ROUTLEDGE COMPLEX REAL PROPERTY RIGHTS SERIES

Beyond Communal and Individual Ownership

Indigenous land reform in Australia

Leon Terrill

ROUTLEDGE

Beyond Communal and Individual Ownership

Over the last decade, Australian governments have introduced a series of land reforms in communities on Indigenous land. This book is the first in-depth study of these significant and far reaching reforms. It explains how the reforms came about, what they do and their consequences for Indigenous landowners and community residents. It also revisits the rationale for their introduction and discusses the significant gap between public debate about the reforms and their actual impact.

Drawing on international research, the book describes how it is necessary to move beyond the concepts of communal and individual ownership in order to understand the true significance of the reforms. The book's fresh perspective on land reform and careful assessment of key land reform theories will be of interest to scholars of indigenous land rights, land law, indigenous studies and aboriginal culture not only in Australia but also in any other country with an interest in indigenous land rights.

Leon Terrill is a Research Director at the Indigenous Law Centre and a Lecturer at the University of New South Wales, Sydney, Australia. He has previously worked as a senior lawyer with the Central Land Council, coordinator of the University of the South Pacific Community Legal Centre and as a lawyer with Victoria Legal Aid.

Routledge Complex Real Property Rights Series
Series editor: Professor Spike Boydell
University of Technology, Sydney, Australia

Real Property Rights are central to the global economy and provide a legal framework for how society (be it developed or customary) relates to land and buildings. We need to better understand property rights to ensure sustainable societies, careful use of limited resources and sound ecological stewardship of our land and water. Contemporary property rights theory is dynamic and needs to engage thinkers who are prepared to think outside their disciplinary limitations.

The Routledge Complex Real Property Rights Series strives to take a transdisciplinary approach to understanding property rights and specifically encourages heterodox thinking. Through rich international case studies our goal is to build models to connect theory to observed reality, allowing us to inform potential policy outcomes. This series is both an ideal forum and reference for students and scholars of property rights and land issues.

Land, Indigenous Peoples and Conflict
Edited by Alan Tidwell and Barry Zellen

Beyond Communal and Individual Ownership
Indigenous land reform in Australia
Leon Terrill

Beyond Communal and Individual Ownership

Indigenous land reform in Australia

Leon Terrill

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2016
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Terrill, Leon, author.
Beyond communal and individual ownership : indigenous land reform in Australia / Leon Terrill.
pages cm. – (Routledge complex real property rights series)
1. Aboriginal Australians–Land tenure. 2. Land tenure–Law and legislation–Australia. I. Title.
KU2562.T49 2016
331.3'194089–dc23 2015016283

ISBN: 978-1-138-85391-1 (hbk)
ISBN: 978-1-315-72247-4 (ebk)

Typeset in Sabon
by Wearset Ltd, Boldon, Tyne and Wear

Contents

Figures

Series editor introduction

Real property rights are central to the economy and provide a legal framework for how society (be it developed or customary) relates to land and buildings. Property rights are both institutional arrangements and social relations. We need to better understand property rights to ensure sustainable societies, careful use of limited resources and sound ecological stewardship of our land and water.

Land conflict is all around us – from corporate and political corruption over land dealings in the developed world, to land grab in developing countries, to compromised indigenous property rights, to resource exploitation. At a time where global food security, water security and shelter are paramount, an understanding of property rights is key to sustainability.

Contemporary property rights theory is dynamic and this series strives to engage thinkers who are prepared to step beyond their disciplinary limitations. 'Property rights' is a broad term that is fundamentally about social relations. Real property rights, obligations and restrictions can be found in and change across the full range of human societies, both in time and space. Property rights research has emerged from a broad range of disciplines including (but not limited to) archaeology, anthropology, ethics, sociology, psychology, law, geography, history, philosophy, economics, planning and business studies. What makes this series special is that it facilitates a transdisciplinary approach to understanding property rights and specifically promotes heterodox thinking.

Beyond Communal and Individual Ownership: Indigenous Land Reform in Australia is the second volume in this Routledge series on Complex Real Property Rights. In this first book-length study of the contemporary reforms introduced by Australian governments in the post-*Mabo* era, Dr Leon Terrill provides a meticulous, significant and timely analysis of how these reforms have engineered property rights over Indigenous land and residential communities in a way that increases state property and government control.

Leon is uniquely well placed to craft this volume having previously worked for several years as a senior lawyer with an Aboriginal Land

Council in the Northern Territory, working with Aboriginal landowners on a variety of land rights issues. He was working in this role when the reforms were introduced, and his familiarity with Land Council processes and the circumstances of Aboriginal communities adds considerably to the level of analysis he is able to provide. He subsequently moved into academe, and his doctoral studies explored the reforms as they were being implemented in the Northern Territory of Australia.

Three main arguments are central in *Beyond Communal and Individual Ownership: Indigenous Land Reform in Australia*. Leon first highlights the way in which debate and discussion about land reform in Australia has been compromised by flawed rhetoric, inappropriate language and misguided emphasis. The second argument centres on how the expensive and intrusive reforms have harmed the relationship between governments and Indigenous communities. This harm manifested through a lack of clear policy vision. The third argument is that while alternative approaches to land reform are available, it is first necessary to make a clear and transparent judgement about three matters: market conditions, the desired model of governance and understandings of benefit provision. Prior failings in strategy and implementation on these very complex matters of social engineering impact significantly on the lives and well-being of Aboriginal and Torres Strait Islanders people, and their aspirations in contemporary Australia.

Skilfully drawing on a diversity of perspectives on property rights, *Beyond Communal and Individual Ownership: Indigenous Land Reform in Australia* engages a transdisciplinary approach to articulate the necessity of moving beyond the contested concepts of communal and individual ownership in order to understand the true significance of land reform and property rights over Indigenous land, not just in Australia but internationally. The contrast between the significant research Australian governments have undertaken in promoting pro-poor land reform in the wider Pacific and the dearth of both research and consultation on its land reform policies at home could not be more stark. The book's fresh perspective on land reform and careful assessment of key land reform theories will be of interest to scholars of indigenous land rights, land law, indigenous studies and aboriginal culture not only in Australia but also in any other country with an interest in indigenous land rights and contested real property rights.

Spike Boydell, *General Editor*
Sydney, June 2015

Acknowledgements

I'd first like to thank Sean Brennan, who has been a remarkable supervisor, colleague and friend, and to whom this book owes a great deal. I am also very grateful for the terrific support and feedback I have received from Megan Davis. There are many other colleagues from the UNSW Law School – too many to list – who have helped at different times with feedback, suggestions, comments and encouragement. Thanks to you all.

