

THE LANGUAGE WE USE TO DEBATE ABORIGINAL LAND REFORM IN AUSTRALIA

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I Introduction

The last decade has witnessed the introduction of widespread reforms to Aboriginal land ownership in Australia.¹ These reforms have occurred at a time of significant upheaval in Aboriginal policy, more generally. Arguing that earlier policies had failed, Australian governments have been actively looking for new ways of addressing the problems faced by Aboriginal communities. The introduction of land reform has been presented as one key component of the new approach. As such, the reforms are significant both in themselves and for what they reflect about the new direction of Aboriginal policy.

It is important, then, that the reforms to Aboriginal land ownership are well understood. This article describes how this has not been the case. Instead, and to an almost singular extent, the introduction of Aboriginal land reform in Australia has been discussed and debated using poorly defined and ill-suited terminology, with the result that there is a great deal of confusion about what the reforms actually do and what they mean for the affected communities. In particular, there has been a high reliance on certain terminology – such as ‘communal ownership’, ‘individual ownership’, ‘private property’ and ‘secure tenure’ – that is either inappropriate to the context in which it is being applied or has been used incorrectly.

This article describes the way in which Aboriginal land reform has been debated in Australia and sets out an alternative set of language that is better suited to the topic. It describes how the real issue for communities on Aboriginal land in Australia is *when* and *how* the earlier informal tenure arrangements should be formalised. This rather dry language is somewhat less suggestive than some of the existing terminology, which

has conveyed the impression that land reform can effect some type of economic transformation or cultural shift in Aboriginal communities. The reforms themselves have not had this impact. They are a very significant set of reforms – particularly in terms of their impact on governance, relationships and autonomy – but not in the way that terms such as ‘communal ownership’ and ‘individual ownership’ or ‘private property’ suggest. The alternative language described here is not only technically more accurate, it is more capable of conveying the nature of some of the complex decisions that are being made.

The remainder of the article is composed of four parts. Part II describes the history of debate about Aboriginal land reform in Australia, which has been divided into three periods. Part III provides definitions for key terms such as communal property, private property, tenure security and formalisation. Part IV then applies this language to the Australian reforms, describing Aboriginal land ownership, the circumstances in residential communities on Aboriginal land prior to reform, and the reforms themselves. Part V concludes the article with a discussion about why it matters that we get the language right.

This article does not answer all of the questions that it asks nor does it explore in detail all of the issues which are raised. It is intended as a framework article, an attempt to clarify language and concepts. It is concerned with recent reforms to statutory land rights, and those reforms have focussed almost entirely on the land inside residential communities. Recent reforms have not affected the much larger areas of Aboriginal land outside communities. As such, the language identified here is that which is most useful for a discussion of land reform in residential areas. If the reforms instead affected those areas of land outside communities,

a slightly different language would be required. Indeed, one of the arguments made by the article is that existing language has tended to obscure the difference between the issues affecting residential communities and the issues affecting other areas of land. It is also noted that this article does not address ongoing reforms to native title law. Native title is referred to only to the extent it is impacted upon by the reforms to statutory land rights.²

II Debate about Aboriginal Land Reform in Australia

A Three Overlapping Periods of Debate

In early December 2004, Warren Mundine, a Bundjalung man from New South Wales, issued a media statement in which he argued that Aboriginal people needed to take a 'drastic look' at 'communal land ownership'.³ Mundine's comments had a greater impact than he could have anticipated. They became the catalyst for a widespread public debate about Aboriginal land reform in Australia.⁴ To be clear, Mundine was not the first person to raise concerns about communal ownership of Aboriginal land. Several others had done so previously. However, largely as a result of the context in which they were made, it was Mundine's comments that marked the beginning of a debate that became a regular news item over coming months and years, and which ultimately led to the introduction of widespread reforms.

Of course, a public debate is not a singular object. It has a variety of contributors and it shifts and evolves over time. This article argues that over the last decade there have been three main periods of debate, coinciding with major shifts in the Australian political landscape. The first period of debate occurred between 2004 and late 2007, during the final term of the Howard Coalition Government. In many respects this was the most important period of debate. It was during this period that the discussion was most widespread and the majority of the reforms themselves were developed.

The second period of debate emerged following the election of a Labor Government in November 2007. The new Minister for Indigenous Affairs, Jenny Macklin, continued to implement the reforms that her predecessor had introduced, with only peripheral changes. Macklin chose, however, to present the case for land reform differently. This usually took the form of statements about a need for 'secure tenure'.

The third period of debate is more recent and at the time of writing is still taking shape. Elections in September 2013 saw the return of a Coalition Government, this time under the leadership of Prime Minister Tony Abbott. The new government has promised to reinvigorate the area of Aboriginal land reform, arguing that the previous government had 'no appetite for changing the status quo'⁵ and had allowed the reforms to 'languish'.⁶ While it is early days, the new government appears to have dropped the use of the term 'secure tenure'. It has, however, not entirely reverted to the earlier language of communal and individual ownership. Instead, it often refers to 'land reform' in more general terms, or else promotes the adoption of township leasing, its preferred land reform model for Aboriginal communities in the Northern Territory.

Each of these three periods is described below in more detail. The description focuses on the dominant language that was used during each period, particularly by the Australian federal government, which has been the key driver of reform. Some quotes are included to give a clearer sense of the flavour and tone of discussion. It should be noted that these three periods of debate are not discrete. There is considerable overflow, whereby the language developed during the first period of debate has continued to re-appear in later years. The description also includes a brief discussion of some of the drawbacks of the language used during each particular period.

B The First Period of Debate: Communal Ownership, Individual Ownership and Private Property

The first period of debate was dominated by the use of two opposing concepts to explain the effect of land reform. Terms such as 'communal ownership' and 'communal property' were used to describe existing arrangements, or the starting point for reform. This was contrasted with 'individual ownership' or 'private property' (and related terms), which were used to characterise the arrangements the reforms would create. This framework was used by people who were in favour of land reform and those who were opposed. And between 2004 and 2007, it was by far the most commonly used framework in all forums of discussion and debate.

Warren Mundine's statements, referred to above, are an example of this type of language. He suggested that '[w]e 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'.⁷ A few days later, Prime Minister John Howard expressed approval for this suggestion, arguing that it was 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'.⁸ By contrast, Mick Dodson, a Yawuru man from Western Australia, said that the Prime Minister 'clearly doesn't understand what communal ownership is', adding that 'you can't just go in and say we'll make [Aboriginal people] like whitefellas'.⁹

The debate that followed often became divisive and heated. It was not uncommon for both sides to draw upon deep emotion or to identify bad faith or naivety on the part of their opponents. Hughes and Warin characterised the existing arrangements in Aboriginal communities as 'a socialist experiment' and argued that the people responsible for introducing land rights had tried to use it as 'the base for customary, communal, socialist societies distinct from the rest of capitalist Australia'.¹⁰ *The Australian* newspaper editorialised that 'much Aboriginal land is held in common by communities, with individuals barred from owning, or purchasing property' which 'conforms to the old ideology of the land rights movement, that [I]ndigenous communities are happiest practising primitive socialism'.¹¹ Conversely, Senator Aiden Ridgeway said that 'the Prime Minister's comments illustrate a profound cross-cultural misunderstanding' and were 'drawn purely from a western perspective that prizes individualism and make no attempt to understand the cultural perspectives of Indigenous peoples'.¹² Nicole Watson argued that the Prime Minister had a 'sinister agenda to render Indigenous people powerless against those desirous of exploiting our lands'.¹³ Even the relatively neutral political commentator, Michelle Grattan, argued that the Prime Minister was 'bent on taking the white picket fence to remote Aboriginal Australia'.¹⁴

There was a very real political outcome to this period of debate. When it began, the opposition Labor Party argued that Aboriginal land reform was inappropriate and unnecessary.¹⁵ By late 2007 it had come to support reform.¹⁶ This was also the period during which the Australian Government introduced three sets of reforms to Aboriginal land ownership in the Northern Territory.¹⁷ It is therefore significant that there were several problems with the way in which land reform was debated during this period.

The first was the general level at which debate was conducted. Terms such as 'communal ownership' came to be used with respect to several very different circumstances, often without distinction. They were used to describe Aboriginal land ownership, sometimes including native title, the tenure arrangements in communities on Aboriginal land, the housing system used in those communities, and even the ownership of businesses. This meant that a number of very different issues were debated at the same time, without the distinction between them being made clear. For example, the question of whether businesses in Aboriginal communities should be owned individually or collectively is very different to that of whether those businesses, and other occupiers, should be made to take on a lease or, be granted a fee simple.

This failure to differentiate caused considerable confusion about what it is that land reform can do. There appears to have been a widespread belief that land reform would result in individuals and families owning houses and businesses. Indeed, this was often made explicit. This is not, however, what the recent reforms have done and in hindsight it was naïve to suggest that they would. Aside from a small number of grants of home ownership – by the end of 2013 there were only 16 grants on Aboriginal land across Australia¹⁸ – the reforms have not led to ownership of property by individuals. For the most part, leases and subleases have been granted to government departments, non-government organisations and collectively-owned enterprises; that is, to the same organisations that were already operating in Aboriginal communities.

