6

Aboriginal Land Rights in Australia

Neither National nor Uniform

FRANCIS MARKHAM AND HEIDI NORMAN

Introduction

Aboriginal Land Rights: A National Story?

After a near complete dispossession, since 1966 a collective land titling process has been underway across Australia, with significant areas returned to Indigenous Peoples. Today, Indigenous Peoples have recognized land interests to over more than half the Australian continent – nearly four million square kilometers, with more under claim. Estimates suggest that Indigenous Peoples hold exclusive possession of native title and fee simple to around 26 percent of Australia's landmass. When non-exclusive native title is included, that number rises to 54 percent of the country and includes national parks, conservation areas, and vast expanses of the continent. However, Aboriginal land restitution,[1] when considered nationally, is uneven and fragmented, with little consistency in the rights that are afforded, or in the amount of land returned.

This spatial heterogeneity is sometimes elided in a rush to celebrate land restitution. For example, in the National Agreement on Closing the Gap, all Australian Governments and the Coalition of Peak Aboriginal and Torres Strait Islander Organisations agreed to a target increasing the area of "Australia's land mass subject to Aboriginal and Torres Strait Islander people's legal rights or interests" by 15 percent (Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, 2020). The notion of "legal rights and interests" is not

[1] We use the term "land restitution" to cover both the *granting* of land to Indigenous Peoples by governments through various land rights schemes and the *recognition by the state* of native title, a form of title based on the laws and customs of Indigenous Peoples that predates colonization and has been continued despite colonization.

https://doi.org/10.1017/9781009521581.009 Published online by Cambridge University Press

further specified in the agreement, and in practice will likely be met by the recognition of limited, non-exclusive rights of access and use to traditional owners over pastoral leases. Other accounts and spatial mapping of land restitution have tended to gloss over the differences among land rights regimes. For example, Altman and Markham (2015), in mapping Indigenous landholdings in 2013, categorized land into three groups: exclusive possession native title, non-exclusive possession native title, and a third catchall category termed "land rights lands and reserves." While they noted the heterogeneity among land rights regimes (and the content of native title determinations), this is bracketed in favor of an abstracting move that obscures jurisdictional differences.

This chapter details the fragmented nature of the last sixty years of Aboriginal land rights across Australia and offers an account as to how and why this came about. Standard accounts of the spatial distribution of land rights stress "remoteness" – or the closeness of non-Indigenous settlement, itself a function of colonization history and the value of the land to the settler economy – as the primary determinant of the presence or absence of land restitution (e.g., Jackson, 2017; Young, 1992). Other accounts focus on the agency of Indigenous activists and their networks of allies as determinative of land restitution outcomes in Australia (e.g., Foley & Anderson, 2006). In this chapter, we do not aim to dispute these inarguable propositions. Rather, we aim to draw attention to a further factor that has influenced the pattern of Indigenous rights and interests in land restitution across Australia: the federal dimension in Indigenous public policymaking.

Across the federation of states and territories that make up the Australian Commonwealth, the legislative responses to enduring Indigenous land demands have taken many different forms. What sits underneath the post-1966 land restitution are varied federal and state-based laws, and from 1992, recognition of native title rights and interests by the High Court, and their subsequent codification and restriction by the Commonwealth Government. Any account of Indigenous land rights therefore reflects these distinct and overlapping bases for land recognition. Multiple arrangements have developed over time in different jurisdictions that variously recognize Indigenous interests and rights in their land, and sometimes offer political recognition and cultural heritage protection. Accordingly, the "national story" of the post-1966 Indigenous land titling is inevitably a federal one, based not only on the idiosyncratic nature of Indigenous land rights campaigns in each state and the particularities of state government responses, but also on the disposition of various

Commonwealth Governments to centralism in public policy. Indeed, we argue that the story of land rights is at least in part a story of the shifting place of Indigenous public policy within the federal politics of Australia. The patchwork of land returns that we now see and will explore later in this chapter results from the intersection of not just Indigenous-settler politics, but also intergovernmental politics within the federation and the tendency of Labor governments and the High Court toward centralism in the federation of Australia (Galligan, 1987).

Land Rights as State and Territory Business, 1960s–1972

In the 1960s, Aboriginal activism thrust the issue of Aboriginal land rights onto the national political agenda, paralleling and engaging with global movements for decolonization and land reform, as well as the civil rights movement in the United States (Cooms, 2012; Piccini, 2019). At that time, government policy toward Indigenous Peoples in Australia was largely left to the states. It was only in the territories where the Commonwealth maintained a role in Indigenous policy and administration matters, especially in the Northern Territory, where the Australian Government acted as a regional government (Sanders, 2013).

Indigenous land rights in the 1960s was seen as a matter for the states. In some parts of the country, Indigenous Peoples lived on (and were often confined to) specifically designated land "reserved" by state and territory governments for Indigenous use. But reserves existed only so long as it pleased settler governments: they could be and were often revoked by state governments, a denial of land that often provided the spark that ignited Aboriginal land rights movements. It was perhaps unsurprising then that the first legislative reforms in response to calls for Aboriginal land rights came from the states, and dealt with reserves, specifically in South Australia and Victoria.

Accordingly, the first statutory Aboriginal land rights scheme in Australia was introduced in 1966 by the newly elected South Australian Labor Government. Speaking on the passage of the legislation, Don Dunstan – a former non-Indigenous advocate for Aboriginal rights and newly appointed Minister of Aboriginal Affairs – acknowledged the harm and alienation Aboriginal peoples experienced due to colonial dispossession (Rowse, 2012). The *Aboriginal Land Trust Act* 1966 was aimed at reparative objectives, creating an organization controlled by Aboriginal peoples, tasked with holding and managing former Aboriginal reserves for the benefit of Aboriginal peoples.

However, Victoria became the first state to grant freehold title to communities themselves, allowing them to own their land outright. In Victoria, the revocation of Aboriginal reserves had long been a cause for Aboriginal organizing and activism (Broome, 2005; Moore, 1981), with almost all of the 1,000 square kilometers of lands reserved for Aboriginal purposes revoked over the century prior to 1960. By 1960, only two Aboriginal reserves remained, at Lake Tyers and Framlingham, both home to small communities. The long-serving Bolte Liberal government had planned to revoke these final reserves over the course of the decade. However, the Black Power movement emerging in Victoria in 1960s under the auspices of the Aborigines' Advancement League was able to successfully fight off these proposals. In 1970, the Bolte government passed idiosyncratic legislation – the *Aboriginal Lands Act* 1970 – to grant these two small parcels of land in a freehold title to these communities, in two separate trusts.

These early moves toward distinctive state responses to land rights coincided with a major shift in federal arrangements for Indigenous public policy that commenced after the 1967 Referendum. At the start of the 1960s, the six states were responsible for Indigenous policy within their borders, with the Commonwealth having played an equivalent role in the Northern Territory since 1911. Dissatisfaction with this federal allocation of responsibility had been developing throughout the 1920s and 1930s, with Aboriginal activists campaigning for rights and white "humanitarians" pushing for a federal takeover of Indigenous affairs (Davis & Williams, 2021; Holland, 2019). It ultimately took two attempts to see the constitution changed to this end, first as part of a failed overhaul of Commonwealth-state relations in 1944 (Fox, 2008) and ultimately as part of a successful constitutional alteration referendum in 1967 (Davis & Williams, 2021).

By the early 1970s, no land reform had been attempted by the Commonwealth, despite the expectations raised by the 1967 Referendum, and it seemed that the Coalition government had no intention of using its new constitutional rights or acting on the mandate of the referendum to do so. Events in the Northern Territory forced the hands of the Coalition government in its dying days. In 1971, a legal challenge by the Yirrkala people regarding the excision of their reserved land for a government-approved bauxite mine, against the asserted interests of the Yolngu people, was unsuccessful (see Nikolakis, Chapter 1, this book). Pressure mounted on the government for a statutory response to the

failure of the legal system to provide for land rights. But on Australia Day in 1972, Prime Minister McMahon's long-awaited announcement of the Coalition government's new land rights policy was a bitter disappointment for campaigners. Not only did the McMahon government oppose the Yirrkala petition to stop this excision, but it also announced that it would not legislate Aboriginal land rights in the Northern Territory. The government instead supported leasing a limited amount of land, subject to application and ministerial approval. The government also continued some of the key features of authoritarian welfare regime and left the Northern Territory's Aboriginal Affairs administration unchallenged (Dexter, 2015). This was despite significant momentum for change and some evident shift in the prevailing assimilation policy in southeastern Australia.

