

THE DAYS OF THE FAILED COLLECTIVE: COMMUNAL OWNERSHIP, INDIVIDUAL OWNERSHIP AND TOWNSHIP LEASING IN ABORIGINAL COMMUNITIES IN THE NORTHERN TERRITORY

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I INTRODUCTION

In 2006, the former Coalition Government amended the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*Land Rights Act*) to provide for a new form of leasing in communities on Aboriginal land, called ‘township leases’ or ‘section 19A leases’. The amendments, frequently described as ‘historic’, were introduced in the context of a public debate about individual and communal land ownership and the role of home ownership and economic development.

This article looks at the introduction of section 19A leases and argues that the debate about individual and communal land ownership is peripheral. Township leasing reforms the governance arrangements for land use decision-making in remote Aboriginal communities, and implements a model of governance under which decision-making is centralised and local Aboriginal authority, both public and private, is contained.

The Australian Labor Party was in opposition when township leasing was introduced and was critical of its impact on Aboriginal land ownership.¹ It was anticipated that after they were elected at a Commonwealth level in November 2007, the Labor Government would take a different approach to community leasing from that of the former Government. This has not been the case – the Labor Government made only minor changes, and while it relies on significantly less provocative rhetoric, it continues to pursue township leases for all major Aboriginal communities in the Northern Territory.

The issue of leasing has become connected to the rollout of the Strategic Indigenous Housing and Infrastructure Program (‘SIHIP’). SIHIP provides an example of how policies that were formulated under the Coalition Government are being implemented by the Labor Government without substantial change. In

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1 See, eg, Second Reading Speech, *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007* (Cth), House of Representatives, 12 June 2007 (Jenny Macklin, Shadow Minister for Indigenous Affairs).

September 2007, shortly before the election, the Commonwealth and Northern Territory Governments signed an agreement in relation to Indigenous housing. The agreement describes a number of significant new policies, such as limiting the provision of new housing to select growth communities, transforming all community housing into mainstream public housing and working to ‘facilitate the establishment of Section 19A leases’ in all large communities.²

When SIHIP was announced in April 2008 it incorporated all of these significant new policies. Only 16 of the 73 major Aboriginal communities in the Northern Territory will receive new housing, while the remaining 57 are eligible for upgrades only.³ Those 16 ‘growth’ communities must have in place some form of long-term lease before new housing will be built. The Labor Government has provided for some flexibility in that it will accept either a housing lease under section 19 or a township lease under section 19A.⁴ However, it will only pay rent under a township lease⁵ and describes section 19 leases as an interim arrangement.⁶

That governments are applying for leases at all is a historic shift. Prior to 2006 neither the Northern Territory nor the Commonwealth had any consistent practice of applying for leases on Aboriginal land, generally relying instead on informal tenure arrangements. This reduced the government’s expenditure but also caused problems, and despite the additional costs there are sound arguments in favour of introducing more formal tenure arrangements through broad scale community leasing.

There are a number of ways in which broad scale community leasing can be introduced. Governments have argued that only township leasing enables Aboriginal communities to move beyond communal title to a more normalised land tenure that supports home ownership and economic development. This article argues that supporters of township leasing have deliberately misrepresented the arrangements which have previously existed in Aboriginal communities, such as the former Minister describing those arrangements as ‘the

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- 2 Australian Government and Northern Territory Government, *Memorandum of Understanding in Relation to Indigenous Housing, Accommodation and Related Services* (2007) cl 18 <http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub28_attachment_8.pdf> at 22 September 2009.
 - 3 Jenny Macklin, Paul Henderson and Warren Snowdon, ‘Landmark Housing Projects for NT Indigenous Communities’ (Press Release, 12 April 2008).
 - 4 A housing lease under s 19 must cover all existing and prospective housing areas and be for a period of at least 40 years. The term ‘housing precinct lease’ is used to describe a lease under s 19 which complies with the requirements of the Commonwealth: see Australian Government and Northern Territory Government, *Leasing* <http://www.territoryhousing.nt.gov.au/_data/assets/pdf_file/0007/63529/fs_leasing_types.pdf> at 22 September 2009.
 - 5 Paul Toohey, ‘A New Lease of Life’, *The Australian* (Sydney), 13 January 2009.
 - 6 Australian Government and Northern Territory Government, *Remote Service Delivery Bilateral Plan 2009–2014* (2009) 6 <http://www.workingfuture.nt.gov.au/download/NT_RSD_Bilat_Imp_Plan.pdf> at 8 September 2009.

days of the failed collective',⁷ in order to move debate about township leasing away from consideration of other leasing models.

This article also argues that the real reason that governments prefer township leasing to other leasing models is because of the governance arrangements that it implements. Currently, a number of government policies take a negative view of local Aboriginal governance and almost reflexively respond by increasing centralised government control. Township leasing reflects this view, and institutionalises it for a period of up to 99 years, by transferring responsibility for land use decision-making to a government entity. Paradoxically, while proponents of township leasing have drawn support from free market rhetoric, its effect is to introduce a higher level of government control over private decision-making.

The article begins by describing the circumstances in communities on Aboriginal land which led to the introduction of section 19A leasing. Part II looks at how Aboriginal land is owned, including land in townships on Aboriginal land, and why there have been so few leases. This part also considers the problems that this creates. Part III looks at the development of the new township leasing model amid criticism of communal land ownership. Part IV examines the impact of section 19A by comparing leases granted under this new section with leases granted under the existing section 19. Part V expands on the consideration of section 19A through a description of the two leases which have been granted under its provisions. Part VI describes other recent changes to land tenure in Aboriginal communities. Part VII introduces some analysis of key elements of the township leasing model, and Part VIII contains the conclusion.

II HOW ABORIGINAL LAND IS OWNED

A Types of Aboriginal Land

The *Land Rights Act*, which is Commonwealth legislation, creates a statutory land rights scheme that applies only in the Northern Territory. From commencement of the Act in 1977 through to the present date, the *Land Rights Act* has enabled more than 44 per cent of land in the Northern Territory to be returned to its traditional Aboriginal owners as inalienable freehold.⁸ Of the 73 Aboriginal communities in the Northern Territory which generally have more than 100 residents,⁹ 52 are situated on this form of Aboriginal land.¹⁰ A

7 Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth), House of Representatives, 31 May 2006 (Mal Brough, Minister for Indigenous Affairs).

8 Northern Territory Government, *Exploration and Mining on Aboriginal Freehold Land* (2007) <http://www.nt.gov.au/d/Minerals_Energy/Content/File/Factsheet_Exploration_and_mining_on_Aboriginal_freehold_land.pdf> at 22 September 2009.

9 See Australian Government, *Communities and Prescribed Areas* <http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/Pages/default.aspx> at 22 September 2009.

significant but smaller number are situated on Aboriginal community living area title, and a smaller number yet are on land with distinct forms of title.¹¹

As this article focuses on the township leasing reforms, which primarily affect only land under the *Land Rights Act*, references to Aboriginal land in the article are to land held under the *Land Rights Act*.

B How Aboriginal Land is Owned and How Leases are Granted

The *Land Rights Act* is a traditional owner-based land rights scheme – that is, it was designed to enable ownership of land by those persons who own it under traditional Aboriginal law. Not all land rights schemes have this focus, as some provide for ownership by (or on behalf of) those Aboriginal people who live on the land or who have a historical rather than traditional connection.¹²

Aboriginal law in relation to land ownership varies across the Northern Territory. In all cases, however, it entails communal ownership by a group whose membership changes over time. The challenge for the architects of the *Land Rights Act* was to enable this dynamic form of land ownership while providing legal certainty consistent with the requirements of the formal legal system. Communal ownership *per se* was not the target of the legislation. Indeed, the group of traditional Aboriginal owners may be quite small.¹³ The aim was to return land to those people who had a right to it under Aboriginal law.

To deal with this challenge the *Land Rights Act* creates Aboriginal Land Trusts, bodies whose only function is to hold formal title to land on behalf of the traditional Aboriginal owners. The land itself cannot be bought or sold, but section 19 provides a process for the grant of a lease (or another estate or interest) over any Aboriginal land to any person for any purpose.¹⁴

While Aboriginal Land Trusts hold title to land, they have no independent authority, and may only take an action (such as granting a lease) when formally directed to do so by a body called an Aboriginal Land Council. In turn, Aboriginal Land Councils can only provide a direction to a Land Trust where the

10 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) sch 7.

11 Examples of distinct forms of title include Mutitjulu, which is on Aboriginal land that is leased to the Director of National Parks as part of Uluru-Kata Tjuta National Park, Finke (Aputula) which is a declared town composed predominantly of simple freehold blocks, Canteen Creek which is on vacant crown land subject to a land claim and Daly River which been leased to a Catholic Church property trust.

12 For an overview of land rights schemes in Australia see Heather McRae et al, *Indigenous Legal Issues – Commentary and Materials* (4th ed, 2009) ch 5.

13 One commentator has compared traditional local descent groups to families of 19th century English landowners, see David Dalrymple, ‘Land Rights and Property Rights’ (2007) 51(1) *Quadrant* 61.

14 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19(4A).

traditional Aboriginal owners as a group consent.¹⁵ Decision-making authority belongs to the traditional Aboriginal owners. Where a person wishes to apply for a lease, they approach the relevant Land Council with a proposal. The Land Council consults with the traditional Aboriginal owners as a group about the proposal, and if as a group they consent then the Land Council directs the Land Trust to enter into the lease.¹⁶

The *Land Rights Act* also includes a protective mechanism whereby the consent of the Commonwealth Minister responsible for Indigenous Affairs is required for the grant of any lease under section 19A and any lease for more than 40 years under section 19. The consent of the Minister is not required for leases under section 19 for 40 years or less.¹⁷

C Tenure Arrangements in Communities on Aboriginal Land

It is important to be clear on the distinction between ‘Aboriginal residents’ of communities on Aboriginal land and the ‘traditional Aboriginal owners’ of that particular land. While there is often overlap between these groups, they are not synonymous. In any large community it is likely that some residents are also traditional Aboriginal owners but there will be residents, even a majority of residents, who are not traditional Aboriginal owners for that country.

As described above, section 19 of the *Land Rights Act* has always provided a mechanism for the grant of leases on Aboriginal land. However, in those 52 communities on Aboriginal land there have been few such leases.¹⁸ The result, in accordance with the law of fixtures, has been that most infrastructure in those communities has belonged to the Land Trust on behalf of the traditional Aboriginal owners (subject to any person being able to establish an equitable interest).¹⁹ This would suggest that the traditional Aboriginal owners have effectively been community landlords. However, in all communities an informal

15 This is simplifying the procedure for the purpose of description. In addition to consulting with the traditional Aboriginal owners, land councils are required to give any Aboriginal community or group that may be affected by the action adequate opportunity to express its views to the land council, and the land council must be satisfied that the terms and conditions of a grant must be reasonable – see *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 19(5), 19A(2). Further, pursuant to s 23(3), in carrying out its functions with respect to Aboriginal land, a land council must consult with and have regard to the interests of any other Aboriginals interested in the land. An affected Aboriginal community or group has the right only to comment on a proposal. It is only the traditional Aboriginal owners who provide or refuse consent.

16 See also above n 15 in relation to other obligations of a land council.

17 Although any agreement which provides for payment or receipt of an amount exceeding \$1 000 000 also requires the approval of the Minister – see *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 27(3).

18 There have been even less leases on Aboriginal community living area land as the legal processes are more restrictive: see *Associations Act 2003* (NT) s 110.

