cases they did so despite not being the formal owner of the houses and land. While this sounds messy and somewhat precarious, these informal arrangements were relied on for several decades without attracting a great deal of concern.

THE REFORMS: TOWNSHIP LEASING AND 'SECURE TENURE' POLICIES

The reforms have resulted in the granting of formal occupancy rights, in the form of leases and subleases, to the same organisations that previously occupied infrastructure informally. For example, a shire council that previously occupied its yards and offices under informal arrangements now does so pursuant to a lease or sublease. With the exception of home ownership – of which there have been only 17 grants across the Northern Territory (discussed below) – they have not led to ownership of property by individuals. That is, the reforms have resulted in the formalisation of tenure arrangements; they have not created a shift from communal property to individual property.

The two sets of reforms described here have brought this about in slightly differently ways. Under a township lease – the first set of reforms – all land in and immediately around a community on Aboriginal land is leased to a statutory office-holder called the Executive Director of Township Leasing (the EDTL).¹³ This is the 'township lease', and it is in the nature of a headlease. The EDTL then grants subleases over each allotment within the community to the relevant

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occupier. Again, the situation with respect to housing for Aboriginal residents is more involved. Most houses in communities subject to a township lease have been subleased to Territory Housing, the public housing body, rather than residents. The reasons for this are described below.

Entering into a township lease is voluntary. Despite the Australian Government offering significant incentives,¹⁴ to date only three township leases have been entered into, covering a total of six communities.¹⁵ This means there are more than 50 larger communities on Aboriginal land that are not subject to township leases. In those communities, the Australian Government has instead been implementing its 'secure tenure' policies by negotiating leases directly with the landowners. For residential housing, those leases are granted to Territory Housing. For most other infrastructure, leases are granted to the existing occupier.

It is important to be clear about the purpose of the leases and subleases to Territory Housing. They are not a prerequisite for or preliminary step towards the introduction of home ownership, but rather a separate and very different reform. Indeed, prominent home ownership advocate Noel Pearson has been very critical of them.¹⁶ The purpose of the leases and subleases to Territory Housing is to implement a shift from *community housing* to *public housing*. Previously residential housing was managed by community housing organisations (IChOs), now it is managed by the mainstream public housing provider (Territory Housing). The leases and subleases to Territory Housing give effect to this change in housing policy.

In communities subject to a township lease, it is the EDTL who grants subleases to occupiers and negotiates the terms on which they are granted. In communities where 'secure tenure' policies are being implemented directly, the Aboriginal landowners grant leases themselves.¹⁷ That is the key difference between the two situations. In other words, where 'secure tenure' policies are being implemented directly, the Aboriginal landowners retain greater control over the process. However, the two situations also have a great deal in common. Both result in the widespread formalisation of tenure arrangements. Both have been introduced at the behest of the Australian Government. And both have resulted in the majority of occupiers – with the notable exception of Territory Housing – now being required to pay rent to Aboriginal landowners.¹⁸

It is not possible in this brief article to describe the full consequences of this shift. In particular, the reforms have had an impact on the governance of Aboriginal communities that is likely to be significant and long-term. However, it is possible to make a brief comment on home ownership and economic development, the two focal issues during the debate that led to the introduction of the reforms.

LAND TENURE REFORM AND HOME OWNERSHIP

There is a great deal of confusion about the way in which the two issues of land tenure reform and home ownership relate. It is not necessary to introduce community-wide reforms such as a township lease in order to enable home ownership on Aboriginal land in the Northern Territory. All that is

required is an appropriate form of tenure for participating houses, such as a long-term and transferable lease or sublease to the homeowner. It makes no difference to the introduction of home ownership whether other infrastructure such as the police station or store has also been leased or subleased. It is true that community-wide reforms such as a township lease *can* make it easier to create the appropriate form of tenure for participating houses. However, this depends on the approach taken by landowners. In the same way that leases have been negotiated directly with landowners under 'secure tenure' policies, so too it is possible to negotiate home ownership leases directly.

More importantly, community-wide reforms such as township leases do not necessarily lead to widespread or sustainable home ownership. This has been clearly demonstrated by the reforms in the Northern Territory. In 2006, in order to 'complement and give substance to' the introduction of township leasing,¹⁹ the Australian Government set up a program called the Home Ownership on Indigenous Land (HOIL) Program. The program provided additional financial assistance to purchasers in communities on Aboriginal land. The government also constructed 49 houses for sale to residents: 29 in the community of Wurrumiyanga (which is subject to a township lease) and ten each in the outstations of Wudapulli and Nama, near Wadeye (which are not subject to a township lease).²⁰ Of these, three were sold to residents while the remaining 46 were transferred to Territory Housing for use as public housing.²¹ It appears that there was too little demand for the houses at the (high) price they were being offered.

The Australian National Audit Office conducted a review of the HOIL Program in 2010. It found that after four years the program had incurred administrative costs of \$9.9 million, and had resulted in just 15 grants of home ownership.²² Since then, the rate of uptake has slowed further. It appears that there are currently 17 grants of home ownership in communities on Aboriginal land across the Northern Territory.²³ This is a poor outcome from an expensive program. This does not mean that home ownership programs should be abandoned. There is plenty of evidence of support for home ownership in remote Aboriginal communities.²⁴ However, it does mean that attention needs to be given to the broader range of issues affecting home ownership, and not just tenure. Indeed, it appears that the idea that home ownership is primarily an issue related to tenure has proved to be a distraction.