Perhaps the greatest problem with the use of terms such as 'communal ownership' and 'individual ownership' is that it led to the wrong issues being debated and the right issues receiving too little attention. In particular, debate about land reform was often used as a proxy for debate about culture, whereby communal ownership of land was presented as key to the maintenance of a more communal culture (or, more pejoratively, of 'primitive socialism') by Aboriginal people. The introduction of 'individual ownership' was presented as a means of inducing a more individualistic ethic. Grattan observed that the government wanted to 'inject a greater dose of individualism... as part of its approach to indigenous Australia generally, which is to re-tilt the communal and collective approach laid down in Aboriginal affairs policy in the 1970s'.¹⁹ While her observations are a fair reflection of the Government's own statements, they are also based on a profound simplification of the relationship between culture

and forms of property ownership.²⁰ Even if the reforms had led to widespread ownership of land by individuals, which they have not, this would not have had the cultural impact that such statements suggest.

These types of matters were also a distraction from issues that did need to be discussed and debated. There were a number of questions that were not raised during the debate, but which are important to the impact that the reforms have. For example: should all leases (or subleases) be transferrable? Should leases be short or long-term? How will leases be allocated? Should lessees be required to pay rent? And who should decide these things? The language of communal-versus-individual ownership tended to obscure rather than clarify the issues requiring attention.

C The Second Period of Debate: A Need for 'Secure Tenure'

By the time of the November 2007 general election, the Coalition Government had already begun to implement its reforms to Aboriginal land in the Northern Territory. After the election, the new Labor Government continued to implement those reforms with only minor changes.²¹ There was however a distinct shift in the language used to describe the need for reform. The former Minister, Mal Brough, tended to present the need for reform forcefully. When introducing the first set of reforms to Parliament he argued that 'the enforcement of collective rights over individual rights has been an abject failure'.²² He also drew a connection between the need for land reform and the 'appalling levels of violence and abuse in many of these communities' which he described as 'a stark reminder of the failed policies of the past'.²³ When the Labor party initially opposed the reforms, he said that they were 'balking at the tough decisions and going weak at the knees'.²⁴ At one point he argued that, together with 'sit down money', land rights legislation in its current form had done 'more to harm indigenous culture... than any two other legislative instruments ever put into the Parliament'.²⁵

The new Minister, Jenny Macklin, took a less provocative approach. Her first speech to the National Press Club as Minister contains no reference to concepts such as communal ownership, individual ownership or private property. Instead, she spoke about a need for 'secure tenure', arguing that without 'secure long term tenure, ownership of housing assets is uncertain...responsibility for the maintenance of facilities and housing is confused

... residents and tenants occupy their homes without any security or certainty [and] potential investors have no incentive to invest'.²⁶ This became the Labor Government's preferred framework for presenting the need for reform. It did not mean that the government entirely stopped using terms such as communal and individual ownership. These were still used,²⁷ but less often.

It is perhaps misleading to refer to 'secure tenure' terminology as forming part of a debate about land reform, and more accurate to describe it as an explanatory device. Part of its appeal was that it provided a means to discuss land reform in less controversial and more technocratic-sounding language. The introduction of 'secure tenure' was presented as a long-overdue, technical reform that earlier governments had failed to implement. One consequence was that there was no real counter argument, in that no one actively advocated against the idea of 'secure tenure'. However, this terminology was not being used by the government in its technical sense. It was effectively employed as short hand for the introduction of formal tenure arrangements (usually leases or subleases) in a manner that complied with government policy. As described below, this is very different to improving tenure security in the true sense of that term. In fact, in some cases the reforms have had the effect of *reducing* tenure security for the people they affect.²⁸

As with the earlier period of debate, a drawback of this language is that it has tended to obscure the issues. A range of decisions were being made during this time about how the reforms should be implemented, and references to the introduction of 'secure tenure' do not capture the importance or complexity of those decisions.

D The Third Period of Debate: A Renewed Focus on Reform

The Liberal-National Coalition was returned to government at a federal level following elections in September 2013. The new Prime Minister, Tony Abbott, promised to give Indigenous Affairs greater priority, as part of which the portfolio was absorbed into the Department of Prime Minister and Cabinet. One of the areas in which the new Coalition Government has sought to distinguish itself from the former Labor Government is with respect to land reform; a reform which was, after all, originally its idea. It has characterised Labor as lacking the resolve to implement land reform fully, and promised to give the issue greater attention.

Again, it has altered the language used to do so. It should however be noted that while the new government describes land reform as a priority area, after more than a year it has said relatively little about the topic. This is not because there has been no action. It is clear that renewed effort has been put into the acquisition of township leases over Aboriginal communities in the Northern Territory.²⁹ There is also evidence of renewed pressure on state governments to reform Aboriginal land for which they are responsible.³⁰ Interest in land reform at a governmental level is further reflected in the attention it receives in commissioned documents such as the *The Forrest Review*.³¹ However, the government itself had made only a small number of public statements about land reform, and has said little about why it is required or how it will effect change. A few comments may be made about its public statements on land reform.

The first is that it appears the new government has dropped the use of 'secure tenure' terminology. Further, while the concepts of communal ownership, individual ownership and private property are still present,³² they are not referred to as often as they were during the first period of debate. Instead, the government has tended to talk more generally about 'land reform',³³ 'land tenure reform',³⁴ or, more recently, 'land administration'.³⁵ At other times it focusses specifically on promoting township leasing, which is its preferred model of land reform for Aboriginal community in the Northern Territory.³⁶

There also appears to have been a shift with respect to the stated rationale for reform. The introduction of 'secure tenure' terminology by the former Labor Government was accompanied by a broadening of the rationale. 'Secure tenure' was required not just for home ownership and economic development, but also so that ownership of assets could be made certain and responsibility for maintenance made clear. In many respects this was more consistent with the actual reforms, in that their impact on home ownership and economic development has been dwarfed by their greater impact on the management or governance of land and infrastructure in Aboriginal communities.³⁷ Despite this, in its public statements the new government appears to have reverted again to explaining the need for land reform solely by reference to home ownership and economic development.³⁸

At times there is a disjuncture between the language employed by the government and the reforms that

it continues to implement. For example, Minister for Indigenous Affairs, Nigel Scullion, recently said there was a need for 'land tenure arrangements that support long term and transferable subleases. The type of lease that you or I could go to the bank with and get a mortgage on'.³⁹ He went on to make it clear that this is why he supported township leasing. As described below, this is not an accurate reflection of the outcomes achieved under existing township leases. This suggests that there may be ongoing confusion about the precise way in which land reform is expected to support economic development.

III Defining the Terminology

What, then, is the actual meaning of 'communal ownership'? How does it relate to individual ownership and private property? And where does secure tenure fit in? This section considers these and related questions by providing definitions of key land reform concepts. They are defined primarily with reference to the extensive literature on land reform in other countries, where debate about land reform has a much longer history and the language has been developed and refined over time. Where there is variation between authors, the language chosen here is that which is best suited to a discussion of Aboriginal land reform in Australia.

A Communal Ownership, Individual Ownership and Private Property

(i) Property Regimes

Particularly during the first period of debate, it has been common for Aboriginal land (as well as businesses, housing and the tenure arrangements in Aboriginal communities) to be described using terms such as communal ownership.⁴⁰ For the most part, these terms have been left undefined,⁴¹ as if their meaning was clear and required no explanation. Upon examination however, they refer to a concept that is actually quite complex. In the literature on land reform, such terms are generally used to refer to what is called a 'tenure system' or 'property regime',⁴² being the system pursuant to which rights and duties in relation to land (and perhaps other property) are allocated. In modern typology, there are four categories of property regime: state property, private property, communal property and non-property. This is one situation where there is some divergence in the way in which the terms are used, particularly between disciplines, so some discussion is required.

The meaning of state property is relatively clear: it refers to those circumstances where access to and use of land is controlled by a government department or agency.⁴³ Australian examples include national parks and public gardens, as well as public housing and many government offices. The meaning of non-property, sometimes called open access, is also relatively clear. It refers to circumstances where no person or group has the right to exclude others, where land can be accessed by everyone.⁴⁴ It has been suggested that non-property is less of a property regime than the absence of a regime, as nobody has effective property rights over land that is subject to open access.⁴⁵

It is the relationship between private property and communal property that causes the most confusion. There is a common tendency to think of private property as meaning ownership by an individual, and communal property as meaning ownership by a group or collective. The distinction is not so simple. This is partly because of the at times complex relationship between property regimes and the rights held under them. It is common, for example, for certain rights on communal property to be allocated to individuals or families. This has often been observed on customary land in parts of Africa and the Pacific, where individuals and families have relatively exclusive rights to certain areas of land, while other areas are used collectively.⁴⁶ Adams, Sibanda and Turner use the term 'the holding' to describe the former and 'the commons' to describe the latter.⁴⁷ While a holding might be owned individually, it would be confusing, in my view, to characterise holdings as private property.⁴⁸ They are better described as a set of rights granted under a communal property system.