I learned a great deal about the subject matter of this book during the five years I spent working at the Central Land Council. A lot of people contributed to my education there, particularly the people I met in communities and worked with out bush. I have also learnt a great deal from conversations with Land Council staff in the period since I left, including Virginia Newell, Jayne Weepers, Julian Cleary, Danielle Campbell, Jeremy Dore, Brian Connelly, Siobhan McDonnell, James Nugent and David Avery.

I thank the Lionel Murphy Foundation for their financial support.

I am grateful for the excellent feedback and suggestions I received at an earlier stage from Tim Rowse and Daniel Fitzpatrick. I have also enjoyed fruitful conversations about the topic of this book with a number of informed people over the years, including Nicolas Peterson, Jon Altman, Jonathon Kneebone, Kirsty Howey, Shannon Burns, Trang Dang and Charlie Ward.

Chapter 1 of the book contains one of Jon Altman and Francis Markham's excellent maps on Indigenous land ownership, which is reproduced here with their permission and the permission of the Federation Press (with thanks to Jason Monaghan). That chapter also contains two very useful maps belonging to the Australian Government, which are again reproduced with permission. Special thanks to Annette Berry, Matthew James and Christian Beitzel for their help with this.

My final thanks go to Gerald and Mary, to whom the book is dedicated.

Addendum

In the period between the manuscript being finalised and the book going to print, there was a development of note with respect to township leasing in the Northern Territory. On 31 July 2015, the Australian Government announced that it had entered into a preliminary agreement for a township lease over the community of Gunyangara in Arnhem Land.[1] Reports indicate that the township lease will be held by a body representing the Gumatj clan.[2] This is the first time the Australian Government has agreed to a township lease to an Aboriginal organisation rather than the Executive Director of Township Leasing. Full details of the proposed lease for Gunyangara are yet to be made public and it is not clear, for example, how rent will be calculated, how the relationship between traditional owners and residents will be accommodated or what approach will be taken to the grant of subleases. The agreement does nevertheless appear to signal a shift in the Australian Governmentís land reform policy, as part of its ongoing efforts to secure township leases over all major communities on Aboriginal land in the Northern Territory.

Leon Terrill
Sydney, 18 August 2015

Notes

1 Nigel Scullion, ëGunyangara a Step Closer to Township Leaseí (Media Release, 31 July 2015) http://minister.indigenous.gov.au/media/2015-07-31/gunyangara-step-closer-township-lease.

2 Neda Vanovac, ëArnhem Land Agreement ìAn Important Stepîí, NT News (online), 1 August 2015 http://www.ntnews.com.au/news/national/indigenous-people-want-role-in-nt-plans/story-fnjbnvyj-1227465892599.

Abbreviations

ABA	Aboriginal Benefits Account
ABC	Australian Broadcasting Corporation
ACT	Australian Capital Territory
ALRA	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
ALRA land	Land held under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
ANAO	Australian National Audit Office
ATSIC	Aboriginal Torres Strait Islander Commission
AusAID	Australian Agency for International Development
CLA	community living area
CLA land	community living area land
CLC	Central Land Council
COAG	Council of Australian Governments
CYI	Cape York Institute
DOGIT	Deed of Grant in Trust
EDTL	Executive Director of Township Leasing
HOIL Program	Home Ownership on Indigenous Land Program
ICHO	Indigenous Community Housing Organisation
NGO	non-government organisation
NIC	National Indigenous Council
NLC	Northern Land Council
NT	Northern Territory
NTER	Northern Territory Emergency Response
UN-Habitat	United Nations Human Settlements Programme

1 Introduction
From land rights to land reform

> We will legislate to give aborigines land rights – not just because their case is beyond argument, but because all of us as Australians are diminished while the aborigines are denied their rightful place in this nation.
>
> Gough Whitlam, 1972[1]

> In the Northern Territory 45 percent of land is Aboriginal land [however] being land rich but dirt poor is not good enough. There is no romance in communal poverty. It crushes individual motivation and condemns all to passive acceptance of more of the same. Something has to change and it will.
>
> Amanda Vanstone, 2005[2]

1.1 The shifting consensus

From land rights to land reform

Behind the reforms that this book describes is the story of two shifts in the Australian political consensus with respect to Indigenous people and their rights to land. The first was the shift that led to the belated introduction of land rights, through schemes such as the iconic *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). One of the remarkable things about that Act is that it was enacted with the support of both major political parties. This would not have been possible just a few years earlier. On Australia Day 1972, Prime Minister William McMahon announced that his conservative Liberal–Country Party had approved a plan to make it easier for Aboriginal people to acquire leases over reserve land but opposed any transfer of ownership.[3] This was an improvement on existing practice but fell short of what a growing number of people thought necessary. *The Australian* newspaper, for example, described the measures outlined by McMahon as a 'set of fringe proposals' and lamented the fact that Australia could be pointed to 'as the only country which offers no land rights to its native people'.[4]

It was the Opposition Labor Party under the leadership of Gough Whitlam that first promised a more comprehensive land rights scheme.

Whitlam's stated reason for doing so, as set out in the quotation above, reflected a growing desire among non-Aboriginal Australians to right a historical wrong. Elections held in December 1972 saw the Labor Party form government, and one of Whitlam's first acts as prime minister was to appoint Edward Woodward to conduct a royal commission into the recognition of Aboriginal land rights in the Northern Territory.[5] In the course of reporting, Woodward took the opportunity to set down what he understood to be 'the aims underlying such recognition'. First and foremost, he saw it as 'the doing of a simple justice to a people who have been deprived of their land without their consent and without compensation'.[6]

In late 1975, Whitlam was controversially dismissed by the Governor-General and in the ensuing elections his party were voted out of office. It was one of the most acrimonious periods in Australian political history. Despite this, the new conservative prime minister, Malcolm Fraser, agreed to support legislation to enable Aboriginal land rights in the Northern Territory. The Fraser Government made some changes to the model that the Whitlam Government had developed but they also left a great deal more intact. The parties then voted together to pass the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA),[7] reflecting a shift in the political consensus towards a shared belief that the grant of Aboriginal land rights was the 'doing of a simple justice'.

Of course, this shift was neither universal nor complete. Aboriginal land rights, and later native title, remained contentious. In the ensuing years very different approaches were taken to weighing up the interests of Indigenous and non-Indigenous Australians with respect to land, resulting in the patchwork of schemes that exist across the country today. The key point of tension was the extent of land rights, the amount required to do justice. For example, in 1997, Prime Minister John Howard argued that a recent High Court decision on native title had 'pushed the pendulum too far in the Aboriginal direction'.[8] Within the framework of the new consensus, contestation about the proper ambit of land rights was ongoing.