19 The article uses the past tense to refer to these circumstances as two recent developments have completely reshaped this process. Firstly, small community-based local councils have been merged into larger, regional shires with more centralised decision-making. Secondly, Aboriginal communities in the Northern Territory are currently subject to ‘five-year leases’ pursuant to s 31 of the *Northern Territory National Emergency Response Act 2007* (Cth). It was the status quo prior to these two recent developments which formed the scene for the introduction of s 19A.

understanding has been developed which responds to community need rather than formal legal ownership. This is best described with reference to some of the rights which normally flow from land ownership, such as the right to receive rent and determine land use.

Decisions about the allocation of properties in Aboriginal communities have most often been made by the local community council. To the extent that traditional Aboriginal owners have been involved in this decision-making, it is primarily through their involvement in the community councils.²⁰ This varies considerably from community to community. There are communities which are situated on land belonging to another language group, where the traditional Aboriginal owners live elsewhere and play no role in community decision-making. There are communities where traditional Aboriginal owners are marginalised and play a minor role in decision-making. There are communities in which the acceptance of a person's traditional ownership enhances their authority in the community, at times considerably.

In nearly all communities, residential tenants have been required to pay some sort of 'rent'.²¹ This rent has been paid not to the traditional Aboriginal owners but to organisations called Indigenous Community Housing Organisations ('ICHOs'), often the community council, who have been funded to provide housing support. While they have had no formal tenure, ICHOs have been responsible for maintenance and housing management. Responsibility for other infrastructure has generally been with the occupant or the community council (and not the traditional Aboriginal owners).

For the most part these arrangements have allowed land to be utilised in accordance with community need, provided that certain underlying rights are respected and that the position of traditional Aboriginal owners is acknowledged in some communities. If not for this understanding, informal tenure arrangements would have been unworkable. However, while these arrangements mitigated the impact, there were still a number of problems with the reliance on informal tenure and these are considered in the next section.

D Problems with the Lack of Formal Leases

Surprisingly, given the attention that the tenure situation in Aboriginal communities has received, there has been very little treatment of the actual problems created by this lack of formal tenure. Instead, there has been a tendency to conflate the two issues of a lack of formal tenure and the existence of communal title. Separating the two issues is important for assessing the appropriateness of any response.

20 Where more formal land use planning processes have been undertaken by the Northern Territory Government in recent years, however, this has also included some role for consultation with traditional Aboriginal owners.

21 For a summary of how housing in remote Aboriginal communities has been managed, see Michael Dillon and Neil Westbury, *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (2007) 158–60.

The first problem is that a lack of formal tenure arrangements means that occupiers are in an uncertain position with respect to their rights. This is an issue for infrastructure investment – whether commercial or government funded – as there is a lack of certainty around ongoing ownership and use of the infrastructure.

This is also an issue for the occupants themselves, whether individuals, community organisations or government agencies. As stated above, decisions about occupancy have most often been made by local community councils. However, the lack of formal tenure arrangements has also been reflected in a lack of clear rules and decision-making structures. There has been a high reliance on norms, such as respecting the intentions of the funding body. Without a formal process, however, there have at times been disputes and allegations of poor or biased decision-making.

A second problem is that in the absence of clearly articulated arrangements, there can be confusion about how responsibilities are shared between the occupant, the community council and other infrastructure service providers. For example, it has not always been clear who (if anyone) should be maintaining buildings and infrastructure, and there have been disputes about who should be paying for what services.

A third problem is that land and infrastructure cannot be legally treated as an asset by the occupier. As its occupancy right cannot be mortgaged or sold, the occupier is unable to use it to raise equity.²² Those who advocate for home ownership also argue that this can prevent occupants from developing a ‘sense of ownership’ in relation to their premises, as a result of which they are less inclined to maintain their asset.²³

A fourth problem is that the land owners, the traditional Aboriginal owners, do not receive rent or a return on their asset (or the opportunity to agree to a rent free lease). Arguably, this discourages land owners from developing an economic development mentality in relation to their asset.

A fifth problem is that in the absence of a clearly articulated arrangement between the occupiers (the community members or community leadership) and the land owners, there is an increased risk of disputes. This problem has been of concern to land councils.²⁴

22 It cannot of course be assumed that a block in a remote Aboriginal community would be accepted as collateral by a commercial lending institution.

23 See, eg, Sara Hudson, *From Rhetoric to Reality: Can 99-year Leases Lead to Homeownership for Indigenous Communities?* (2009) Centre for Independent Studies 1 <http://www.cis.org.au/policy_monographs/pm92.pdf> at 11 October 2009.

24 See Evidence to Senate Community Affairs Legislation Committee Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Parliament of Australia, Darwin, 21 July 2006, 78 (Dennis Bree, Deputy Chief Executive, Department of Business, Economic and Regional Development, Northern Territory):

At the November 2003 governance conference at Jabiru, the two major land council directors gave papers talking about the importance of improving governance arrangements on remote communities. In particular, David Ross’s paper called for the development of leases on communities to assist in the resolution of conflict between residents and traditional owners.

A sixth, and final, problem is that the absence of clear and enforceable laws in relation to land allocation and infrastructure use undermines appropriate decision-making authority. This in turn impedes the development of effective community governance.

None of these problems are the result of communal land ownership per se. As the next section details, however, the existence of communal title is relevant to why the informal arrangements were allowed to develop and to how governments have responded.

E Reasons for the Lack of Formal Tenure

It is the absence of lease applications, rather than a refusal to grant leases,²⁵ which has determined the informal tenure situation in Aboriginal communities. Primarily, this is the result of government agencies not applying or providing for leases when funding infrastructure on Aboriginal land and not applying for leases when they themselves are occupants.

Four explanations have been advanced for this failure to apply for leases.

The first explanation is that, as the informal arrangements worked sufficiently well, government agencies formed the view that the costs of applying for leases outweighed the benefits. Michael Dillon and Neil Westbury state that while the ‘Australian Government has generally sought and obtained formal title for its facilities (which are not numerous), the Northern Territory Government has a long standing policy of not seeking formal title for its assets’.²⁶ This policy was ‘rarely discussed publicly by Northern Territory officials’. However, the ‘implicit rationale’ was that ‘informal community consultations do occur, the assets are invariably built with government funds to provide community services, there is no market in land in these communities, and the delays inherent in negotiating formal title would disadvantage the communities as basic services would be delayed’.²⁷

It is likely that this overstates the extent to which Commonwealth agencies across the board have sought or required leases.²⁸ Certain Commonwealth agencies, such as Telstra, have sought leases more frequently than other agencies, perhaps because they are more accustomed to applying for leases on other types of land.

25 There is no evidence of broad scale refusal of lease applications in Aboriginal communities, and to the author’s knowledge this has not been alleged. As described below, some critics instead argue that the current arrangements have prevented the making of lease applications.

26 Dillon and Westbury, above n 21, 131. Dillon and Westbury also describe the impact of s 14 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which provides government agencies with a continued right of occupation in relation to land that they occupied at the time it became Aboriginal land although they recognise that this was only intended as a transitional provision. The proportion of community land which was occupied by government agencies at the time it became Aboriginal land and has been continuously occupied since that time is small and s 14 does not have a significant impact.

27 Ibid 132.

28 For example, the Nguui lease discussed below annexed a list of existing leases at the time of grant of that lease describing only three leases to Commonwealth bodies, which would not represent all Commonwealth funded infrastructure in that community.

As the quote from Dillon and Westbury indicates, governments have implicitly relied on communities and traditional Aboriginal owners to develop their own informal arrangements with respect to community land use,²⁹ and have regarded those arrangements as sufficiently functional to continue installing infrastructure without formal leases.

The second explanation is a variation of the first which places significantly more emphasis on the transactions costs and delays associated with the consent processes under section 19 of the *Land Rights Act*. Proponents of this viewpoint argue that the ‘complex and time consuming processes’ for obtaining a lease have meant that few persons have attempted to do so.³⁰

As an explanation for a 30 year history of successive governments failing to apply for leases, this reasoning is not persuasive.³¹ Its proponents have appeared to accept this, preferring instead to draw a line underneath the situation as it stands, taking as their starting point ‘[t]he fact is that there is a legacy of very limited leasing of land within Aboriginal townships’.³² In other words, this second reason has been used less as a historical explanation and more as a rationale for why governments have been unable to rectify this ‘legacy’ in recent years and, more importantly, as an argument for why a new form of leasing (such as township leasing) was required to address this.

This argument relies on the assumption that lower transactions costs will be, and can only be, achieved through township leasing. A more detailed consideration of transaction costs, which is provided in Part VII, does not support this assumption.

A third explanation is that the hostile, almost toxic, relationship that subsisted between the Northern Territory Government and the land councils over decades prevented them from meeting to work on a solution to community planning

29 It would be misleading to assert that all government agencies have consciously distinguished the interests of traditional Aboriginal owners from the interests of community members. As Dillon and Westbury state, implicit in the policy of the Northern Territory is the requirement that ‘if Indigenous communities wish to obtain basic services, then they should provide access to the land free’, above n 21, 132. This requires an assumption that the land belongs to the community, not a separately identifiable group of traditional Aboriginal owners. The impact on community members and traditional Aboriginal owners, however, is not dependent on the rationale of the government agency – they were still required to come to an understanding about land use. It should also be noted that non-Aboriginal operatives, such as community council and land council staff, play a role in the development of these understandings.

30 See, eg, Department of Families, Community Services and Indigenous Affairs Office of Indigenous Policy Coordination, *Submission to the Senate Community Affairs Legislation Committee Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (2006) 4–5.

31 It would be more compelling if there was a history of governments initially attempting to obtain leases then desisting when they found the process too cumbersome. There is no evidence of such a practice. Further, whereas Aboriginal land under the *Land Rights Act* is controlled by the Commonwealth, the Northern Territory has always had full jurisdiction over Aboriginal community living area land. The protective mechanisms contained in s 110 of the *Associations Act 2003* (NT), make it more difficult, not less difficult, to obtain leases on this form of title as a result of which there are next to no leases. The Northern Territory has never attempted to reduce the transaction costs of obtaining leases on this form of title.

32 Dennis Bree, above n 24, 78.

problems.³³ The Country Liberal Party ('CLP'), which governed the Northern Territory from self-government in 1978 through to its electoral defeat in 2001, was both opposed to land rights on ideological grounds and resentful of the restrictions on Territory power imposed by the *Land Rights Act*. The CLP's 'bloody minded' opposition to land claims frequently pitted them against the land councils in protracted litigation,³⁴ and in successive elections they campaigned strongly on their opposition to land rights and the activities of the land councils.

It is likely that this hostility has played a role in the failure of Northern Territory governments to apply for leases. There has generally been significantly less hostility between the land councils and Commonwealth governments.

The fourth explanation for the lack of community leases was propagated by the then Minister Mal Brough in the course of introducing legislation to support township leasing as described below. Aligning himself with critics of self-determination policies of the past 30 years, referred to by one prominent author as the 'Coombs socialist "homeland" model',³⁵ the then Minister described how 'the enforcement of collective rights over individual rights has been an abject failure'³⁶ and that 'self-determination was the biggest mistake'.³⁷

The Northern Territory Government has primarily been responsible for infrastructure in Aboriginal communities. The suggestion that successive CLP governments have refrained from applying for leases out of deference to 'the enforcement of collective rights over individual rights' or a commitment to self-determination is insupportable. As described below in Part VII, the failure to apply for leases is more consistent with government agencies holding communally owned land in lower regard and believing that traditional Aboriginal owners were obliged to make land available for free.

The statements of the former Minister are illustrative of a danger which inhabits simplistic critiques of 'past policies of self-determination'. In relation to community leasing, the usual infrastructure of state (community planning and a formal agreement process between the community and land owners) was not provided, and instead there was a heavy reliance on informal Aboriginal governance to fill the void. A critique which focuses only the 'failure of self-determination', and ignores the circumstances surrounding the reliance on

33 'Both the CLP and land councils, not natural friends, suspected negotiations for such leases would be protracted and unpleasant': Toohey, above n 5.