Conversely, it is not uncommon for private property to be owned collectively. Indeed a significant portion of land in Australia that is generally regarded as private property is owned collectively in some way, through co-ownership, ownership by a corporation or ownership through a trust. Co-ownership is widespread – in the form of either a joint tenancy or tenancy in common – but the number of co-owners tends to be very small. With respect to corporate and trust ownership, the situation is far more diverse and the arrangements more complex. The number of 'owners' can range from two to several hundred thousand and there is significant variation in the exact nature of the legal rights and duties of 'owners' and those people in a position of management or trust.⁴⁹

To complicate matters further, in Australia all land that is regarded as communal property (including Indigenous land) is owned through the medium of some type of corporate body. This means that some types of corporate ownership are regarded as private property while others are regarded as communal property. For example, an Aboriginal community living area in the Northern Territory,⁵⁰ which is owned by an Indigenous corporation or incorporated association, is usually regarded as communal property; while an office block in Sydney that is owned by a proprietary limited company is usually regarded as private property. This is not just a semantic distinction, there is something significant about the difference. If the incorporated association owning an Aboriginal community living area were converted into a proprietary limited company, even with the same membership, something fundamental would have altered. But what exactly is it that would have changed? And what is it that *defines* the difference?

This appears to be less of an issue in developing countries, and consequently most definitions of communal and private property do not distinguish between forms of corporate ownership.⁵¹ A very good starting point is Van den Brink et al's observation that on communal property 'individual rights are regulated by the community', whereas in 'a private property regime, individual rights are regulated by the state'.⁵² This statement captures the systemic difference that is at the heart of the distinction between communal and private property. In other words, what is distinct about communal property is the role that owners play in determining the rights of other owners. On collective private property it is state law that regulates the rights of individual owners, whereas on communal property the rights of individuals are to some extent regulated by the ownership group. Where your rights can be amended by the group, they are an inherently different sort of property right.

Van den Brink et al make this observation in the context of a discussion about rights to use land for activities such as cropping or grazing. They too characterise holdings as rights granted under a communal property system rather than private property, because the rights of individuals to use the land are regulated by the community rather than the state. The same approach can be used to distinguish between different forms of collective ownership through a corporation. Where the rights of individual owners of the

corporation are regulated by the state, it is private property. This captures land owned by a proprietary limited corporation, where the rights of shareholders are fixed by law. Where the rights of individual owners are regulated by the group, it is communal property. This captures land owned by an incorporated association, such as the example of an Aboriginal community living area provided above. Members of the association have fluid rather than fixed rights under the formal legal system, which means the exercise of their ownership rights is dependent on the group or community.

It is described below how Indigenous land held under statutory schemes and native title are examples of communal property.⁵³ It is also described how the exact nature of those schemes varies considerably. Property regimes are broad categories, and convey only general information about the ownership structure. There can be very different types of communal property. It is also noted here that these concepts can extend beyond land, including to such things as the ownership of enterprises. Enterprises that take the form of an incorporated association, or similar,⁵⁴ might also be considered communal property. On the other hand, enterprises which take the form of a proprietary limited company – of which there are many examples in Indigenous communities⁵⁵ – can be considered private property.

(ii) Property Regimes May Overlap

It is important to note that, however carefully defined, property regimes will always be ‘ideal, analytic types’.⁵⁶ In practice, land may be subject to overlapping property regimes. This can occur in several ways. Most relevantly, in a legal system that provides for the grant of leases, one property regime may overlay another. Where, for example, Crown land is subject to a long term lease, to a company or an individual, for the duration of that lease there is a shift from state property towards private property. Conversely, when a government agency takes a long term lease over private property there is a shift towards state property. The extent of the shift will depend on the terms of the lease, and whether the landowner retains some control over the allocation of rights and duties. In the Australian Capital Territory, where land is owned by the state, and ‘owners’ obtain a leasehold interest, the shift towards private property is almost complete, as those leases are long-term and plenary. In other circumstances the shift is less complete.

(iii) So Where Does Individual Ownership Fit In?

It has been common during debate about Aboriginal land reform in Australia for communal property to be opposed to individual ownership rather than private property. This raises some important questions: would the arguments of those in favour of ‘individual ownership’ be satisfied by a shift towards more frequent individual rights on communal property? Would they instead be satisfied with a shift from communal property to collective private property? Or would they only be satisfied by a shift towards individual ownership of private property? Or perhaps something even more specific, such as individual ownership of alienable private property? The same can be asked of the arguments of those who were opposed to a shift away from communal ownership: would they be less concerned about individuals being allocated exclusive rights under the communal property regime? Or by a transition to collective private property? I do not answer those questions here. I suggest, however, that their consideration might be assisted by clearer language and a better understanding of the relationship between individual rights and property regimes.

While I have argued that private property should not be conflated with individual ownership, it should not be ignored that individual rights do *tend* to occur differently on private property. On private property, the rights of individuals with respect to land tend to be more clearly defined, more exclusive, more secure and more likely to be alienable (although, see below). On communal land, particularly on customary land, the rights of individuals tend to be more variable, flexible and overlapping, subject to a greater level of negotiation, more embedded in and connected to other social obligations, and more likely to be subject to restrictions on alienability.⁵⁷ For example, Adams, Sibanda and Turner describe how a holding might be transformed into a commons once crops have been harvested, allowing stock to graze the stubble.⁵⁸

It is however a mistake to *assume* that individual rights will have certain characteristics simply because they occur on private property. Often when people refer to ‘private property’, they appear to have in mind ownership of a fee simple. This is not the only form of private property. To the contrary, many Australian businesses do not own the land out of which they operate, instead holding a commercial lease, which may be subject to a variety of covenants, including restrictions on use and alienability. In a similar manner, private

residential tenants have a far more contained, and far less stable, set of rights than homeowners. Not all private property held by individuals is as secure and plenary as a fee simple. As described below, to the limited extent that recent Aboriginal land reforms have resulted in a shift towards private property, more often it has been a contained form of private property such as a short-term lease. Aboriginal land reform has not led to everybody acquiring fee simple ownership of the land that they want, and it was never going to.

B Tenure Security

It is described above how between 2008 and 2013 the Australian government often spoke about the need for ‘secure tenure’ in residential communities on Aboriginal land. While several positive values were attributed to ‘secure tenure’ – such as greater incentives for investors and improved clarity around maintenance – the term itself was never actually defined. Properly defined, ‘tenure security’ is a foundational land reform concept. A succinct definition is provided by the Australian Agency for International Development (‘AusAID’) in a 2008 report on land reform in the Pacific, in which tenure security is described as ‘the certainty that a person’s or a group’s rights to land will be recognised by others and protected in cases of challenge’.⁵⁹

It is important here to recognise that there is a ‘crucial distinction between formality of a tenure system and security of tenure’.⁶⁰ Tenure formality, which is discussed further below, describes the extent to which tenure arrangements are incorporated into the formal legal system. It is a legal status. Tenure security on the other hand is a ‘perception based on past experiences and world views’.⁶¹ It describes the extent to which people feel confident that they will not be arbitrarily deprived of their rights and that their interests will be recognised by others and protected in the event of challenge.⁶² Provided that it is well-functioning, an informal tenure system can provide for a high level of tenure security, and do so ‘quite efficiently’.⁶³ There are of course limits to this. Of their nature, informal rights do not enjoy legal or constitutional protection. It is no surprise that in developed countries, formal rights tend to be preferred. At the same time, where a grant of formal rights does not have community acceptance, or attracts community hostility, it may be experienced or perceived as being insecure.⁶⁴

The reason that tenure security is a foundational land reform concept is because tenure insecurity can result in a long list of

harms, from poor resource allocation and underinvestment to tension, conflict and landlessness.⁶⁵ However, it does not appear that tenure insecurity has historically been a significant issue in communities on Aboriginal land.⁶⁶ It was certainly not widely discussed.⁶⁷

The Australian government has used the term ‘secure tenure’ variably. Its most common usage has been in the context of what have been described as ‘secure tenure’ policies.⁶⁸ Those policies require that tenure arrangements in communities be formalised through the grant of leases that comply with certain rules. For example, in the Northern Territory the government has required that all residential housing be leased to Territory Housing for at least 40 years before it will fund new housing. It describes this as requiring ‘secure tenure’. Thus, for example, where a previous Minister stated that ‘secure tenure’ is ‘a pre-condition’ to government investment in housing,⁶⁹ she was using the term as short-hand for the formalisation of tenure in a manner that complies with government policy.

However this is not the only sense in which the term has been used. It has also been used to describe *government control over land*, even where tenure has not been formalised, such as where the five-year leases were described as ‘providing short-term security of tenure’.⁷⁰ At times, it has also been used in the same way that terms such as ‘individual ownership’ were used previously: to describe the purported beneficial outcomes of land reform in the most general of terms. For example, the government has said that ‘secure tenure reduces transaction costs and provides the commercial certainty that allows a land asset to be used in different ways, whether as security for financing, as a site for business establishment or as a resource to be developed’.⁷¹ It is hard to attribute a single meaning to ‘secure tenure’ in this sentence.

C Tenure Formality

An important concept for land reform in Australia is that of tenure formality. Tenure formality describes the extent to which land tenure arrangements are given a formal legal definition or come under the regulation of the formal legal system.⁷² This leaves the concept of tenure informality to be defined negatively, which makes it very broad as there are so many different ways for tenure arrangements to be informal.⁷³ For example, customary tenure arrangements in parts of Africa might be described as informal,⁷⁴ but so might a squatter settlement on state land in Lima,⁷⁵ or an unauthorised

subdivision in Mexico.⁷⁶ While all are examples of informal tenure, they are also very different from each other.