In 2004, a new and very different type of debate about Aboriginal land rights emerged. This time the terms of debate were set by the conservative Liberal–National Coalition. This was a debate about the *way* Aboriginal land was owned. By then, the ALRA had resulted in around 45 per cent of the Northern Territory becoming Aboriginal land. It was argued that ownership of that land had not delivered sufficient economic benefits to Aboriginal people because it was owned communally. Stating that 'being land rich but dirt poor is not good enough', the Minister for Indigenous Affairs, Amanda Vanstone, directed her department to develop reforms that would enable Aboriginal people to 'draw economic benefits from their land'.[9] Her successor as minister, Mal Brough, was even more emphatic about the need for reform. He argued that together with 'sit down money', the land rights legislation introduced by the Fraser Government had done

'more to harm indigenous culture … than any two other legislative instruments ever put into the Parliament'.[10]

When this debate first emerged, the Opposition Labor Party disagreed with the Coalition's arguments and opposed reform.[11] This began to shift during 2007, and when Labor took office in November of that year they agreed to retain all of the reforms that the Coalition had introduced. As Fraser had done in 1976, the Labor Party made some changes but did not alter the fundamentals. The symmetry is striking. Three decades after the introduction of land rights there had once again been a shift in the political consensus, this time towards a shared belief that Indigenous land ownership in Australia was in need of reform.[12]

About this book

This book considers the reforms that arose out of this second shift in the political consensus. It describes how the reforms came about, what they do, what they mean for Indigenous communities and how they compare to other options. It is also the first book-length monograph on the Australian reforms.[13] While land tenure reform is a new development in Australia, it has a longer history in many other countries and there is by now a well-developed body of international literature about reform and its consequences. In some respects, this book can be seen as an attempt to apply the lessons from that 'international literature' to Australia and the Australian reforms. Chapter 2, which deals with land reform theory and terminology, is drawn almost exclusively from that international literature.

However, the book aims to do more than this. It also clarifies some of the issues that are particular to the reform of Indigenous land in a country such as Australia. The Australian reforms raise different issues to, for example, titling programmes for urban squatters in Peru or even customary land reform in the Pacific. The book describes how Australia fits in and exactly how it differs. It also draws out the nature of certain issues arising out of the Australian reforms that are not addressed in the international literature. One of those issues is the relationship between land reform and welfare reform, which has impacted significantly on the way that land reform has been debated and implemented in this country.

There are three main arguments that unite the chapters of this book. The first is that the way in which Indigenous land reform has been debated and discussed in Australia has been flawed. In particular, the frequent use of a communal–individual ownership dualism has resulted in the wrong issues being debated and pertinent issues receiving too little attention. As the title of the book suggests, it is necessary to go beyond communal and individual ownership to properly understand Indigenous land reform in Australia, particularly as it relates to residential communities. This book moves beyond that binary approach by separating out property systems (state property, communal property, private property, open access) from

property features or characteristics (such as tenure security, alienability, individual and collective ownership). This provides a more useful framework for talking about the array of tenure possibilities, which better captures both the nature of earlier arrangements and the variety of potential reform outcomes.

The second main argument is that there are significant problems with the way in which Australian governments have implemented land tenure reforms over the last decade. This is largely because those reforms were introduced without a clear or coherent understanding of what it was they should do. This has resulted in mistakes being made and has meant that options have been foreclosed without due regard to the consequences of doing so. The reforms have also been expensive and intrusive and have harmed the relationship between governments and Indigenous communities. The third main argument is that alternative approaches to reform are available, but that in order to determine which approach should be taken it is first necessary to make a clear and transparent judgement about three 'cardinal issues': the nature of the market conditions in which the reforms will operate, the desired model of governance to be implemented and the approach being taken to the question of what it is that can make the provision of welfare harmful. These are clearly very complex matters, not easily decided upon. However, as the book makes clear, any land reform model will implement a particular approach to them. It is better to be clear about the decisions that are being made than to allow them to remain unexamined.

The book also has a number of subsidiary objectives. It clarifies the nature of land-use arrangements in residential communities on Indigenous land in Australia and the role of traditional law in those arrangements. In doing so, it explains why it is so misleading to simply describe those communities as places of communal ownership. It provides some basic tools for understanding the relationship between land tenure arrangements and economic development. It sets out clear and workable definitions for key terminology and concepts, such as communal ownership, tenure security and formalisation. It introduces new terminology to better clarify the nature of the recent Australia reforms, such as 'exogenous formalisation'. And it considers what the recent reforms to Indigenous land tenure reflect about the current direction of Indigenous policy in Australia.

1.2 Background to the reforms

The debate

The public debate that led to the introduction of Indigenous land tenure reform in Australia began in late 2004. As the Central Land Council (one of Australia's largest Aboriginal land councils) noted at the time, the debate centred on 'the merits of individual ownership versus communal

ownership of land', particularly with respect to enabling home ownership and economic development in Aboriginal communities.[14] It was, however, about more than just home ownership and economic development. From the beginning, the debate about land reform was also a debate about culture. The introduction of 'individual ownership' was presented as a means of enabling a shift away from a separate or traditional culture, towards a more economically integrated or 'entrepreneurial culture'.[15] Debate about land reform was also understood as forming part of a broader dialogue about the direction of Indigenous policy. The Australian Government said that it was changing the emphasis from engaging with 'the collective Aboriginal community' to engaging directly with 'individuals and families'.[16]

This debate – particularly in the period between 2004 and 2007 – was widespread, intense, significant, divisive and deeply flawed. Describing the pre-existing arrangements in Aboriginal communities as 'communal ownership' is misleading to the point of confusion. Presenting the outcome of reforms as the introduction of 'individual ownership' or 'private property' is in most cases simply wrong. The use of these terms – which were usually left undefined – resulted in several distinct issues being conflated and, to an extent that is in hindsight remarkable, meant that the likely impact of reform was misunderstood. This book describes how one of the more common outcomes of reform has been an increase in government control over land use, the very opposite of what terms such as 'individual ownership' suggest.

This was also a debate with a very concrete outcome. It led to a bipartisan consensus that there is a pressing need for widespread reform to land tenure arrangements in Indigenous communities. To be clear, it is not simply that concerns emerged about the nature of the earlier arrangements, the arrangements that governments and Indigenous residents had relied upon for decades. The shift was more significant. Those earlier arrangements have come to be characterised as fundamentally flawed, and governments – particularly the Australian Government – have spent tens of millions of dollars on permanently overhauling them.

Indigenous land ownership in Australia

When colonisation of Australia began, no formal recognition was given to prior ownership of the land by Indigenous peoples. This remained the approach for the best part of two centuries. Governments did create a large number of missions and reserves, areas of land that were set aside for the use of Indigenous people; however, this arrangement did not convey any ownership rights. This was the situation that prevailed until the mid-1960s, since which time there has been what Altman and Markham describe as an 'Indigenous land titling revolution'. As a result, today Indigenous groups have exclusive legal rights to around 22.4 per cent of the

country.[17] This remarkable shift does require some context. The overwhelming majority of this land – around 98.6 per cent – is located in areas classified as 'very remote'.[18] The impact in areas of higher population, and on land of greater economic value, has been far more contained.