The Australian Labor Party (ALP), propelled by the "Yirrkala problem" in Arnhem Land and the Gurindji's walk-off from Wave Hill, had begun developing a position on Aboriginal land rights in 1963. Their Aboriginal Affairs Committee recommended what became a forerunner of the land rights response and the land purchase fund we write more about below. While these changes were developing, including ALP conversations with the Commonwealth's Council for Aboriginal Affairs (CAA), the three-member group appointed immediately after the 1967 Referendum to advise the Commonwealth's new policy role, the conservative Liberal and National Country party government maintained an official policy of assimilation. Aboriginal land rights were nowhere on Coalition government's agenda (Norman, 2015).

Following Prime Minister McMahon's 1972 Australia Day announcement of a much-promised new direction in Aboriginal Affairs, a group of young Aboriginal men, then living in and around Redfern, were compelled to drive overnight to Canberra. There in protest, they erected beach umbrellas and later tents and camped on the manicured lawns opposite the Australian Parliament, deploying a not unfamiliar form of Aboriginal housing: the "Tent Embassy" dramatically registered the effects of being made alien in one's own country and announced a seismic shift in Aboriginal and Australian politics. Optimism for change following a referendum in 1967 – cast in terms of equal rights but in fact about giving the Commonwealth the power to make laws for Indigenous Peoples – was already characterized as the stuff of "fools and dreamers" (Walker, 1969). Demands for Aboriginal rights from the far north to the southern island grew louder in response to the unfulfilled promise of

1967, and attracted a growing band of supporters in new networks of solidarity.

Although Prime Minister McMahon's unsatisfying announcement related specifically to the Northern Territory, it mobilized Kooris and Murris in Redfern, Sydney, and catalyzed a national protest movement. Many thousands more over the coming months joined a growing appreciation of Aboriginal land rights, with unique local claims shaped by a history of colonialism and dispossession that began to conceptualize land rights variously as property, rights, and lore, and as central to the ability to exercise self-determination. The Tent Embassy protest first propelled the emergence of a shared land rights claim across very different political geographies and sparked a growing awareness among Australians of the demand for land rights.

Aboriginal peoples across tropical northern Australia encountered the invasion of their lands more than one hundred years later than in the southeast, and in different circumstances that saw a fragile co-existence over territory granted as pastoral leases. In the south, from the 1960s onwards, Aboriginal reserve land was under threat of revocation as "inclusion" – a version of assimilation was pursued that included the promise of town housing for Indigenous Peoples. In New South Wales (NSW) and elsewhere, the security of reserve lands, alongside the protection of sacred sites, was a leading concern for political organizing by Indigenous Peoples (Goodall, 2008). Placards from the Tent Embassy revealed an evident shift in the scope of land demands over the course of the few months between January 1972 and mid-1972. Over the course of several months, the demands for land rights connected over a much larger space and were imbued with claims of spiritual attachment captured by the phrase "Ningla-Ana," we are "Hungry for our Land" (Cook & Goodall, 2013; Norman, 2015). The new national politics eschewed the assimilation discourse that inhered in the 1967 referendum citizenship campaign in favor of cultural identity connected to land.

McMahon's Liberal government met the new politics with violent disavowal. The police were repeatedly ordered to dismantle the Tent Embassy over the months that followed. Images of excessive numbers of police marching in formation across the front of the Parliament House, careering ambulances and police wagons, followed by a knock-down and drag-out mayhem, reached national audiences via the relatively new family ritual of viewing the evening news on television. Not a single lease promised by McMahon in his Australia Day address was delivered before the election.

Centralism Interrupted, 1972–1975

The Opposition Labor Party had long been more receptive to Aboriginal demands. Visiting the Tent Embassy, Gough Whitlam, the Leader of the Opposition, showed support for and comprehension of the new politics. At the November 1972 Labor Party policy launch, Whitlam announced his program to an already electrified Blacktown civic center audience. "A rightful place in this nation" was both Whitlam's challenge and promise to a nation coming to terms with its colonial past, projecting its independent future, and reckoning with ancient peoples who not only refused to disappear but were contesting the legitimacy of government and the interests of capital accumulation.

The Whitlam Labor Opposition's promises in Blacktown were radical and progressive – but they also represented a watering down of the national ambition of the Australian Labor Party platform. No doubt capitalizing on the national attention focused on the Northern Territory – not least by Aboriginal activists at the Tent Embassy – Whitlam promised that a system of land rights would be established in the Northern Territory should a Labor government be elected. Specifically, Whitlam promised legislation that would vest in Aboriginal communities in land "for aboriginal use and benefit a system of aboriginal tenure based on the traditional rights of clans and other tribal groups" (Whitlam, 1972, p. 30). In doing so, Whitlam narrowed the national ambition of the Labor Party platform of 1971 and its promise of inalienable title and full mineral rights for all "Aboriginal communities that demonstrate a strong tribal structure" (Young, 1971, p. 31). Beyond the Commonwealth's jurisdiction in the Northern Territory, Whitlam promised much less, the creation of an Aboriginal Land Fund, to acquire lands for "... significant continuing aboriginal communities" (Whitlam, 1972).

Eleven days after Whitlam was elected as prime minister in December 1972, a commission of inquiry, known as the Woodward Commission, was announced to recommend ways to achieve Aboriginal land rights. The Whitlam government announced that it would legislate land rights first in the Northern Territory, where the Commonwealth was responsible for legislation and public administration prior to self-government in 1978. The Commonwealth was leading the way, not by centralist coercion but by example.

This contrasted with the Whitlam government's approach to other questions of Indigenous public policy. There it was enacting a suite of

reforms – including the establishment of the National Aboriginal Consultative Committee (NACC), the creation of a mechanism for Aboriginal organizations to form and pursue community social and economic aspirations, the creation of a separate department for Aboriginal Affairs, and the enactment of a legislative prohibition on racial discrimination – that amounted to an unprecedented Commonwealth intervention into Indigenous policy, previously a state domain (Bennett, 1988; Sanders, 2013). In quick time, the government, with the CAA, made significant changes in Aboriginal Affairs policy that had proven impossible under the previous government, comprised as it was of hostile bureaucrats and ministers who stubbornly refused to depart from assimilationism. That policy was swiftly abandoned in favor of so-called "self-determination." The old Ministry for the Interior – that bastion of assimilation and authoritarian welfare, which held sway in the previous Cabinet – was abolished. Barrie Dexter from the CAA was installed as head of the new Department of Aboriginal Affairs, and Gordon Bryant appointed as the responsible minister. By 1975, the election promise of a legislative prohibition for discrimination on the grounds of race had been implemented through the enactment of the *Racial Discrimination Act* 1975. This Commonwealth leadership in Indigenous policy was part of Whitlam's centralist approach to the question of federalism, described in his 1972 election speech as "a national endeavour to expand and equalise opportunities for all our people" (Whitlam, 1972, p. 32).

In July 1974, the Whitlam Cabinet accepted most of the recommendations of the two reports produced by the Woodward Commission on land rights and issued drafting instructions for legislation affecting Aboriginal land claims in the Northern Territory. The first report (April 1973) had recommended the federal government set up a Central Land Council and a Northern Land Council in the Northern Territory, each to represent the distinct central and northern parts of the jurisdiction. The second report drew on submissions provided by the new land councils and provided a "blueprint" for an Aboriginal land rights regime in the Northern Territory. Among other things, the report recommended that:

- Reserve lands be returned to Aboriginal corporations (known as Land Trusts) in fee simple through an inalienable and/or perpetual form of land title.
- Regional Land Councils be established to support Land Trusts and to advance the interests of traditional owners.

- A process be established to allow Regional Land Councils to make claims based on traditional ties to "vacant" Crown lands.
- Land be acquired and returned to Aboriginal peoples by an Aboriginal Land Commission (with no cash compensation to be paid for Aboriginal peoples whose traditional lands cannot be returned).
- Development on Aboriginal land to take place only with the consent of the relevant Land Trust.
- Entry to Aboriginal land by settlers be regulated by a permit system.
- Minerals remain the property of the Crown, but traditional owners have the power to prevent mineral exploration on their lands.
- A royalty equivalent payment of 2.5 to 3.75 percent of the selling price of the mineral, less costs of treatment and transport, be paid to Aboriginal peoples through the Regional Land Councils.