34 Sean Brennan, 'Economic Development and Land Council Power: Modernising the *Land Rights Act* or Same Old Same Old?' (2006) 10(4) *Australian Indigenous Law Reporter* 1, 21–2.

35 Helen Hughes, *Lands of Shame: Aboriginal and Torres Strait Islander 'homelands' in transition* (2007) 11.

36 Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth), House of Representatives, 19 June 2006 (Mal Brough, Minister for Indigenous Affairs).

37 Ibid. Note that the Minister did not explicitly address the reason for the lack of leases. However, his language is inconsistent with any of the first three reasons and relies on a fourth view that communal rights were deliberately 'enforced'. The view that there was an explicit enforcement of communal rights was also expressed more widely, see, eg, Helen Hughes who refers to 'the imposition of communal instead of private property rights (notably for housing)': see Hughes, above n 35, 4.

Aboriginal governance, in particular ‘ongoing government disengagement’³⁸ and the absence of supporting infrastructure, will necessarily underestimate or even disregard existing Indigenous capacity.

III TOWNSHIP LEASING AND SECTION 19A

A Critics of Communal Title

While the issue of community wide leasing in the Northern Territory has been raised before,³⁹ the most recent discussion began in 2004 with the release of a confidential concept paper by the Northern Territory Government,⁴⁰ provided initially to the land councils and then to the Commonwealth Government.

The discussion paper may have gone no further, but for the fact that it became linked to a broader discussion about communal title which had been developing in Australia for a few years. Critics of communal title have argued that it is a structural impediment to economic development in Aboriginal communities.

It has been suggested that there are two separate but related ‘strands’ to this argument. First, it appealed to those who were always opposed to the concept of land rights, or any special rights for Aboriginal people. This opposition had a long history, but since around 2000 its proponents had become more organised, vocal and prominent.⁴¹ Secondly, it appealed to those with more ‘technocratic concerns’ who were persuaded that the writings of international development economists such as Hernando de Soto were relevant to Aboriginal communities.⁴²

B The New Township Leasing Model

The new township leasing model proposed by the Northern Territory Government in 2004 was for all the land in and around a community to be leased

38 This term is taken from Dillon and Westbury, above n 21, 9, who argue that while ‘misguided government policies’ have had a ‘non-trivial impact’, they do not believe that it is the ‘primary cause of Indigenous disadvantage’. Their analysis instead focuses on the impact of the ‘structural absence of a wide array of economic and social institutions across remote Australia, arising primarily from long-standing and ongoing government disengagement’.

39 See Brennan, above n 34, 11, for a description of early discussion of community leasing.

40 This concept paper was called ‘Tenure and Town Planning in Remote Communities’ and is not publicly available but is described in Central Land Council, *Communal Title and Economic Development* (2005) 2 <http://www.clc.org.au/Media/papers/CLC_%20tenure_paper.pdf> at 23 September 2009. It is also referred to by Paul Toohey, who attributes its authorship to Mike Dillon, ‘then a Territory government adviser, now Indigenous Affairs Minister Jenny Macklin’s senior advisor’, Toohey, above n 5. Dillon is also one of the authors of Dillon and Westbury, above n 21.

41 The most prominent example is the Bennelong Society, founded after a workshop of predominantly conservative commentators in December 2000 called ‘Aboriginal Policy: Failure, Reappraisal and Reform’. For an example of these arguments see Peter Howson, *Aboriginal Land Rights – the Greatest Folly* (2007) The Bennelong Society <<http://www.bennelong.com.au/articles/howson9.php>> at 23 September 2009.

42 Dillon and Westbury, above n 21, 146.

for 99 years to a government entity, who would in turn sublease sections of the community to occupants. The grant of a head lease to the government entity would be pursuant to the consent procedures under the *Land Rights Act*, but the subleases would not, which means that subleases could be created and transferred more quickly.

This effectively takes as a model the position of vacant crown land as the natural starting point for the development of individual tenure. Instead of actual vacant crown land, a 99 year lease to a government entity becomes the substructure on which normalised tenure arrangements could be established. Key to this model is limiting the ability of the underlying land owners, the traditional Aboriginal owners, to control decision-making about subleases.⁴³

C Other Possible Models of Community Leasing

In March 2005 one of the two major Aboriginal land councils, the Central Land Council, published a policy paper responding to the Northern Territory Government's township leasing model and to the general debate about communal land ownership.⁴⁴ The Land Council accepted the need to establish regularised tenure arrangements in communities on Aboriginal land and proposed an alternative community leasing model.⁴⁵ This model divided community land use into three categories: community housing, government services and commercial use. In relation to community housing, it proposed a block lease of housing to a statutory housing corporation. In relation to government infrastructure, it proposed leasing based on standard terms and conditions.⁴⁶ In relation to commercial land use, it proposed the consideration of leases on a case by case basis, arguing that this was the best means to provide for flexible benefits for traditional Aboriginal owners and community members.⁴⁷

In December 2006, the Thamarrurr Council proposed an alternative model for the community of Wadeye. Thamarrurr had prepared a draft community wide lease to a 'town corporation' controlled by traditional Aboriginal owners, who would then sublease sections of the community in a similar manner to the government entity under the Northern Territory Government's township leasing model.⁴⁸ The difference of course was that town corporation, rather than a government entity, would be responsible for decision-making.

43 Ibid 151.

44 Central Land Council, above n 40.

45 The Central Land Council had previously argued for the regularisation of leasing in communities, see Dennis Bree, above n 24, 78.

46 The Land Council noted that 'In the past, leases for a community purpose have been provided on the basis of a peppercorn rent', indicating a willingness to consider the same for future leases: *ibid* 21.

47 The Land Council refers to benefits such as preferential employment and training and trust fund initiatives for specific community purposes, as well as the potential for joint venture arrangements, above n 40, 22.

48 Tara Ravens, 'Wadeye fights for land', *The Australian* (Sydney), 4 December 2006 <<http://www.theaustralian.news.com.au/story/0,20867,20865735-5006790,00.html>> at 23 September 2009.

In September 2007, the senior and high profile Aboriginal leader Galarrwuy Yunupingu made an agreement with the then Minister for Indigenous Affairs, Mal Brough, in relation to the land around the Gunyangara ‘Ski Beach’ community. The agreement was in the form of a Memorandum of Understanding with the Commonwealth to work towards a lease to the Gumatj association, who would then sublease portions of the lease area.⁴⁹

Each of these alternative models was capable of being implemented under the existing provisions in section 19 of the *Land Right Act*.⁵⁰

Other models are available, and have no doubt been discussed, however no other models have attracted any level of publicity primarily because the Commonwealth has preferred township leasing and refused to consider other models.

D The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

In May 2006, the then Minister Mal Brough introduced the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth) to the Commonwealth parliament. The Bill contained a number of amendments to the *Land Rights Act* including a new section 19A to enable township leasing along the lines of the model proposed by the Northern Territory Government in 2004.

The township leasing amendments received significant public attention. Mr Brough took an aggressive, and perhaps calculatedly provocative, approach to township leasing, describing the ‘appalling levels of violence and abuse’ in communities as result of ‘the failed policies of the past’ and in particular ‘the enforcement of collective rights over individual rights’.⁵¹ His township leasing reforms would ‘normalise life’ for community residents by creating a ‘new tenure system ... that will allow for individuals to have property rights’.⁵² The new tenure system, he argued, would facilitate economic development and give community residents an avenue to own their own home, a right that they had been denied for many years.

49 For a useful overview of the agreement see Agreements, Treaties and Negotiated Settlements Project, *Memorandum of Understanding between Galarrwuy Yunupingu and the Commonwealth of Australia*, 20 September 2007 <<http://www.atns.net.au/agreement.asp?EntityID=4010>> at 23 September 2009. The agreement was negotiated in the context of Yunupingu agreeing to give public support to the Northern Territory Intervention, and it has been pointed out that it did not include the land owners or the land council, who were the actual decision-makers. The Memorandum of Understanding has not been pursued under the new Labor government.

50 Although the Land Council reiterated its request that s 19(8) of the *Land Rights Act* be amended to allow for ‘prospective’ consent to future dealings in relation to a lease under s 19. This request had earlier formed part of a joint submission to the Commonwealth by the land councils and the Northern Territory government requesting ‘consent’ amendments to the *Land Rights Act*. The *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth) introduced new s 19(8A), (8B) in response to these concerns.

51 Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth), House of Representatives, 19 June 2006 (Mal Brough, Minister for Indigenous Affairs).

52 Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth), House of Representatives, 31 May 2006 (Mal Brough, Minister for Indigenous Affairs).

Mr Brough made no distinction between the existence of communal ownership and the absence of formal leases, referring only to the situation that he described as ‘the failed collective’. He made no mention of the Central Land Council’s alternative leasing model (which had been published a year before the amendments) and disregarded other models.⁵³

In taking this approach, Mr Brough promoted a dualistic view of tenure in Aboriginal communities, whereby the alternatives were either the existing informal tenure arrangements (which, he implied, were the result of support for collective ownership) or section 19A township leasing.

E The Public Debate

The debate in relation to community leasing has been detailed elsewhere, and only a few observations will be made here.⁵⁴

First, the debate about the amendments was frequently linked to the wider debate about individual/communal title. While that debate raises significant issues, it is a misleading framework for understanding the actual impact of the amendments or the concerns of those affected by township leasing.

Land councils and communities have not been opposed to community leasing per se, out of a commitment to communal title or otherwise, although they regard it as raising complex issues. As demonstrated above, land councils and communities have put forward other models of community leasing, and it has been noted that in 2003 the major land councils themselves expressed concerns about governance arrangements in communities and the potential for disputes between residents and land owners, and called for the development of leases.⁵⁵ They were concerned about section 19A because of the particular model of leasing that it provides for.

Secondly, while the Government’s frequent attacks on the ‘failure of self determination’ were misleading, they were not irrelevant. As described above, this language reflected an attempt to create an alliance with conservative voters and commentators. However, beyond this it also articulated the Government’s negative view of local Aboriginal governance, and its frustration at being unable to itself assert greater control.

The actions of the Commonwealth Government since 2006 confirm this observation. In Part VI of this article, the land reform related measures of the Northern Territory Emergency Response are described. None of those measures make sense in the context of promoting individual title, home ownership or economic development. They are, however, a more direct expression of the Commonwealth’s intention to assert control.

53 When Thamarrur proposed an alternative model for Wadeye in December 2006, Mr Brough dismissed it as economically unsound and unable to meet the goals of private home ownership and commercial business development and there was no further negotiation: see Ravens, above n 48.

54 See, eg, Brennan, above n 34, 11; Dillon and Westbury, above n 21, 136.

55 See Bree, above n 24.

IV DIFFERENCE BETWEEN SECTION 19 AND 19A LEASES

This section describes the effect of the new section 19A by considering the differences between leases under sections 19 and 19A. The distinction between leases under sections 19 and 19A has been blurred in certain circumstances by further amendments to the *Land Rights Act* since 2006, and these amendments are also described.

There is no substantial difference in the process for the grant of a lease under sections 19 and 19A.⁵⁶ Each follows the traditional owner consent processes which are described above. The differences between the two forms of lease are in relation to the area of the lease, the restrictions on the terms of the lease, the ability to preserve existing rights and the identity of the lease holder.