It is nevertheless a significant transformation, and it has come about in two ways. The first is through the grant of statutory land rights schemes such as the ALRA. Australia has a federal legal system, under which power is shared between the Australian/Commonwealth Government and the various state and territory governments. The introduction of statutory schemes has been uneven, with some jurisdictions introducing relatively generous schemes and others none at all.[19] In some jurisdictions, including the Northern Territory, there are multiple schemes aimed at different groups. Altman and Markham identify a total of 34 separate legislative regimes across the country.[20] The result is a patchwork of ownership, with the different schemes varying significantly in terms of their coverage, the strength of the rights that they afford, their ownership structures, the restrictions that they impose upon the use and alienation of land and their funding arrangements.

The second component of this transformation has been native title. In 1992, in *Mabo v Queensland No 2 (Mabo)*,[21] six out of seven judges of the Australian High Court found that the common law of Australia did in fact recognise prior ownership of land by Indigenous peoples, and that this prior ownership gave rise to ongoing rights where those rights had not been extinguished. A key difference between statutory land rights schemes and native title is that while the former are created by parliaments the latter came about as the result of judicial recognition. It quickly became apparent, however, that the recognition of native title required a legislative response. This led to the *Native Title Act 1993* (Cth), which to a considerable extent regulates the actual impact of native title.

Often a declaration of native title results in an exclusive set of rights to the land – which in some respects is then treated as equivalent to, although not the same as, ownership of a fee simple. In other places native title coexists with other property interests, most commonly with a pastoral lease. Where that occurs, the native title holders have a more limited set of rights. More broadly, native title only survives where it has not been extinguished by inconsistent government action and consequently it no longer exists over most of Australia. Extinguishment has been more common in highly populated areas. Conversely, in those areas where strong land rights schemes already existed prior to *Mabo*, such as in the Northern Territory and parts of South Australia, the need for native title was less. Schemes such as the ALRA already gave Aboriginal people a high level of ownership and control, higher in some respects than a declaration of native title could deliver. It is consequently in Western Australia and Queensland, with their relatively weak land rights schemes, that the impact of native title has been greatest. The combined outcome of statutory land rights

schemes and native title is shown in Figure 1.1, with its four maps depicting the Indigenous dispossession and partial repossession of Australia.[22]

Aboriginal and Torres Strait Islander Australians

When the colonisation of Australia began in 1788 there were hundreds of separate nations occupying mainland Australia and the offshore islands. There was no single, area-wide government. Today, the term 'Aboriginal' is used to describe people from the mainland nations (including Tasmania), and 'Torres Strait Islander' to describe people from the nations occupying the islands of the Torres Strait. The term 'Indigenous' refers to Aboriginal and Torres Strait Islander people collectively, though many Indigenous people identify first as belonging to a particular area, clan or language group. It is estimated that there are currently around 670,000 Indigenous Australians, which represents 3 per cent of the total Australian population.[23] This group remains very diverse, not least with respect to the

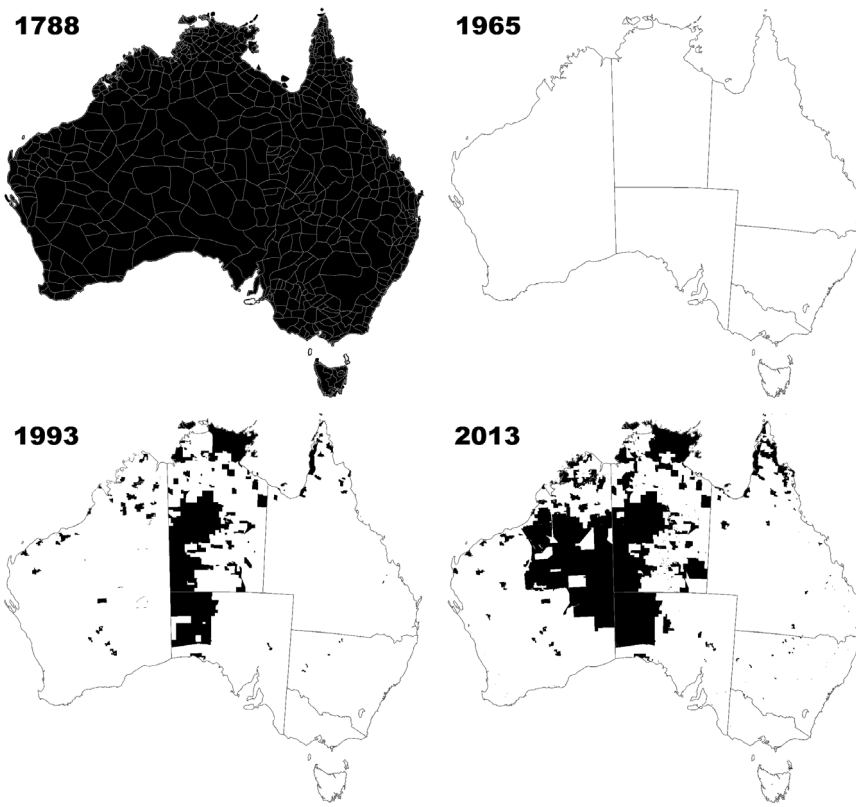

Figure 1.1 Indigenous land ownership over time (courtesy of Altman and Markham).

different ways in which people engage with the non-Indigenous population. The majority of Indigenous people – more than three-quarters – live in either major cities or regional areas.[24] Only 21.4 per cent – or around 142,900 – live in the remote and very remote regions where most Indigenous land is found.[25] It is this group that is most affected by the recent reforms that are the subject of this book.

Scope of the reforms

Not all Indigenous land in Australia has been affected by the recent introduction of land reform. Perhaps the single most important point for understanding the scope of the reforms is that they target the land in and immediately around residential communities, particularly in remote areas. With some minor exceptions, they do not affect the much larger areas of Indigenous land outside those communities. This means that only a small fraction of Indigenous land has been affected, albeit the fraction on which most people live.

This is consequently a book about urban and peri-urban land reform. If the reforms were instead directed at those large areas of land outside communities, it would be a different book. The issues with respect to residential communities are both more contained and more complex. The book describes how until recently almost all land and infrastructure in communities on Indigenous land was allocated under *informal tenure arrangements* that developed at a local level. Those informal arrangements have been to some extent distinct from the land ownership system. This means that in order to understand the recent reforms, their impact and consequences, it is necessary to begin with an understanding of both the underlying land ownership system *and* the informal tenure arrangements that evolved in communities. Both have been affected by the reforms.