Woodward's second report essentially provided a roadmap for the implementation of Whitlam's agenda promised in 1972 but recommended that full mineral rights remain with the Crown rather than Aboriginal landowners. While Woodward's second report was welcomed in some circles, the newly formed NACC was disappointed by the narrow geographical scope of the government's ambition. At its May 1974 meeting, the NACC resolved to reject Woodward's second report and called for the government to establish Commissions for Land Rights in the six states, as well as offer cash compensation for those whose traditional lands could not be redeemed (Hiatt et al., 1976).

The Whitlam government's land rights response was not entirely focused on the Northern Territory. By December 1974, Woodward's recommendation regarding the purchase of pastoral leases was already on the way to implementation, delivering on a promise in Whitlam's 1972 Blacktown speech. Enacting the *Aboriginal Land Fund Act* 1974, the Commonwealth created a statutory authority with a budget of $5 million for ten years to purchase property on the market in the states and territories, which could then be held on behalf of traditional owners or Aboriginal groups with long-standing ties to the land (Palmer, 1988). Significantly, the Aboriginal Land Fund Commission had a national focus and responsibility that went beyond the Northern Territory.

Whitlam had expressed an intention to extend his centralist approach to national Aboriginal land rights legislation, but when his government was dismissed in 1975, the Aboriginal Land Rights Bill was yet to be passed by the Senate. While the *Aboriginal Land Rights (Northern Territory) Act* 1976, which implemented most of Woodward's

recommendations, was eventually passed in a somewhat watered-down form by the Fraser coalition government, the legislation was limited to the Northern Territory.

Fraser's "New Federalism" and Commonwealth Deference to the States, 1976–1983

Two different approaches to the federal question in land rights policy were to play out over the next two decades. While Fraser's coalition government came to power with a policy of passing the *Aboriginal Land Rights (Northern Territory) Act* 1976 more or less in line with Woodward's recommendations,[2] beyond that, the land rights agenda would be left to the states. A coercive strategy of compulsory acquisition by the Commonwealth was not contemplated. Instead, Fraser's approach to Commonwealth–state relations, known as "New Federalism," emphasized negotiation as the preferred method for managing intergovernmental relations. He deliberately avoided antagonism or confrontation with the states (Weller, 1989). The Coalition's position was that outside the Northern Territory, mining and development should continue on existing Indigenous reserves "but under strict governmental control which would reflect the needs and views of the aboriginal people" with the "rights of the Aboriginal people where the land surface and use are concerned . . . fully protected" (Liberal Party of Australia & National Country Party of Australia, 1976, p. 53). The main active role foreseen by Fraser for the Commonwealth outside the Northern Territory was through funding the acquisitions of the Aboriginal Land Fund (Liberal Party of Australia & National Country Party of Australia, 1976), a role that was drastically curtailed when funding to the ALFC was dramatically frozen by Fraser in his austere first budget.[3]

In contrast, the Labor Party's approach to federalism was for uniformity and a centralized role for the Commonwealth in coercing potentially

[2] The primary distinction between the land rights legislation proposed by Labor in 1975 and the one enacted by the Fraser government in 1976, as stipulated in the *Aboriginal Land Rights Act* (NT) 1976, is that the latter did not mandate Aboriginal consent for mining activities on petroleum leases filed before November 1976 or within the Ranger uranium region.

[3] Expenditure by the Aboriginal Land Fund Commission was reportedly $2.02 million in 1975–76, and then cut to zero in 1976–77 by the incoming Fraser government, before being restored to sums of $0.75 million in 1977–78, and $0.54 million in 1978–79 (West, 1980, p. 61).

intransigent states. Whitlam, running as Labor Leader of the Opposition in 1977, maintained his promise to pursue land rights "in the states" even against the wishes of state Premiers, in order to discharge the responsibility given to the Commonwealth during the 1967 Referendum (Whitlam, 1977). The ALP's platform from 1977 professed that "the principles and recommendations of the Aboriginal Land Rights Commission (Woodward Report) should form a pattern for legislation. An Australian Labor Party government will . . . seek the co-operation of State Parliaments to adopt similar legislation and, only where the States fail to co-operate, would an Australian Labor Government introduce legislation to implement those principles and recommendations" (Combe, 1977, p. 113).

The limits of the Fraser government's New Federalist strategy of negotiation rather than coercion quickly became apparent over his eight years in power. Perhaps unsurprisingly, different states took radically different trajectories in their approaches to Aboriginal land rights, sometimes shifting in their approaches over time. As we will see, intransigent state administrations had ample opportunity to obstruct the land rights agenda.

In South Australia, the pioneer for land rights nationally, successive Labor and Liberal governments proved willing and able to implement much of the Woodward vision. Most of the Aboriginal reserve land in the state had not been returned under the *Aboriginal Lands Trust Act* 1966 (Tedmanson, 2016). In particular, the North West Aboriginal Reserve lands traditionally belonging to Pitjantjatjara, Yankunytatjara, and Ngaanyatjara peoples remained under settler control. Inspired by developments across the border in the Northern Territory, in 1976 Anangu formed the Pitjantjatjara Council to campaign for land rights. The Pitjantjatjara Council's demands were receptively heard by Don Dunstan, now the state Premier. The Pitjantjatjara Land Rights Bill, introduced in 1978, would provide for "a form of tenure consistent with that now being proposed in the Northern Territory as a result of Commonwealth initiatives" (Tedmanson, 2016). After the sudden resignation of Premier Dunstan, and a change of government, an amended Bill was passed that was largely unchanged, aside from the lessening of Anangu control of mineral exploration. The *Maralinga Tjarutja Land Rights Act* 1984 established a similar regime for lands in the southwest of the state, resulting from another Aboriginal campaign (Hiskey, 2021). However, no scheme was put in place for Aboriginal claims to Crown land outside of bounds of the areas outlined in the three South Australian acts.

NSW took a different path in its legislation of statutory land rights during this period, arguably demonstrating the potential of Fraser's hands-off approach to federalism to deliver statutory land rights tailored to the specific needs of different jurisdictions. Activism for land rights in NSW had been long in the making, but blossomed with the establishment of the Tent Embassy by Kooris and Murris in Canberra and as resistance grew to the revocation of Aboriginal reserves in NSW (Norman, 2015). Partly in response to pressure from the embryonic NSW Aboriginal Land Council, and partly in response to the party's national policy, the NSW Labor Party – in government since 1976 – adopted a land rights policy at its 1978 state conference. First proposed through an inquiry report in 1980, and subsequently watered down through green papers and cabinet processes, the once-radical proposal for land rights in NSW was met with significant resistance from Aboriginal activists in the state.

When finally enacted, the *Aboriginal Land Rights Act* 1983 (NSW) was an innovative departure from the Woodward model, adapted to the very different circumstances facing Aboriginal peoples in NSW. It established a tiered structure of statutory local, regional, and state-level land councils. As recommended by the Woodward Report, remaining reserves were transferred to the relevant land councils, and a claims process was established to allow certain "claimable" Crown lands to transfer to land councils, mostly in the form of freehold title.[4] A key point of difference with the Woodward model was the reparative approach adopted in NSW. The approach to land repossession was compensation for lost land and colonial dispossession, considering both pre-colonial and historically formed networks among Aboriginal peoples. Membership in Local Aboriginal Land Councils (LALCs) is open to all Aboriginal and Torres Strait Islander peoples, based on current residence or cultural connection. Further, the Act provided for a measure of financial redistribution, with a percentage of land tax revenue in NSW transferred to an Aboriginal-controlled capital fund for a period of fifteen years. The Act also provided a strong form of mineral rights, with the rights to most minerals vested in land councils and LALCs generally being able to withhold consent for mining on their land. However, the realization of

[4] Except in the Western Lands Division, where perpetual leases may be granted instead of freehold title. Since 1990, land granted or claimed under the Act can be alienated under certain conditions.

these rights has been frustrating in practice, with less than 1 percent of land in the state returned under the Act.