A Area of Land Under Lease

In keeping with its purpose, section 19A can only be used in relation to a 'township'. Township is defined by reference to the Regulations, which can describe either a specific area or kind of Aboriginal land.⁵⁷ Two specific areas have now been prescribed, for the two leases which have been granted under section 19A.⁵⁸ Those leases have included all roads, parks, community areas, schools, ovals, stores, offices and other existing infrastructure in the communities together with a large area of land surrounding the community.⁵⁹

Section 19 is more general, and allows for the grant of a lease over any Aboriginal land to any person for any purpose.⁶⁰ A lease under section 19 can relate to any area – from a single community lot to a more broad area of Aboriginal land.

B Restrictions on the Terms of a Section 19A Lease

There are no restrictions in the *Land Rights Act* on the terms which may be contained in a lease granted under section 19, whereas section 19A contains three sets of restrictions.

First, there are certain restrictions in relation to the period of the lease. A lease under section 19A must be for a period of between 40 and 99 years. Originally, section 19A provided only for leases of 99 years, but this was amended in 2008 by the new Labor Government.⁶¹ Once agreed to, the period of the lease cannot be reduced even by agreement between the parties.⁶²

56 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 19(5), 19A(2).

57 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3AB(2), (3).

58 *Aboriginal Land Rights (Northern Territory) Regulations 2007* (Cth) regs 5, 6.

59 The s 19A lease over the community of Nguui covers an area of 454 hectares, or 4.54 kilometres, and the s 19A lease over the communities of Angurugu, Umbakumba and Milyakburra covers 150, 314 and 510 hectares respectively. In each case, this is considerably larger than the existing footprint of the community: *Aboriginal Land Rights (Northern Territory) Regulations 2007* (Cth) regs 5, 6.

60 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19(4A).

61 *Indigenous Affairs Legislation Amendment Act 2008* (Cth).

62 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19A(4), (4A).

Secondly, there are restrictions on the lease holder which prevent the transfer or encumbrance of the lease. A lease under section 19A cannot be mortgaged and can only be transferred from one approved government entity to another.⁶³ This reflects the purpose of section 19A as a head lease for township leasing, and does not prevent the transfer or encumbrance of subleases granted under the lease.

Thirdly, there are restrictions which prevent the Land Trust from imposing certain conditions in relation to the grant of subleases. A lease under section 19A cannot contain a rule which relates to the payment, or non-payment, of rent under a sublease, or a rule which requires the consent of any person to the grant of a sublease.⁶⁴

Restricting the level of control of traditional Aboriginal owners over subleases is a key component of the township leasing model.⁶⁵ The effect of this is considered in more detail below, in relation to the two leases which have been granted under section 19A.

C Preserved Rights and Interests

As leases under section 19A are granted over entire township areas, they may apply to areas which are already subject to a lease (granted under section 19) or where the occupant has some other formal or informal right of occupancy. Section 19A allows for existing interests to be preserved and to continue (for the duration of the lease) as if they were granted by the leaseholder in place of the Land Trust.⁶⁶

D The Lease Holder

Whereas a lease under section 19 can be made to any person, a lease under section 19A can only be made to an approved government entity. In 2007, the Commonwealth created the Executive Director of Township Leasing ('EDTL') to enter into section 19A leases on its behalf.⁶⁷

Since then, the role of the EDTL has been expanded in a manner which has blurred some of the distinctions between section 19 and 19A leases. The EDTL is now capable of accepting not just township leases under section 19A, but also leases of any area under section 19, leases of Aboriginal community living areas and subleases of town camps,⁶⁸ and some of the benefits which were particular to section 19A leases now also apply to other interests that are held by the EDTL.

When section 19A was introduced, it was supported by provisions which allowed leases under section 19A, and the land affected by those leases, to be exempt from certain Northern Territory laws. First, section 19C provides that

63 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19A(8), (8A), (9).

64 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19A(14), (15).

65 Dillon and Westbury, above n 21, 151.

66 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19A(10), (11), (12).

67 *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007* (Cth). The Office of Township Leasing now has its own website: see <<http://www.otl.gov.au/>> at 27 September 2009.

68 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 20C.

stamp duty does not apply to section 19A leases granted to a Commonwealth entity. Secondly, section 19C also provides that the Registrar-General of the Northern Territory must register a section 19A lease as if it were duly executed in accordance with Northern Territory law relating to the transfer of land (whether or not it is accordance with that law). Thirdly, section 19D provides that the procedures in relation to the subdivision of land under Northern Territory law do not apply to the grant of a section 19A lease to a Commonwealth entity. Fourthly, section 19E enables the regulations to modify any law of the Northern Territory relating to planning, infrastructure, subdivision or transfer of land or other prescribed matters in relation to land subject to a section 19A lease to the Commonwealth.

Originally, this created a distinction between leases to a Commonwealth entity under section 19A and other leases. However, when the *Land Rights Act* was modified to create the EDTL, these exemptions were extended to apply to all leases (including leases under section 19) and subleases which are to the EDTL.⁶⁹

The provision which enables the regulations to modify certain Northern Territory laws was exercised in December 2008.⁷⁰ The regulations modify the application of the *Planning Act* (NT) and *Land Titles Act* (NT), with the effect that the Commonwealth has a three year period from the grant of the lease (or in relation to town camps, the sublease) during which it may submit a survey plan which formalises subdivisions for existing infrastructure⁷¹ without having to follow the normal subdivision procedures and survey requirements.⁷²

The intention of modifying these laws is to reduce the transactions costs of creating individual land parcels. The need to reduce these costs is real, but the way in which the Commonwealth has achieved this outcome is to grant itself exemptions that no one else receives. This creates a legal bias in favour of leases to the EDTL. For example, a housing lease directly to the Northern Territory housing authority would not have the same exemptions, although this example could be rectified by the Northern Territory government introducing equivalent exemptions under its own legislation.

V LEASES GRANTED UNDER SECTION 19A

This section further describes the new section 19A through an overview of the two existing township leases. The first was granted on 30 August 2007 by the Tiwi Aboriginal Land Trust over the Nguiu community for a period of 99 years (the 'Nguiu lease'), under the former Coalition Government. The second was

69 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 20SA(2), (3), (4) and 20SB respectively.

70 *Aboriginal Land Rights (Northern Territory) Amendment Regulations 2008* (No. 2) (Cth).

71 Existing at the time of lodgement of the survey plan, including infrastructure which has been built since the grant of the lease / sublease: *Aboriginal Land Rights (Northern Territory) Amendment Regulations 2008* (No. 2) (Cth) reg 6A.

72 For clarity, the distinction between ss 19D and 20SA(4), which are described above, and this regulation is that the former apply to the main lease whereas the regulation applies to subleases under that lease.

granted under the current Labor Government on 4 December 2008 by the Anindilyakwa Land Trust over the communities of Angurugu, Umbakumba and Milyakburra for a period of 40 years with an option to renew for a further 40 years (the ‘Anindilyakwa lease’). Both leases are granted to the EDTL, and copies of the leases are available for a small fee through the Northern Territory Land Titles Office.⁷³

The office of the EDTL has now also created a ‘Standard Township Head Lease’ which is available online (the ‘Standard Lease’).⁷⁴

A General Comment on the Terms of the Leases

The Nguiu lease is a thorough and extensive document, with the main body of the lease running to around 70 pages. Both the Anindilyakwa lease and the Standard Lease are amended versions of the Nguiu lease. Some of the amendments simplify the original lease while others appear to reflect small movements in government policy during the intervening period.

In 2006 and 2007, when the terms of the Nguiu lease were being negotiated, the Commonwealth Government was conscious of the political environment surrounding township leasing and was motivated to secure a lease as soon as possible. This strengthened the negotiating position of the Tiwi Land Council. The enhanced position of the Tiwis appears to be reflected in both the terms of the lease and the additional benefits which were secured for the community. It is possible that the Nguiu lease represents a high water mark for traditional Aboriginal owners and communities, both with respect to the terms of the lease and the additional benefits. Some of the changes to the Anindilyakwa lease and Standard Lease are consistent with a retreat from this high water mark by the Commonwealth Government.

The major provisions of these leases are described below. As the Standard Lease is more accessible, this article uses references to the Standard Lease for matters which are common to the other leases.

B Rent and Other Payments

1 Rent

The rent under each lease has a fixed component and a variable component.⁷⁵

The variable component is calculated by reference to income generated under the lease, primarily rent payments from subleases.⁷⁶ The EDTL is required to record the income it receives and, after the deduction of operating expenses, to pay the balance as rent on the township lease. Operating expenses means all the costs of the EDTL in relation to managing that lease.⁷⁷ This includes both direct

73 The Nguiu lease is lease number 662214 and the Anindilyakwa lease is lease number 692818.

74 See Office of Township Leasing, *Standard Township Head Lease* <http://www.otl.gov.au/township_head_lease/default.htm> at 27 September 2009.

75 Ibid cl 5.

76 Ibid cl 1.1.

77 Ibid cl 1.1.

costs such as surveying costs and the costs of preparing subleases and the administration and management costs of the EDTL which are attributable to that lease (including wages of EDTL staff, etc). The variable component of the rental is effectively the net profit (if any) of the EDTL on the lease.

In addition to this the leases provide for a one-off up-front introductory payment. This also acts as a minimum payment for the first 15 years of the lease, as during those 15 years additional rent is only payable if the total variable component exceeds the amount of the introductory payment. The introductory payment under the Nguiu lease was \$5 000 000. It is not clear how this amount was calculated as it does not appear to be directly related to the commercial value of the land.⁷⁸ The introductory payment was reduced to \$4 500 000 for the Anindilyakwa lease (in total for the three communities).

There are no further minimum payments provided for in the leases and future rent will depend on whether the income that the EDTL makes on subleases is greater than its expenses. The operating expenses for the Office of the Director of Township Leasing for the 2007/08 financial year were \$457 000.⁷⁹ During this period only the Nguiu lease had been executed. However, some of these costs may be attributable to the EDTL's activities in other communities, including negotiations in relation to the Anindilyakwa lease.⁸⁰

2 Other Benefits

Rent payments under the lease are for the benefit of the traditional Aboriginal owners rather than community members. However, both leases have been accompanied by a benefits package for the community.⁸¹ For the Nguiu community, the Commonwealth agreed to a package which included 25 new houses, repairs and maintenance on all other houses, \$1 000 000 extra for health initiatives, improvements to the cemetery and a community profile study.⁸² These benefits were not recorded in the lease, but were included in the memorandum of understanding which led to the lease.⁸³

78 Mr John Hicks, Executive Secretary of the Tiwi Land Council, advised the Senate Standing Committee on Community Affairs that valuations obtained by the Land Council found that the improved value of the community was approximately \$54 000 000 (which is also the minimum amount that the EDTL is required to insure the township for under cl 21.1(a)(i) of the Nguiu lease). Commercial rent on this for 15 years would be considerably more than \$5 000 000. See evidence to Senate Standing Committee on Community Affairs, Parliament of Australia, Canberra, 28 May 2007, 66–7 (John Hicks).

79 Department of Families, Housing, Community Services and Indigenous Affairs, *Annual Report 2007–2008* (2008) 397.

80 The definition of Operating Expenses in each lease makes it clear that costs incurred by the EDTL prior to commencement of the township lease itself are not recoverable. These costs are instead paid for out of the Aboriginal Benefits Account: *ibid*. See also *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 64(4A).

81 Payments under the lease are made to the land council, who in accordance with s 35(4B) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) must pay an equivalent amount 'to an Aboriginal and Torres Strait Islander corporation for the benefit of the traditional Aboriginal owners of the land'.

82 Mal Brough MP, 'Historic agreement for 99 year lease in NT' (Press Release, 30 August 2007).

83 Mal Brough MP, 'Breakthrough agreement on Aboriginal Land in the NT' (Press Release, 9 May 2007).

Annexed to the Anindilyakwa lease is a copy of a Regional Partnership Agreement ('RPA') between the Anindilyakwa Land Council and the Commonwealth and Northern Territory Governments, dated 20 May 2008.⁸⁴ The RPA commits the parties to negotiating a section 19A lease and details a number of housing, education and training benefits for the communities.