As a further comment on the scope of the reforms, it is noted that they target Indigenous land held under statutory schemes. Native title has not been directly targeted. In some places it is affected, in that certain of the reforms will result in its extinguishment, but the focus of reform has been on communities situated on statutory land.

Case study: the Northern Territory

The communities most affected by the reforms are those located on Aboriginal land in the Northern Territory. One reason for this is that the reforms have largely been driven by the Australian Government, which, for historical reasons, plays a more direct role in Aboriginal affairs in the Northern Territory. The ALRA itself is Commonwealth legislation applying only to the Northern Territory and, to date, communities on ALRA land have been the primary focus of reform.

Certain of the reforms also affect communities on Indigenous land in Western Australia, South Australia, Queensland and to a lesser extent New

South Wales. The reforms in those states are less well developed. With the exception of one recent development in Queensland, which is discussed below, they are also similar in nature to the reforms being implemented in the Northern Territory. Consequently, the book takes the Northern Territory reforms as its primary case study. There are several advantages to this. The narrower focus enables a more detailed description of both the reforms and the circumstances in which they operate, while avoiding repetition. And those details matter. One significant problem with debate about land reform in Australia is that too often it has been abstracted from the actual circumstances of communities.

The focus on the Northern Territory begins in Chapter 3, which describes how Aboriginal land in the Northern Territory is owned under both Aboriginal law and under the formal or mainstream legal system.[26] Three types of Aboriginal land are described. The first is land held under the ALRA, or 'ALRA land', which is by far the most widespread. The second is Aboriginal community living area land, or 'CLA land'. Areas of CLA land tend to be smaller and have often been excised from pastoral leases. The third is 'town camp land', which is explained below.

By 2006 – the year the first set of reforms were introduced – there were 41,681 people[27] living in 641 discrete Aboriginal communities across the Northern Territory.[28] All but a handful of these were situated on one of these three types of Aboriginal land. These 641 discrete communities can be usefully divided into two groups. The first are *town camps*, which are housing areas situated on the fringes of towns and cities such as Darwin, Alice Springs and Tennant Creek. There are around 47 town camps across the Territory, at the locations depicted in Figure 1.2.[29]

In the second group are *remote settlements*, which are located further away from the major urban centres. The size of these remote settlements varies considerably, and they can be further subdivided into two groups: larger settlements called 'communities' and smaller settlements called 'outstations' or 'homelands'. In the course of the recent reforms, the Australian Government has identified 73 remote settlements as generally having a population of more than 100. Together with town camps, it is these larger remote communities (rather than outstations or homelands) that have been the focus of recent land reforms. These 73 larger remote communities are illustrated in Figure 1.3.[30]

Chapter 4 describes the nature of the informal tenure arrangements that have evolved in remote communities over the past few decades. This description reveals something that is often overlooked. There are many places around the world where people living on indigenous land have relatively exclusive rights with respect to their houses *under customary law*. That has not been the case on mainland Australia, where traditional laws with respect to land ownership were developed in the context of hunter-gather societies and not permanent residential communities. Individuals did not have exclusive rights to particular areas. And yet today people

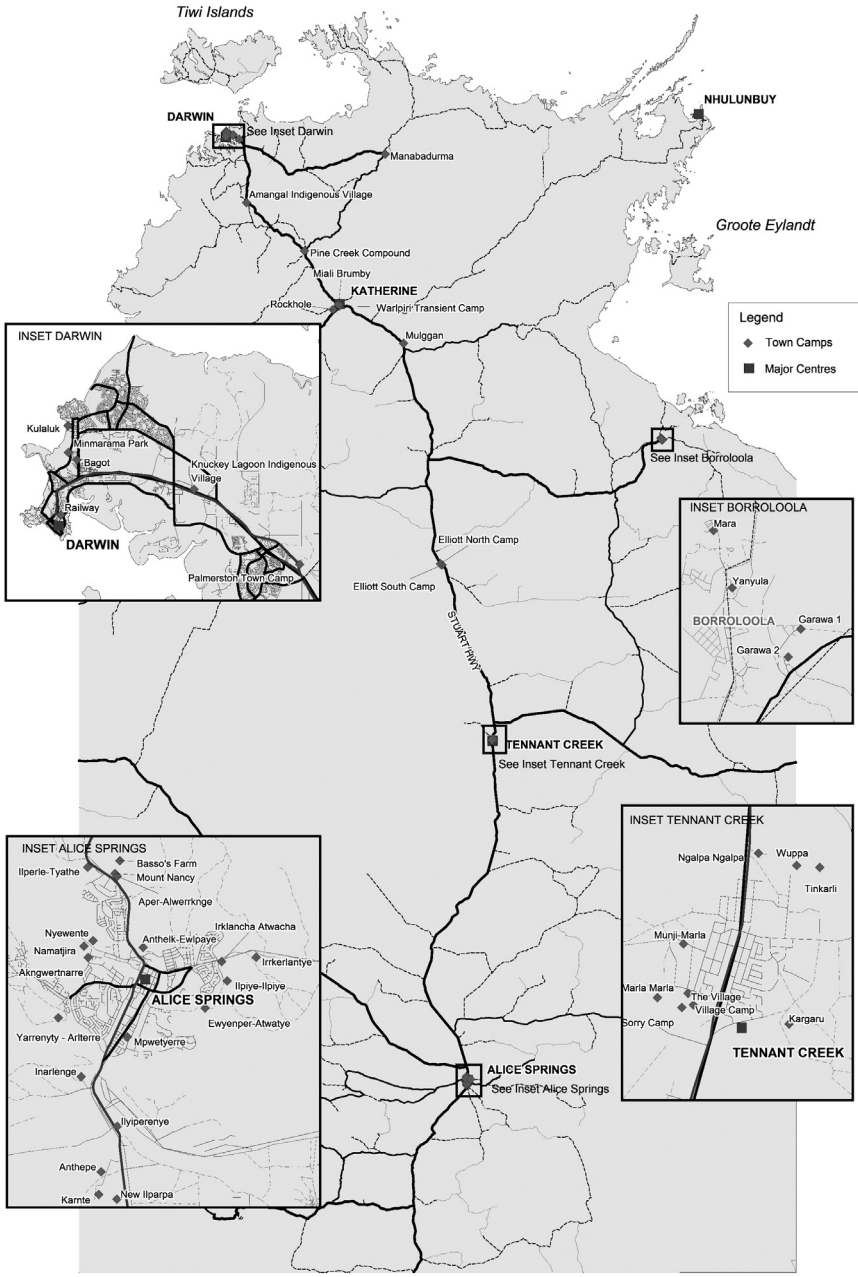

Figure 1.2 Map of town camps in the Northern Territory (courtesy of Australian Government, Department of Prime Minister and Cabinet).

