



# The past and future of debate about Indigenous land tenure reform

Never Stand Still

Faculty of Law



INDIGENOUS LAW CENTRE

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Current Commonwealth funding includes:

\$17 million over three years for township lease negotiations and land administration measures.

\$10.6 million over four years for pilot projects that demonstrate the benefits of tenure reform



1. Existing debate about land tenure reform has undermined Indigenous claims to territory.



1. Existing debate about land tenure reform has undermined Indigenous claims to territory.
2. There is still a need for debate, just not the debate we had previously.



# Debate about land rights: 1970s – 2000s

Land rights as the doing of justice.



What has happened with native title is that the pendulum has swung too far in one direction, particularly after the Wik decision. And what I have done with this legislation is to bring it back to the middle.

John Howard 1997



# Debate about land tenure reform: 2004 -

## Native Title Report 2005:

[it has come to be argued] that communal ownership must be limited, reduced or removed because it hinders economic development, while individual ownership facilitates entrepreneurship.



I believe there is a case  
for reviewing the whole issue of  
Aboriginal land title,  
in the sense of looking more towards  
private recognition

John Howard, April 2005





The revolution under way in thinking about black land rights in Australia now has tangible shape in the Howard Government's plan ...

to allow individuals to privately own what is now communal property

*The Australian,*  
Editorial, October 2005



# Debate about land tenure reform: 2004 -

From:

Land rights as the  
doing of justice

To:

Land rights as  
flawed economic  
development.



let me make it clear that the  
Government does not seek to wind  
back or undermine native title or land  
rights ...

John Howard, May 2005



sit down money under Gough  
Whitlam and land rights under the  
Fraser Government:

Those two things did more to harm  
indigenous culture ... than any two  
other legislative instruments ever put  
into the Parliament.

Mal Brough, October 2007



The five-year leases: clearly a backward step for economic development.



# Existing attempts to reframe discussion

*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.

Indigenous Economic Development Strategy  
2011



# Existing attempts to reframe discussion

- Indigenous Property Rights Project
- ‘land administration’
- ‘transaction costs’



# Existing attempts to reframe discussion

Township leases can support bankable interests in land and positive economic development outcomes by providing long-term tradable tenure.

Australian Government, 2017





# Future debate

Framing terms of debate is always an exercise in simplification.



# The earlier debate

## Indigenous land

- Different / abnormal
  - communal, etc



## Non-Indigenous land

- Normal
  - private property
  - individual ownership

# The earlier debate

## Non-Indigenous land

- Normal
  - private property
  - individual ownership



# The earlier debate

## Non-Indigenous land

Not uniform:

- variety of forms of tenure
- variety of ownership



# The earlier debate

## Non-Indigenous land

Variety of forms of tenure:

- freehold
- ordinary leases
- pastoral leases, etc



# The earlier debate

## Non-Indigenous land

Variety of forms of tenure:

- freehold
- ordinary leases:
  - short / long;
  - alienable / inalienable;
  - rent free / market rent;
- pastoral leases, etc



# The earlier debate

## Non-Indigenous land

Variety of ownership:

- by individual(s)
- by collectives
- by governments



# The earlier debate

## Non-Indigenous land

Variety of ownership:

- by individual(s)
- by collectives
  - corporations, associations, trusts, coops, social enterprises, etc
- by governments





# Rather than ...

## Non-Indigenous land

- Normal
  - private property
  - individual ownership



# It is ...

individual(s)

freehold

social enterprise

short & long leases

corporation

alienable & inalienable leases

association

rent free & market rent, etc

coop

trust, etc

pastoral leases

government



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individual(s)

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social enterprise

corporation

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rent free & market rent, etc

pastoral leases

government



# And on Indigenous land ...

individual(s)

freehold

social enterprise

short & long leases

corporation

alienable & inalienable leases

association

rent free & market rent, etc

coop

trust, etc

pastoral leases

**communal groups:**  
**traditional or residential**

government



# And on Indigenous land ...

individual(s)

freehold

**inalienable freehold**

social enterprise

short & long leases

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alienable & inalienable leases

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rent free & market rent, etc

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trust, etc

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**communal groups:**  
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**native title**

trust, etc

pastoral leases

**communal groups:**

**traditional or residential**

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# And on Indigenous land ...

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**inalienable freehold**

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**native title**

trust, etc

pastoral leases

**communal groups:**

**informal rights**

**traditional or residential**

government





# In summary

- no binaries
- no normal
- no panaceas



# Under a township lease

individual(s)

social enterprise

corporation

association

coop

trust, etc

**communal groups:**

**traditional or residential**

government

freehold

**inalienable freehold**

short & long leases

alienable & inalienable leases

rent free & market rent, etc

**native title**

pastoral leases

**informal rights**



# In summary

- no binaries
- no normal
- no panaceas



# Framing a more constructive debate

How can debate about ideas best support approaches that are community-driven rather than government-driven?



# Framing a more constructive debate

- We need debate about concrete details



# Framing a more constructive debate

- We need debate about concrete details
- Acknowledge what people are already doing



# Rather than say there must be

individual(s)

social enterprise

corporation

association

coop

trust, etc

**communal groups:**  
**traditional or residential**

government

freehold

**inalienable freehold**

short & long leases

alienable & inalienable leases

rent free & market rent, etc

**native title**

pastoral leases

**informal rights**



# We can ask: What is currently working and not working?

individual(s)

freehold

**inalienable freehold**

social enterprise

short & long leases

corporation

alienable & inalienable leases

association

rent free & market rent, etc

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**native title**

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**traditional or residential**

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# Framing a more constructive debate

- We need debate about concrete details
- Acknowledge what people are already doing
- Need to speak with the people affected



# Framing a more constructive debate

- We need debate about concrete details
- Acknowledge what people are already doing
- Need to speak with the people affected
- Recognise potential for conflict



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