Aboriginal Land Rights: is there a new consensus?

By Leon Terrill

I have assumed [the aim of recognising land rights for Aboriginal people] to be:
(i) the doing of a simple justice to a people who have been deprived of their land without their consent and without compensation.

Edward Woodward, 1974

It has been our responsibility, as legislators over the last 30 years, starting with sit down money with Gough Whitlam and land rights under the Fraser Government. Those two single things did more to harm indigenous culture and destroy it than any two other legislative instruments ever put into the Parliament.

Mal Brough, 2007

One of the remarkable things about the *Aboriginal Land Rights (Northern Territory) Act* (the *Land Rights Act*) is that when it was passed by the Commonwealth parliament in 1976, it was passed with the support of both major parties.

This was an historical development. Aboriginal land rights had emerged as a Labor party issue, and in the lead up to the 1972 general elections it was one of the policies that Gough Whitlam used to present himself as the progressive alternative to the incumbent Coalition government. In the intervening years, Whitlam had been elected to government and then 'sacked' and voted out in highly acrimonious circumstances. By 1976 the level of animosity between the two major parties was high.

Despite this, a new Coalition government lead by Malcolm Fraser agreed to support the *Land Rights Bill* that Gough Whitlam had previously introduced (albeit with some modifications). There had been in effect been a shift in the consensus in relation to Aboriginal land rights, towards a recognition that the grant of land rights was the 'doing of a simple justice'. This was due in no small part to the leadership of those people involved at the time – including Whitlam and Fraser themselves, as well as people like Edward Woodward, who had prepared the two reports which formed the basis for the *Land Rights Act* and whose words appear at the start of this article.

Some thirty years later under a new Coalition government, then Minister for Indigenous Affairs Mal Brough argued that the *Land Rights Act* had done more harm to Indigenous culture that just about any other legislation ever passed by the Commonwealth parliament. One of his primary criticisms was that the *Land Rights Act* provided for 'communal' rather than 'individual' ownership. Brough argued that this had acted as a barrier to home ownership and economic development.

Based on these criticisms, the Coalition government then introduced a number of reforms to Aboriginal land in the Northern Territory. While at the time the Labor party opposed many of these reforms, since being elected to government it has continued to implement the same policies. It appears that the consensus in relation to Aboriginal land rights may once again be shifting, although this time it is the Coalition party that has taken the lead.

But if a new consensus in relation to Aboriginal land rights is emerging – what exactly is the nature of that consensus? And how do you go about understanding the recent reforms? This article provides a brief overview.

The reforms

The land which has been the focus of government reforms to date has been the land in and around remote Aboriginal communities. This is only a small portion of all Aboriginal land, although it is obviously the land on which most people live. The Commonwealth government has introduced three major reforms to this land.

The first was made possible through amendments to the *Land Rights Act* in 2006 which added a new section 19A. Section 19A enables the grant of a township lease (sometimes also called section 19A lease) over an entire community to a government body which is then able to grant subleases over sections of the community.

The second reform was introduced as part of the Northern Territory Emergency Response (also called the Intervention). As part of the Intervention, the Commonwealth compulsorily acquired five-year leases over 63 communities on Aboriginal land. The third reform relates only to housing in Aboriginal communities. Under new rules, the Commonwealth will not fund new housing in remote Aboriginal communities unless all housing areas have been leased to the Department of Housing for a period of at least 40 years.

The effect of the reforms

In the past, most buildings in communities on Aboriginal land have been built without any arrangements being made for the grant of a formal lease. While the *Land Rights Act* allows for such leases to be granted, generally this has not occurred. Instead, there has been a high reliance in *informal* ownership arrangements – that is, where there is an informal understanding about who owns a particular building – but this is not reflected in any legal agreement. One of the main reasons there were so few leases was that the grant of leases is expensive, particularly where a survey plan is required, and for the most part the informal arrangements worked sufficiently well.

The Commonwealth government argues that township leasing provides a fast and easy way to formalise these informal land use arrangements in Aboriginal communities. This is true up to a point – township leases do provide one way of formalising land use arrangements, although there are other ways of doing this. Township leasing also involves control over land use decision-making being transferred from the traditional Aboriginal owners to the government.

It is still a controversial question whether the informal land use arrangements in remote Aboriginal communities were actually acting as a barrier to economic development. A number of commentators have pointed to other, seemingly more significant, barriers such as the remoteness of the communities, the lack of access to markets, low levels of employment and education, and cultural factors.

While the economic impact of township leasing is still controversial, what is clear is that the two subsequent reforms – the five-year leases and housing leases – do not have home ownership or economic development as their aim. The five-year leases impose a further impediment to the creation of any long term or economic tenure. The housing leases are a step away from private home ownership towards public housing, and in fact a house would need to be removed from the lease before it could become the subject of home ownership.

These two reforms instead provide the government with increased control over certain decision making in remote communities.

A new consensus?

Underlying the earlier consensus in relation to Aboriginal land rights was the belief that land rights was first and foremost a question of doing justice. If a new consensus is emerging, it is far more difficult to ascertain what it is.

It is made difficult by the fact that the original justification for recent reforms – providing for home ownership and economic development – is clearly inconsistent with the way in which the reforms have since been implemented. Whatever the strengths and weaknesses of arguments about the economic value of reforms, they cannot explain the entirety of the government's actions. There is clearly another factor at work, in relation to which the economic arguments are secondary.

But what is this other factor? Unfortunately the government has never published an explanation or released a policy which sets out the rationale behind the reforms. The former Minister, Mal Brough, made a number of statements in relation to the *Land Rights Act* which appear to have been deliberately provocative and controversial, such as the quote at the start of this article. However, his public statements express more clearly what he was *against* rather than what he was *for*. He frequently criticised the 'failed policies of the past' but was less clear about what he proposed as an alternative framework for the future.

While the new Minister, Jenny Macklin, has pursued the same policies, she has relied on more considered language. She has, however, also avoided explaining in any detail the reason for the government's reforms to Aboriginal land.

It is obviously significant that these Aboriginal land reform policies emerged at the same time as, and also formed part of, the Northern Territory Intervention. A central theme of the Intervention was the government having greater control over decision making in remote Aboriginal communities, and local Aboriginal people themselves having less. This has certainly been the impact of the land reforms.

It has sometimes been said that the reforms are a government 'land grab'. While it is true that recent reforms have provided for far more government ownership than individual ownership, in my view, the term 'land grab' is not helpful. It gives the impression that the government is motivated by self interest or an interest in acquiring more land. There are real and significant problems affecting remote Aboriginal communities, and it is far more likely that the government is trying to fix these problems than take the opportunity to acquire land.

This does not mean that the government's policies are the right policies, and it is unfortunate that the government has chosen not to set out the reasons for its reform program. This would allow the public, and in particular the communities affected by the reforms, to get a clearer picture of whether a new consensus is emerging between the two side of politics in relation to Aboriginal land rights and what it is that underlies that consensus. ■

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