Of particular relevance to Aboriginal land reform in Australia is the concept of an informal settlement. This describes a situation where the relationship between landowners and occupiers is informal, which is to say that relationship has not been formalised through a legal device such as a lease. Historically, most residential communities on Aboriginal land in Australia have been informal settlements. There have been very few leases or formal legal mechanisms regulating the relationship between landowners and the occupiers of each lot within a community. Instead, rights and responsibilities in relation to land have been allocated under *informal arrangements*. While this might at first sound like a precarious arrangement, it was relied upon for several decades in Aboriginal communities across Australia.⁷⁷

For the most part, the effect of the recent reforms has been to formalise those arrangements through the grant of leases and subleases.

D Land Tenure Reform

This final section considers the meaning of the term 'land reform' itself. There are two broad categories of land reform, being land redistribution and land tenure reform. Land redistribution refers to a large-scale transfer of land ownership from one group of people to another, usually from wealthy rural landowners to small farmers or the landless poor.⁷⁸ Land tenure reform instead describes changes to the way in which land is owned, without a wholesale change in ownership from one group to another.⁷⁹ The recent reforms to Aboriginal land in Australia have been an example of land tenure reform, and the term has often (correctly) been used in the Australian context.

In turn, land tenure reform can be usefully divided between *formalisation* and *partitioning*. Partitioning – which is also called individuation⁸⁰ or allotment⁸¹ – describes circumstances where communal property is divided, with legal ownership of the resultant portions being allocated to individuals and families. Historic reforms to Indigenous land in the United States⁸² and New Zealand⁸³ are examples of partitioning. They also illustrate the potential for partitioning to have devastating consequences, particularly where it is done badly. In both of those countries, partitioning led to massive land loss for Indigenous peoples as well as the creation of

highly 'fractionated' or complicated ownership structures for the land that remained in Indigenous ownership.⁸⁴

Formalisation instead describes a broader group of reforms that result in informal tenure arrangements being rendered more formal. This can happen in a variety of ways. In their review of the relevant literature, Durand-Lasserve and Selod identify five main criteria for distinguishing between different formalisation programs: who owns the underlying land (in particular whether it is state property, private property or communal property), the type of informal settlement, the type of rights granted to occupiers, the eligibility criteria and the scale and time of implementation.⁸⁵ The purpose of pointing out this diversity is to highlight the variety of decisions that need to be made during the formalisation process. It is not simply a matter of instituting a formalisation program. There are a great many components to the formalisation process that then need to be considered.

It is described above how communities on Aboriginal land have historically been informal settlements. Broadly, the formalisation of an informal settlement can occur in two quite different ways. First, the state can provide landowners with the autonomous ability to grant formal rights to occupiers of their land. For example, a landowning group can be provided with the means to grant leases to occupiers and to determine the content of those leases. This might be described as 'endogenous formalisation'. Alternatively, the state can itself take on the role of determining how and when formal rights are allocated. This might instead be described as 'exogenous formalisation'.

The question of whether endogenous formalisation is to be preferred to exogenous is not straightforward. It would be simplistic to suggest that endogenous formalisation is always better because it comes from the group. It does however need to be acknowledged that the two are different, in that exogenous formalisation is an intervention as well as a change in the level of formality. Whether the process is endogenous or exogenous will impact on the way an outcome is experienced. In Australia, the process for formalising tenure arrangements in communities on Aboriginal land has often been highly exogenous.

IV Applying the Terminology

Considered in the abstract, this terminology may seem a little dry and perhaps even confusing. However, its value

quickly becomes apparent when it is applied to practice. Part IV of the article illustrates how the terminology can be used to more clearly describe: Aboriginal land ownership in Australia, the particular arrangements that developed in residential communities on Aboriginal land, and the recent reforms themselves.

A Aboriginal Land Ownership in Australia

The way in which Aboriginal land in Australia is owned varies considerably between the different statutory schemes. Broadly, it can be divided into three categories: land which is owned traditionally, land which is owned by a local Aboriginal community, and reserve land. There are important differences between the three forms of ownership. It is also very difficult to appreciate the issues arising out of land reform in Aboriginal communities without first having some understanding of the distinction between traditional ownership and residence. Consequently, this section begins by explaining what this distinction means.

(i) Traditional Ownership

It is not uncommon for Aboriginal residents of a community on Aboriginal land to be described as the ‘traditional owners’ of that land, but the relationship between traditional ownership and residence is far more complicated than this. While it varies between regions, under traditional Aboriginal law, ownership is based primarily on membership of descent groups.⁸⁶ When permanent Aboriginal settlements were introduced, it was inevitably the case that many residents came to live in settlements that were situated on land that they did not own under traditional law. They may have had secondary or contingent rights in relation to that particular land, or they may have had no rights at all. They may instead have retained rights to another area of land. In some places, residence over the course of generations may itself give rise to certain rights, complicating the relationship between traditional ownership and residence.⁸⁷ However, one of Australia’s most experienced anthropologists, Peter Sutton, has said that in his experience attempts to remove the distinction between traditional ownership and residence are rare and ‘are typically met with fierce opposition’.⁸⁸

One consequence of this is that in any community on Aboriginal land it is likely that a significant proportion of Aboriginal residents are not the traditional owners of that particular land. In many larger communities this will be

true for the majority of residents. This can result in tension or conflict between those people with a traditional interest and those people with a historical or residential connection to the land. This occurs differently depending on how the land is owned.

(ii) Land which is Owned Traditionally

In some places, statutory land rights schemes reflect an attempt to replicate or incorporate ownership of land in accordance with Aboriginal tradition. Perhaps the most well-known example of this is the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*‘ALRA’*), which is Commonwealth legislation applying to the Northern Territory. The *ALRA* provides for formal ownership of land by bodies called Aboriginal Land Trusts, which can only take an action in relation to land (such as granting a lease) when directed to do so by a regional Aboriginal Land Council. A Land Council can provide such a direction to a Land Trust only where the traditional Aboriginal owners of the land have, as a group, consented.⁸⁹ Around half of all land in the Northern Territory is now held under the *ALRA*,⁹⁰ making it the single largest land rights scheme in Australia.⁹¹ While this article does not directly deal with native title, it too – by its nature – is based on traditional ownership.

(iii) Land Owned by Residents

In other places, statutory land rights schemes instead provide for ownership of Aboriginal land by the residential group, or by people with a historical connection. One example of this Deed Of Grant in Trust land, or DOGIT title land, in Queensland, which is one of several forms of Indigenous land ownership in that state. DOGIT title land, which was created by the Bjelke-Peterson Government as an alternative to traditional ownership, is usually owned by Indigenous local government councils on behalf of Indigenous inhabitants.⁹² There are also examples of Aboriginal land being owned by the residential group in the Northern Territory⁹³ and South Australia.⁹⁴ The New South Wales *Aboriginal Land Rights Act 1983* (NSW) provides for ownership of land by Local Aboriginal Land Councils whose membership is usually based on residence or historical association, but may also be based on traditional ownership.⁹⁵

(iv) Reserve Land

Prior to the introduction of land rights, land that was held

for the benefit of Aboriginal people was owned by the government and reserved for Aboriginal people. Aboriginal people themselves had no formal ownership rights. Western Australia has never had a statutory land rights scheme, instead retaining a type of modified reserve system, where the government retains ownership, generally subject to the control and management of a body called the Aboriginal Lands Trust, and in many places also subject to long term leases to local Aboriginal groups.⁹⁶ A reserve system also still operates with respect to some areas of Aboriginal land in Queensland.⁹⁷

(v) Describing Aboriginal Land Ownership

It is both accurate and appropriate to describe Aboriginal land held under statutory land rights schemes as examples of 'communal property'. This applies to both land which is owned traditionally and land which is owned by residential groups, although there are obviously important differences between the two. In fact, this points to a limitation on the use of terms such as 'communal property' – they are broad categories and provide only general information about the nature of the property regime. There is a great deal more that they do not convey.

Aboriginal reserve land is more accurately categorised as state property. As noted above, property regimes can overlap, and where reserve land is subject to a lease to a local Aboriginal organisation there will be a shift towards communal property (the extent of the shift depending on the terms of the lease).

B Communities on Aboriginal Land

Significantly, it is far more problematic to refer to the circumstances in residential communities on Aboriginal land as communal property. This is firstly because such terms convey the impression that there is a single 'community' which collectively owns everything. However there is no such single grouping. There are various diverse groups interacting with each other with respect to the tenure arrangements in residential communities; not just the traditional owners and Aboriginal residents, but also occupiers such as government departments, non-government organisations and community enterprises (many with non-Aboriginal staff). Further, the role played by governments in those tenure arrangements goes beyond just being occupiers. They have also played a part in

community planning process and the funding of roads, houses and essential services infrastructure, all of which gives them some control over the allocation of land and infrastructure in communities. This complex interaction between several different groups is not made apparent by terms such as 'communal ownership'.