Whereas Labor Governments in South Australia and NSW took the Woodward model of land rights forward, similar ambitions were frustrated in Victoria. After John Cain led the Labor Party to its first election victory in 27 years without an upper house majority, it was sometimes remarked that Labor was "in government, but not in power" (Coghill, 1997). In March 1983, the Victorian government, led by John Cain's ALP administration, introduced the Aboriginal Land Claims Bill, which aimed to provide a process for the claiming of various types of public land by Aboriginal groups based on their historical association with the land, traditional rights and needs, or as compensation for dispossession (Victorian Government, 1983). Once a claim was approved, the land would be granted in freehold title, subject to certain conditions such as restrictions on the sale and transfer of the granted land and specific guidelines for mining activities. However, the Bill faced controversy regarding compensation for lost land and, under pressure from the Aboriginal community, its passage was delayed pending a report from an Aboriginal Task Force. Ultimately, the Cain government was unable to secure enough support in the upper house to pass the 1983 Aboriginal Land Claims Bill (Broome, 2005). Instead, five more highly specific acts were passed to transfer particular parcels of land to Aboriginal peoples. At one point, the Victorian Labor government circumvented the upper house entirely, enlisting the Commonwealth to pass the *Aboriginal Land (Lake Condah and Framlingham Forest) Act* 1987 (Commonwealth), which returned two further specific parcels of former reserve land to Aboriginal peoples. However, a systematic land claims process was not reconsidered in Victoria for several decades to come.

It was in Western Australia and Queensland, however, that the limitations of Fraser's decision to leave land rights to the states became most apparent. In Queensland, the state government had long exercised unfettered control over reserves and oppressive supervision of their Aboriginal residents. In the 1950s, the discovery of bauxite on the Weipa reserve saw the Queensland Government all but revoke the 5,870-square kilometer reserve in favor of a mining company. By 1962, the remainder of the reserve was revoked to grant a mining lease over the remainder of the reserve close to Mapoon, with protesting Aboriginal residents forcibly relocated by the Queensland police, who burnt their houses to prevent their return (Anderson, 1981). With land rights coming on to the agenda nationally, the Country Party government led by Joh Bjelke-Petersen

had, in September 1972, decided to oppose "proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines" (Palmer, 1988, p. 67). Accordingly, the Queensland government actively sabotaged the purchase of leasehold properties by the Commonwealth's Aboriginal Land Fund Commission. In particular, it attempted to block the transfer of the Archer River and Glenore pastoral leases to Aboriginal traditional owners, first by failing to approve their transfer, and then, in the case of Archer River, by resuming the land as a national park. The resulting public confrontation between the Bjelke-Petersen and Fraser governments was highly embarrassing for Ian Viner, the minister of Aboriginal Affairs, and had two important consequences. First, Viner, frustrated by the independence of the Aboriginal Land Fund Commission, which he saw as responsible for mismanaging the relationship with the Queensland Government, announced the commission's abolition in 1978 (Palmer, 1988). Second, this created the space for the High Court of Australia to set land rights policy, with a successful challenge to the resumption of Archer River in *Koowarta v Bjelke-Petersen* in 1982 ultimately upholding the constitutional validity of the *Racial Discrimination Act* 1975 (Commonwealth) and its ability to override discriminatory state laws. Where the Fraser government was engaged in negotiation to enact its land rights agenda, the High Court was acting in a centralizing manner to enhance Commonwealth powers.

Similarly, the Bjelke-Petersen government frustrated the Fraser government in its attempts to provide Aboriginal control over mining on Aurukun reserve (Brennan, 1991; Nettheim, 1981). When no negotiated agreement could be reached between the Queensland and Commonwealth governments, the Commonwealth attempted to override state legislation and hand control of reserves to their Aboriginal residents. This move was side-stepped by Bjelke-Petersen, who degazetted the Aurukun reserve and reclassified it as a shire, outside of the control of the new Commonwealth legislation. By 1978, the Queensland government had succeeded in maintaining control of the shire, with Fraser and Viner choosing to back down rather than risk further confrontation with Bjelke-Petersen. This did little to reassure Aboriginal activists, who by 1982 were planning to disrupt the Brisbane Commonwealth Games with protests for land rights. The Bjelke-Petersen government's response was to use an existing mechanism in the *Land Act* 1962 (Qld) to provide title to reserves to local Aboriginal councils in the form of a "deed of grant-in-trust" (or DOGIT). This form of tenure fell far short of those in the Northern Territory, particularly with regard to mining (no provisions for

a veto over exploration or for royalties were provided) and security of tenure (the government could rescind DOGITs at any time, subject to eventual parliamentary oversight). This was far short of the Fraser government's commitment to land rights, but – in the spirit of the New Federalism – it did not elicit a legislative response but merely a threat by the Aboriginal Affairs Minister Senator Baume that the rescinding of a DOGIT by the Queensland government would be met with a legislative response from the Commonwealth government (Brennan, 1991).

In Western Australia, the government of Premier Charles Court adamantly opposed land rights, and particularly Aboriginal control over minerals, bringing it into conflict with the Fraser government. In 1972, the government of Western Australia had established the Aboriginal Affairs Planning Authority to oversee reserve lands held for Aboriginal peoples. However, it did not take steps to grant the Aboriginal residents' control or ownership of these lands. The developmentalist Court government was deeply opposed to any reforms which might slow or reduce the profitability of mineral extraction. After the Aboriginal Land Fund Commission bought Noonkanbah Station for the Yungngora community in 1975, Amax Petroleum's plans to explore for oil there led to a significant clash in 1979 and 1980 (Ritter, 2002). Sacred sites were at risk, and despite legal opposition and a physical confrontation by the Aboriginal community, the Western Australian government, led by Premier Court, facilitated Amax's exploration. Ultimately, no oil was found, but the event soured relations between the Court government – which had no intention of legislating land rights – and the Fraser government and particularly its new minister of Aboriginal Affairs, Fred Chaney. From 1980, the Court government obstructed the transfer of any new pastoral leases purchased by the Aboriginal Land Fund Commission into Aboriginal ownership (Palmer, 1988). While Chaney was perceived to have supported the Yungngora community in their resistance to drilling, in practice the Fraser government had proven unwilling to intervene substantively and legislate for land rights in Western Australia. Noonkanbah demonstrated once again Fraser's willingness to see the national land rights agenda stall in the face of reactionary state governments, with little political capital expended to advance the platform of the federal Liberal Party.

By the end of Fraser's third term in 1983, the limitations of his "New Federalism" were evident when it came to Aboriginal land rights. While the Commonwealth had advanced land rights in the Northern Territory where it held jurisdiction and had established an Aboriginal Land Fund

Commission with a national mandate, state responses varied. In South Australia and NSW, Labor governments had legislated regimes that were more or less consistent with the spirit of the principles of the Woodward Royal Commission. In Victoria, attempts at progress by the Cain Labor government were stalled by an uncooperative upper house. In Tasmania, little had been achieved. The Queensland and Western Australian governments continued their obstruction of the federal Liberal Party's land rights policy, resisting the work of the Aboriginal Land Fund Commission and showing little interest in legislating land rights. Any semblance of a national approach to Aboriginal land rights was in disarray.

National Uniform Land Rights Betrayed: Labor's "Practical Reconciliation with Federalism," 1983–1992

As the Labor government prepared to contest the 1980 and 1983 elections, they responded to criticism of the Fraser government's passivity by strengthening their policy platform on national land rights. The 1982 platform committed a future Labor government to "Grant land rights and compensation to Aboriginal and Islander communities, using the principles and recommendations of the Aboriginal Land Rights Commission (Woodward Report) as a basis for legislation" (McMullan, 1982, pp. 4–5). What was new was not just the promise of compensation, as advocated by the NACC some years earlier, but also the promised mechanism for achieving national land rights. While a Labor government would seek "complementary state or territory legislation" where this was not introduced, they would "use Commonwealth constitutional powers and legislation to achieve these objectives" (McMullan, 1982, p. 5), just as Whitlam had promised in 1977 (Combe, 1977; Whitlam, 1977). With respect to the political flashpoint of mineral extraction on Aboriginal land, the Northern Territory model of an Aboriginal veto right and royalties paid to Aboriginal peoples was promised. However, out of recognition that the *Aboriginal Land Rights Act* 1983 (NSW) had granted ownership of most minerals to Aboriginal land holders, the Woodward principles were intended to place a floor, not a ceiling, on Aboriginal rights.