On these two occasions, the strategy of providing up-front payment and a community benefits package was effective in persuading traditional Aboriginal owners to consent to the grant of a township lease.⁸⁵ This strategy is discussed further in Part VII of the article.

C Existing Occupiers

As previously described, one of the distinct features of a lease granted under section 19A is that existing rights, titles and interests are preserved and continue to have effect as if they were granted by the EDTL in place of the landowner.

The leases refer to the relevant parts of section 19A and provide a mechanism for the EDTL to follow where it wishes to formalise an informal occupancy. The EDTL can either grant the occupant a lease or give the occupant notice to vacate.⁸⁶

D The Making of Subleases and Licences

1 General

The leases acknowledge that the EDTL may grant subleases⁸⁷ over parts of the lease area subject to certain conditions. The Nguiu lease includes the most conditions, which are intended to operate for protection or benefit of the traditional Aboriginal owners. This section primarily describes the conditions under the Nguiu lease and where there are differences these are also referred to, so as to illustrate any shifts in government policy.

The conditions under the Nguiu lease are that: subleases must contain certain mandatory terms,⁸⁸ the number of non-Tiwi permanent residents of Nguiu must not exceed 15 per cent of the population,⁸⁹ subleases over sacred sites and surrounding land may only be granted to custodians or a sacred site authority,⁹⁰

84 Annexure 3 of the Anindilyakwa lease, also referred to at cl 2.5.

85 See, eg, Dillon and Westbury, who state that 'the Tiwi Land Council was initially opposed, but has swung round to a more positive attitude following discussions with the Australian Government involving funding for a secondary college on the islands': Dillon and Westbury, above n 21, 150.

86 See Standard Township Head Lease, above n 74, cl 6.

87 See Standard Township Head Lease, above n 74, cl 10. Each of the leases also provide for the grant of licences on similar terms. To avoid repetition, this article refers to the grant of subleases only except where separate issues arise in relation to the grant of licences.

88 See cl 10.1(c) of the Nguiu lease. The Nguiu lease also attaches pro forma subleases and licences which contain the mandatory terms. The Anindilyakwa lease and Standard Lease do not contain this provision in relation to mandatory terms (nor the attached pro forma agreements) reflecting a move towards the EDTL having greater discretion over the terms of subleases and licences.

89 This condition is described further below.

90 See cl 10.14 of the Nguiu lease, cl 10.11 of the Anindilyakwa lease and cl 10.10 of the Standard Lease.

generally subleases must be granted on a commercial basis,⁹¹ sublease holders require consent to part with or share possession,⁹² subleases may only be granted to a fit and proper person⁹³ and where the EDTL proposes to grant a sublease for commercial operations it must notify ‘the public’ of the proposed terms and allow interested parties to apply for the lease.⁹⁴

A number of these conditions are considered further below.

2 Subleases on a Commercial Basis

Each of the leases provides that subleases must be granted ‘on a commercial basis applying sound business principles’ taking into account the general purpose of the township lease and the specific purpose of the relevant sublease.⁹⁵ The EDTL is able, but not required, to grant on more favourable terms to a sacred site custodian/authority, and under the Nguiu lease to a community benefit organisation.⁹⁶

This would appear to provide that all other subleases in the township, including subleases to government bodies, housing authorities, home owners,⁹⁷ community organisations, community stores and other commercial operators, will provide for commercial rent. This must be considered with reference to section 19A(15) of the *Land Rights Act*, which provides: ‘A leased granted under this section must not contain any provision relating to the payment of rent, or the non-payment of rent, in relation to a sublease of the lease.’

Both the general rule that grants of subleases be made on a commercial basis, and the exceptions to this rule, would appear to be provisions ‘relating to the payment of rent, or the non-payment of rent, in relation to a sublease’ in breach of this section. If this is the case, the EDTL is bound by neither the general rule nor the exceptions.

The application of section 19A(15) to licences is less clear. Section 19A(13) states in general terms that the holder of a section 19A lease is not prevented from granting subleases. There is an equivalent general provision at section 19A(17) with respect to licences. By comparison, there is no equivalent provision to section 19A(15) with respect to licences. This could leave open the interpretation that section 19A(15) is intended to restrict only subleases, and not licences.

As this section illustrates, the impact of section 19A(15) is significant. The issues which arise from this are discussed further in Part VII below.

91 This condition is described further below.

92 This condition is described further below.

93 This condition is described further below.

94 See cl 10.8 of the Nguiu lease. Clause 10.8(f) requires the EDTL to grant the sublease ‘to the most appropriate person’. There is no equivalent provision in the Anindilyakwa lease or the Standard Lease.

95 See cl 10.1 of the Nguiu lease, cl 10.2 of the Anindilyakwa lease and cl 10.1 of the Standard Lease.

96 The EDTL must have ‘due regard’ to any Community Benefit Organisation Sublease Guidelines developed by the Nguiu Consultative Forum – see cl 10.7 of the Nguiu lease. The exemption for Community Benefit Organisations is not retained in the Anindilyakwa lease or the Standard Lease.

97 That is, any person granted a long term ‘home ownership sublease’.

3 *Requirement of Prior Written Consent of the Land Trust*

The Nguui lease provides that the EDTL must ensure that a sublease holder does not:

- (i) part with or share possession of [the sublease area] other than to or with a Relative; or
- (ii) grant a licence to occupy or use [any part of the sublease area];

without the prior written consent of the Land Trust (which will not be unreasonably withheld) and the EDTL.⁹⁸

This provision raises two issues. The first issue is the intersection of this provision with section 19A(14) of the *Land Rights Act*, which provides: ‘A lease granted under this section must not contain any provision requiring the consent of any person to the grant of a sublease of the lease.’

Curiously, while a provision requiring the consent of the Land Trust to the grant of a sublease is prohibited, a provision requiring the consent of the Land Trust to the transfer, parting with or sharing possession of a sublease may be allowed. As with section 19A(15) of the *Land Rights Act*, there is no equivalent provision to section 19A(14) in relation to licences.

The second issue is that this provision reflects an intention for the EDTL (and to a lesser extent the Land Trust) to retain a level of control over subleases in a manner which is consistent with a landlord / tenant relationship. The effect of this on ‘normalising’ individual tenure is discussed further in Part VII of this article.

4 *Limit on Percentage of Non-Tiwi Permanent Residents*

The Nguui lease provides that the grant of a sublease or licence must not ‘directly result in the number of Non-Tiwi Permanent Residents of the Township’ exceeding 15 per cent of the total population, unless the Consultative Form increases this limit by written notice to the EDTL.⁹⁹

The ongoing application of this provision will be subject to anti-discrimination legislation and in particular the extent to which is it regarded as a ‘special measure’. There is a risk also that this section may also be affected by section 19A(14) of the *Land Rights Act* (see above), as where the grant of a sublease would cause the number of non-Tiwi permanent residents to exceed 15 per cent of the total population then the provision may effectively ‘require the consent’ of the Consultative Forum to the grant.

98 See cl 10.1(f) of the Nguui lease. There is no equivalent provision in the Anindilyakwa lease or the Standard Lease.

99 See cl 10.5 of the Nguui lease. There is no equivalent provision in the Anindilyakwa lease or Standard Lease.

5 *Fit and Proper Persons*

The leases provide that the EDTL must not grant a sublease to any person unless satisfied that the applicant is a ‘fit and proper person’.¹⁰⁰ A person is not a fit and proper person if they have been convicted of a ‘Sexual or Crime against Children Offence’.

The definition of these offences is drafted by reference to the definition of ‘sexual offence’ in the *Criminal Records (Spent Convictions) Act 1992* (NT). To the extent that the definitions are co-existent, this avoids putting this provision of the leases in breach of the *Anti-Discrimination Act 1992* (NT).¹⁰¹ If there are changes to the spent convictions scheme in the future,¹⁰² or to anti-discrimination law, this may change.

As a Commonwealth authority,¹⁰³ the EDTL is also bound by the spent conviction scheme in Part VIIC of the *Crimes Act 1914* (Cth). Under the Commonwealth scheme a wider group of convictions are able to become ‘spent’,¹⁰⁴ which means that certain convictions will become spent under Commonwealth law but not under the Northern Territory law. To the extent that the lease attempts to require the EDTL to act in breach of the Commonwealth scheme, it will not be enforceable.

The lease provides no exemption for, or discretion to exempt, traditional Aboriginal owners, community residents or local Aboriginal people more generally, meaning that they are unable to be granted a sublease if they do not meet the test for a ‘fit and proper person’.

E **Role of the Consultative Forum**

When a township lease is granted, decision making responsibility for community land is transferred to the EDTL for the duration of the lease. The only forum for local Aboriginal input into the decision making process is through a ‘Consultative Forum’.

Each of the leases provides for a Consultative Forum, which is a body made up of nominees of the Land Trust and of the EDTL, with the majority being

100 See clause 10.6 of the Nguiu lease, clause 10.5 of the Anindilyakwa lease and clause 10.5 of the Standard Lease. In relation to a grant to a body corporate, each director or person concerned with the management of the body corporate must be a fit and proper person.

101 The *Anti-Discrimination Act 1992* (NT) prohibits discrimination on the basis of an ‘irrelevant criminal record’ which is defined with reference to ‘spent convictions’. As sexual offences do not become spent convictions they do not fall within the definition of irrelevant criminal record.

102 The Standing Committee of Attorneys-General is working on a project to design a national model Bill for a spent-convictions scheme, see Attorney-General’s Department, *Model Spent Convictions Bill – Draft consultation paper* (2008) <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Model+Spent+Convictions+Bill+-+Draft+consultation+paper.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Model+Spent+Convictions+Bill+-+Draft+consultation+paper.pdf/$file/Model+Spent+Convictions+Bill+-+Draft+consultation+paper.pdf)> at 28 September 2009.

103 See *Crimes Act 1914* (Cth) s 85ZL for the definition of Commonwealth authority.

104 See *Crimes Act 1914* (Cth) s 85ZM(2)(b): ‘the person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than 30 months’.

nominees of the Land Trust.¹⁰⁵ The role of the Consultative Forum is to advise the EDTL in relation to certain decision-making under the lease. In almost all instances where the EDTL is required to consult with the Consultative Forum, the EDTL must 'have due regard to' its recommendations but is not required to follow its directions. There are three exceptions to this in the Nguui lease. First, only the Consultative Forum may increase the limit of 15 per cent with respect to non-Tiwi permanent residents.¹⁰⁶ Secondly, the EDTL must not undertake or allow the construction of a building that is in excess of two storeys or is within 50 metres of the high water mark 'without the consent of the Consultative Forum'.¹⁰⁷ Thirdly, the Consultative Forum can authorise certain exceptions to the quarantine restrictions of the Tiwi Land Council.¹⁰⁸ None of these exceptions are retained in the Anindilyakwa lease or the Standard Lease, under those leases the Consultative Forum may only make recommendations.

Consultative Forum members are appointed by the landowners and not by community members. There is no special forum for community input into decision-making, except as members of 'the public'.¹⁰⁹

This means that the only input into decision-making under the township lease is by representatives of the traditional Aboriginal owners through the Consultative Forum, and in most instances the EDTL is only required to 'have due regard do' the Consultative Forum's recommendations. These arrangements provide for no local Aboriginal responsibility or accountability, only an avenue for traditional Aboriginal owners to 'provide advice' and keep the EDTL 'aware of emerging issues within the township'.¹¹⁰

VI FURTHER LEGAL REFORMS

A The Northern Territory Emergency Response

On 21 June 2007, John Howard and Mal Brough held a joint press conference to announce a new set of measures to protect Aboriginal children in the Northern

105 The Nguui lease and the Standard Lease refer to nominees of the Land Trust, whereas the Anindilyakwa refers to nominees of the Land Council. See cl 23.1 of the Nguui lease, cl 21.1 of the Standard Lease and cl 21.1 of the Anindilyakwa lease.