Such terms can also convey the impression that it is a collection of individuals and families who share the property in question. Again, this is not the case in residential communities on Aboriginal land. Often property in those communities is allocated to organisations – including government departments and non-government organisations from outside the community – rather than to individuals.

Such misapprehensions have appeared often during debate about Aboriginal land reform in Australia. For example, in his first public comment on the reforms, Prime Minister John Howard referred to 'everything being owned by the community and not enough encouragement being given to individuals and families to own their own properties':⁹⁸ implying both the existence of a single grouping and the idea that reform would lead to property being allocated among the individuals and families who comprise that grouping. Neither of these has been the case.

In addition to this, terms such as communal property and individual ownership have now become so caught up with debates that are laden with emotion and ideology that they make it more difficult to engage in considered discussion about the real issues facing Aboriginal communities. Consequently, it is argued here that the terms 'informal tenure arrangements' and 'informal settlement' are more conducive to productive conversation, as well as being technically more accurate.

C The Recent Australian Reforms

It is now nearly a decade since reforms to Aboriginal land ownership were first introduced. Each year it becomes more difficult to describe them briefly, as new reforms are added and existing reforms are modified. Summarised below are the four most significant reforms: township leasing, the Northern Territory Emergency Response, 'secure tenure' policies and more recent reforms to Indigenous land in Queensland.

(i) Township Leasing

Township leases are the Australian government's preferred model for formalising tenure arrangements in communities on Aboriginal land in the Northern Territory. They were made possible through changes to the *ALRA* in 2006.⁹⁹ Township leases are in the nature of a head lease.¹⁰⁰ They are granted to a body called the Executive Director of Township Leasing ('EDTL'), which is then responsible for managing the allocation of land inside the community. This is done primarily through the grant of subleases to occupiers. A key feature of township leases is that they give the EDTL authority to grant subleases without requiring the further consent of traditional owners.

The process for the grant of a township lease itself is voluntary, although the government provides significant incentives in the form of an up-front rental payment and a benefits package for the community.¹⁰¹ While to date only three township leases have been granted, over a total of six communities,¹⁰² it has been reported that the traditional owners for several other communities will soon consent to the grant of a township lease.¹⁰³ The government has also suggested that communities without a township lease may find it more difficult to attract government funding for services such as housing.¹⁰⁴

When township leasing was introduced, the government argued that their purpose was to create 'a new tenure system for townships on Aboriginal land that will allow individuals to have property rights' so as to 'drive economic development'.¹⁰⁵ It is instructive to compare these statements with the outcome of existing township leases. The first lease was granted over the community of Wurrumiyana (formerly Ngiuu) in 2007, where today almost every lot in the community has been subleased. Very few of these subleases have been granted to individuals.

Public records indicate that there are around 300 houses in the community.¹⁰⁶ Of these, 281 have been subleased to Territory Housing for use as public housing.¹⁰⁷ As the result of a home ownership program introduced by the Australian government in 2006, a further 16 houses have now become the subject of home ownership.¹⁰⁸ These 16 grants of home ownership are the only instances in which 'individuals' have acquired property rights. All other subleases – including all commercial subleases – have been granted to government departments, non-government organisations and, less

commonly, to corporate entities such as the community store association, art centre or to a corporation owned by the traditional owners.¹⁰⁹ Clearly it does not assist to describe this outcome in terms of the introduction of individual ownership or private property.

As referred to earlier, the current Minister for Indigenous Affairs has said that one reason the government favours the grant of township leases is because they 'support long term and transferable subleases' of a type 'that you or I could go to the bank with and get mortgage on'.¹¹⁰ However Beadman reported in 2010 that when the Commonwealth Bank were provided with a copy of the standard terms for commercial subleases, they advised that they were not suitable to support a mortgage as the terms were 'so onerous as to make the [sublease] near to valueless' and arguably 'a business liability rather than an asset'.¹¹¹ A more recent title search reveals that in 2013 Westpac was granted a mortgage over three subleases held by Mantiyupwi Pty Ltd, which is an investment company owned by the traditional Aboriginal owners.¹¹² This is the first and only recorded mortgage of a commercial sublease, and it appears to have been made possible by the fact that, as they were granted to the traditional owner corporation, the subleases were made on more favourable terms than other subleases. As such, I suggest that it is more misleading than accurate to characterise township leases as enabling long term and transferable subleases that people can take to the bank and mortgage.

Township leases themselves can more aptly be described as a shift towards state property. During the term of the lease, underlying legal control shifts from the Aboriginal landowners to the EDTL, a statutory body which holds leases 'on behalf of the Commonwealth'.¹¹³ Alternatively, township leasing might be described as a mechanism for enabling *exogenous* formalisation; that is, government directed formalisation. The exogenous features of a township lease are not incidental, they form part of the statutory framework itself. Section 19A of the *ALRA* prevents the traditional owners from retaining control over key decision-making, once a township lease is granted.¹¹⁴ The purpose of a township lease is to enable the EDTL to control all subsequent aspects of the formalisation process.

(ii) The Northern Territory Emergency Response

The Northern Territory Emergency Response ('NTER'), announced in June 2007, was one of the most significant and

dramatic events in the history of Australian Aboriginal policy. Seven years later it remains a divisive and controversial development. It was introduced by the Howard Coalition Government in the context of allegations of widespread sexual abuse of children in Aboriginal communities. The suite of measures it introduced was far ranging. It included additional alcohol restrictions, the compulsory management of social security payments, the regulation of community stores, restrictions on pornography and, most relevantly to this article, the compulsory acquisition of five-year leases over 64 communities on Aboriginal land.¹¹⁵

The five-year leases were a very intrusive model of land reform. While township leases require the consent of traditional owners, the five-year leases were introduced without consultation or permission. They also expired in August 2012 and have not been renewed. Whilst they were introduced in the context of a debate about whether Aboriginal land reform was necessary to enable home ownership and economic development, they were clearly not designed to deliver either. They were simply too short. Their purpose was to give the government greater control over land use in communities for their duration.

Again, the language of communal and individual ownership is ill-suited to a discussion of the five-year leases. They did not result in individual ownership in any meaningful sense. Nor can they be described in terms of formalisation, as due to their short duration the government did not pursue subleases for occupants. Instead, they are most aptly described as a shift to state property for the duration of the lease, a shift whose purpose was government control.

(iii) Housing Reforms and Secure Tenure Policies

The third set of reforms have been the most widespread and far-reaching, which has been the introduction of more widespread leasing in all communities on Aboriginal land. The initial target of this policy was housing. Beginning in the Northern Territory in September 2007, the Australian government has linked the provision of housing funding to the acquisition of long term leases over housing areas by the relevant state or territory housing department.¹¹⁶ These are sometimes called 'housing precinct leases'.¹¹⁷ This rule has since been extended to other states, making this reform one that also affects Indigenous communities in Queensland, New South Wales, South Australia and Western Australia.¹¹⁸

On one level this reform represents the mainstreaming of housing delivery. Historically housing in Indigenous communities was managed by community-run housing organisations, and the leases facilitate a shift to direct management of housing by the government.¹¹⁹ However from a tenure perspective, the reform is slightly broader. The housing precinct leases themselves, which must be for a period of at least 40 years, implement yet another shift towards state property.¹²⁰ It is open to later governments to again tinker with the housing model, perhaps through a return to community-run housing. What has changed is that, as a result of the leases, the government has gained more direct control over such decisions.

Over time, the link between leases and government funding was extended to infrastructure beyond housing. In 2013, an Aboriginal Land Council in the Northern Territory described how the 'Australian Government wants to see every building in an Aboriginal community covered by a lease'.¹²¹ The government has often referred to this, in the context of housing and more broadly, as requiring 'secure tenure',¹²² and so this policy of introducing leases came to be known as the 'secure tenure' policy.¹²³

It is described above how tenure security is one of the foundational land reform concepts, due to the fact that tenure insecurity is responsible for a long list of harms. The Australian government, however, has used references to 'secure tenure' in this context in a different sense (which is why the term appears here in inverted commas). Effectively it is used as shorthand for the grant of a lease or sublease in a manner that is consistent with the government's funding rules. This is different from the true meaning of tenure security. In fact, in the context of housing, one of the government's rationales for introducing long-term leases to housing departments is to *reduce* tenure security for residents, as a way of introducing new standards of behaviour. Following the grant of a housing precinct lease, residents are required to sign up to individual tenancy management agreements under which, according to the Australian government, they are at greater risk of eviction.¹²⁴ In effect, the government is arguing that under informal community housing arrangements individuals were too secure in their tenure. The leases enable governments to impose higher rental and demand behavioural change. Residents who do not comply face eviction. Part of the value of identifying the leases as a shift towards state property is that it directs attention to the role that governments have taken on, interposing themselves between the community

and individuals in an attempt to alter individual behaviour and community norms.

(iv) Reforms to Aboriginal Land in Queensland

Over the last few years there have been several reforms to Indigenous land in Queensland to make it easier for landowners to grant leases in a wider variety of circumstances.¹²⁵ The purpose of those reforms has been to facilitate the formalisation of tenure arrangements in communities on Indigenous land. It appears that part of the impetus for this was to comply with the Australian government's 'secure tenure' policy, particularly as it applies to housing.¹²⁶ To the extent that they made it easier to grant leases, those earlier reforms effectively put Indigenous land in Queensland on more equal footing with Aboriginal land in most other jurisdictions, where leasing was already permitted in a wider variety of circumstances.