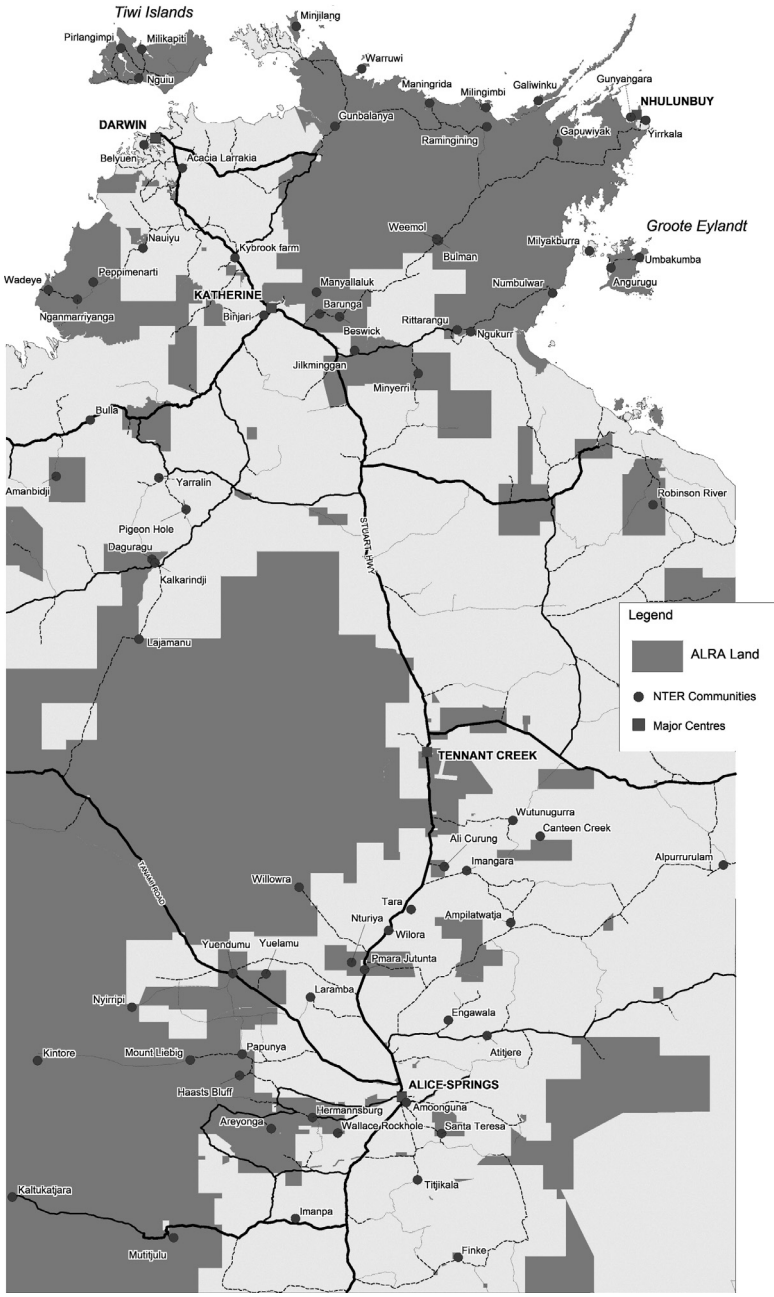

Figure 1.3 The 73 larger remote Aboriginal communities in the Northern Territory (courtesy of Australian Government, Department of Prime Minister and Cabinet).

living on Aboriginal land do reside in permanent communities and often have exclusive rights to their houses. This book explains how this occurs, and what role traditional law plays in that process. It is a mistake to think of the informal tenure arrangements as simply an expression of traditional law, but it is also a mistake to think that traditional law is irrelevant.[31]

Before introducing the reforms themselves, it is useful to have a clearer picture of what these communities look like. In this respect town camps are different from remote communities. Town camps are basically housing areas. Some have additional facilities such as a learning centre,[32] but in most cases the residents shop and seek out services in the nearby town or city. Remote communities necessarily have a wider range of facilities. In addition to housing for community residents, there can be found such services as childcare centres, police stations, schools, recreational halls, churches, land council offices, media associations and outstation resource centres. There might also be found such enterprises as stores, art centres, visitor accommodation, tour operators, garages and contract construction workers. The actual composition of each community varies considerably. This is partly a reflection of their size: even within this group of 73 larger communities, populations range from a little over 100 to around 2,600. While most residents are local Aboriginal people, all communities also have a smaller number of non-Aboriginal residents, most of whom are employees of local enterprises and service providers.

1.3 The reforms and their consequences

The Northern Territory: three sets of reforms

The Australian Government has now made three sets of reforms to Aboriginal land in the Northern Territory. The first was township leasing, which was introduced in 2006. This is a reform particular to communities on ALRA land. It involves the grant of a head lease over community land (that is, the land in and immediately surrounding a larger residential community) to a statutory body, whose role it is to grant and manage subleases over portions of the community. The grant of the head lease itself – the township lease – is voluntary. There are 52 larger communities on ALRA land, and to date only six are subject to a township lease. The second set of reforms was introduced the following year as part of the controversial Northern Territory Emergency Response (the NTER), or Intervention. The NTER included a number of land reforms and affected town camps as well as remote communities on ALRA and CLA land. The majority (although not all) of the NTER measures expired in 2012, and were replaced by a new set of measures called Stronger Futures. The Stronger Futures package included one additional land reform, which is particular to CLA and town camp land.

The third set of reforms was also introduced in 2007, and while it has attracted much less publicity it has become the most wide-ranging. In September of that year the Australian and Northern Territory governments entered into a memorandum of understanding with respect to housing in Aboriginal communities. This agreement embedded the core elements of what have since come to be known as 'secure tenure' policies. Under those policies, funding for certain infrastructure – initially housing, and then a wider range of infrastructure – has come to be contingent on tenure arrangements being formalised through the grant of a lease. Most of those leases are granted to government agencies. For example, before it will provide funding for new houses, the Australian Government requires that all community housing in the subject community be leased to Territory Housing, the Northern Territory Government public housing body. This is a very different reform to the introduction of home ownership (to the limited extent that the latter has occurred). The housing leases have primarily been used to implement a change in housing management, a shift from community housing to mainstream public housing.

The book is primarily concerned with the reforms as they affect remote communities. The more limited reforms to town camps are an important part of the reform context and understanding them provides a fuller picture of the Australian Government's reform policy. For this reason, the book includes a description of town camp land and of the town camp reforms. It is, however, remote communities that are the focus of book.