After winning the 1983 election, the Hawke Labor government faced the challenging task of delivering on this promise. The new minister of Aboriginal Affairs, Clyde Holding, argued that support for land rights assisted the nation in coming to terms with itself. Land rights recognition by the states, as Goot and Rowse (2007) explained, was Holding's response to the expected opposition to national land rights, an expression

of the racist strain in Australian society. In practical terms, he interpreted the commitments in the Labor platform in two ways. First, he derived five principles which the Labor government recognized (Libby, 1989):

1. Aboriginal land was to be held under inalienable freehold title.
2. Aboriginal sacred sites were to be protected.
3. Aboriginal peoples were to have control of mining on their land.
4. They were to have access to mining royalty equivalents.
5. Compensation for lost land was to be negotiated between the federal government and Aboriginal peoples.

Minister Holding's strategy involved drafting federal legislation in collaboration with Aboriginal groups, particularly the NACC, which would play a crucial role in its formulation (Libby, 1989). The minister committed to not presenting the draft to Parliament without NACC's approval. This draft was intended to pressure state governments into enacting similar Aboriginal land rights legislation. If states failed to legislate by a set deadline, the Commonwealth planned to override their authority in this matter using the powers granted by the Australian people in the 1967 referendum. This approach was not just politically risky but also faced legal hurdles, in particular the likelihood that the states would be constitutionally entitled to just terms compensation for any Crown land granted to Aboriginal peoples.

Holding's brinkmanship in land rights policy stood in contrast to Prime Minister Hawke's approach to federal–state relations. The Hawke government has been described as the culmination of what Galligan and Mardiste (1992) termed "Labor's practical reconciliation with federalism." Hawke preferred a co-operative consensual federal model rather than a centralist role for the Commonwealth, primarily as a pragmatic strategy.

Holding's confrontational plan, emphasizing federal dominance in land rights, was soon to clash with Hawke's pragmatic preference for cooperative intergovernmental relations (for a book-length account, see Libby, 1989). Delays in implementing the minister's plan had given time for critics to attack the policy. Aboriginal members of the steering committee advising the minister were concerned that the approach didn't go far enough, particularly on questions of which land might be available for claim and compensation. By late 1984, the plan was unravelling. The Burke Labor government of Western Australia – which had also come to power in 1983 with a strategy of cultivating friendly relations with

business elites – was under pressure from the mining lobby to resist the Commonwealth's land rights agenda. Over the course of 1983, Burke came to a position that decisively and vigorously opposed Holding's five principles, especially regarding mineral extraction. The mining industry had been campaigning heavily in Western Australia on the issue, spooking politicians nationally (Goot & Rowse, 2007). Faced with advocacy by Burke, conflict among Labor factions, and polling in Western Australia suggesting that Aboriginal land rights were unpopular, Prime Minister Hawke unilaterally decided in October 1984 to remove the Aboriginal veto over mining from Labor policy. He did not discuss the matter with Aboriginal interests, or even Minister Holding. With the Labor Party heading toward an early election in December, neither Holding nor his Aboriginal advisors were able to advance the Woodward land rights agenda.

By the end of 1984, the Labor agenda of uniform, national land rights was in tatters but not yet abandoned. A period of negotiation between Aboriginal interests and the mining industry ended in stalemate in February 1986. The mining lobby was unsuccessful in its efforts to remove the *de facto* veto on mining in the existing Northern Territory legislation, and Aboriginal interests were unable to advance the national uniform land rights legislation. Hawke's consensual approach to the federal dimension in Aboriginal land rights had defused a potential political crisis – but at the cost of abandoning the Woodward principles for land rights. Recognition of this failure can be seen in the passage of special land rights legislation for the small Aboriginal community at Wreck Bay in Jervis Bay Territory, the final mainland territory in which the Commonwealth had legislative responsibilities for an Indigenous population. The *Aboriginal Land Grants (Jervis Bay Territory) Act* 1986 (Commonwealth) granted Woodward-style land rights to that community in response to protest, and in an admission that no national legislation was forthcoming. Labor's practical reconciliation with federalism meant the betrayal of the promise of national uniform land rights, with the states – and crucially the judiciary – once again becoming the focus of activism for land restitution.

Yet few states were responsive to this renewal of legislative responsibility. Only in Queensland was land rights legislation enacted during this period, and there it was weak and belated (Brennan, 1991). After its initial reforms in 1982, the Bjelke-Peterson government further modified the DOGIT regime to both strengthen Indigenous security of tenure (ultimately requiring an act of Parliament to revoke DOGITs) and to

facilitate the granting of perpetual leases over dwellings to individual residents. When the Goss Labor government came to power in late 1989 after three decades of conservative rule, it did so with the promise of substantive reform to Indigenous policy in Queensland, including land rights. Its approach to land rights was to offer the mining and pastoral industries a choice: support the introduction of a weak package, or publicly resist land rights and have a Northern Territory style scheme legislated. Business elites chose the former path, and it was thus that the Goss Labor government legislated a weak form of land rights in 1991 without substantive Aboriginal input and in the face of significant Aboriginal resistance.

Judicial Centralism and Reaction, 1993–2007

The fierce opposition to land rights from Queensland's Bjelke-Petersen government and its plan in 1981 and 1982 to issue DOGITs over former Indigenous reserves, catalyzed the preparation of a new legal challenge to settler dispossession (Keon-Cohen, 2000). Known as the Mabo case, the litigants were successful in overturning the myth that Australia at the time of colonization was *terra nullius* or land belonging to no one. In their decision in 1992 in *Mabo v. Queensland (No. 2)*, the majority of High Court justices recognized the fact that Indigenous Peoples had lived in Australia for thousands of years and enjoyed rights to their land according to their own laws and customs. The High Court decision altered the foundation of land law in Australia, finding that while the Australian system of real property law could, and does, include native title, such native title rights could also be extinguished a number of ways, including by governments granting rights to land to others (like freehold or leasehold titles) that are inconsistent with the continued existence of native title. In certain limited situations, such extinguishment might create a right for native title holders to be compensated.

The Keating Labor government's response to the Mabo decision came after a period of intense negotiation between the states and an "A Team" representing Indigenous interests. Seeking consensus, Keating's Native Title Bill had several objectives. Among them, it created a framework for the recognition of native title and a claims system through which such recognition might be sought. Crucially for settler interests, it sought to legalize (or "validate") the extinguishment of native title, which, since the passage of the *Racial Discrimination Act* 1975, was illegal. The bill did not result in grants of inalienable freehold title to land, but instead the

recognition of native title rights in certain parcels of land so long as customary connection to such land continued, with the right to exclude others from such lands granted in cases such as on reserves and Crown land where it had not already been extinguished. Crucially, no veto over mining or statutory royalty scheme was introduced, with the bill instead granting certain native title holders a "right to negotiate" for compensation with proponents of mining on their land. In 1992, the *Native Title Act* 1993 (Commonwealth) was passed through the Australian Parliament, opening the way for claims by Aboriginal and Torres Strait Islander peoples to their traditional rights to land and compensation. While our chapter is focused on legislated land rights, native title rights and interests emerge from 1993 as the leading mechanism for Indigenous recognition by the settler-state.

The High Court's decision in 1992 and the subsequent *Native Title Act* 1993 finally introduced a form of national uniform land restitution. The High Court's "judicial revolution" represented a significant intervention into Australian constitutionalism. While the Mabo decision was celebrated by Indigenous activists, critics argued it amounted to law-making by judiciary, with at least three of the justices directly confronting the question in their decisions and arguing that a change in Australian law was warranted (Chesterman & Galligan, 1997). Alternatively, the Mabo decision may be seen as a move by the judiciary to force the Parliament to legislate on the unresolved question of national land rights, which the Commonwealth had abandoned for almost a decade. As such, the High Court acted in its familiar role as centralizer in the Australian federal system (cf. Galligan, 1987). The Keating government was finally drawn into legislating a national response to the dispossession of Aboriginal land two decades after the election of Whitlam. But its response was reformist rather revolutionary, falling far short of the principles in the Woodward Report.

The Commonwealth's introduction of even this modest legislation was too much for some conservative state governments, however (Chesterman & Galligan, 1997). In Western Australia – led by a conservative government and with no land rights legislation introduced – competing legislation was introduced in an attempt to reduce Aboriginal rights by extinguishing native title and replacing it with weaker statutory rights of usage. This Western Australian legislation was found to be invalid by the High Court, however, which ruled not just that the legislation contravened the *Racial Discrimination Act* 1975, but also that Commonwealth's power to legislate for Aboriginal peoples granted in 1967 empowered it to pass the *Native Title Act* 1993. Having forced the Commonwealth to act in response to the Mabo decision, the

judiciary had once confirmed the Commonwealth's role in legislating for national land restitution.