106 Clause 10.5(b) of the Nguui lease.

107 Clause 17.2 of the Nguui lease, the impact of this must be considered with regard to s 134(2) of the *Law of Property Act 2000* (NT), which states that 'In a lease that contains a covenant ... against the making of improvements without ... consent, the covenant ... is, despite any express term in the lease to the contrary, to be taken to be subject to the qualification that the ... consent is not to be unreasonably withheld'.

108 Clause 19.6 of the Nguui lease.

109 For example, cl 11.8(b) provides that the EDTL 'must notify the public of any proposal to vary the Permitted Use of a Township Licence. Members of the public must have sufficient opportunity to comment or object to such variation'.

110 'The forum meets regularly and provides advice to the [EDTL] about issues of importance to the township. The consultative forum is a very important mechanism for keeping the [EDTL] aware of emerging issues within the township': see Office of Township Leasing, *About the Office of Township Leasing* <<http://www.otl.gov.au/about.htm#5>> at 28 September 2009.

Territory,¹¹¹ known as the Northern Territory Emergency Response or simply the Intervention. When legislation to implement these measures was introduced in August 2007, it contained three reforms which affect Aboriginal land tenure: five-year leases, statutory rights and the power to acquire town camp land.

1 *Five-year Leases*

Pursuant to section 31 of the *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER Act*'), the Commonwealth compulsorily acquired leases over 64 Aboriginal communities, and significant areas of surrounding land, for a period ending five years after the commencement of the Act.

The Explanatory Memorandum stated that the 'leasing provisions will facilitate the repair of buildings and infrastructure in this crisis situation by ensuring that the Government has unfettered access to the land and assets in question'.¹¹² On 21 May 2009, the Commonwealth Government announced that it intended to retain the five-year leases, as they 'have provided temporary tenure to underpin the provision of safe houses and GBM accommodation, and will underpin substantial housing refurbishments'.¹¹³

While there is genuine confusion as to why five-year leases were required,¹¹⁴ it is clear that they do substantially more than provide access or underpin infrastructure provision. Five-year leases give the Commonwealth control over land use in communities, and arguably alter the bargaining position of parties with respect to long term leasing negotiations.¹¹⁵

2 *Statutory Rights*

The *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) introduced a new section Part IIB to the *Land Rights Act*, which provides a means for the Commonwealth or Northern Territory government to obtain a set of rights called 'statutory rights' over Aboriginal land

111 See Mal Brough, 'National emergency response to protect Aboriginal children in the NT' (Press Release, 21 June 2007) <http://pandora.nla.gov.au/pan/36764/20071026-1200/www.facs.gov.au/internet/minister3.nsf/print/emergency_21june07-2.htm> at 28 September 2009.

112 Explanatory Memorandum, Northern Territory National Emergency Response Bill 2007 (Cth) 26.

113 Australian Government, *Future Directions for the Northern Territory Emergency Response – Discussion Paper* (2009) 17.

114 Eg, 'The rationale for compulsorily acquiring five year leaseholds is difficult to ascertain': Dillon and Westbury, above n 21, 147.

115 David Dalrymple, 'The Abnormalisation of Land Tenure' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 213, 214.

on which infrastructure has been built or repaired¹¹⁶ using funds which include government funds.¹¹⁷

The rights provided for by statutory rights include the exclusive and perpetual right to occupy the land without the requirement to pay rent.¹¹⁸ Where the government agrees to a section 19 lease over the same area, the rights are suspended for the duration of the lease.¹¹⁹ Where the government agrees to a section 19A lease over the same area, statutory rights cease.¹²⁰

Statutory rights are not a compulsory acquisition as the consent of the Aboriginal land council is required.¹²¹ It is difficult to foresee any circumstances in which a land council would consent to statutory rights rather than negotiate a lease, as a lease is able to contain terms in favour of both parties whereas statutory rights benefit only the government occupier.

3 *Town Camp Land*

Town camps are situated on land held under perpetual leases rather than Aboriginal land under the *Land Rights Act*. Section 47 of the *NTNER Act* provides a process for the Commonwealth to compulsorily acquire all interests in town camp land. The Commonwealth has for some time been trying to obtain a 40 year sublease over the Alice Springs town camps to the EDTL. When these negotiations stalled because the town camp associations wanted to retain certain decision making control and appoint a newly created community housing body as the interim housing manager,¹²² the Commonwealth gave notice of its intention to compulsorily acquire the town camp land.¹²³ The town camp associations argued that the model they preferred was more sophisticated, with scope to attract private investment and provide for home ownership, including shared equity home ownership.¹²⁴ The primary point of difference was in relation to

116 Provided the total estimated cost of the repairs or renovations exceeds \$50 000 – see definition of ‘threshold amount’ and ‘works’ in s 20T of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

117 The works must be either wholly government funded or partly government funded and the Minister determines in writing that the provisions apply – see ss 20U(1)(d), 20ZF(1)(d) of the *Land Rights Act*.

118 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). See ss 20W(2), 20ZH(2) for the definition of statutory rights.

119 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 20ZD(1), 20ZO(1).

120 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 20ZD(3), 20ZO(3).

121 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 20U(1)(c), 20ZF(1)(b).

122 Tangentyere Council, ‘Resolution on Lease Negotiations Close’ (Press Release, 22 May 2009).

123 See Jenny Macklin, ‘First steps on Alice Springs town camps’ (Press Release, 25 May 2009).

124 For a description of the Central Australian Affordable Housing Company model see Tangentyere Council, *Submission to the National Human Rights Consultation Committee* (2009) 4–7 <http://www.tangentyere.org.au/publications/submissions/2009/SUBMISSIONHUMANRIGHTSCOMMITTEE_JUNE%2009.pdf> at 28 September 2009.

government control. With the deadline for compulsory acquisition looming, the town camp associations agreed to the Commonwealth's demands.¹²⁵

B Relevance to Township Leasing

While none of these reforms directly affect section 19A of the *Land Rights Act*, they were created by the same department and are being implemented during the same time period. Their relevance to this article is what they demonstrate about the aims of the Commonwealth Government's land reform policies.

These reforms are not designed to facilitate individual title, home ownership or economic development. Five-year leases are too short to develop a market in subleases or support homeownership. Contrary to economic development principles, statutory rights provide a means for land owners to effectively forfeit property rights for an indeterminate period so that it can be used for the provision of government infrastructure. In relation to the Alice Springs town camps, the Commonwealth threatened to compulsorily acquire the land if it could not obtain a sublease which gave it the control it required.

The purpose of each of these reforms is to provide a means for governments, in particular the Commonwealth Government, to exercise control over land.

VII DISCUSSION

A The Five Views of Land Ownership

There is no clear or consistent view of land ownership in Aboriginal communities which determines government policy. Instead, government policies reflect the influence of five different views, which are at times in conflict.

The first and the second views are closely related. The first view, which is the most accurate legally, is that land in communities and infrastructure on that land belong to the traditional Aboriginal owners. The second view accepts only that the land belongs to the traditional owners, but not the infrastructure. The distinction is most relevant to the question of whether rent should reflect the improved or unimproved value of the land.

In circumstances where they have agreed to rent, governments have generally preferred the view that traditional Aboriginal owners do not really own the infrastructure as most of it was installed using government funding. The provisions in the *NTNER Act* in relation to valuing five-year leases¹²⁶ reflect this view, as the Northern Territory Valuer-General is directed to disregard the value

125 See Jenny Macklin, Paul Henderson and Warren Snowdon, 'Agreement on Alice Springs Transformation Plan' (Press Release, 29 July 2009). After the making of this announcement, court proceedings were commenced which prevented the grant of the subleases. In response to the court proceedings the Minister has issued a further notice: see Jenny Macklin and Warren Snowdon, 'Alice Springs town camps' (Press Release, 24 August 2009). Those proceedings have not been resolved at the time of writing and the subleases have not been granted.

126 The five-year leases themselves are more consistent with the fourth view; it is the rules in relation to valuing the land which are consistent with the second view.

of any improvements on the land (regardless of who installed them).¹²⁷ Curiously, the original version of section 19A contained a cap on the rent which was determined by reference to the improved value of the land, which could have resulted in much higher rent.

The third view is that the land in and around communities belongs to the community rather than the traditional Aboriginal owners. This view has been reflected in such practices as government agencies consulting with communities, rather than land owners, in relation to land use developments in communities.¹²⁸ This view is also commonly assumed by members of the public who are less aware of Aboriginal land ownership.¹²⁹

As I described earlier, under some other statutory schemes Aboriginal land is owned by, or for the benefit of, the Aboriginal residents. That is not the case under the *Land Rights Act*, which provides for ownership by 'traditional Aboriginal owners', defined by reference to a 'local descent group'.¹³⁰ This means, for example, that a community of a few thousand people can be situated on land belonging to a group of less than a few hundred.¹³¹ Describing the rights under Aboriginal law of long term Aboriginal residents who are not traditional owners is complex and can be contentious. However, it is clear that those rights do not approach ownership rights. Aboriginal communities do have the right under the *Land Rights Act* to be consulted in relation to land use proposals which may affect them, but it is only the traditional Aboriginal owners who may grant or withhold consent.¹³²

A fourth view is that Aboriginal land on which government funded infrastructure has been built has been forfeited to the government for the duration. Under this view, when a government agency installs infrastructure on Aboriginal land it should not be required to pay rent. For the most part the actions of governments over past decades are consistent with this view, and the idea that governments may be asked to pay rent continues to provoke

127 *Northern Territory National Emergency Response Act 2007* (Cth) s 62(4).

128 A contemporary example of this is the process for the Commonwealth consulting in relation to land use approval requests under five-year leases. This process includes the GBM 'seeking information regarding community views' but makes no mention of seeking the view of the traditional Aboriginal owners: see Department of Families, Housing, Community Services and Indigenous Affairs, *Five-year Leased Communities* <http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/housing_land_reform/Pages/five_year_leased_communities.aspx> at 29 September 2009.

129 A popular example is describing Mutitjulu residents as 'the traditional owners of Uluru'.

130 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3.

131 The community of Nguiu is an example of this. The Nguiu lease attaches a 'register of traditional Aboriginal owners' at Annexure 6, which lists about 250 persons, whereas the population of Nguiu is around 1582.

132 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 19(5)(b), 19A(2)(b), 23(3).

resentment.¹³³ The concept of statutory rights is a legislative implementation of this view.

In this context, it is interesting to consider the argument that the *Land Rights Act* implements a Coombs socialist model.¹³⁴ The *Land Rights Act* itself implements a capitalist model under which traditional Aboriginal owners negotiate rent or compensation for activities on their land, such as the grant of a lease or consent to explore for minerals. Traditional Aboriginal owners are familiar and comfortable with this process.¹³⁵ The fourth view of land ownership derives not from the *Land Rights Act*, or the way in which Aboriginal land is owned, but rather from an understanding that where governments are delivering services to an Aboriginal community they should be provided with the land they require and should not be charged rent.

This socialisation of private property has been driven by governments, including conservative CLP and Coalition governments, for several reasons, including: to reduce costs, out of resentment that Aboriginal land owners would profit from the provision of services to Aboriginal communities, out of a lower regard for Aboriginal land ownership because of its communal nature and perhaps even at times out of concern for the impact that a more strict adherence to the principles of capitalism might have on emerging communities.

