NATIVE TITLE FROM MABO TO AKIBA: A Vehicle for Change and Empowerment?
Sean Brennan, Megan Davis, Brendan Edgeworth, Leon Terrill (eds); The Federation Press, 2015; 292 pages; $84.95 (paperback)

BEYOND COMMUNAL AND INDIVIDUAL OWNERSHIP: Indigenous Land Reform in Australia
Leon Terrill; Routledge, 2015; 303 pages; UK£95 (hardback)

When I first encountered native title as a legal practitioner, having come from a commercial law background, I was surprised to see what I perceived to be negotiated yet largely-accepted strictures on native title claimants’ interests and the routine exclusion of commercial rights. Over a decade later, the landscape looks quite different. This edited book, *Native Title from Mabo to Akiba*, provides a comprehensive picture of key features of contemporary native title including the context for the shift in how we understand its potential.

The book has two parts. It commences with eight chapters on the legal dynamics in the development of native title, followed by a further nine chapters specifically on native title as a vehicle for Indigenous empowerment. The authors come from diverse disciplines and backgrounds, including policy, lawmaking, negotiation, research, and front line work with traditional owners. This provides the reader with wide-ranging viewpoints that canvass a spectrum of issues relevant to understanding what native title might deliver for Aboriginal and Torres Strait Islander Australians and, importantly, how.

The early chapters weave historical accounts of land tenure, including chapters by David Yarrow and Brendan Edgeworth, through contemporary experiences before and within the Australian courts in chapters by Bret Walker and Paul Finn. The decision in *Akiba* has allowed us to reimagine the bounds of native title and many chapters grapple with the question not just of what constitutes traditional owners’ property, but how traditional owners can use that property. This extends beyond the question of state regulation of resources, to the alienability of land, and the ostensibly artificial differentiation between the law’s treatment of Indigenous interests and non-Indigenous property. Edgeworth takes the boundary further again, pointing to the ‘vibe’ of *Mabo* and importantly for lawyers, exploring the broader legal implications: ‘… they now can only be seen through a Mabo-tinted lens: shot-through with exclusion, discrimination, expropriation and an overwhelming sense of injustice that demands immediate reparation’ (p 93). This is a powerful legacy indeed.

The second part is no less interesting, again drawing together diverse elements that sometimes mark the colonisation of native title itself. Jon Altman and Francis Markham present their important work mapping Indigenous landholdings noting however that maps are ‘highly political constructs’ (p 132). Marcia Langton (Chapter 12) writes of the role of the prescribed body corporate in the empowerment of Indigenous people, offering ‘tentative proposals for reform’ to overcome the ‘high cost’ of the complex and onerous compliance requirements. Similarly, Tim Rowse notes that ‘a book on native title cannot avoid considering incorporation as a step that empowers or disempowers Indigenous Australians’ (p 185).

This part contains some interesting case studies also. Danielle Campbell and Janet Hunt showcase a community development model from Central Australia as one means of delivering benefits. David Trigger describes the challenges for claimant groups themselves through a case study of a dispute over claim group membership in the Gulf country in Queensland. All the while, the reader is pondering how these different hurdles might ultimately deliver on the promise of native title.

The book does not shy away from explaining the necessary relationship between colonial expansion, and the ongoing artful and awful dispossession of Indigenous Australians. Thus importantly for contemporary debates about constitutional reform and treaty, sovereignty is never far from discussions in this book about land. The organisation of chapters in the first part, and the authors’ critical approaches, highlight the connectedness of land, culture, dispossession, law, self-determination, sovereignty, and economic outcomes. This serves as a timely remedy to the tendency of public discussions about ‘Indigenous affairs’ to segregate varied yet interconnected issues.

This book canvasses a range of authorial experiences that cover the field of native title doctrinally, pragmatically and conceptually. Its importance lies, in my view, in collecting in one volume contemporary and progressive thinking about Indigenous empowerment in Australia, hinging off two legal watersheds — as imperfect as they are. The book therefore has wide appeal, and will be accessible to audiences beyond lawyers, legal scholars, legal practitioners and anthropologists. It is a must-read for all involved in Indigenous policy and the layperson who wishes to gain an understanding of the complex landscape native title and beyond.

One of the more directly economic chapters in this book is written by Leon Terrill, who provides a critique of and answer to de Soto’s theory of land ownership. This theory has had some considerable currency in Australian tenure policy and
Terrill contrasts the context of the theory with the reality of Indigenous needs. Complementing his chapter in Mabo to Akiba, Terrill has also written a monograph on communal title — Beyond Communal and Individual Ownership — which follows neatly from his observations on tenure.

The 1970s heralded the first wave of Indigenous land reform through enactment of the Aboriginal Land Act in the Northern Territory. The second wave of reform commenced in the mid 2000s around a discourse of individual, private title. Beyond Communal and Individual Ownership is a survey of the most recent wave of reform to Indigenous statutory tenures, using the Northern Territory as a case study. In doing so, Terrill canvasses three principal arguments.