Recently, however, something more significant has been occurring. In 2014, the Queensland Government passed legislation to allow Indigenous land (or portions thereof) in 34 of the state's Aboriginal and Torres Strait Islander communities to be divided into smaller lots and converted to ordinary freehold.¹²⁷ The significance of this is that it is the first time an Australian government, federal or state, has engaged in actual partitioning of Indigenous land ownership. In other words, this is the closest Australian reform yet, to the historic reforms in the United States and New Zealand, which in those places turned out badly.

The new legislation is optional. The decision whether to participate in the new scheme rests with the Indigenous body which owns the land.¹²⁸ As a grant of freehold extinguishes native title, future act processes need to be complied with. The initial grant of freehold can only be made to an Aboriginal person or Torres Strait Islander, or their spouse.¹²⁹ Thereafter, there are no restrictions on transfer. As the model is self-funding, it is expected that grantees will be required to buy the land, rather than receiving it for free.¹³⁰

V Conclusion: Why This Matters

A Why Language Matters

The article concludes by considering why it is important to get the terminology right, and why it matters that in

Australia we have so often got it wrong. It is suggested there that there are four main reasons: technical accuracy, the impact of language on the terms of debate, the need to better understand the range of decisions that are being made, and to enable more informative comparisons.

(i) The Value of Technical Accuracy

The reforms to Aboriginal land which are described in this article are ongoing, widespread, long term, expensive and significant. As such, it is important for people implementing and critiquing them to have access to the most technically accurate language, and, correspondingly, the most informed understanding of what the reforms can and cannot do. This has not always been the case in Australia. This article describes, for example, how the term 'communal property' is accurate when applied to most Aboriginal land ownership but is not appropriate when applied to the tenure arrangements in residential communities on Aboriginal land. Those are better described as informal settlements, or as involving informal tenure arrangements, terms that direct attention to the fact that those arrangements – which evolved in the post-contact era, with considerable government involvement – are separate to traditional ownership. This article also described how the Australian government has often used the term 'secure tenure' as shorthand for the formalisation of tenure in a manner consistent with government policy. This is different to tenure security in the true sense of that term. It would consequently be wrong to state that 'secure tenure' policies will lead to an increase in tenure security and the associated benefits. To the contrary, with respect to housing the government has strategically reduced the level of tenure security experienced by residents. There are reasons for this, and those reasons might be debated, but it is first necessary to be clear about what is occurring. Where 'secure tenure' policies actually result in more insecure tenure, there is clearly scope for confusion.

(ii) The Impact of Language on the Scope of Debate and Discussion

The problem with much of the existing language is not just its technical inaccuracy. Such language also tends to narrow the parameters of debate and evoke the wrong impression about what is occurring, and indeed what it is possible for land reform to do. A conversion from communal ownership to individual ownership suggests an economic and/or cultural transformation, a shift in the rules and signals

under which communities operate. The recent reforms are far more modest in terms of their economic and cultural impact. While they are significant, they are significant for different reasons. They involve centralised governments playing a new and more directive role in the management of Aboriginal communities. They alter relationships and shift authority. This article has only partly explored those issues – the point here is that the very existence of those issues is better captured by references to formalisation, and especially by describing how several of the reforms implement a shift towards state property. That is a very different set of themes than those which are suggested by terms such as communal and individual ownership, or for that matter by references to ‘secure tenure’.

The terms individual ownership and private property are also very evocative. They convey a sense of enterprise and self-sufficiency. This misrepresents the way in which governments are currently trying to bring about change in Aboriginal communities. Rather than exposing individuals and enterprises to the influence of markets, for the most part governments have taken upon themselves the role of instilling greater discipline. How well equipped are governments to take on this role? To what extent have they succeeded in doing so previously? And what does it mean for centralised governments to impose such approaches on a colonised people? These are significant issues, requiring careful attention and debate. They are less likely to get that attention while land reform is discussed in terms of its impact on individual ownership or ‘secure tenure’.

The debate about land reform needs to broaden if it is to engage with the full set of issues that the recent reforms give rise to. Much of the existing language inhibits this. This harms the prospects of developing better policies in this complex and important area.

(iii) Illuminating the Decisions to be Made

Relatedly, the terminology described in this article is better for understanding the decisions that are made during the reform process. Both the communal-individual ownership dualism and references to the introduction of ‘secure tenure’ convey the existence of a single goal or outcome, and misleadingly so. No such single outcome is suggested when it is instead asked *when* the informal tenure arrangements in communities on Aboriginal land should be formalised, and, if they should be formalised, *how* this should occur.

This better directs attention to the full range of decisions that need to be made when reforms are implemented. Are there lower cost alternatives to formalisation, or cheaper types of formalisation that can achieve the desired outcome? Should formalisation be endogenous or exogenous? Who should be the recipient of formal rights? Should those rights be alienable or inalienable? Short term or long term? In what circumstances is market integration more important than tenure security? How should the position of women be protected? Should the emphasis be on extracting payments for land use or making land available at the lowest cost? When should preference be given to local autonomy, ahead of government control over decision making? When should leases be granted to individuals or families, rather than collectively-owned enterprises? And when is freehold preferable to leasehold? The answers to these questions depend, to a considerable extent, on the relative priority given to different values and the relative weight given to different risks. These are clearly complex issues whose resolution would benefit from greater discussion and debate.

(iv) Comparing Apples with Apples

A further reason why more accurate language is useful is that it enables more meaningful comparisons to be made. On several occasions during public debate in Australia, reference has been made to the harm caused by historic reforms in the United States and New Zealand. However, those historic reforms were of a different type to the majority of the recent Australian reforms, which limits the value of such comparisons. It is only more recently that the Queensland Government has introduced legislation to enable partitioning. This is significant. The recent Queensland reforms give rise to a different, and broader, set of issues than the now widespread reforms in the Northern Territory. They need to be discussed and debated on this basis, not as if they were more or less the same as other reforms.

B Concluding Comments

It is likely that the reforms described in this article will continue and expand in coming years, not least because Australian governments have identified land reform as a key component of their new approach to Aboriginal policy. It is to be hoped that debate about the reforms will also continue, and evolve over time, so that more nuanced and sophisticated understandings might emerge. This article argues that this project would be assisted by more careful

attention to language. Some of the language that has been relied upon previously during the course of public debate has contributed to confusion about the reforms. The extensive research literature on land reform in other countries yields a more precise set of terminology, which better assists with identifying the impact of the recent reforms, the range of decisions that are being made during the reform process and the nature of the issues that they give rise to.

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1 The focus of this article is on reforms to mainland Australia rather than the Torres Strait, and consequently the term Aboriginal is used throughout except where context makes it necessary to refer to Aboriginal and Torres Strait Islander or Indigenous.

2 In Australia, the term 'native title' describes the common law's acknowledgement that Aboriginal and Torres Strait Islanders have ongoing rights to certain areas of land based on their traditional connection. Native title was first recognised in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, and is now regulated by the *Native Title Act 1993* (Cth). Statutory land rights instead refers to land granted to Indigenous people under various legislative schemes – the key difference being that statutory land rights are ultimately granted by parliaments while native title instead arose out of common law recognition.

3 Mark Metherell, 'Land System Holds Us Back, says Mundine', *The Sydney Morning Herald* (Sydney), 7 December 2004, 6.

4 For a description of the debate during this early period, see Stuart Bradfield, 'White Picket Fence or Trojan Horse? The Debate Over Communal Ownership of Indigenous Land and Individual Wealth Creation' (Issue Paper No. 3, Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Research Unit, 2005); Michael Dodson and Diana McCarthy, 'Communal Land and the Amendments to the *Aboriginal Land Rights (Northern Territory) Act*' (Research Discussion Paper No. 19, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2006) 1-9.

5 The Liberal Party and The Nationals, 'The Coalition's Policy for Indigenous Affairs' (September 2013) 8.

6 Nigel Scullion, '2014 National Native Title Conference Speech' (Speech delivered at the National Native Title Conference, Coffs Harbour, 2 June 2014).

7 Metherell, above n 3.

8 Mark Metherell, 'PM Backs Indigenous Enterprise', *The Sydney Morning Herald* (Sydney), 10 December 2004, 7.

9 Patricia Karvelas, 'Land Rights May Be Privatised', *The Australian*, 10 December 2004, 4.

10 Helen Hughes and Jenness Warin, 'A New Deal for Aborigines and Torres Strait Islanders in Remote Communities' (Issues Analysis No. 54, Centre for Independent Studies, 1 March 2005) 1, 4.

11 Editorial, 'Land Rights Should Apply to Individuals', *The Australian*, 19 February 2005, 13.

12 Aden Ridgeway, 'Addressing the Economic Exclusion of Indigenous Australians through Native Title' (Paper presented at the Native Title Conference, Coffs Harbour, 1-3 June 2005) 8. Ridgeway is a Gumbaynggirr man and between 1999 and 2005 was a senator and member of the Australian Democrats.