LAND TENURE REFORM AND ECONOMIC DEVELOPMENT

The effect of land tenure reform on economic development in Aboriginal communities has been modest, and also different to what has sometimes been suggested. During the public debate about land tenure reform, it was argued that reforms would enable individuals to acquire land and set up businesses. To date, there is no evidence of this occurring. Overwhelmingly, leases and subleases have been granted to existing businesses. A more significant result has been the substantial increase in the amount of rent that is paid

to Aboriginal landowners as a group. This too gives rise to complex issues. There is some evidence of landowning groups investing their rent, including in the development of new enterprises.²⁵ However, the flipside to this is that rent represents an additional expense for enterprises in Aboriginal communities. The reforms have made access to land more expensive, not cheaper. The impact of this should not be overstated; the amounts of rent being paid are relatively small compared to the many other costs of operating in remote communities.²⁶

CONCLUSION

This article has attempted to cut through some of the mystique surrounding the issue of Aboriginal land tenure reform by providing a clearer picture of what recent reforms in the Northern Territory actually do. While we might all prefer that land tenure reform had the potential to transform the economic circumstances of remote Aboriginal communities, the effect of the Northern Territory reforms has been far more modest. ■

Notes: **1** Australian Broadcasting Commission, 'Property key to ending Indigenous welfare cycle: Newman', *ABC News*, 15 January 2013 (Eric Tlozek). **2** Andrew Johnson, 'Unlocking the North', *The Australian*, 14 June 2013, 10. **3** Quoted in Mark Metherell, 'Land system holds us back, says Mundine', *The Sydney Morning Herald*, 7 December 2004, 6. For an overview of the debate see Stuart Bradfield, 'White picket fence or Trojan horse? The debate over communal ownership of Indigenous land and individual wealth creation' (Issues Paper No. 3, Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Research Unit, 2005). **4** Quoted in Mark Metherell, 'PM backs indigenous enterprise', *The Sydney Morning Herald*, 10 December 2004, 7. **5** Amanda Vanstone, 'Beyond Conspicuous Compassion: Indigenous Australians Deserve More Than Good Intentions' (Speech delivered to the Australia and New Zealand School of Government, Australian National University, Canberra, 7 December 2005). **6** *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth). **7** Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 5 (Mal Brough). **8** When implemented, this reform will make it easier to grant leases over Aboriginal community living area land and subleases over town camp land, with the government currently focusing on the former. See Australian Government, *Community Living Area Land Reform in the Northern Territory* (2013) Department of Families, Housing, Community Services and Indigenous Affairs <www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/community-living-area-land-reform-in-the-northern-territory>. **9** Australian Government and Northern Territory Government, 'Memorandum of Understanding – Indigenous Housing, Accommodation and Related Services' (17 September 2007). **10** *Ibid*, cl 13. **11** Also referred to as 'security of tenure', see Jenny Macklin, Paul Henderson and Warren Snowdon, 'Landmark housing project for NT Indigenous communities' (Media Release, 12 April 2008). **12** For an overview of the introduction of these policies see Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009), Chapter Four. **13** See Australian Government, *About the Office of Township Leasing* (2012) Office of Township Leasing <www.otl.gov.au/site/about.asp>. **14** See Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009), 160-1. **15** Australian Government, *Current Leases* (2012) Office of Township Leasing <<http://www.otl.gov.au/site/current.asp>>. **16** Noel Pearson, 'Social housing model rips the heart out of indigenous communities', *The Weekend Australian*, 6 February 2010, 13. **17** This occurs through the Aboriginal Land Councils. For a discussion of the leasing process on Aboriginal land see Leon Terrill, 'The Days of the Failed Collective: Communal Ownership,

Individual Ownership and Township Leasing in Aboriginal Communities in the Northern Territory', (2009) 32(3) *University of New South Wales Law Journal* 814, 817-8. **18** On a township lease, the EDTL collects the rent on subleases and, after deducting expenses, pays the balance to the Aboriginal landowners. See *Ibid*, 831-2. **19** Auditor-General, 'Home Ownership on Indigenous Land Program' (Audit Report No. 23 2010-11, Australian National Audit Office, 21 December 2010), 16. On 1 July 2012 the HOIL Program was amalgamated with another program to form the Indigenous Home Ownership Program. **20** *Ibid*, 59-62. **21** *Ibid*, 18, 62. **22** *Ibid*, 19. This is in addition to the \$2.7 million lent to purchasers. **23** A title search of the community of Wurrumiyanga reveals two further grants as at 13 February 2013. There are no other public reports of further grants. Several existing reports refer to only 15 grants. **24** See, for example, the findings of Paul Memmott et al, 'Indigenous home-ownership on communal title lands' (Final Report No. 139, Australian Housing and Urban Research Institute, November 2009). **25** See Greg Roche, 'Executive Director of Township Leasing Annual Report 2011-2012' (Australian Government, 2012), 10-2, 19-21, 23-5. **26** For example, the NT Government has stated that its entire rent for all premises on Aboriginal land across the Territory will be 'around \$5 million per year when all parcels are surveyed and leased', Malarndirri McCarthy, 'Historic Decision to Pay the Rent to Lease Aboriginal Land' (Media Release, 23 November 2011). This represents a small fraction of its overall operating costs in remote communities.

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