The fifth view is that certain land in the community is public land, or land in relation to which the public have a right of access. This view is reflected in the changes to the permit system introduced as part of the Northern Territory Emergency Response, which provide a public right of entry to certain sections of Aboriginal communities.¹³⁶

As with the earlier government policies, township leasing reflects a combination of these views of land ownership. While the legal rights of traditional Aboriginal owners are recognised through the payment of some rent, in the long term they have no control over the amount of rent they receive (including whether it reflects the improved or unimproved value), or over other land use decision-making. Community residents are recognised only as occupants or members of the public. In keeping with the fourth view, township leasing makes land use decision-making a government responsibility, however it may result in some government agencies paying rent (on subleases) on Aboriginal land for the first time.

133 See, eg, the newly appointed Coordinator for Indigenous Services in the Northern Territory, Bob Beadman, who states 'There's been instances where land councils have [sought] royalties say for a sewage pipeline to cross somebody's traditional land for a scheme that is going to benefit the wider community now the taxpayer's not going to pay twice in those circumstances': ABC Local Radio, 'Big Policy Shift for Aboriginal communities', *PM*, 20 May 2009 <<http://www.abc.net.au/pm/content/2008/s2576349.htm>> at 29 September 2009.

134 For an example of this argument see Helen Hughes and Jenness Warin, 'A New Deal for Aborigines and Torres Strait Islanders in Remote Communities' (No 54, Centre for Independent Studies' Issue Analysis series, 1 March 2005).

135 Notwithstanding their spiritual relationship with the land and need to protect certain areas, see Dalrymple, above n 13, 62–3.

136 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 70A–70G.

B Decisions to be Made By the EDTL

As described above, township leases provide for centralised decision-making by transferring responsibility to the EDTL. To consider the wider governance implications of this, it is useful to describe the types of decisions that the EDTL will make. In general terms there are three types of decisions.

First, the EDTL will allocate land within the area covered by a township lease. This includes deciding what new land to make available, to whom and for what purpose. It also includes deciding who (if anyone) will receive a sublease or licence over existing infrastructure, which may involve removing some organisations and/or persons from the blocks that they currently occupy.¹³⁷ The EDTL may have the final say on who can or cannot live or work in a community.¹³⁸

Secondly, the EDTL will decide the terms and conditions of subleases and licences, subject to any conditions in the head lease. Under the leases which are described above, as modified by section 19A of the *Land Rights Act*, the EDTL will decide on all key terms and conditions, including the period of the sublease, the permitted activities and the amount of rent.

One important outcome of this is that it falls to the discretion of the EDTL whether or not the traditional Aboriginal owners will receive rent under the township lease (beyond the one-off introductory payment). If the EDTL elects to pursue market rental on all subleases, then it is likely that the total of this will exceed the EDTL's expenses and rent will be payable on the township lease. If the EDTL elects to pursue only sporadic or limited rent then its costs will not be exceeded and no rent will be payable on the township lease.¹³⁹

This also means that the amount of rent required from occupiers will be primarily determined by government policy.¹⁴⁰ Not only does this put the traditional Aboriginal owners in a difficult position when deciding whether or not to agree to a section 19A lease, it runs contrary to the free market rhetoric which was used to support the introduction of section 19A leases. This is most important in the context of leases for commercial purposes. What is otherwise a private negotiation between the traditional Aboriginal owners and the prospective lease holder, under a section 19A lease becomes a regulated transaction under the control of a government body.

137 As described above, under the Nguiu and Anindilyakwa lease the EDTL is required to go through a process to remove a person with existing occupancy rights, but is not prevented from doing so.

138 In Nguiu, this is subject to the requirement that no more than 15 per cent of occupants may be non-Tiwi. There is no equivalent requirement in the Anindilyakwa lease. Where a person/organisation has already obtained a sublease/licence, the ability of the EDTL to remove the person will be subject to the terms of the sublease/licence. This may also be subject to the reservation in s 71 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

139 If the costs of the EDTL are not met out of rent then the Commonwealth will be required to fund the difference. This provides the Commonwealth with an incentive to ensure that the EDTL pursues rent from at least some occupants.

140 Note that the EDTL enters into leases 'on behalf of the Commonwealth' and is not granted any form of statutory independence in decision-making: see *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 20C.

Thirdly, the EDTL will act as ‘landlord’ in relation to tenants of subleases and licences. Under the Nguiu lease, at a minimum¹⁴¹ this includes making decisions about whether or not to consent to the parting with or sharing of possession under a sublease or licence.

The argument that section 19A leases ‘normalise’ community tenure is dependent on a number of assumptions, including the assumption that occupants will acquire normal title, that is, title which approximates individual freehold (the form of title in ‘normal’ towns). This is not the case. The title that occupants acquire under a township lease is that of tenant of a government entity. The terms of subleases, and the way in which the EDTL exercises its rights under subleases, will respond to government policy. Current Commonwealth policies, as reflected in the terms of the existing section 19A leases as well as other recent developments, are consistent with a government policy of maintaining relatively high levels of control.

Occupants in Aboriginal communities can be broadly divided into four groups: residents of public housing (formerly community housing), community service organisations, government agencies and commercial operations (the last three groups may occupy both office and residential sites).¹⁴²

The current policy is for the EDTL to sublease all public housing to Territory Housing, and this is likely to occur fairly quickly.¹⁴³ The situation in relation to community service organisations who deliver services in Aboriginal communities is less clear. Funding for those organisations is generally provided on a cyclical basis, often after a tender process, and it is unlikely that a community organisation will be granted a sublease for a period which is longer than the period for which they are funded as this would interfere with future funding decisions. The policy with respect to subleases for government agencies has also not yet been publicised.

As economic development is one of the main rationales for township leasing it is instructive to consider the position of subleases to commercial operators, in relation to which the EDTL has created a ‘Commercial sublease application form’.¹⁴⁴ The form requires applicants for a commercial sublease to provide extensive information including a detailed organisational and financial plan, which it notes will be referred to KPMG. The application form also advises that ‘the Sublessee is generally not permitted to undertake any Development or Construction of any Building other than ... with the EDTL’s prior written consent’, that ‘the Office of Township Leasing will advise how much the rent is

141 There is nothing in the Nguiu or Anindilyakwa leases, or in s 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which prevents the EDTL from imposing further conditions on the use and transfer of subleases and licences.

142 For an interesting description of all occupants in one such Aboriginal community, the Yuendumu community, see Yasmine Musharbash, *Yuendumu Everyday* (2008) 158.

143 See Australian Government and Northern Territory Government, above n 4.

144 Office of Township Leasing, *Commercial Sublease Application Form* <http://www.otl.gov.au/docs/sublease_application_form.pdf> at 29 September 2009.

for your chosen site/location' and that the EDTL 'may stop the application process at any time if it considers that it is in the public interest to do so'.¹⁴⁵

It is not surprising to see that the EDTL has developed forms and processes to assist with carrying out its functions, that sublease holders will require the consent of the EDTL to construct buildings, that the EDTL will advise applicants what the rent on a sublease will be or that the EDTL refers to making decisions 'in the public interest'. This is a logical consequence of the township leasing model and the EDTL carrying out its functions under the *Land Rights Act*. It does, however, demonstrate the extent to which township leasing extends the role of bureaucracy in Aboriginal communities and increases the level of government involvement in the lives of Aboriginal residents.

C Economic Development and Transaction Costs

Supporters of the section 19A township leasing model, and in particular the Northern Territory Government, have argued that the transaction costs associated with obtaining leases under section 19 deter prospective lease holders, discourage economic development and prevent governments from rectifying informal tenure, while township leasing enables the creation and transfer of individual title at a reduced cost.

Frequently, references to the transaction costs of obtaining leases under section 19 describe the cost of obtaining a lease over a single land parcel.¹⁴⁶ Clearly, this is not the only option. Any realistic leasing model needs to utilise economies of scale, and a well constructed leasing model under section 19 would include community wide planning, surveying, consultation and negotiation. It is against such a community wide leasing model that the transaction costs of section 19A township leasing should be compared,¹⁴⁷ not a model based on the cost of obtaining a leases over a single parcel of land, one at a time.

Under any leasing model, there will be four types of transaction costs. First, there are the planning costs, primarily the cost of preparing a survey plan and complying with planning laws, including laws in relation to subdividing community land into single portions.¹⁴⁸ All models of community leasing involve substantially the same planning costs as they are dependent on the portioning of title not the form of tenure. Some of these costs can be reduced by amendments to planning law, as the Commonwealth has made with respect to leases/subleases involving the EDTL.¹⁴⁹ There is nothing to prevent the Northern Territory Government from making similar amendments to facilitate other leasing models, and there is nothing inherent in the township leasing model which reduces planning costs.

145 Ibid 7, 8, iii.

146 See, eg, Bree, above n 24, 85 and Dillon and Westbury, above n 21, 134.

147 Recognising that the transactions costs of the various community leasing models under s 19 also differ.

148 Any lease of part of a single portion of land for more than 12 years is a 'subdivision': see *Planning Act 1999* (NT) s 5.

149 *Aboriginal Land Rights (Northern Territory) Amendment Regulations 2008* (No. 2) (Cth).

Secondly, there are legal costs, primarily the cost of negotiating and drawing up lease and where relevant sublease agreements, and having them registered with the Land Title's Office. The use of standard term agreement is the key to reducing the legal costs of community wide leasing, which would be a part of any realistic community leasing model.

Thirdly, there are consultation costs, primarily the costs of consulting with the traditional Aboriginal owners and community members in relation to leases, subleases and planning issues. It is in relation to consultation costs that there is potentially the greatest difference between different community leasing models. It is perhaps this difference that illustrates most clearly why only two township leases have been granted, despite the incentives that the Commonwealth has provided.

Consulting on the township lease itself is one of the major consultation costs under the township leasing model. The difficulty faced by land councils when consulting traditional Aboriginal owners in relation to township leases is that once they consent to the lease they lose control over future decision-making – including whether they will receive ongoing rent and how vacant land in the lease area will be allocated. Other community leasing models can require some decisions, in particular decisions about land allocation and the terms on which leases/subleases are granted, to be made up front. This makes it easier for land councils to consult, and easier for traditional Aboriginal owners to consent, as they have a better understanding of what they are agreeing to for the life of the lease. This could lead to quicker consultation timeframes and reduced up front consultation costs. However, it also requires governments to implement key decision-making at the start of the process while they still require the consent of traditional Aboriginal owners, rather than after they have assumed control over decision-making. It is precisely the flexibility that township leases provide to governments which makes it difficult for traditional Aboriginal owners to consent to their grant.

Once a township lease has been granted, the ongoing consultation costs depend on how actively the EDTL consults through the Consultative Forum. Ultimately this is determined by the policies of the EDTL, which may vary over time. To the extent that there are transaction cost savings, this will be at the expense of consultation at the local Aboriginal level.

The fourth type of transaction costs are the bureaucratic costs of administering the leasing model. This is determined not just by the leasing model but also by how it is administered, and in particular the extent to which leases/subleases to occupants require further consent for activities under the lease/sublease. As described above, for township leasing this will include the costs of the EDTL processing applications for the grant or transfer of subleases or for the installation of infrastructure on a sublease.¹⁵⁰

150 A distinction is made here between consultation costs and administrative costs. Eg, the EDTL may not consult with the Consultative Forum in relation to an application for consent to install infrastructure. However, there will still be the cost of complying with the processes of the EDTL.