Beyond the Northern Territory

The Australian Government's reforms to housing are also being rolled out in certain larger communities on Indigenous land in Western Australia, South Australia, Queensland and New South Wales. Some of those states – particularly South Australia and Queensland – have also introduced reforms that make it easier to grant leases over Indigenous land. Such reforms raise similar issues to the Northern Territory reforms. There is, however, a more recent development in Queensland which is different. In 2014, the Queensland Government legislated to allow certain areas of Indigenous land in 34 communities to be divided up and converted to ordinary freehold. All other reforms – including the Northern Territory reforms – have involved the grant of leases and subleases over Indigenous land. While some of those leases and subleases are lengthy, they do not change underlying ownership by Indigenous groups. The Queensland amendments are the first to do so. This raises a broader set of issues, and so a detailed description of the Queensland reforms and their consequences is provided in later chapters.

Consequences of the reforms

Impact on governance

The Northern Territory reforms do not – as it was suggested they would – replace communal ownership of land with individual ownership. Nor do they necessarily enable more secure tenure, as the Australian Government has also argued. For the most part, they are more accurately described as a type of *mandatory formalisation*. However, even this description only partly captures the significance of the reforms. Their short-term effect has been to disrupt, disempower and to some extent antagonise Indigenous landowners and community residents in a manner that was unhelpful and unnecessary. In the long term they have two main consequences. The first is the impact that they have on governance. The meaning of the term 'governance' in this context can be elusive, partly because there are two, interrelated elements. It refers first to the 'formal and informal structures and processes through which a group' – in this case a residential community – 'conducts and regulates its internal affairs as well as its relations with others'.[33] It also describes the way 'government engages with – and governs – its citizens and institutions' in those communities.[34] To put it another way, governance in the context of Indigenous communities refers to both the way communities govern themselves and the way that governments exercise their authority in those communities. These two aspects of governance intersect and diverge at different points. Both have been affected by the recent reforms. Those reforms result in governments playing a more embedded and controlling role in the management of remote communities. Concomitantly, they reduce the scope for communities to govern themselves. In many places, the reforms also result in one group of Aboriginal people – the traditional owners – having an increased say in certain decision-making at the expense of another group of Aboriginal people, being non-traditional owner residents. The exact meaning of this distinction is described in some detail in Chapter 3.

Rent

The second major consequence of the reforms, which emerged later in the reform process and has a more convoluted history, is that a far greater proportion of land users in Aboriginal communities are now paying rent. The rent referred to here is different from that paid by Aboriginal residents of community housing. That rent has always been paid to the organisation responsible for housing management, rather than the landowners, and this has not changed. It is other occupiers – service providers such as the child-care centre, enterprises such as the art centre – who are now far more likely to pay rent, and that rent is paid to landowners.

The impact of this development is complicated. From the perspective of occupiers, rent adds to the cost of doing business in communities on

Indigenous land. As the amount of rent is small relative to other costs, however, the impact of this should not be overstated. From the perspective of landowners, rent is a new form of income, and there are some very different perspectives on how this income should be characterised. Those perspectives are explored in Chapters 7 and 8.

Home ownership and economic development

The aims most often referred to during debate about land reform have been home ownership and economic development. Here, the impact of the reforms has been modest. To accompany its reforms, in 2006 the Australian Government set up a programme to encourage the uptake of home ownership in communities on Indigenous land. As of October 2014, that programme had achieved a total of 25 grants of home ownership across the country.[35] This is despite the expenditure of considerable effort and tens of millions of dollars. Further, the approach to the pricing of housing in some communities may be putting purchasers at risk.[36] The book argues that a focus on the tenure aspects of home ownership has actually impeded the development of more nuanced and effective home-ownership policies.

The book also describes how, in the course of implementing the reforms, the Australian Government's approach to enabling economic development has effectively been inverted. Originally, it argued that land reform would lead to economic development by providing *occupiers* with more economically useful forms of tenure, or by making it easier for enterprises to acquire access to land cheaply. In the course of implementing the reforms it took a different tack. While the reforms have in fact made access to land more expensive, through more occupiers paying rent, the government argues that this enables economic development by assisting *landowners* to better exploit their asset.

Allotment: a different type of reform

Legislation to enable the allotment of Indigenous land in Queensland only commenced on 1 January 2015, and as the process is both expensive and involved it is likely to be some time before the amendments are utilised. When they are utilised it will be an Australian first, as allotment involves a slightly different set of issues to formalisation through leasing and subleasing. There are two elements to this. The first is the impact on underlying Indigenous ownership and the consequences this has for relationships around land use. Allotment puts an end to underlying ownership by the Indigenous group and extinguishes native title. Effectively, this resolves the tension between *traditional ownership* and *residence* in the opposite manner to the Northern Territory reforms. The Northern Territory reforms have resulted in the empowerment of traditional owners at the expense of non-traditional owner residents. Allotment involves a transfer

of ownership to select residents with no ongoing role for the traditional owners.

Second, where tenure arrangements are formalised through leasing and subleasing it is possible for a centralised body to retain some level of control over the ongoing reallocation of land. For example, the terms of a lease can provide that it can only be transferred to certain persons or with landowner consent. This makes it possible to create closed or regulated markets. Allotment leads to ordinary freehold, which can then be transferred to anyone. This raises questions about when or in what circumstances freely transferable forms of property are likely to be more helpful than harmful in the context of remote Indigenous communities. Chapter 8 introduces a framework for considering this issue, and argues that it would be naive to assume that freely transferable forms of ownership are always preferable.

1.4 Overview of the book

Book structure

The book is composed of nine chapters. Drawing heavily from the international literature on land reform, Chapter 2 provides explanations for key land reform terms and concepts, with a focus on those terms and concepts that are most relevant to a discussion of land tenure reform in a country such as Australia. It also identifies the potential benefits and risks of engaging in land tenure reform and describes two theories that have had a big impact on debate about land reform in Australia and more broadly, being evolutionary theory and Hernando de Soto's theory of capital.

Chapter 3 contains two related sections. The first describes ownership of land under Aboriginal law, while the second describes the way Aboriginal land ownership is provided for under Northern Territory law. The first section is drawn primarily from the published research of anthropologists, much of which has been written in the context of land claims. The second section is instead an analysis of the legislation behind ALRA land, CLA land and town camp land, combined with some commentary on how the legislation works in practice. So as to keep the distinction clear, the book uses the term *Aboriginal land tenure* when referring to (understandings of) rights and responsibilities to land under Aboriginal law; and *Aboriginal land* when referring to any form of Aboriginal-specific land ownership under mainstream law.