Yet, as the subsequent years revealed, centralizing Indigenous land restitution was no guarantee of positive reform for Indigenous Peoples. When native title was recognized in 1993, a significant portion of the Australia landmass was subject to pastoral leases ranging from 34 percent of land tenure in Western Australia to 54 percent in Queensland. As native title law evolved through the common law, the High Court ruled in 1996 that the Wik peoples' native title rights and interests in northern Queensland were not extinguished and could co-exist with the granting of a pastoral lease. That is, both the Wik people and the lessee could exercise their rights, so long as one didn't conflict with the other. This decision mobilized the new conservative government, led by Prime Minister John Howard (1996–2007) to develop a response known as the "10-point plan" and by 1998 the Native Title Act was amended under the heading, "Confirmation of past extinguishment of native title." The prime minister's stated ambition was to provide "certainty to pastoralists and miners" (Howard, 1997). The 1998 amendments undercut the intent of the native title legislation and foreclosed options for pursuing beneficial outcomes through the courts.

In 2007, with the long-serving Prime Minister John Howard approaching electoral defeat, a suite of measures were hastily crafted in relation to the Northern Territory, ostensibly in the interests of the "safety and wellbeing of children" and "designed to ensure the protection of Aboriginal children from harm" (Brough, 2007). To enact this package of legislation, several existing laws were affected or partially suspended, which included the *Racial Discrimination Act* 1975, the *Aboriginal Land Rights (Northern Territory) Act* 1976, and the *Native Title Act* 1993 (Commonwealth). The laws gave the Commonwealth powers to compulsorily acquire townships held under the *Native Title Act* 1993. Sixty-five Aboriginal communities were compulsorily acquired and subject to five-year leases that gave the government unconditional authority over and access to those lands, and, to an extent, resident Traditional Owners. While both Prime Ministers Keating and Howard had centralizing approaches to Indigenous land questions, they took very different ideological approaches.

Commonwealth Disinterest and the Negotiated Settlements

Since Howard, no Commonwealth government has pursued any substantive agenda on land rights or native title. Dreams of national uniform

land rights along the lines of the Woodward principles are long forgotten. And governments have shown little appetite to change the statutory framework for native title enacted in the *Native Title Act* 1993, despite numerous reviews suggesting that reform is necessary (Law Reform Commission review, Juukan Gorge review). Instead, it has been left to state governments (and, with respect to native title, the courts) to provide solutions to Indigenous land issues, some innovative, some less so.

In 1995, Tasmania recognized Aboriginal land rights through the Tasmanian *Aboriginal Lands Act*, transferring significant lands to the Tasmanian Aboriginal Land Council (TALC). This legislation came after the High Court acknowledged the fallacy of *terra nullius* and recognized native title rights. It reflected a broader national movement toward reconciliation and acknowledging past injustices against Aboriginal peoples. The Act aimed to reconcile with the Aboriginal community by granting lands of historic and cultural importance. Clyde Mansell, Chair of the TALC, emphasized that the Act recognized their historical presence and resilience against colonial oppression. The Launceston TALC office displays photos capturing the community's journey, illustrating both the grief of past injustices and the joy of recognition.

The TALC consists of eight elected Aboriginal representatives. This council manages fifteen areas as of 2021, often under plan and including culturally important sites like *putalina*/Oyster Cove and Mount Cameron West. Despite initial progress, the transfer of additional lands has stalled, leading to frustration among community leaders.

In Victoria, a more substantial land rights response was developed that offered a viable alternative to the Commonwealth native title process while still operationalizing the Native Title Act. Unlike earlier laws that were site specific, the *Traditional Owner Settlement (TOS) Act* 2010 (Vic) emphasized a series of Recognition and Settlement Agreements drawn between Aboriginal peoples and the state relating to land transfer agreement, land use activity agreement, natural resources agreement, and funding agreements. By entering into an agreement with the Victorian Government under the TOS Act, Traditional Owners agree to withdraw any native title claims and suspend any future claims. Under the TOS Act, there is no requirement to recognize or extinguish native title but it allows the state's recognition of a group of people as the Traditional Owners for a particular area, together with other negotiated benefits. A Recognition and Settlement Agreement under the TOS Act is underpinned by the registration of an Indigenous Land Use Agreement (ILUA) on the Register of Indigenous Land Use Agreements. Preparations for treaties are also

underway at the time of writing, which – if eventually negotiated and implemented – promise to deliver further negotiated land and other reparative settlements with the Aboriginal Traditional Owners of Victoria.

In Western Australia, a settlement process has been underway. In 2018 the largest native title settlement, known as the Noongar Settlement, was registered with the Native Title Registrar. The Noongar Agreement was the culmination of several years of negotiation to amalgamate six native title claims into a single claim encompassing Noongar country. The settlement has been characterized as the largest and most comprehensive agreement relating to Aboriginal interests in land in Australian history (Hobbs & Williams, 2018b). The Noongar Settlement was struck on behalf of 30,000 Noongar Traditional Owners, covering 200,000 square kilometers of land in southwestern Australia, and is valued at $1.3 billion. The wide-reaching agreement covers rights, obligations, and opportunities relating to land, resources, governance, finance, and cultural heritage. Critical to the agreement, and which runs counter to the recommendations of the Woodward Report, Noongar peoples had to concede any current or future claims. Yamatji people, from mid-west Western Australia, also reached a comprehensive settlement in February 2020. In the Yamatji case, native title rights and interests and alternative settlements were reached simultaneously. Yamatji groups were awarded possession of traditional lands, non-exclusive native title and a $450 million economic package to Yamatji people's social and economic independence. The Noongar and Yamatji comprehensive settlements show the evolution of the Native Title Act, led by state governments negotiating outcomes beyond native title rights and interests.

Uneven Outcomes

This chapter section illustrates the kinds of inconsistent outcomes of land rights created by variations in legislation and court decisions over time and space. The analysis above has described how land rights at the state level were contingent on political dynamics, demonstrating how the varying stances of Commonwealth and state governments on land rights and federal–state relations have led to a patchwork of land rights laws across Australia. The two maps below illustrate this patchwork of outcomes using the examples of tenure and veto rights over mineral extraction.

These maps have been produced by compiling spatial data separately on land restored to Indigenous Peoples under each land rights regime, as

well as on native title determination outcomes. While every effort has been made to compile comprehensive information, there are some spatial data we were unable to access: lands held by land councils in NSW that entered the estate in ways other than the claims process; lands transferred as part of settlements in Western Australia, in particular through the Noongar Settlement Agreement, the Yamatji Settlement Agreement, and the Yawuru Global Agreement; some Community Living Areas in the Northern Territory that are held under various forms of tenure other than freehold; lands purchased using government funds by organizations such as ATSIC or the Aboriginal Development Commission; lands divested from the Aboriginal Lands Trust estate in Western Australia; and, various other one-off or ad hoc arrangements.

Nevertheless, we believe we have compiled spatial data on the vast majority of land held by Indigenous Peoples. Methodologically, we have followed the approach outlined by Altman and Markham (2015), but accessed a more comprehensive set of data. Almost all data are current as of July 1, 2023, or more recently. For each parcel of land, we have attempted to classify the rights enjoyed by land holders in terms of land tenure and alienability, and whether landholders have a veto right over mining (*de facto* or *de jure*). In doing so, we have relied on the summary by Nettheim et al. (2002), as well as our own interpretation of the relevant legislation, a process of abstraction which – even as it illustrates heterogeneity – hides much of the real legal complexity and diversity in rights.

Figure 6.1 maps the varying land tenure underlying the multitudes of different land rights and native title lands returned. It shows a patchwork of land tenures, with freehold titles predominantly outside Western Australia. Only in the Northern Territory, the western parts of South Australia, Cape York in Queensland, and in small pockets of land in Victoria is land returned under inalienable freehold as Woodward recommended.