First, he claims that Indigenous land reform in Australia is flawed in that it debates the wrong issues. It focuses on a duality of individual vs communal ownership that fails to grasp what is really at stake for Indigenous communities — and residential communities in particular. His second argument is that the implementation of tenure reforms has lacked a clear purpose or direction, rendering it flawed also. Thirdly, he identifies that there are alternatives available but that each alternative requires taking a stance on matters such as the market conditions to operate, preferred governance models, and the desirability of welfare.

For the reader requiring an introduction into the context of Indigenous land reform, Terrill draws first on international literature to explain the role of and conceptual foundations for land tenure reform in Australia. He then describes Aboriginal land ownership in the Northern Territory. In what may be familiar to some practising in the area but novel to other readers, Chapter Four contains a useful and detailed examination of informal tenure arrangements in remote communities.

Subsequent chapters set out the public debate — established as Terrill maintains, on a flawed duality — and examine the reforms to date and their consequences. Considering the discourse around achieving ‘private ownership’ for Aboriginal people, the mere 25 grants of home ownership in the Northern Territory up to October 2014 seem somewhat of a disappointment. In contrast to the promise of individual ownership from the land reforms, Terrill identifies an increase in government control over land tenures and a ‘shift towards state property over specific infrastructure’ (p 205). Further, the ostensible gold standard of ‘secure tenure’ has been sorely lacking in the tenure reforms overall. By Chapter Eight, Terrill’s suggested framework for developing an alternative approach to land reform is welcome.

This book makes clear that in years of reform — ostensibly to free Aboriginal landowners from ‘communal poverty’ that accompanies what have been described as ‘communal’ tenures — the promised benefits have simply not emerged. But perhaps more troubling is the lack of any Indigenous land reform policy, let alone a coherent one, resulting in an ideological agenda for what Terrill describes as a technical issue. Terrill identifies the stark contrast between Australia’s domestic approach and its AusAID efforts in the South Pacific, where its contribution to land reform is methodical and evidence-based.

Land, and land tenures, are central to contemporary debates about the Australian economy, social outcomes, and Indigenous Australians’ wellbeing and culture. For Northern Australia, land tenure is seen as a crucial foundation for intended significant economic development. Terrill has demonstrated both the paucity in genuine planning in Indigenous tenure reform so far in Australia, as well as the imperative to get the planning right — and a framework within which this might be achieved.

This is a technical book that is grounded in theory, but I found it eminently readable. What is striking to me is the heightened need for wide engagement of the ideas Terrill presents, to promote a broad ‘tenure literacy’ among policymakers and advocates that can properly inform planning and policy into the future. Those involved in Indigenous affairs, land use, planning and development, government, community development and housing would all be well-served by reading this book. Were they to do so, the communities they serve would ultimately benefit.

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JUDGING FOR THE PEOPLE: A Social History of the Victorian Supreme Court 1841–2016
Simon Smith (ed); HSV/Allen & Unwin, 2016; $60 (hardcover)

In 2014, when Helen Garner published her account of the trial of Robert Farquharson for the murder of his three young sons in a Winchelsea dam, she dedicated her book to the Victorian Supreme Court, ‘this treasury of pain, this house of power and grief’.

Reading this history of the Victorian Supreme Court, auspiced by the Royal Historical Society of Victoria and edited by Simon Smith to mark the Court’s 175th anniversary, it is easy to see why.

A social history of the Court is, in a sense, a condensed history of Victoria itself, filtered through the lens of an institution built to accommodate and resolve its most intense political and social conflicts. These range from wills and gold rush crimes to Victoria’s own version of Dickens’ Jarndyce v Jarndyce, the fifty-year-long battle over the construction contract for the Geelong-Ballarat railway (p 115), to the trials of Ned Kelly and Ronald Ryan.

Nor were these conflicts restricted to those played out within the courtroom’s theatre. Part of this book’s fascination lies in the way the Court’s customs and hierarchies reflected Victoria’s changing social fabric, through debates about women as jurors or judge’s associates or judges, or admission requirements, or the divided profession.

No doubt fortunately, Victoria missed the first phase of Sydney’s legal history, in which the only trained lawyers were convicts who had been ‘struck off’ before being transported, and who acted as ‘open or secret advisers, actors and promoters’ of ‘chicané’ and ‘iniquitous proceedings’, as Governor King proclaimed (p 71). However, Victoria’s early legal history showed no lack of ‘iniquitous proceedings’, such as that of Justice John Walpole Willis, Port Phillip’s first ‘resident Judge’ against a newspaper proprietor for libel of the judge himself. Willis, acting as ‘judge in his own case’, denied the defendant a jury trial and sentenced him to twelve months’ gaol and a hefty fine (p 12).

There is much in this book to interest the legal historian, as well as the student of legal process or legal professional ethics. In the 1800s, for example, as Simon Smith points out, a barrister’s admission required the applicant to pass an examination at