In Chapter 4, the book departs from existing research by providing a detailed description of the *informal tenure arrangements* that operated in remote communities prior to the recent reforms. During public debate about land reform, those tenure arrangements have often been treated as being synonymous with the land ownership system or as being a type of laissez-faire collectivism. Chapter 4 instead describes how those informal

arrangements were a developed, relatively structured, stable, inexpensive, sometimes effective and sometimes flawed system for allocating land and infrastructure in communities to particular occupiers. It was not the case that everyone simply owned everything, nor did everything belong to the 'traditional owners'. Rather, in response to their changed circumstances and in the course of their interaction with governments, Aboriginal residents had developed a new set of arrangements that better met their modern-day needs.

Chapter 5 considers the public debate about land reform and how it led to the development of a new political consensus. It is described how there have been different periods of debate. The first and most important was between 2004 and 2007. This was the period during which the political consensus shifted and when the use of a communal–individual ownership dualism was at its most prevalent. In 2008, the Labor Government introduced a new and slightly different set of terminology to explain the purpose of land reform, in the form of frequent references to a need for 'secure tenure'. This did not entirely displace the earlier language, but terms such as communal and individual ownership came to be used less often. It also coincided with a broadening of the rationale for land reform. The government argued that land reform was required not just to enable home ownership and economic development, but also to clarify responsibility for the maintenance and upkeep of infrastructure in communities. Since 2013, a re-elected Coalition Government has dropped the use of 'secure tenure' terminology and re-emphasised home ownership and economic development as the rationale for reform.

The reforms and their consequences are described in Chapters 6 and 7. During debate, proponents argued that the reforms would enable new types of relationships in Aboriginal communities. In particular they suggested that the reforms would make it easier for Aboriginal community residents to engage economically with mainstream Australia. There is no evidence of this occurring. More significant has been the impact of the reforms on existing relationships, such as those between governments, community residents and traditional owners. As described above, certain reforms have altered the governance arrangements in communities in a way that has institutionalised a greater role for government and changed the relationship between traditional owners and non-traditional owner residents. The reforms also result in a larger proportion of occupiers paying rent. While these are the two most significant consequences of the reforms, they are not the only ones. These two chapters also detail the impact of the reforms on home ownership and economic development and consider the consequences of housing precinct leases and the shift to public housing.

Chapter 8 then sets out a framework for developing an alternative approach to land reform in remote communities. The framework is presented in two steps. The first step is to identify the main variables, or *what*

needs to be decided upon. The second step is to identify the key issues, or what it is that determines *how* these variables should be decided upon. The book argues that there are 'three cardinal issues' that, above all others, determine the approach that should be taken to land reform. They are an assessment of market conditions, the intended model of governance and understandings of benefit provision. The first two are fairly self-explanatory. The last – understandings of benefit provision – refers to understandings about how and why government benefits might sometimes be regarded as harmful. In recognition of the dominant role that governments play in the economy of remote communities, it is argued that this is one of the key issues for developing a land reform model. This relates to a broader argument that Chapter 8 presents, which is that expectations as to the transformative impact of land reform need to be moderated. New forms of tenure will not transcend the broader economic environment, nor will formalising tenure and centralising decision-making result in the type of order and clarity that governments have suggested. Chapter 9 provides some concluding statements and summarises the book's arguments.

Some important terminology

This book uses a number of terms that are defined as they are introduced, such as 'formalisation', 'tenure security' and 'benefit provision'. In addition to this, there are some words that are used throughout and for which a definition is given here. The first of these is 'culture', a word whose meaning is so notoriously difficult to pin down that Johada argues that 'it is quite practicable and defensible simply to use the term without seeking to define it'.[37] He goes on to suggest that, if clarification is required, it is better to explain the manner in which the term is being used rather than attempt a universal definition. That is the intention here. In this book, the word culture is used to refer to what Trigger summarises as the 'key assumptions (not always articulated consciously) and practices which inform everyday-life'.[38] It is in this sense something dynamic rather than static and relational as well as internal. As Trigger notes, sometimes the word culture is used in a narrower sense to mean 'art and/or associated spiritual beliefs and ceremonies'.[39] That is not the sense in which the word is being used here. Further, when applied to Aboriginal people, the word culture can sometimes take on a more essentialised meaning. Chapter 5 describes how, during debate about land reform, Aboriginal culture was sometimes characterised as something 'traditional' that people can and should discard so as to successfully take their place in the broader Australian community. Indeed, the debate about land reform perpetuated this construction of culture, which was one of the problems with the debate. When this book refers to the distinct cultural circumstances of Aboriginal communities, it refers to the distinct set of assumptions and practices that inform everyday-life as it occurs today.

The term 'Aboriginal community' can be used to describe a variety of groupings of Aboriginal people. In this book it is used to describe larger residential settlements, which in context can be either remote settlements or remote settlements and town camps. Where smaller settlements are intended, the term 'outstation' is used. Accordingly 'community land' refers to the land in and immediately around a residential community, comprising at most a few square kilometres, as opposed to the much larger areas of Aboriginal land that surround many communities.

The term 'secure tenure' has a clear meaning in the research literature on land reform. Used correctly, it is a foundational land reform concept. The term has also been used by the Australian Government in a non-technical manner, both to describe a concept (upon examination several different concepts) and a set of policies. To avoid confusion, when the term secure tenure is used here in its technical sense, it is not in inverted commas. When referring to the term as it is used by the government, inverted commas are employed. Thus the government's policies are referred to as 'secure tenure' policies, and its terminology referred to as 'secure tenure' terminology.

The terms 'Aboriginal land' and 'Aboriginal land tenure' have already been defined above: the former to describe Aboriginal-specific forms of land ownership under mainstream law, and the latter to describe the allocation of rights and responsibilities to land under Aboriginal law. When referring to communities on Aboriginal land, the term 'informal tenure arrangements' is used to describe the arrangements that developed for the allocation of land and infrastructure to particular occupiers. Finally, a distinction is made between two forms of housing in communities. 'Residential housing' describes the housing occupied by Aboriginal community residents and 'staff housing' occupied by the staff of organisations operating in communities, who are often non-Aboriginal. The reason for the distinction is that different arrangements have been, and continue to be, used with respect to each.

Notes

1 Gough Whitlam, 'It's Time for Leadership' (Speech delivered at Blacktown Civic Centre, Sydney, 13 November 1972).
2 Amanda Vanstone, 'Beyond Conspicuous Compassion: Indigenous Australians Deserve More than Good Intentions' (Speech delivered to the Australia and New Zealand School of Government, Australian National University, Canberra, 7 December 2005).
3 William McMahon, 'Australian Aborigines: Commonwealth Policy and Achievement' (Statement by the Prime Minister, 26 January 1972). McMahon also announced $13 million over five years to fund the acquisition of further reserves. See also Peter H. Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of Toronto Press, 2005) 159–63.
4 Editorial, 'A Price on Our Guilt', *The Australian*, 26 January 1972, 8.