It should not be assumed that other leasing models would involve the same, or a greater, level of bureaucratic costs. The EDTL has obligations on the township lease and under the *Land Rights Act* which will require it to take a risk averse approach to its functions. A lease which is made directly between a land trust and the occupant is a private negotiation, and within certain parameters may include less control over future activities such as the transfer of the lease.¹⁵¹

D Home Ownership

There is legitimate debate to be had about whether home ownership represents one alternative means of meeting some of the unmet housing needs of Aboriginal people in some Northern Territory communities. Previous attempts at home ownership schemes in remote Aboriginal communities, however, have not been successful,¹⁵² and any debate needs to acknowledge the complex social, cultural and economic issues that arise.¹⁵³

When introducing section 19A to the *Land Rights Act* the approach of the former Coalition Government was to denounce existing tenure arrangements, saying that they denied Aboriginal people the right to home ownership. The office of the EDTL continues to use this approach, stating on its website: “Tiwi people are for the first time in a position to own their own home, realising the ‘great Australian dream’ that the rest of Australia takes for granted”, says Walter Kerinaiaua, a senior Mantiyupwi land owner.¹⁵⁴

Township leasing does provide one way of creating a form of tenure which can be used in a home ownership scheme, but it is not the only way of doing so. A number of other leasing models can also create a suitable form of tenure. More important, however, is that providing a suitable form of tenure is only one small component of an effective home ownership scheme, and the policies of the Commonwealth Government as a whole do not reflect a commitment to developing the other components. While a subsidised mortgage program has been extended to purchasers on Aboriginal land, other more important matters, such as addressing structural market problems, have been ignored.¹⁵⁵ Remote Aboriginal communities are currently dominated by public housing and

151 It was at the request of the land councils and the Northern Territory Government that s 19(8) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was amended by the Commonwealth to make it clear that the land trust (and where necessary the Minister) can provide consent to future transfer of a lease at the same time as consenting to grant of a lease: see *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth).

152 See, eg, the discussion of ‘Katter leases’ in Mark Moran et al, ‘Indigenous home ownership and community title land: a preliminary household survey’ (2002) 20(4) *Urban Policy and Research* 357–70.

153 For a discussion of some of the cultural factors, see Will Sanders, *Indigenous Housing Tenure in Remote Areas: Directions and Constraints* (Centre for Aboriginal Economic Policy Research Topical Issue No 6/2008, Australian National University).

154 Office of Township Leasing, *Tiwi Township Lease* <http://www.otl.gov.au/tiwi_news.htm> at 29 September 2009.

155 See Indigenous Business Australia, *Fact Sheet: Home Ownership on Indigenous Land (HOIL)* (2009) <<http://www.iba.gov.au/wp-content/uploads/2009/08/20090831FactsheetHomeOwnershipOnIndigenousLand.pdf>> at 19 October 2009.

characterised by housing construction costs¹⁵⁶ which are considerably in excess of what residents can afford.¹⁵⁷ In the absence of a clear and long term housing market strategy (and possibly market intervention) it cannot be assumed that a housing market will develop in such circumstances or that home owners are acquiring a valuable asset.¹⁵⁸

Dillon and Westbury, who support the township leasing model, argue that the Commonwealth's home ownership rhetoric was not realistic and was more likely a response to its conservative constituency.¹⁵⁹ As conservative commentators have since noted, the ongoing activities of the Commonwealth confirm a commitment to the public housing model rather than home ownership.¹⁶⁰

In non-Aboriginal politics, issues relating to home ownership and housing affordability have played a prominent role in at least the last two Commonwealth elections. The 'right' to home ownership is a charged and potent issue. It is unsurprising that the focus on home ownership in the context of the township leasing debate was effective in gaining not only conservative but wide spread support for the reforms, and also in drawing attacks upon opponents of township leasing.¹⁶¹

A proper analysis of the issues raised by home ownership schemes would require considerably more discussion. The purpose of this brief analysis is to demonstrate that Commonwealth Government policies as a whole reflect only a

156 The estimated construction costs for new houses under SIHIP in the Northern Territory were recently revised to \$450 000 per house, with higher costs in the Tiwi Islands and Groote Eylandt: see Jenny Macklin and Paul Henderson, 'Improving Indigenous housing in the NT' (Media Release, 31 August 2009).

157 Preliminary work by World Vision in the Queensland community of Mapoon suggests that affordability would be around \$150 000: see World Vision Australia, 'Unblocking the path to home ownership in Mapoon – World Vision's new plan' (Press Release, 1 September 2009). The Cape York Institute estimated that the communities in its region could support a market value of around \$100 000 which may not rise significantly or at all over time: see Cape York Institute, *From Hand Out to Hand Up* (2007) 14.

158 Paul Toohey refers to houses which are more than 10 years old being made available for around \$80 000 in Nguiu, which after first home owner and other discounts means an effective purchase price of around \$50 000: see Toohey, above n 5, 18. This may present an opportunity for residents but also raises more questions than answers, such as what condition the houses are in, whether they are able to retain their value (relying on private maintenance) and how other houses are being valued (including new houses being built at a cost of more than \$450 000). Ten years can represent a significant portion of a house's life cycle. One of the aims of the new COAG Indigenous housing program is to introduce 'a program of ongoing maintenance and repairs that progressively increases the life cycle of remote Indigenous housing from seven years to a public housing-like lifecycle of up to 30 years': see Council of Australian Governments, *National Partnership on Remote Indigenous Housing* (2009) cl 13(c). The transfer of old, run down housing stock was one of the reasons given for the failure of Katter leases in Queensland: see Moran et al, above n 152.

159 Dillon and Westbury, above n 21, 146.

160 Hudson, above n 23, 17.

161 Eg, when the Aboriginal and Torres Strait Island Commissioner, Tom Calma, questioned the 99 year lease scheme details of his income and of the value of the house that he had purchased in Canberra were published alongside of a description of Mr Calma as 'an adamant opponent of allowing people in remote indigenous communities to have access to the 99-year lease scheme'. See Simon Kearney and Sean Parnell, 'Some "not ready" for Aussie dream', *The Australian* (Sydney), 21 February 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23249313-5013172,00.html>> at 30 September 2009.

superficial commitment to home ownership in Aboriginal communities, and that providing for home ownership cannot explain why it is committed to obtaining township leases.

E Approach to Consultation

As described above, negotiations in relation to the two existing section 19A leases have been characterised by the use of one-off inducements to persuade the traditional Aboriginal owners to consent to the grant of a lease.

The reliance on inducements reflects a particular approach to the consent process, treating it as an obligation to be complied with rather than a means of determining or engaging with the issues. Put another way, decision-making is made centrally and obtaining consent is less a part of that decision-making and more a step in the implementation of decisions.

The reliance on inducements undermines the argument that traditional Aboriginal owners and community members were persuaded by the value of the reforms, or that their consent provides the ideological basis for the reforms, as they were not put in a position to weigh up the relative merits of different models. This can also reinforce a community sentiment that the reforms are government measures that they have agreed to, and are therefore a government responsibility.

From a broader perspective, a policy of diverting finite government funding to particular communities on the basis of compliance, rather than need, also raises issues.

F Local Aboriginal Governance

The most important difference between township leasing and other models for community leasing is that under township leasing land use decision-making is transferred to the EDTL for the term of the lease (and any renewal period). The types of decisions that the EDTL will make are described above. The role of traditional Aboriginal owners in that decision-making is to recommend, provide advice and keep the EDTL aware of emerging issues. Where community residents have a role it is to provide comment as members of the public. There is no responsibility, or accountability, for decision-making at a local Aboriginal level and decreased opportunities for traditional Aboriginal owners to engage in private negotiation.

A number of other recent reforms have also impacted on local Aboriginal governance. The Northern Territory Emergency Response has increased centralised Commonwealth Government control, coordinated at the local level

through Government Business Managers.¹⁶² Small community-based councils have been merged into large regional shire councils as a response to concerns about the performance of small councils. This has been a significant and complex reform. One aspect of the reform is that community council boards, which previously played a number of leadership roles in communities, have been dissolved and input into shire decision-making at a local community level instead occurs through a body called a 'local board' which has no decision-making authority¹⁶³ and meets only infrequently.¹⁶⁴ At a broader level, the Commonwealth is implementing reforms to Indigenous housing across Australia which include a shift from community housing to mainstream public housing,¹⁶⁵ a move which is contrary to its policy in the non-Indigenous social housing sector.¹⁶⁶

Each of these reforms raises complex and discrete issues. However, they also have a cumulative effect in relation to local Aboriginal governance. The impact, including the medium and long term impact, of policies which reduce the opportunities for Aboriginal communities to take collective responsibility for their circumstances deserves significantly more consideration. As Noel Pearson has stated, 'in our area, indigenous policy, the main trend has indeed been the rise and rise of governments. The notion that indigenous problems must ultimately be solved by indigenous people themselves has almost completely disappeared'.¹⁶⁷

In relation to township leasing, the 'rise and rise' of the role of government has gone almost unremarked as the use of free market rhetoric to support township leasing has not been challenged and the debate has instead focussed on the issues of communal and individual title, home ownership and economic development.

162 Information published by the Commonwealth Government on five-year leases is instructive in relation to the role of Government Business Managers. The process to consider a land use application in a five-year lease area will 'usually involve' the Department of Families, Housing, Community Services and Indigenous Affairs taking a number of steps including 'seeking information regarding community views through Government Business Managers'. The language avoids any suggestion that the Government Business Managers might be required to follow directions provided by the community (land owners are not mentioned) or even engage in a formal consultation process: see Department of Families, Housing, Community Services and Indigenous Affairs, above n 128.

163 *Local Government Act 2009* (NT) s 52.

164 Eg, Local Boards in the Central Desert Shire Council meet bi-monthly and in the MacDonnell Shire Council meet quarterly: see Central Desert Shire Council, *Local Advisory Boards Policy* (2009) <<http://www.centraldesert.nt.gov.au/LinkClick.aspx?fileticket=gRck8XzGx0Y%3d&tabid=936&language=en-US>>; MacDonnell Shire Council, *Local Board Meetings* <<http://www.macdonnell.nt.gov.au/LocalBoardMeetings/tabid/521/Default.aspx>> at 30 September 2009.

165 See, eg, Australian Government and Northern Territory Government, above n 2.

166 See Tanya Plibersek, 'Room for more: boosting providers of social housing' (Speech delivered at the Sydney Institute, Sydney, 19 March 2009).

167 Noel Pearson, 'Big government hurts Aboriginal population', *The Australian* (Sydney), 26 June 2006, 10.

VIII CONCLUSION

There are a number of models available for the introduction of community wide leasing to communities on Aboriginal land which are able to achieve the stated goal of providing for individual title. This article argues that the reason that governments prefer township leasing is because of the model of governance that it supports.

A number of recent reforms respond to concerns about the failure of 'past policies of self-determination' by extending the involvement of centralised governments. While this article is not able to address the complex issues raised by other reforms, such as those mentioned above, it has demonstrated that despite the language employed during the debate in relation to township leasing there was no past policy of self-determination for community land use, and no 'days of the failed collective', only a policy of relying on informal tenure.

Despite the use of significant financial incentives, in the three years since section 19A was introduced only two township leases have been granted. While communities, traditional Aboriginal owners and land councils have demonstrated that they are not opposed to community leasing per se, they are concerned about the governance impact of township leasing. Despite this, the Commonwealth and Northern Territory governments remain focussed on obtaining township leases in all major Aboriginal communities to the exclusion of other leasing models. The coercive means that governments have available to them to obtain township leases include continuing (or increasing) the use of incentives, connecting township leases to ongoing service provision or introducing the threat of extending the compulsory five-year leases. An alternative is to engage in a more open approach to community leasing negotiations where concerns about governance are acknowledged and a discussion about appropriate governance arrangements forms the basis for developing the most appropriate community leasing model. Such an approach is not only more likely to achieve a quicker resolution of tenure across all communities but also to provide a means for Aboriginal people to take responsibility for the development of their own communities.