13 Nicole Watson, 'Review of Aboriginal Land Titles' (Briefing Paper No. 7, Jumbunna Indigenous House of Learning, September 2005) 2. Watson is a member of the Birri-Gubba People and Yugambah language group and a researcher at the University of Technology, Sydney.

14 Michelle Grattan, 'Howard Tilts at Title Fight', *The Sunday Age* (Melbourne), 10 April 2005, 17.

15 See Australian Human Rights Commission, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 126. There were exceptions – notably, Warren Mundine was National Vice-President of the Labor Party when he began arguing for reform. At the time Labor's Indigenous affairs spokesman, Senator Kim Carr, made it clear that Mundine's comments were his own and did not reflect party policy: see Metherell, above n 3.

16 See, eg, Australian Broadcasting Corporation, 'PM Receives Support for his plan for Aboriginal Communities', *Lateline*, 21 June 2007, (Narda Gilmore). See also Australian Human Rights Commission, above n 15, 127.

17 For historical and constitutional reasons, the Australian government plays a more direct role with respect to Aboriginal land rights in the Northern Territory than it does in other parts of Australia. The reforms themselves are summarised below.

18 Leon Terrill, 'What price to pay? Home ownership on Aboriginal Land in the Northern Territory' (2013) 8(9) *Indigenous Law Bulletin* 12. There have been some further grants of home ownership in Queensland during 2014, but overall numbers remain very low.

19 Grattan, above n 14.

20 As Rowse notes, both sides of the debate were guilty of attaching 'far too much, sociologically, to forms of title' and believing 'too strongly in the moral paradigms of "property"': Tim Rowse, 'The National Emergency and Indigenous Jurisdictions' in Jon Altman and Melinda Hinkson (eds),

- Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications, 2007) 47, 54.
- 21 For example, it reduced the minimum period for a township lease from 99 years to 40 years: See, *Indigenous Affairs Legislation Amendment Act 2008* (Cth) sch 1.
- 22 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 121 (Mal Brough).
- 23 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 5 (Mal Brough).
- 24 Mal Brough, 'ALP Wishy Washy on Land Ownership for Indigenous Australians' (Media Release, 13 June 2006).
- 25 Mal Brough, 'On the Federal Government's Intervention into Northern Territory Indigenous Communities' (Speech delivered at the Alfred Deakin Lecture, University of Melbourne, 2 October 2007).
- 26 Jenny Macklin, 'Closing the Gap – Building an Indigenous Future' (Speech delivered to the National Press Club, Canberra, 27 February 2008).
- 27 See, eg, Jenny Macklin, 'Building Homes That Last' (Speech delivered to the World Indigenous Housing Conference, Vancouver, Canada, 13 June 2012).
- 28 This is discussed in Part IV under reforms to housing.
- 29 See, eg, Nigel Scullion, 'Historic Arnhem Land lease agreement' (Media Release, 17 October 2013); Nigel Scullion, 'Pirlangimpi township lease agreement' (Media Release, 14 March 2014).
- 30 See Scullion, above n 6.
- 31 Andrew Forrest, 'The Forrest Review: Creating Parity' (Commonwealth of Australia, 2014).
- 32 *The Forrest Review* makes no reference to communal ownership but a number of references to 'individual ownership', 'individual leasing' and land being traded 'by the individual': See *ibid*, 209-215.
- 33 Nigel Scullion, 'Land Reform for the Future', *Koori Mail* (online), 26 March 2014 <<http://minister.indigenous.gov.au/media/2014-03-26/land-reform-future-published-koori-mail>>.
- 34 The Liberal Party and The Nationals, above n 5, 8.
- 35 Australian Government, Department of Prime Minister and Cabinet, *Jobs, Land and Economy Programme* (2014) <http://www.dpmc.gov.au/indigenous_affairs/ias/jobs_land_economy/index.cfm>. The term also appears in *The Forrest Review*, above n 31.
- 36 See Australian Government, Department of Prime Minister and Cabinet, *Township Leasing on Aboriginal Land in the Northern Territory* (19 June 2014) <http://www.dpmc.gov.au/indigenous_affairs/township_leasing_taskforce/index.cfm>.
- 37 See discussion in Part IV.
- 38 See, eg, Australian Government, above n 35; Scullion, above n 33. See also Forrest, above n 31, 209-215.
- 39 Scullion, above n 6.
- 40 Other terms that have been used include 'communal title', 'communally held land', 'communally owned land', 'communal land', 'communally titled land', 'community-based businesses' and 'the failed collective'.
- 41 The first time that these terms were properly defined in the Australian context was in 2010 by Jude Wallace: See Jude Wallace, 'Managing social tenure' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Land and Individual Ownership: Sustainable Futures* (Routledge, 2010) 25, 34.
- 42 Other terms include tenure types, land tenure systems and property-rights regimes. These terms are used widely.
- 43 Wallace, above n 41, 34. Similar definitions to those described here are also employed by several other authors, including Daniel W. Bromley, 'Property Relations and Economic Development: The Other Land Reform' (1989) 17(6) *World Development* 867, 872.
- 44 Wallace, above n 41, 34.
- 45 Bromley, above n 43, 872.
- 46 See, eg, Rogier van den Brink et al, 'Consensus, Confusion, and Controversy: Selected Land Reform Issues in Sub-Saharan Africa' (Working Paper No. 71, The World Bank, 2006) 6 including n 9; Australian Agency for International Development ('AusAID'), 'Making Land Work, Volume One, Reconciling Customary Land and Development in the Pacific' (Commonwealth of Australia, 2008) 5; Food and Agriculture Organisation of the United Nations ('FAO'), 'Land Tenure and Rural Development' (FAO Land Tenure Studies 3, 2002) 8-9.
- 47 Martin Adams, Siphos Sibanda and Stephen Turner, 'Land Tenure Reform and Rural Livelihoods in Southern Africa' in Camilla Toulmin and Julian Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (International Institute for Environment and Development, 2000) 135, 139.
- 48 It should be noted that many authors employ a definition of private property that would extend to include holdings: See, eg, FAO, above n 46, 8. One problem with this is that holdings vary significantly in terms of their duration, exclusivity and alienability, raising the question of when they meet the threshold of being regarded as private property. The issue is, however, too incidental to Indigenous land reform in Australia to warrant a more in depth discussion in this article.
- 49 Those more familiar with property law may be uncomfortable with ownership of land by a corporation or a trust being described as 'collective ownership of land', and rightly so. Shareholders in a landowning corporation are not landowners in a legal sense: it is the corporation alone that owns the land, and the shareholders have certain ownership rights in the corporation. This might suggest that corporate ownership could be considered

- 'individual ownership'. As explained below, however, all Aboriginal land in Australia is also owned through corporate bodies of various types, and it would clearly not be useful to describe Aboriginal land as individual ownership. The point is that the definitions need to recognise different types of corporate ownership.
- 50 Aboriginal community living areas are the second most common form of Aboriginal-specific land ownership in the Northern Territory. The laws regulating community living areas are a little diffuse, but see, especially, *Associations Act 2003* (NT) s 110 as modified by the *Stronger Futures in the Northern Territory Regulations 2013* (Cth).
- 51 Some authors expressly take the view that any land ownership by an incorporated body is private property regardless of its ownership structure, see, eg, Michael Barry, 'Land Restitution and Communal Property Associations: The Elandskloof case' (2011) 28 *Land Use Policy* 139, 141-2. A different approach is suggested in this article.
- 52 Van den Brink et al, above n 46, 6.
- 53 Native title is recognised and protected by the Australian legal system at the group or community level. Where individuals have rights under native title, those rights are derived from the group's title. A more detailed discussion of native title is beyond the scope of this article.
- 54 Such as an Indigenous incorporation, which despite the name, is similar in form to an incorporated association.
- 55 Such as the iconic Papunya Tula Artists Pty Ltd. This does not mean that such bodies will operate in the same way as other proprietary limited companies. They are still very much affected by the cultural and economic context in which they operate.
- 56 David Feeny et al, 'The Tragedy of the Commons: Twenty-Two Years Later' (1990) 18(1) *Human Ecology* 4.
- 57 Fourie describes how negotiation and ambiguity are inherent to the 'customary way of doing business' while 'modern' land titling systems instead aim for 'certainty built around formal rules', Clarrisa Fourie, 'Land Readjustment for Peri-Urban Customary Tenure: The Example of Botswana' in Robert Hume and Hilary Lim (eds), *Demystifying the Mystery of Capital: Land Tenure and Poverty in Africa and the Caribbean* (Routledge Cavendish, 2004) 31, 31.
- 58 Adams, Sibanda and Turner, above n 47, 139.
- 59 AusAID, above n 46, 10, 129.
- 60 Anisha Sharma, Shayak Barman and Paramita Datta Dey, 'Land Tenure Security: Is Titling Enough?' (National Institute of Urban Affairs, December 2006) 1. The Australian government, through its aid agency AusAID, has previously acknowledged this distinction, see *ibid* 10.
- 61 Jamie Baxter and Michael Trebilcock, "'Formalizing" Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform' (2009) 7(2) *Indigenous Law Journal* 45, 62.
- 62 United Nations Human Settlements Programme ('UN-HABITAT'), 'Secure Land Rights for All' (2008) 5; See also *ibid* 61.
- 63 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Black Swan, 2001) 58.
- 64 Broegaard notes that 'whatever the legal situation of a piece of land, it is the perceived tenure situation that forms the basis upon which the landholder can be expected to take decisions and to act': Rikke J Broegaard, 'Land Tenure Insecurity and Inequality in Nicaragua' (2005) 36(5) *Development and Change* 845, 851.
- 65 See, eg, Klaus Deininger, 'Land Policies for Growth and Poverty Reduction' (A World Bank Policy Research Report, 2003) 36-51.
- 66 Although cf Michael Dillon and Neil Westbury, *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (Seaview Press, 2007) 131, who argue that the informal rights of residents provided 'a measure of security' but were 'subject to the exigencies of internal community politics' and as such were 'tenuous and insecure'.
- 67 In 1998, John Reeves QC recommended the grant of leases to Aboriginal communities collectively so as to give them more 'secure title' vis-a-vis the landowners. This is however a very different issue to the tenure security experienced by occupiers of individual lots within each community, in relation to which Reeves does not report any issues. See John Reeves, 'Building on Land Rights for the Next Generation: The Review of the *Aboriginal Land Rights (Northern Territory) Act 1976*' (Commonwealth of Australia, 1998) 498. I could find no other historical references to tenure insecurity.
- 68 Central Land Council, 'Land Reform in the Northern Territory: Evidence Not Ideology' (2013), 3.
- 69 Macklin, above n 26. See, also, Australian Human Rights Commission, above n 15, 133-140.
- 70 Australian Government, 'Stronger Futures in the Northern Territory' (Discussion Paper, June 2011), 22.
- 71 Australian Government, 'Indigenous Economic Development Strategy 2011-2018' (Department of Families, Housing, Community Services and Indigenous Affairs, 2011) 63.
- 72 For an overview of some of the alternative approaches to the definition of formality, see Willem Assies, 'Land Tenure, Land Law and Development: Some Thoughts on Recent Debates' (2009) 36(3) *The Journal of Peasant Studies* 573, 576-7. Other terms include 'extralegal': see de Soto, above n 63, 23 and throughout, and 'irregular', see Alain Durand-Lasserve and Lauren Royston, 'International Trends and Country Contexts – From Tenure Regularization to Tenure Security' in Alain Durand-Lasserve and Lauren Royston (eds), *Holding Their Grond: Secure Land*