The map also shows how native title has acted as a baseline form of uniform land restitution. In Western Australia in particular native title is the primary means by which Aboriginal peoples have gained legally enforceable rights in land. It does this in two ways, extensively and substantively. First, it extends Aboriginal rights in land to vast areas of Crown land far beyond those available for Aboriginal peoples through the Aboriginal Land Trust, pastoral lease transfers and other arrangements. Second, it substantively strengthens the rights of traditional owners in areas like reserves that are already set aside for Aboriginal peoples. This second function also acts to strengthen legal protections against alienation under arrangements like the Aboriginal Land Trust in

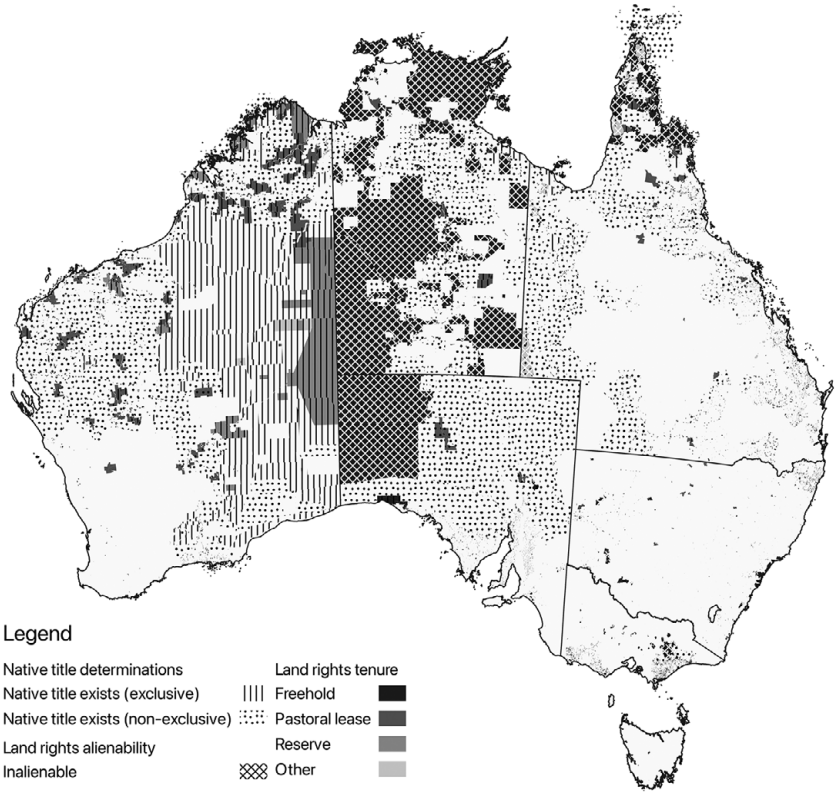

Figure 6.1 Indigenous land restitution in Australia, 2023, showing land tenure, alienability and native title recognition (Source: Produced by the authors from data provided by state and territory, and Commonwealth government agencies)

South Australia, while complicating Indigenous rights by intersecting the traditional ownership basis of native title with the residency basis of the *Aboriginal Lands Trust Act* 2013 (South Australia).

Figure 6.2 shows the extent of a further crucial element of land rights as envisaged by Woodward, the *de facto* or *de jure* right to veto mineral extraction. It shows a tiered system of three levels of rights. Land holders in the Northern Territory can control mining on their land, holding *de facto* veto rights over mining in areas of land held subject to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Commonwealth), with mining prohibited on the smaller community living areas in the territory. In NSW, most minerals are owned by land

https://doi.org/10.1017/9781009521581.009 Published online by Cambridge University Press

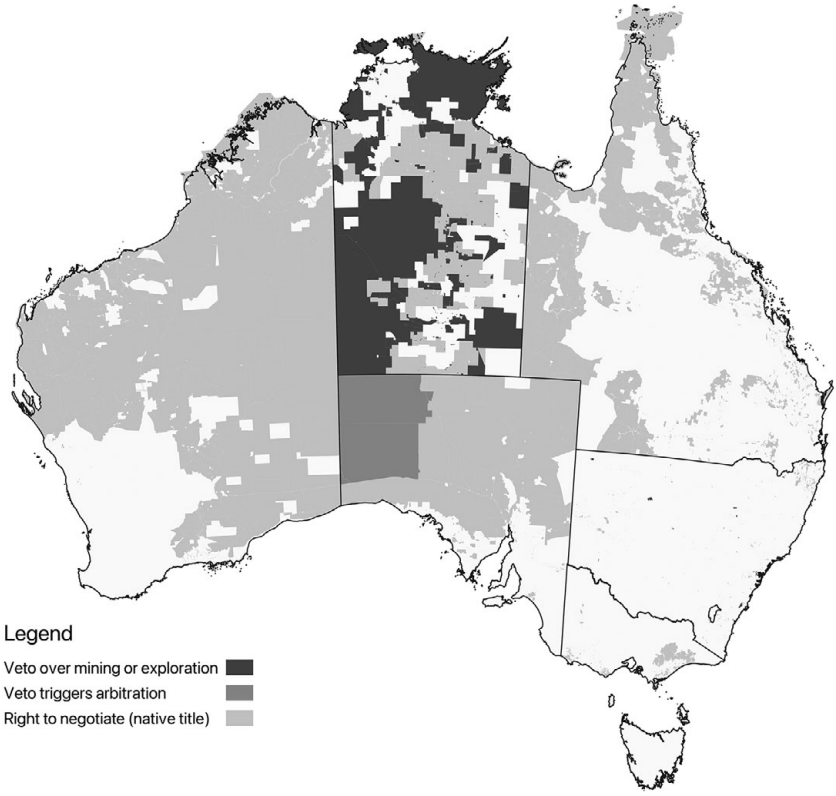

Figure 6.2 Indigenous land restitution in Australia, 2023, by type of mineral extraction veto rights enjoyed by landholders (Source: Produced by the authors from data provided by state and territory, and Commonwealth government agencies)

holders under the *Aboriginal Land Rights Act* 1983 (NSW), although the amount of land restored to Aboriginal peoples under that scheme is relatively small. In South Australia, traditional owners of the Anangu Pitjantjatjara Yankunytjatjara lands and the Maralinga Tjarutja lands have similar rights to veto mineral extraction, although doing so may trigger an arbitration process. For much of the rest of the country, most notably Queensland and Western Australia, Indigenous land holders lack powers to veto mineral development, instead having only a time-limited "right to negotiate" compensation with proponents of extractive developments. As such, the rights enjoyed by Aboriginal landholders with regard to mineral extraction vary radically across the continent, a

https://doi.org/10.1017/9781009521581.009 Published online by Cambridge University Press

consequence of the uneven and contested political process that has unfolded across the Australian federation since the 1960s.

Conclusion

Legislative responses to recognize Aboriginal land rights were initially led by the states, and the Commonwealth in the Northern Territory. The Woodward Report was intended to guide state-based responses; however, both the Fraser coalition government in the late 1970s and the Hawke Labor government in the 1980s failed to advance a national land rights agenda that left advancing Aboriginal interests in land to the states and litigation through the courts. The land rights model outlined in the Woodward Report was limited in influence on NSW and South Australia. Litigation that successfully challenged the legality of occupation necessitated a Commonwealth Government response confirming land dealings and creating a mechanism for the recognition of native title. State-based responses after recognition of native title rights and interests have continued to evolve. Accepting the difficulty of proving native title, the Tasmania state government responded with limited land rights recognition. In Victoria and Western Australia, settlement processes have been underway that utilize the structures of the Native Title Act, and that also engage the states in the negotiation of a range of social justice aspirations that go beyond land repossession.

In this chapter we argue the land rights recognition in Australia is an outcome of shifting state–Commonwealth relations within the Australian federation. This has led to a hugely varied and spatially uneven set of legislative land rights regimes across Australia, placing onus on Indigenous Peoples to work to advancing their rights and interests in the absence of agreed-upon national standards or leadership from the Commonwealth government.

References

Altman, J. C., & Markham, F. (2015). Burgeoning Indigenous land ownership: Diverse values and strategic potentialities. In S. Brennan, M. Davis, B. Edgeworth, & L. Terrill (eds.), *Native Title from Mabo to Akiba: A vehicle for change and empowerment* (pp. 126–142). Melbourne: Federation Press.

Anderson, C. (1981). Queensland. In N. Peterson (ed.), *Aboriginal land rights: A handbook* (pp.53–114). Canberra: Australian Institute of Aboriginal Studies.