- Tenure for the Urban Poor in Developing Countries* (Earthscan Publications, 2002) 1, 4.
- 73 Alain Durand-Lasserve and Harris Selod, 'The Formalisation of Urban Land Tenure in Developing Countries' (Paper prepared for World Bank Urban Research Symposium, Washington DC, 14-16 May 2007) 6.
- 74 UN-HABITAT, above n 62, 8. Van den Brink et al 2006, above n 46, 12, argue that such arrangements are better described as an 'alternative formality, a community-based formality'.
- 75 Erica Field, 'Entitled to Work: Urban Property Rights and Labor Supply in Peru' (2007) *The Quarterly Journal of Economics* 1561.
- 76 Durand-Lasserve and Royston, above n 73, 4.
- 77 Dillon and Westbury, above n 66, 135-6.
- 78 Van den Brink et al, above n 46, v.
- 79 Ibid. The distinction is not entirely neat, as land tenure reform will necessarily involve some reallocation of ownership rights.
- 80 See, eg, Richard Boast, 'Individualization – An Idea Whose Time Came, and Went' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 145.
- 81 Particularly in the United States context, see, eg, Ezra Rosser, 'Anticipating de Soto: Allotment of Indian Reservations and the Dangers of Land-Titling' in Benjamin D. Barros (ed), *Hernando de Soto and Property in a Market Economy* (Ashgate, 2010) 61.
- 82 For an overview, see *ibid.*
- 83 For an overview, see Boast, above n 80.
- 84 This point has previously been made by several authors in the Australian context, including Jon Altman, Craig Linkhorn and Jennifer Clarke, 'Land Rights and Development Reform in Remote Australia' (Discussion Paper No. 276/2005, Centre for Aboriginal Economic Policy Research, 2005) 23-4; Margaret Stephenson, 'You Can't Always Get What You Want – Economic Development on Indigenous Individual and Collective Titles in North America: Which Land Tenure Models are Relevant to Australia?' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 100, 107-9.
- 85 Durand-Lasserve and Selod, above n 73, 15.
- 86 Some regions place greater emphasis on such matters as birth or conception sites and the attainment of ritual knowledge and status. For a comprehensive overview of Aboriginal land tenure across Australia, see Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003). The book is designed to be accessible for a non-anthropological audience, although it is at times quite technical. It is also the nature of this area that anthropological models are contested.
- 87 Peter Sutton, 'Anthropological Submission on the Reeves Review' (1999) 9(2) *Anthropological Forum* 189, 191.
- 88 *Ibid.*
- 89 The Land Council must also consult with other Aboriginal people affected by the proposal, however it is only the traditional Aboriginal owners who can grant or withhold consent. For a more detailed summary of the relevant provisions, see, Sean Brennan, 'Wurridjal v Commonwealth: The Northern Territory Intervention and Just Terms for the Acquisition of Property' (2009) 33 *Melbourne University Law Review* 957, 959-60.
- 90 Northern Land Council, *Our History* (2014) <<http://www.nlc.org.au/articles/info/history-of-the-nlc/>>.
- 91 See Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (Thomson Reuters, 2009), 209.
- 92 *Ibid* 265.
- 93 Such as, Aboriginal community living areas, which are referred to above at note 50, and town camps.
- 94 McRae et al, above n 91, 257-60.
- 95 *Ibid* 252-5.
- 96 *Ibid* 273.
- 97 *Ibid* 265.
- 98 See Metherell, above n 8.
- 99 For an overview of those changes, see Sean Brennan, 'Economic Development and Land Council Power: Modernising the *Land Rights Act* or Same Old Same Old?' (2006) 10(4) *Australian Indigenous Law Reporter* 1.
- 100 While they are modified slightly by the statute, township leases are leases in the common law sense of the term and (subject to any reservations) convey exclusive possession. In this respect they are different, for example, from many pastoral leases.
- 101 See, eg, Australian Human Rights Commission, above n 15, 160-1.
- 102 Australian Government Office of Township Leasing, *Current Leases* (2014), Commonwealth of Australia <<http://www.otl.gov.au/site/current.asp>>.
- 103 See, eg, Nigel Scullion, 'Gunbalanya One Step Closer to Lease Agreement' (Media Release, 18 August 2014).
- 104 Scullion, above n 33.
- 105 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 5 (Mal Brough).
- 106 The figures described here refer only to housing for Aboriginal residents, which is managed as social housing (except for the new grants of home ownership). There is additionally housing for the staff of organisations working in the community, which is outside of the social housing system.
- 107 See Pat Watson, 'Executive Director of Township Leasing Annual Report 2009-2010' (Australian Government, 2010) 9.
- 108 See Terrill, above n 18, 14.
- 109 The author conducted a title search of NT Portion 1640 through the Northern Territory Land Titles Office on 16 July 2014.
- 110 Scullion, above n 6.

- 111 Bob Beadman, 'Northern Territory Coordinator General for Remote Services: Report No. 2 December 2009 to May 2010' (Northern Territory Government, 2010) 74-7.
- 112 See title search of NT Portion 1640, above n 108.
- 113 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 20C(a).
- 114 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, 828-9, 834-7.
- 115 See Mal Brough, 'National emergency response to protect Aboriginal children in the NT' (Media Release, 21 June 2007).
- 116 Australian Human Rights Commission, above n 15, 143. In communities with a township lease, it will instead be a sublease.
- 117 Australian Government and Northern Territory Government, *What Are the Different Types of Leases in Remote Communities?* (November 2009, Territory Housing) <http://www.housing.nt.gov.au/_data/assets/pdf_file/0012/123411/rfs45_rhnt_typesofleases_Jan12.pdf>.
- 118 Australian Human Rights Commission, above n 15, 126-36.
- 119 Ibid 134-5.
- 120 As described above, the extent to which a lease involves a shift from one property regime to another depends on the terms of the lease. The requirement that housing departments obtain unfettered control over tenancy management means that for the housing leases the shift is almost complete during the term of the leases.
- 121 Central Land Council, above n 68, 16.
- 122 See, eg, Macklin, 'Closing the Gap', above n 26; Jenny Macklin, 'Building the foundations for change' (Speech delivered at the Sydney Institute, Sydney, 9 August 2011).
- 123 See, eg, Central Land Council, above n 68, 3.
- 124 See Australian Human Rights Commission, above n 15, 127-30.
- 125 Those reforms are summarised at *ibid*, 169-73.
- 126 *Ibid*, 167.
- 127 *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014* (Qld), which commenced on 1 January 2015.
- 128 For an overview, see Queensland Government Department of Natural Resources and Mines, *Freehold title in Indigenous Communities* (2014) <<https://www.dnrm.qld.gov.au/our-department/policies-initiatives/indigenous-land-initiatives/freehold>>.
- 129 *Ibid*.
- 130 *Ibid*.