Bennett, S. (1988). Federalism and aboriginal affairs. *Australian Aboriginal Studies (Canberra)*, 1, 18–27. https://doi.org/10.3316/informit.177910165588169

Brennan, F. (1991). *Land rights Queensland style: The struggle for Aboriginal self-management—Australian National University*. University of Queensland Press, Brisbane Australia.

Broome, R. (2005). *Aboriginal Victorians: A history since 1800*. Allen & Unwin, Crows Nest, Australia.

Brough, M. (2007). 'National emergency response to protect Aboriginal children', Media Release 21 June 2007, Minister for Families, Community Services and Indigenous Affairs. Available at: https://formerministers.dss.gov.au/3581/emergency_21june07/

Chesterman, J., & Galligan, B. (1997). *Citizens without rights: Aborigines and Australian citizenship*. Cambridge University Press, Cambridge, UK.

Coalition of Aboriginal and Torres Strait Islander Peak Organisations & Australian Governments. (2020). *National agreement on closing the gap*. National Indigenous Australians Agency, Canberra, Australia. http://web.archive.org/web/20200926040101/www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf

Coghill, K. (1997). In government but not in power: Victorian Labor 1982–92. *Legislative Studies*, 11(2) 76–77.

Combe, D. (1977). *Australian Labor Party Platform, constitution and rules as approved by the 32nd National Conference, Perth 1977*. Australian Labor Party, National Secretariat, Barton, Australia.

Cook K., & Goodall, H. (2013). *Making change happen: Black and white activists talk to Kevin Cook about Aboriginal, Union and Liberation Politics*. Canberra: ANU Express.

Cooms, V. (2012). *Free the blacks and smash the Act! Aboriginal policy and resistance in Queensland between 1965 and 1975* [PhD dissertation, Australian National University]. https://doi.org/10.25911/5c6e71395b26c

Davis, M., & Williams, G. (2021). *Everything you need to know about the Uluru Statement from the Heart*. Sydney, Australia: NewSouth Publishing.

Dexter, B. and edited by G. Foley & E. Howell (2015). *Pandora's box: The Council for Aboriginal Affairs 1967–1976*. Southport, Queensland: Keeaira Press. See https://scholarly.info/book/pandoras-box-the-council-for-aboriginal-affairs-1967-1976/.

Foley, G., & Anderson, T. (2006). Land rights and Aboriginal voices. *Australian Journal of Human Rights*, 12(1), 83–108. https://doi.org/10.1080/1323238X.2006.11910814

Fox, C. (2008). The fourteen powers referendum of 1944 and the federalisation of Aboriginal affairs. *Aboriginal History*, 32, 27–48.

Galligan, B. (1987). *Politics of the High Court: A study of the judicial branch of government in Australia*. Brisbane: University of Queensland Press.

Galligan, B., & Mardiste, D. (1992). Labor's reconciliation with federalism. *Australian Journal of Political Science*, 27(1), 71–86. https://doi.org/10.1080/00323269208402182

Goodall, H. (2008). *Invasion to embassy: Land in Aboriginal politics in New South Wales, 1770–1972*. Sydney: Sydney University Press.

Goot, M., & Rowse, T. (2007). *Divided nation? Indigenous affairs and the imagined public*. Melbourne: Melbourne University Press.

Hiatt, L., Luther, M., O'Donoghue, L., & Stanley, J. (1976, November). *National Aboriginal Consultative Committee: Report of Committee of Inquiry*.

Hiskey, G. (2021). *Maralinga: The struggle for return of the lands*. Cambridge, MA: Wakefield Press.

Hobbs, H., & Williams, G. (2018b). Australia's First Treaty. www.auspublaw.org/blog/2018/04/australias-first-treaty

Holland, A. (2019). *Breaking the silence: Aboriginal defenders and the settler state, 1905–1939*. Melbourne: Melbourne University Press.

Howard, J. (1997). "WIK 10 POINT PLAN", The Department of Prime Minister and Cabinet, Australian Government, Canberra, Australia. Media Release, accessed 20 February 2024 at https://pmtranscripts.pmc.gov.au/release/transcript-10323

Jackson, S. (2017). Land rights: A postcolonial revolution in land title. In S. Jackson, L. Porter & L. Johnson, (eds.), *Planning in Indigenous Australia: From imperial foundations to postcolonial futures* (pp. 155–174). Routledge, London, UK. https://doi.org/10.4324/9781315693668

Keon-Cohen, B. (2000). The Mabo litigation: A personal and procedural account. *Melbourne University Law Review*, 24, 893–951.

Libby, R. T. (1989). *Hawke's law: The politics of mining and Aboriginal land rights in Australia*. Perth: University of Western Australia Press.

Liberal Party of Australia & National Country Party of Australia. (1976). *The New government policies: A complete guide to the official announced policies of the Fraser Liberal/National Country Party Government which took office in Australia in December, 1975*. Canberra.

McMullan, R. F. (1982). *Australian Labor Party Platform, Constitutional and Rules as approved by the 35th National Conference, Perth 1982*. Australian Labor Party, National Secretariat. https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/1032121/upload_binary/1032121.pdf;fileType=application/pdf

Moore, B. (1981). Victoria. In N. Peterson (ed.), *Aboriginal land rights: A handbook* (pp. 148–167). Australian Institute of Aboriginal Studies, Canberra, Australia.

Nettheim, G. (1981). *Victims of the law: Black Queenslanders today*. Allen & Unwin, Crows Nest, Australia.

Nettheim, G., Meyers, G. D., & Craig, D. (2002). Australian land rights legislation. In G. Nettheim (ed.) *ndigenous Peoples and governance structures:*

A comparative analysis of land and resource management rights (pp. 237–317). Canberra: Aboriginal Studies Press.

Norman, H. (2015). *What do we want? A political history of Aboriginal Land Rights in NSW*. Canberra: Aboriginal Studies Press.

Palmer, I. (1988). *Buying back the land: Organisational struggle and the Aboriginal Land Fund Commission*. Canberra: Aboriginal Studies Press.

Piccini, J. (2019). *Human rights in twentieth-century Australia*. Cambridge: Cambridge University Press.

Ritter, D. (2002). The fulcrum of Noonkanbah. *Journal of Australian Studies*, 26(75), 51–58. https://doi.org/10.1080/14443050209387803

Rowse, T. (2012). *Rethinking social justice: From 'peoples' to 'populations.'* Canberra: Aboriginal Studies Press.

Sanders, W. (2013). Changing agendas in Australian Indigenous policy: Federalism, competing principles and generational dynamics. *Australian Journal of Public Administration*, 72(2), 156–170. https://doi.org/10.1111/1467-8500.12014

Tedmanson, D. (2016). Shifting state constructions of Anangu Pitjantjatjara Yankunytjatjara: Changes to the South Australian Pitjantjatjara Land Rights Act 1981–2006 [PhD dissertation, Australian National University]. https://doi.org/10.25911/5d763524705f3

Victorian Government. (1983). Explanatory Memorandum: Aboriginal Land Claims Bill 1983. Available from: https://classic.austlii.edu.au/au/legis/vic/bill_em/alcb1983187/alcb1983187.html

Walker, K. (1969). The black commandments. *Koorier*, 1(10), 25.

Weller, P. (1989). *Malcolm Fraser, PM: A study in prime ministerial power*. Penguin Books, Melbourne Australia.

West, S. (1980). *Aboriginal affairs: A guideline to labor policies*. Australian Labor Party, Canberra, Australia. https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/1011080/upload_binary/1011080.pdf;fileType=application%2Fpdf

Whitlam, G. (1972, November 13). It's time for leadership. https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/1022125/upload_binary/1022125.pdf;fileType=application%2Fpdf#search=%22library/partypol/1022125%22

(1977). Address at the National Press Club on 5 December 1977 [sound recording]. Available from http://nla.gov.au/nla.obj-215135396

Young, E. A. (1992). Aboriginal land rights in Australia: Expectations, achievements and implications. *Applied Geography*, 12(2), 146–161. https://doi.org/10.1016/0143-6228(92)90004-7

Young, M. (1971). *Australian Labor Party Platform, Constitutional and Rules as approved by the 29th Commonwealth Conference, Launceston 1971*. Australian Labor Party, Federal Secretariat. https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/1042679/upload_binary/1042679.pdf;fileType=application/pdf#search=%22labor%20party%20constitution%20rules%22